Spring 1974

The Deceptive and Unfair Trade Practices Act: A New Approach To Trade Regulation in Florida

Rod Tennyson

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Commercial Law Commons, Consumer Protection Law Commons, and the State and Local Government Law Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol2/iss2/1

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.
THE DECEPTIVE AND UNFAIR TRADE PRACTICES ACT: A NEW APPROACH TO TRADE REGULATION IN FLORIDA

ROD TENNYSON*

I. INTRODUCTION

On June 7, 1973, Governor Reubin Askew signed into law House Bill 1915, the Florida Deceptive and Unfair Trade Practices Act. This new law, nicknamed the "little FTC" Act (because it was patterned after the Federal Trade Commission Act), initiated a new approach to consumer protection and trade regulation in Florida. This article will discuss the background and legislative history leading to the passage of the Act, explain the provisions of the Act and examine the Act's anticipated effect on trade practices in Florida.

II. BACKGROUND AND LEGISLATIVE HISTORY

In September 1972, the Governor's consumer advisor received a federal grant to conduct a study of consumer market problems in Florida. The study was completed and a report submitted with a number of conclusions and recommendations. One general conclusion was that Florida's consumer protection laws were primarily criminal statutes with few, if any, civil remedies. The report also found that criminal sanctions provide minimal protection for the consumer because of the nature of consumer transactions and the difficulty of proving criminal intent beyond a reasonable doubt. The study concluded that most Florida laws regulating trade practices consisted of licensing provisions, the enforcement of which was supervised by boards or commissions composed of members of the regulated industry. License revocation or suspension, however, was a sanction rarely im-

---

* Member, Florida Bar. B.M.E., Georgia Institute of Technology, 1969; J.D., University of Florida, 1972. The author was a member of the Governor's staff that drafted the Florida Deceptive and Unfair Trade Practices Act. The views expressed in the article, however, are those of the author personally and do not reflect the views of the State of Florida.

3. 1 A. ENGLAND, F. JONES, T. LANG, R. PERKINS, C. RICHARDS, R. SELLABS, R. TENNYSON & J. YOUNG, CONSUMER AFFAIRS IN FLORIDA: A REPORT TO GOVERNOR REUBIN O'D. ASKEW (1973) [hereinafter cited as ENGLAND REPORT].
4. See id. at 133-36.
5. Id. at 138.
posed by the boards or commissions on their fellow industry members to police unfair or deceptive trade practices. The report therefore recommended that the legislature consider adopting a "little FTC" act, giving strong civil enforcement remedies to the Attorney General, to the state attorneys and to private citizens to curtail deceptive and unfair trade practices in the Florida marketplace.

Before the 1973 legislative session opened, the Governor's office had drafted an entirely new "Deceptive and Unfair Trade Practices Act" for the state. The draft was submitted to the Attorney General's staff and to the House Subcommittee on Consumer Protection for their suggestions and recommendations. The bill was also prefilled in the Senate, but no independent action was ever taken by the Senate.

The first draft of the bill (H.B. 1915) was modeled after the Uniform Consumer Sales Practices Act, the Unfair Trade Practice and Consumer Protection Act and the Federal Trade Commission Act.

The language incorporated into the first draft was that proposed by the Uniform Consumer Sales Practices Act: A "deceptive act or practice by a supplier in connection with a consumer transaction" shall be an unlawful activity. This definition was followed by a long list of examples of deceptive practices.

By using the terms "deceptive," "consumer transaction" and "supplier," the uniform act provision would have limited the new law to the area of consumer protection. The Subcommittee on Consumer Protection, its staff and the Governor's staff later decided to broaden the bill by adopting the language of the Federal Trade Commission Act. They concluded that the bill should

6. See tables, id. at 123-32.
7. Id. at 313.
8. The House Subcommittee on Consumer Protection, with chairman Representative John Forbes, was created under the House Committee on Business Regulation, chaired by Representative Bill Andrews. The bill was introduced to the legislature as a committee bill by the Committee on Business Regulation.
9. Senate Bill 1159 (1973) failed even to leave the committee, FLA. S. JOUR. 956 (1973), and all efforts to ensure passage were concentrated on the companion house bill, H.B. 1915 (1973).
11. See pp. 251-57 infra. The appendix includes typographical markings to indicate changes made in the bill during the legislative process. Citations to the appendix will refer to the section number as the provision appears in the 1973 Florida Statutes.
12. UNIFORM CONSUMER SALES PRACTICES ACT § 3. See appendix § 501.204.
13. Federal Trade Commission Act § (5)(a)(1), 15 U.S.C. § 45 (a)(1) (1970), provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful." The federal Act requires the unlawful activity to be "in commerce" under the commerce clause of the federal Constitution, while the Florida Act inserts the phrase "in the conduct of any trade or commerce" in its
LITTLE FTC ACT

protect both consumers and businessmen from all unfair trade practices. The full committee adopted this recommendation and favorably reported the bill out of committee on April 27, 1973.

After passing the House of Representatives,14 the bill was assigned to the Commerce Committee in the Senate. This committee voted to change the word "unfair" in section 501.204 to "fraudulent." This amendment would have jeopardized effective use of the established precedents under the Federal Trade Commission Act, as the same wording of the federal Act would not have been adopted. The bill was further amended on the Senate floor, however, and the term "unfair" was reinserted and became a permanent feature of the Act.15

III. PROVISIONS OF THE "LITTLE FTC" ACT

A. Unlawful Activities

The language of section 501.204 is broad enough to cover almost any activity in the marketplace, including antitrust matters and restraint of trade activities.16 Subsection (2) of this section gives a more precise definition of "unfair" or "deceptive" by stating the legislative intent to adopt the established precedents of the numerous federal decisions under the Federal Trade Commission Act17 as the standard to be used in defining "unfair" and "deceptive."18

Because most businessmen and consumers have little knowledge of the meaning of "unfair" and "deceptive" as established by the decisions of the Federal Trade Commission, the legislature found it necessary to give rule-making authority to the executive branch to codify, in rule form, the meaning of those terms.19 Previously, the declaration of unlawful activity. Since the Florida law was passed under the state's police power, no showing of interstate commerce need be made in applying the Act.

15. FLA. S. JOUR. 676 (1973). The bill passed the Senate with only one dissenting vote.
17. FLA. STAT. § 501.204(2) (1973) provides:
   It is the intent of the legislature that in construing subsection (1) of this section due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
18. The standards to test whether a practice is "unfair" or "deceptive" are discussed in more detail at pp. 237-43 infra.
19. FLA. STAT. § 501.205 (1973) provides:
   (1) The department shall propose rules to the cabinet that prohibit with specificity acts or practices that violate this part and which prescribe procedural
legislature's approach to consumer protection problems was to describe statutorily a deceptive or unfair trade practice and then to declare it unlawful.\textsuperscript{20} Since the marketplace is quite complicated, it was easy for any unscrupulous operator to conduct his business affairs in a manner just outside the statutory proscription and to reap a great profit before the legislature had time to enact a statute interrupting the operation. Substantive rule-making authority enables the executive branch to stop deceptive and unfair activities as they arise by promulgating rules to cover the activity; citizens seeking relief are no longer required to wait for the legislature to convene.

The original draft of the bill assigned the rule-making authority to the Department of Legal Affairs.\textsuperscript{21} As a compromise measure, the House Subcommittee on Consumer Affairs adopted a provision requiring the Cabinet to approve the rules proposed by the Department.\textsuperscript{22}

\textbf{B. Remedies}

To control unlawful trade practice in a complicated marketplace, it was necessary to provide the enforcing authorities with broad investigatory powers. Section 501.206 of the Act gives the enforcing authority subpoena power before a lawsuit is ever filed. With this essential power, the enforcing authority can (upon probable cause) review a business' records to determine whether a deceptive or unfair trade practice has been or is occurring.\textsuperscript{23} The enforcing authority must adhere to the rules of civil procedure when collecting evidence through depositions and interrogatories, but it does not have to file suit before using the rules of discovery.\textsuperscript{24}

\begin{itemize}
\item<1> rules for the administration of this part. Such rules shall be adopted by majority vote of the cabinet. All rules prescribed by the cabinet and administrative action taken by the department shall be pursuant to chapter 120, Florida Statutes. The attorney general shall, at least thirty days (30) before the meeting at which the rules are to be considered by the cabinet, mail a copy of such rules to any person filing a written request with the attorney general to receive copies of proposed rules. The attorney general may charge a reasonable rate for providing copies of such rules, which rate shall not exceed the actual cost of printing and mailing.
\item<2> All substantive rules and regulations promulgated under this part shall be consistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.
\item<20> See England Report 133-46.
\item<21> See appendix § 501.205.
\item<22> This compromise was incorporated into the final bill. See Fla. Stat. § 501-205(1) (1973).
\item<23> Fla. Stat. § 501.206 (1973) was adopted from Uniform Consumer Sales Act § 8.
\item<24> Fla. S. Jour. 676 (1973). The requirement to follow the Florida Rules of Civil Procedure was an amendment passed on the Senate floor. See appendix § 501.206(1).
\end{itemize}
The enforcing authority is given civil remedies to enforce the Act. It may bring an action for declaratory judgment, an action to enjoin deceptive or unfair acts or an action to recover damages suffered by a large class of consumers. Before an action for declaratory judgment or for damages can be initiated by the enforcing authority, it must first hold an administrative hearing to determine if there is probable cause for such action. No such administrative hearing is required if the enforcing authority is seeking injunctive relief in the circuit court. In any of these actions, the court, upon motion by the enforcing authority, may appoint a receiver to distribute a business' assets to reimburse consumers damaged by that business' unlawful activities. The court also has the authority to require specific performance of a consumer transaction and to "strike or limit the application of clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief." For example, once the enforcing authority brings an action for violation of the Act, it has standing to move that the court reform unfair, one-sided adhesion contracts or landlord-tenant agreements.

Litigation, however, is not the only remedy available to the enforcing authority. It may also accept an assurance of voluntary compliance from a merchant, which can be conditioned upon restitution to injured consumers. Like the Federal Trade Commission, the enforcing authority also has quasi-judicial administrative enforcement powers to enjoin anyone from performing unfair or deceptive trade

26. The administrative hearing requirements were added by the House Committee on Business Regulation to act as a safeguard against frivolous, harassment suits. In order to provide the enforcing authority a speedy remedy for stopping unlawful practices, no hearing is required when it seeks injunctive relief. If the enforcing authority can establish a prima facie case for a violation of the Act, the court should grant a temporary injunction without the enforcing authority's having to prove the traditional irreparable harm. See Times Publishing Co. v. Williams, 222 So. 2d 470 (Fla. 2d Dist. Ct. App. 1969).
27. FLA. STAT. § 501.207(3) (1973). This section was adopted from Uniform Consumer Sales Practices Act § 9.
29. FLA. STAT. § 501.207(6) (1973) allows the enforcing authority to accept an assurance of voluntary compliance from a business that agrees to stop a certain practice. The business does not have to admit to any wrong-doing in rendering the assurance. It is important to note that an assurance of voluntary compliance is not a consent order, and the business' subsequent violation of its own assurance does not subject it to contempt of court penalties or to the civil monetary penalties of FLA. STAT. § 501.208(8) (1973). Violation of an assurance of voluntary compliance is, however, prima facie evidence of a deceptive or unfair trade practice.
practices. If the enforcing authority believes a deceptive or unfair trade practice is occurring, it can serve the offending party with a complaint requiring him to come forth and, in an administrative hearing, show cause why an order to cease and desist should not be entered against him. If the hearing officer finds the trade practice to be in violation of the Act, the respondent in the action can appeal to the Attorney General for administrative review. Judicial review of the Attorney General's decision is available by certiorari to the appropriate district court of appeal.

The ability to enforce the Act through administrative action may be the most useful remedy provided. It allows the enforcer and the businessman to resolve their differences without costly and time-consuming court appearances. When a county or municipal ordinance exists which covers the activity complained of, the enforcing authority may also proceed pursuant to the local ordinance and before local administrative bodies. Any appeal from a decision of a local administrative body is taken to the Attorney General with judicial review in the district courts of appeal. Failure to obey a cease-and-desist order can result in fines of $5000 per day, which can be collected in a civil action brought by the enforcing authority. An affected party can avoid an administrative enforcement action by removing the proceeding to the circuit court. The Senate created this option under the heading of "Jury Trial," to permit anyone subject to an administrative hearing under section 501.208 directly to obtain circuit court adjudication of the issues. The affected party's transfer of the action

32. The cease-and-desist administrative procedure is similar to the procedures of the Federal Trade Commission except that the Attorney General replaces the Commission as the final decision-maker in the administrative process.
34. Fla. Stat. § 501.208(4) was added to encourage county and city governments to establish local consumer protection agencies to act as hearing officers in administrative hearings. See, e.g., Palm Beach County, Fla., Ordinance 72-2. The broad powers granted to counties and municipalities by the state constitution and statutes, however, could have resulted in conflicts with the Deceptive and Unfair Trade Practices Act unless provision was made to accommodate local ordinances in the enforcement scheme of the Act. See Fla. Const. art. VIII, § 2; Fla. Stat. § 125.01 (1973). Because he must follow the same appeals procedure from either a state or local hearing, a person accused of a violation of the Act receives the same administrative and judicial review regardless of the nature of the proceeding below.
37. Fla. Stat. § 501.2091 (1973) allows the respondent in an administrative action to have his case tried in the judicial branch. However, he must exercise his option by actually filing a civil petition or complaint in the circuit court before the hearing officer renders his decision and order. Once the hearing officer has made his final de-
to the circuit court changes the cease-and-desist remedy into an equitable action in which the enforcing authority seeks to enjoin the allegedly unfair or deceptive practice. If the enforcing authority did not take advantage of the transfer to allege a damage action, the affected party would not be entitled to a jury trial as a matter of right.38

Unlike the drafters of the Federal Trade Commission Act, the Florida Legislature felt individuals should have enforcement remedies available to protect themselves from abuses in the marketplace.39 Individual consumers and businessmen are given private remedies notwithstanding any action the enforcing authority has initiated or will initiate. An individual can bring an action for declaratory relief, injunctive relief or damages against all alleged violators of the Act.40 To encourage such civil actions by individual citizens and to protect businessmen from the expense of defending against frivolous law suits, the prevailing party in a private action is entitled to recoup costs and attorney's fees.41 The ability to institute private class actions was eliminated from

cision, the “proceeding” is over even though the Attorney General must still review his decision. Judicial review then lies with the district courts of appeal. If he so desires, a respondent should exercise his option to have his case tried in the circuit court prior to the administrative hearing date.

The ability of a party charged by the enforcing authority to convert the administrative enforcement hearing into a judicial proceeding may be analogized to the civil defendant's ability in a state court (upon certain conditions) to remove a case to the federal district court. See 28 U.S.C. § 1441 (1970). The differences in the procedures and remedies between the administrative and judicial proceedings are significant, but presumably the party charged with a violation of the Act understands the effect of transfer to the circuit court. Compare Fla. R. Civ. P. passim with Fla. Stat. §§ 120.20-28 (1973).

38. Presumably the enforcing authority, now required to litigate its case in the circuit court, could prosecute any action for damages pursuant to the Act. See Fla. Stat. § 501.207(1)(c) (1973). In the interest of judicial economy, the affected party may desire that the enforcing authority consolidate all claims in one action. See Fla. R. Civ. P. 1.010, 1.110(g). Concerning the question of trial by jury, see Fla. R. Civ. P. 1.430.


41. Fla. Stat. § 501.211(2) (1973). This section directs the trial judge in his discretion to award the prevailing party attorney's fees and costs based upon the attorney's actual work on the case. An additional intent of this section was to ensure that attorneys would be adequately compensated for their efforts on behalf of consumers.

The plaintiff or defendant must lose on the merits of his case before he becomes liable for the other party's attorney’s fees and costs. Losing on procedural or other technical grounds is not a “judgment in the trial court” as required in this section. See Fla. Stat. § 501.210 (1973). If a private suit is dismissed on a technicality, each party would bear its own expenses unless the case is refiled and a judgment finally obtained on the merits of the case. Note that this section applies only to “consumer transactions” and would not apply if a non-consumer initiates the private suit. The section does not address the very common situation in which settlement is made without trial and judgment. In this situation the parties themselves would have to agree on who is to pay the attorney's fees.
the bill while still in committee. Under present Florida and federal rules and decisions, these suits present difficulties for the litigants in maintaining the necessary "standing" to prosecute the action. Although the Act prohibits private class actions, section 501.207 does allow the enforcing authority to bring a "class action" on behalf of consumers.

C. Special Provisions

Other sections of the Act contain important statements of purpose, definitions and special exemptions. "Consumer transactions" is defined in the Act to mean the sale of goods and services primarily for personal, family or household use. The term does not include real property or securities transactions, but does include franchises and distributorship sales. This does not exempt real property or securities transactions from coverage under the Act, however, since the term "consumer transaction" appears neither in the general declaration of unlawful activity, section 501.204, nor in the administrative enforcement procedures, section 501.208. Section 501.210, relating to attorney's fees and private civil actions, does limit its provisions to "consumer transactions" and may technically exclude real property and securities transactions as well as other transactions not relating to personal, family or household use. The term "supplier" includes a manufacturer, wholesaler, dealer, debt collection agency or advertising agency that regularly solicits, engages in or enforces "consumer transactions." Here again, the term "consumer transaction" is used, thus limiting a "supplier" to one who deals with consumer goods, services or intangibles primarily for personal, family or household use. Some one who deals exclusively in real property, securities or non-consumer business transactions technically is not a supplier, although

42. See appendix § 501.212. Court interpretations of standing for class actions have been very strict in Florida. No class action is available unless similar frauds are perpetrated on all the members of the class, the fact situation for each fraud is the same and only one remedy is available to each defrauded person. See, e.g., Lakeland v. Chase Nat'l Co., 32 So. 2d 883 (Fla. 1947). Federal law requires that each member of the class allege over $10,000 in damages in order to meet the requirements of 28 U.S.C. §§1331(a), 1332(a) (1970) for standing in federal court. See Zahn v. International Paper Co., 94 S. Ct. 505 (1973). Members of the class cannot aggregate their claims to meet this $10,000 jurisdictional requirement; this effectively excludes most consumer suits since few single consumer transactions involve $10,000. See Snyder v. Harris, 394 U.S. 332 (1969) (interpreting Fed. R. Civ. P. 23); Comment, Class Actions—Aggregation Aggravation, 24 U. MIAMI L. REV. 173 (1969).


45. This definition was adopted from Uniform Consumer Sales Practices Act § 2.

such a restricted definition may not have been the intent of the legislature.\textsuperscript{47} The term "supplier" like "consumer transaction" is used in neither section 501.204, which defines unlawful activity, nor section 501.208, which describes the administrative enforcement procedures. The terms "supplier" and "consumer transaction" were deliberately excluded from these sections to make the bill not only a consumer protection statute but also a trade regulation statute.

The state attorneys and the Department of Legal Affairs share enforcement powers under the Act and both are included in the definition of "enforcing authority."\textsuperscript{48} The state attorney enforces the provisions of the Act if the violation occurs in or affects only his judicial circuit and the Department has approved the requested enforcement action. The state attorney also has jurisdiction to act if the Department refers a complaint to his office. The Department enforces the Act when a practice affects more than one judicial circuit; it may also enforce the Act in one judicial circuit if the state attorney has failed to take action on a violation within a reasonable period of time.\textsuperscript{49}

A violation of the Act arises from a violation of any provision of the Act or a violation of any rule promulgated pursuant to the Act.\textsuperscript{50} Section 501.204 prohibits any unfair or deceptive act, relying upon 60 years of precedent established by the federal courts and the Federal Trade Commission for a precise definition of the proscribed conduct. Thus if anyone engages in a deceptive or unfair act that is not specifically covered by a rule promulgated by the Cabinet, the enforcing authority or an individual can still initiate action using federal precedent as authority.

There are several exemptions from and limitations upon liability for violations of the Act. Any person who disseminates information (publishers, broadcasters and printers) without actual knowledge of its illegality is not liable if such information is subsequently found to be deceptive.\textsuperscript{51} A person engaging in an unfair or deceptive act is liable only for damages directly related to the unfair or deceptive activity and not for consequential damages to either person or property.\textsuperscript{52} A

\textsuperscript{47} These definitional terms were adopted from \textit{Uniform Consumer Sales Practices Act} § 2 in the first draft of the bill. However, when the Subcommittee on Consumer Protection decided to expand the bill into a "little FTC" act, it failed to change the definitional section of the bill to coincide with the new declaration of unlawful activity. \textit{See} appendix §§ 501.203-04.


\textsuperscript{52} \textit{Fla. Stat.} § 501.212(3) (1973), adopted from the \textit{Uniform Consumer Sales Practices Act} § 14, for which the official comment states:
holder in due course who, in good faith and without notice of defenses, accepts a note or contract is not liable for any unfair or deceptive act committed by the assignor of the note or contract.\(^5\)

Certain industries were exempted from the provisions of the Act on the premise that the state is currently regulating those industries.\(^6\) Attempts were made to exclude all state-regulated industries, including land sales, from the purview of the Act, but such a broad exclusion was never adopted. The exemption provision states that "[a]ny person or activity regulated under laws administered by the department of insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance"\(^5\) are not subject to the provisions of the Act. Persons regulated under laws administered by the Department of Insurance include anyone who conducts insurance transactions in the state either directly or indirectly.\(^5\) Industries regulated by the Public Service Commission include private electric companies, telephone companies, gas companies, common carriers, railroads, and private water and sewage systems.\(^5\) Banks and savings and loan companies regulated by the Department of Banking and Finance include savings banks and industrial saving banks incorporated under Florida law,\(^5\) state banks and commercial banks chartered by the state,\(^5\) any other bank incorporated or chartered under the laws of Florida,\(^5\) and savings and loan associations incorporated or chartered under state law.\(^5\) The exemption provision does not apply to banks and savings and loan associations chartered by the federal government since those institutions are not regulated by the Department of Banking and Finance.\(^5\)

The Act does not preclude anyone from bringing a civil or criminal action against someone committing a deceptive or unfair trade practice

This subsection has primary application to product liability claims. To the extent that joinder is appropriate, it does not bar the joinder of a product liability claim with a related claim for violation of this Act, § 15.

56. FLA. STAT. § 624.401 (1973). This exemption applies to deceptive insurance sales practices for which a license can be revoked, but a person is not exempted from the Act simply because he holds an insurance sales license.
59. FLA. STAT. ch. 656 (1973).
60. FLA. STAT. chs. 658-61 (1973).
for violation of the plaintiff's common law or statutory rights. In addition, the Act clearly states that local consumer protection ordinances not inconsistent with the Act are still valid and in force.

IV. CONSTITUTIONAL QUESTIONS

A. The Need for Delegation

During the past 60 years, one of the more significant trends in government at all levels has been the legislative branch's delegation of its traditional powers and duties to the executive. To a certain extent, this delegation is necessitated by the complexities of modern society. State legislatures, meeting for 60- to 90-day periods every one or two years have found it difficult to specify by statute the elements necessary to solve any particular public problem. One attractive solution has been to state a broad public policy, delegating to the executive the necessary power to implement the policy in accordance with specified standards or guidelines. This approach was adopted by the Florida Legislature when it passed the Deceptive and Unfair Trade Practice Act.

In the Florida marketplace numerous consumer and business transactions occur every day. The ingenuity of the business community in a rapidly changing market has resulted in the imposition of complicated terms and conditions upon many types of transactions. As a result, the legislature saw the need to exercise its police power to eliminate abusive business practices which injured consumers and businessmen alike. Meeting for only two months of the year, the legislature found it an impossible task to specify in statutory form every abusive business practice occurring in the marketplace. Mr. Justice Brandeis best described the legislature's problem when Congress first passed the Federal Trade Commission Act:

Instead of undertaking to define what practices should be deemed unfair, as had been done in earlier legislation, the act left the determination to the Commission. Experience with existing laws had taught that definition, being necessarily rigid, would prove embarrassing and, if rigorously applied, would involve great hardship. Methods of competition which would be unfair in one industry, under certain circumstances, might, when adopted in another industry, or even in the same industry under different circumstances, be entirely unobjectionable. Furthermore, an enumeration, however comprehensive, of existing methods of unfair competition must

64. FLA. STAT. § 501.213(2) (1973).
necessarily soon prove incomplete, as with new conditions constantly arising novel unfair methods would be devised and developed.65

B. Delegation Standards

This delegation of legislative power to the executive branch in the Deceptive and Unfair Trade Practices Act also has raised several constitutional questions. The potential problems arise from the vague language describing unlawful activity in section 501.204 and the rule-making authority in section 501.205.

Two questions first must be answered. Is the act sufficiently explicit to adequately inform those concerned of what activities are considered unlawful? Are sufficient standards imposed on the executive to preclude arbitrary actions? Section 501.204 states:

(1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the legislature that in construing subsection (1) of this section due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

Subsection (1) is derived, almost verbatim, from the language used in the Federal Trade Commission Act and several other state "little FTC" acts.66 The federal courts and some state courts have held such language sufficiently explicit to meet any vagueness test.67 The

67. See, e.g., State v. Reader's Digest Ass'n, 501 P.2d 290 (Wash. 1972), appeal dismissed, 411 U.S. 945 (1973). There the Washington Supreme Court held that language identical to that of Fla. Stat. § 501.204(1) (1973) was sufficiently explicit to satisfy constitutional requirements:

Thus, in interpreting the language of RCW 19.86.020 we must hold that phrases "unfair methods of competition" and "unfair or deceptive acts or practices" have a sufficiently well established meaning in common law and federal trade law, by which we are guided, to meet any constitutional challenge of vagueness.

... We hold that the phrases in question are not so vague as to violate substantive due process. We also hold that an act which is illegal and against public policy is per se unfair within the meaning of RCW 19.86.020.

501 P.2d at 301.

In Sears, Roebuck & Co. v. FTC, 258 F. 307 (7th Cir. 1919), the Commission issued a complaint against false and misleading advertising by Sears in its mail-order business. The opinion discussed the charge that the FTC Act was unconstitutionally vague. The court concluded that the words "unfair methods of competition" appearing in the Act
Florida Supreme Court on two occasions, however, has invalidated statutes using the term "unfair" and has stated that the term is too vague to describe unlawful activity.68 The Deceptive and Unfair Trade Practices Act appears to have met the void-for-vagueness problem by imposing a standard that the executive must follow in implementing the law. As a guide or standard to define "unfair" or "deceptive" trade practices, subsection 501.204(2) adopts the decisions of the Federal Trade Commission and the precedents of the federal courts in reviewing the Commission's decisions. The term "as from time to time amended" of subsection (2) applies to amendments of the Federal Trade Commission Act occurring before the legislature adopted the new law.69 The legislature intended the standards of subsection (2) to be fixed standards to meet the necessary constitutional requirements.70

were no more vague than other legal terms such as "due process of law" or "undue influence," and then observed that even in criminal statutes, "schemes to defraud" not specifically listed can still be condemned by courts. Id. at 311. The court believed that such a description of the proscribed conduct must be constitutionally acceptable because statutes containing more specific definitions of the forbidden activities would be circumvented as soon as they were enacted by new, ingenious methods. Id.

The appellant had urged that the FTC Act was an unconstitutional delegation of legislative and judicial power. The court responded:

With the increasing complexity of human activities . . . governmental control can be secured only by the "board" or "commission" form of legislation. In such instances Congress declares the public policy, fixes the general principles that are to control, and charges an administrative body with the duty of ascertaining within particular fields from time to time the facts which bring into play the principles established by Congress. Though the action of the Commission in finding the facts and declaring them to be specific offenses of the character embraced within the general definition by Congress may be deemed to be quasi legislative, it is so only in the sense that it converts the actual legislation from a static into a dynamic condition. But the converter is not the electricity. And though the action of the commission in ordering desistance may be counted quasi judicial on account of its form, with respect to power it is not judicial, because a judicial determination is only that which is embodied in a judgment or decree of a court and enforceable by execution or other writ of the court.

Id. at 312.

68. See Robbins v. Webb's Cut Rate Drug Co., 16 So. 2d 121 (Fla. 1944); Conner v. Joe Hatton, Inc., 216 So. 2d 209 (Fla. 1968).

69. One such amendment, the Wheeler-Lea Act of 1938, ch. 49, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45(a) (1970), added the terms "unfair or deceptive acts or practices" to the already existing "unfair methods of competition" language giving the Federal Trade Commission power to protect consumers as well as competitors.

70. Cf. Florida Indus. Comm'n v. State, 21 So. 2d 599 (Fla. 1945). In State v. Reader's Digest Ass'n, 501 P.2d 290 (Wash. 1972), appeal dismissed, 411 U.S. 945 (1973), the court held that statutory language identical to that in FLA. STAT. § 501.204(2) (1973) did not adopt existing federal rules and precedents. Rather the language merely states that in construing the act the state courts are to be guided by the interpretation given by federal courts to federal statutes dealing with similar matters.
Section 501.205 of the Act delegates rule-making authority to the Florida Cabinet,\(^7\) such rules to prohibit with specificity "acts or practices that violate" section 501.204. Again in section 501.205, the legislature has imposed a standard or guide on the executive:

\[
(2) \text{All substantive rules and regulations promulgated under} \\
\text{this part shall be consistent with the rules, regulations and decisions} \\
\text{of the Federal Trade Commission and the federal courts in interpreting} \\
\text{the provisions of § 5(a)(1) of the Federal Trade Commission} \\
\text{Act (15 U.S.C. 45(a)(1)), as from time to time amended.}
\]

Although there is some difference between the wording of the standards imposed by sections 501.204 and 501.205, it appears the legislature intended to impose the same standard on both the rule-making and the enforcing authorities.\(^7\) The standard imposed on the Cabinet's rule-making power is the established decisions of the Federal Trade Commission and the federal courts defining "unfair" or "deceptive." The same standard is imposed upon the enforcing authority when it brings an enforcement action pursuant to the provisions of section 501.204. If this standard is sufficient in itself to preclude unbridled discretionary action by the executive branch then the statute is a constitutionally valid delegation of power:

The exact meaning of the requirement of a standard has never been fixed. The exigencies of modern government have increasingly dictated the use of general rather than minutely detailed standards in regulating enactments under the police power. However, when statutes delegate power with inadequate protection against unfairness or favoritism, and when such protection could easily have been provided, the reviewing court should invalidate the legislation. In other words, the legislative exercise of the police power should be so clearly defined, so limited in scope, that nothing is left to the unbridled discretion or whim of the administrative agency charged with the responsibility of enforcing the act.\(^7\) Since federal judicial interpretations are guiding but not binding, we may consider all relevant federal precedent, including that decided after the enactment of RCW 19.86.920.

\[Id. \text{at 301.}\]

\(71.\) The Florida Cabinet is comprised of six individually elected members, chosen every four years by a state-wide general election. See FLA. CONST. art. IV, §§ 4-5.

\(72.\) The function of the rule-making authority is to promulgate rules that specify acts or practices that violate FLA. STAT. § 501.204 (1973). Thus the standard used to define "unfair" and "deceptive" trade practices in these rules and the standard to guide the enforcing agency must be identical to ensure that the actions of the Cabinet and the enforcing agency complement each other.

\(73.\) Dickinson v. State ex rel. Bryant, 227 So. 2d 96, 97 (Fla. 1969).
The legislature may expressly authorize designated officials within definite limitations to provide rules and regulations for the complete operation and enforcement of the law within its express general purpose, but it may not delegate the power to enact a law, or to declare what the law shall be or to exercise an unrestricted discretion in applying the law . . . .

The precedents established by the decisions of the Federal Trade Commission and the federal courts in reviewing the Commission's decisions incorporate several well-founded principles defining "unfair" and "deceptive," principles that constitute a definite standard for the executive to follow. Adoption of this guide does not leave the executive branch any power to enact a law or to declare what the law shall be. No executive official may fabricate his own definition of "unfair" or "deceptive" apart from the principles established by the Commission; the standard imposed is definite and complete.

V. FEDERAL PRECEDENTS

Because of the Florida Act's reliance upon federal enactments, and to achieve a better understanding of the standard the legislature has imposed on the executive branch, one needs to consider the Federal Trade Commission's interpretations and decisions as well as the federal courts' review of many of these decisions. Such a study is no small task, since the Commission's reported decisions fill 81 volumes and the court decisions another 26 volumes.

One of the most active and visible areas of the Commission's work is in the field of "unfair trade practices." In a recent attempt to define more precisely an "unfair trade practice" the Federal Trade Commission stated:

No enumeration of examples can define the outer limits of the Commission's authority to proscribe unfair acts or practices, but

74. Husband v. Cassel, 130 So. 2d 69, 71 (Fla. 1961).
75. In State v. Reader's Digest Ass'n, 501 P.2d 290 (Wash. 1972), appeal dismissed, 411 U.S. 945 (1973), the court seemed to give a more liberal interpretation of its "little FTC" Act than is advocated here. The Washington court appeared to conclude that no definite standard is needed for such a delegation of power because the terms "unfair" and "deceptive" are already sufficiently well-defined.
76. Federal Trade Commission Decisions contains the full text of the Commission's complaints, opinions and orders. The 81 volumes are available from the Government Printing Office and can be found in the Florida State Library, Supreme Court Building, Tallahassee, Florida, and in other federal depository libraries.
77. The Commerce Clearing House Trade Regulation Reporter (Trade Cases) contains the complete text of all appellate court decisions concerning the Federal Trade Commission Act and other antitrust legislation.
the examples should help to indicate the breadth and flexibility of the concept of unfair acts or practices and to suggest the factors that determine whether a particular act or practice should be forbidden on this ground. These factors are as follows:

1. whether the practice, without necessarily having been previously considered unlawful, offends public policy as has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness;
2. whether it is immoral, unethical, oppressive, or unscrupulous;
3. whether it causes substantial injury to consumers (or competitors, or other businessmen).

If all three factors are present, the challenged conduct will surely violate Section 5 even if there is no specific precedent for proscribing it. The wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive, or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others. Beyond this, it is difficult to generalize.78

Other practices the Commission has found to be unfair include bribery, payola, coercion, intimidation, scare tactics, competitor harassment, inducing breach of a competitor contract, physical interference with a competitor's goods, deals or payments wrongfully forced and shipment of unordered goods.79 If a trade practice, such as a lottery, violates public policy then it is also an unfair trade practice.80

Another of the primary principles the Commission has developed concerns the dissemination of misleading and deceptive materials or advertising. The Commission has held that advertising may in fact be deceptive even though no one was actually deceived.81 The information need only have the tendency to deceive; proof of actual deception is not essential.82 The misrepresentation, however, must be of a material fact which would appreciably affect a consumer's decision to buy.83 It is immaterial that the business did not have knowledge

79. 2 TRADE REG. REP. ¶¶ 7903, 7906, 7912, 7915, 7921, 7950, 7954.
82. Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943).
of the misrepresentation or knowledge of the advertisement's falsity.\textsuperscript{84} Nor is it a defense to deceptive advertising that the advertiser had no intent to deceive.\textsuperscript{85} An advertisement containing the literal truth may be deceptive if ignorant, unthinking or credulous consumers could misinterpret its meaning.\textsuperscript{86} The test is whether the advertisement, as a whole, is misleading or deceptive even though the literal truth may be disclosed.\textsuperscript{87} Ambiguous advertising which implies two meanings, one of which is correct and the other of which is false, is considered deceptive.\textsuperscript{88}

The Federal Trade Commission has also developed the principle that, in order to eliminate deception and misrepresentation, the Commission can require affirmative disclosures of certain information. The disclosure may be required to clarify a statement or provision which, standing alone, has the capacity to mislead.\textsuperscript{89} In addition, a disclosure will be required if it concerns a material fact relevant to the transaction.\textsuperscript{90} A "material fact" is one which pertains to conditions or provisions of the transaction considered highly important, or affecting the likelihood of purchase.\textsuperscript{91} In the past, the Federal Trade Commission has required disclosure of technical data of a product such as wattage rating on light bulbs\textsuperscript{92} and octane rating of gasoline.\textsuperscript{93} Also, if a product conceals its actual composition, its make-up must be affirmatively disclosed.\textsuperscript{94} A consumer's legal rights concerning contract cancellation,\textsuperscript{95} negotiability of commercial paper\textsuperscript{96} and return of unordered merchandise\textsuperscript{97} must also be disclosed. The Commission has also required full disclosure of contract terms in warranties, promissory notes, conditional sales contracts and other instruments.\textsuperscript{98}

Failure to perform in accordance with representations has been

\begin{thebibliography}{99}
\bibitem{84} D.D.D. Corp. v. FTC, 125 F.2d 679 (7th Cir. 1942).
\bibitem{85} Bockenstette v. FTC, 134 F.2d 369 (10th Cir. 1943).
\bibitem{86} Charles of the Ritz Distrib. Corp. v. FTC, 143 F.2d 676 (2d Cir. 1944).
\bibitem{87} See Kalwajtys v. FTC, 237 F.2d 654 (7th Cir. 1956).
\bibitem{88} E. KINTER, \textit{supra} note 81, at 37.
\bibitem{89} \textit{Id.} at 104.
\bibitem{90} J.B. Williams Co. v. FTC, 381 F.2d 884 (6th Cir. 1967). See E. KINTER, \textit{supra} note 81, at 104-14.
\bibitem{91} S.S.S. Co. v. FTC, 416 F.2d 226 (6th Cir. 1969).
\bibitem{92} 16 C.F.R. § 409 (1973).
\bibitem{93} 16 C.F.R. § 422 (1973); National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672 (D.C. Cir. 1973).
\bibitem{94} See 2 \textit{TRADE REG. REP.} ¶ 7547.
\bibitem{95} 16 C.F.R. § 429 (1973).
\bibitem{96} 2 \textit{TRADE REG. REP.} ¶ 7559; E. KINTER, \textit{supra} note 81, at 112.
\bibitem{97} 2 \textit{TRADE REG. REP.} ¶ 7559, n. 75.
\bibitem{98} 2 \textit{TRADE REG. REP.} ¶ 7705; Tashof v. FTC, 437 F.2d 707 (D.C. Cir. 1970); Walter Dlutz v. FTC, 5 \textit{TRADE REG. REP.} (1969 Trade Cas.) ¶ 72,687.
\end{thebibliography}
declared an unfair and deceptive trade practice by the Federal Trade Commission. The Commission has held that mail order companies must deliver merchandise within a reasonable period of time or within the time period they have represented to their customers. Failure to perform on warranties is also considered an unfair and deceptive trade practice. The Commission takes the position that representa-

99. In Bill Jordan, 59 F.T.C. 543 (1961), respondent was charged in a complaint with, among other things, unduly delaying deliveries of photographs of new babies after representing such prints would be delivered soon after the photographic session. The complaint alleged such a representation was false, misleading and deceptive because the respondent had either failed to deliver additional pictures for which the parents had at least partially paid or had made only partial delivery. Moreover, the date of delivery of many other orders had been several months later than the explicitly or implicitly promised delivery date. Id. at 545. In its complaint the Commission alleged that respondent's acts and practices were "to the prejudice and injury of the public and . . . of respondent's competitors and constituted, and now constitute, unfair and deceptive acts and practices and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act." Id.

A cease and desist order subsequently issued directed respondent to cease failing to deliver pictures on the date he had promised delivery. A similar ruling was made in Gadget-of-the-Month Club, 52 F.T.C. 225 (1955).

Other cases in which the FTC has labeled failure to perform as promised to be an unfair trade practice include: Goodman v. FTC, 244 F.2d 584 (9th Cir. 1957) (failing to make promised refunds); Mark Cummings, 57 F.T.C. 294 (1960) (failing to deliver photographs within reasonable time); Superior Distrib. Corp., 54 F.T.C. 105 (1957) (failing to deliver hot-drink vending machines on promised date); Community Services, Inc., 53 F.T.C. 855 (1957) (failing to deliver high school annuals, promised for graduation, until many months later). One of the most blatant examples of failure to perform as promised is illustrated by Tri-State Printers, Inc., 53 F.T.C. 1019 (1957). The respondents in this case had enlisted various civic organizations to take orders for cookbooks, date books and similar publications. They made representations that the products would be delivered within a stated period of time (usually 30 to 90 days), but most contracts remained unperformed for periods in excess of two years. Allegedly, deliveries were made only after legal action was threatened. The FTC acknowledged that the contracts included a clause disclaiming any promise not contained within them. The Commission observed, however, that the contracts contained another clause requiring the customer to place any additional orders within 90 days. The Commission found:

This is, in a manner, a form of verification of the oral statement of the respondents' salesmen to the sponsoring group's signer of the contract that delivery will be made in 90 days and would no doubt be so construed by the average woman who hastily read it in the high pressure atmosphere created by respondents' salesmen. Id. at 1032. This failure to deliver within the stated period or even within a reasonable time "constitute[d] unfair methods of competition." Id. at 1036. Thus respondent was ordered to ensure that any promised delivery dates would be met.

100. Failure to honor the terms of guarantee or warranty is normally treated as a breach of contract. The Federal Trade Commission, when faced with such failures, has labeled them unfair and deceptive trade practices.

In L.T. Baldwin, 59 F.T.C. 975 (1961), a seller and distributor of water heaters was offering unconditional guarantees for the products he sold. The complaint alleged:

Respondent, in many cases, fails and refuses to perform under the terms of his written guarantees where his product covered by the guarantee has failed
tions or promises of future performance should not be made unless the performance will actually take place as represented. It is immaterial whether the promisor had the intent not to perform at the time he made the promise or that his failure to perform resulted from management problems.\footnote{101}

On rare occasions, the Federal Trade Commission has imposed a contract provision on certain transactions between businessmen and consumers. Such action is seldom taken unless the Commission has felt it necessary to assist consumers experiencing an unconscionable hardship. The Commission recently promulgated a rule giving consumers an automatic three day "cooling-off" period in which to cancel, without penalty, contracts solicited in the consumer's home.\footnote{102} "Cooling-off" periods have also been allowed for contracts involving future consumer services\footnote{103} and, in some cases, limits have been placed on the monetary value of such contracts.\footnote{104} In at least one case the Commission has ordered a merchant to stop using negotiable instruments which could be sold or otherwise disposed of, cutting off the consumer's personal defenses. In a consent order, the Commission during the period of the guarantee and he has been notified of such failure.

\textit{Id.} at 976. The complaint urged that such practices were, and are, all to the prejudice and injury of the public and of respondent's competitors and constituted, and now constitute, \textit{unfair and deceptive acts and practices} and unfair methods of competition, in commerce, within the intent and meaning of the Federal Trade Commission Act.

\textit{Id.} at 977 (emphasis added).

In Infraglass Heater Co., 55 F.T.C. 124 (1958), a distributor of electric water heaters was charged with failing to honor the guarantee that it advertised would accompany its products. The Commission ordered respondent to cease and desist from representing, directly or by implication, that their electric heaters, or other merchandise, is guaranteed when any provision of the guarantee is not fully complied with.

\textit{Id.} at 126. This failure to honor the guarantee was clearly an unfair and deceptive trade practice.

In Excel Products, Inc., 61 F.T.C. 1119 (1962), a distributor of storm windows and doors, aluminum and fiberglass awnings, carpets, and patio covers was representing in its advertisements that it "will make repairs or adjustments pursuant to the terms of their guarantee." \textit{Id.} at 1121. The complaint alleged:

\textit{Respondents in many instances do not make repairs or adjustments in accordance with their guarantee... [and the representations in their advertisements] are false, misleading and deceptive.}

\textit{Id.} at 1121. Respondents were ordered to cease and desist from engaging in these unfair and deceptive trade practices.

directed the business to include the following provision in its promissory notes:

"Notice"

"Any holder of this note shall take this note subject to all defenses of any party which would be available in an action on a simple contract."^105

Unfair methods of competition were the activities first prohibited under the Federal Trade Commission Act. An "unfair method of competition" is an activity which violates the "letter or the spirit" of the federal antitrust laws.^106 The federal courts have determined that a violation of either the Sherman, Clayton or Robinson-Patman antitrust acts is an unfair method of competition:

If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the power to suppress it as an unfair method of competition.^107

The Federal Trade Commission (as well as the enforcing authority under the Florida Act) has authority to enforce the provisions of the antitrust laws even though the Congress (legislature) did not specifically give the Commission (enforcing authority) enforcement powers under such laws.^108 In defining an unfair method of competition the federal courts have stated that a combination or conspiracy is not necessarily an essential element in the unlawful activity:

While we hold that the Commission's findings of combination were supported by evidence, that does not mean that existence of a "combination" is an indispensable ingredient of an "unfair method of competition" under the Trade Commission Act.^109

---


However, an unfair method of competition does require some showing of effect on competitors:

[T]he word "competition" imports the existence of present or potential competitors, and the unfair methods must be such as injuriously affect or tend thus to affect the business of the competitors—that is to say, the trader whose methods are assailed as unfair must have present or potential rivals in trade whose business will be, or is likely to be, lessened or otherwise injured.\(^{110}\)

Therefore, the federal precedents clearly show that price-fixing, tying arrangements, combinations in restraint of trade and other anti-competitive activities are "unfair methods of competition" within the legislative definition of the Florida Deceptive and Unfair Trade Practices Act.

VI. Rule Making

The legislature included rule-making powers in the new Act to "prohibit with specificity acts or practices that violate this part."\(^{111}\) The rule-making power was delegated to the Department of Legal Affairs and the Cabinet, with the Department proposing rules and the Cabinet accepting or rejecting them by majority vote.\(^{112}\) Under Florida's Administrative Procedure Act, the actual rule-making authority is the Cabinet\(^{113}\) and therefore the Cabinet must hold the required public hearings before adopting any rules.\(^{114}\) Since the statute requires the Department of Legal Affairs to propose the rules,\(^{115}\) it is the Department's responsibility to establish a basis for the rules and to prepare a proposed draft for public review prior to final adoption by the Cabinet.

The Department's first step in the establishment of criteria for the initial rules was to hold public hearings throughout the state to obtain information on consumer and trade problems and to determine in what areas remedial action was required.\(^{116}\) This information would supplement information already compiled from the thousands

---

116. Public hearings were held in the cities of St. Petersburg, Tampa, Miami, Orlando, Jacksonville, Pensacola, West Palm Beach and Ft. Lauderdale during July, August and September of 1973. Additional hearings were held in Tallahassee from October 22 to 26, 1973.
of consumer complaints which the Attorney General, the office of the Governor and the Division of Consumer Services of the Department of Agriculture had received. After compiling this information, the Department concluded that the Florida marketplace was experiencing the following major problems:

(1) A significant amount of information disseminated to the general public in the advertising of goods, services and property was deceptive, misleading or false;

(2) Many sellers of property, goods and services had failed to disclose to the consumer material aspects of the transaction;

(3) Sellers of property, goods and services would often make promises of performance or delivery to consumers and subsequently fail to perform as promised;

(4) Numerous contracts between consumer and seller later created unconscionable hardships on the consumer; and

(5) Some sellers of property, goods and services engaged in practices which were unlawful, oppressive or unethical resulting in damage not only to consumers but also to the seller's competitors.

To solve these consumer market problems, the Department could have initiated any of several programs. One direct approach could have been to initiate a case-by-case enforcement plan based upon the established precedents of the Federal Trade Commission. This approach, however, would have been inadequate. The Department is not the only enforcement authority under the Act since both the state attorneys and individuals may initiate enforcement action. It is questionable whether consumers, state attorneys and businessmen are familiar with the precedents of the Federal Trade Commission defining "unfair" and "deceptive" trade practices. With these problems in mind, it became apparent that the better approach would be to reduce the Federal Trade Commission precedents to rule form covering the major trade-practice problems in Florida. With the adoption of uniform rules, any enforcing entity would be guided by the same criteria in defining an unfair or deceptive practice.

A. Cabinet Rules

In proposing the trade practice rules, the Department was required by the Act to make such rules "consistent" with rules, regulations and decisions of the Federal Trade Commission. The Cabinet

117. For an explanation of the responsibilities of the consumer agencies in Florida prior to the "little FTC" act, see England Report 29.


in adopting the rules recommended by the Department of Legal Affairs, has promulgated many of the rules under the Federal Trade Commission principle entitled "misleading and deceptive." This standard was used in the rules concerning sales, use of the word "free," game promotions, motor vehicle leasing, sale of mobile homes, sale of land, sale of condominiums, distributorship agreements, private-school selling methods and sale of motor vehicles.

One of the cornerstone provisions of the Cabinet-promulgated rules is the requirement that a seller or his agent affirmatively disclose material facts relevant to the consumer's decision to purchase. Disclosures required under the rules include conditions for receiving free gifts, availability of service, conditions of renting apartments or mobile home park lots, mobile home warranties, closing costs on real property, air conditioning operating efficiencies, terms of home improvement contracts, terms of condominium sales agreements, cancellation rights on contracts for future consumer services and estimates for auto repair.

The Cabinet's rules adopt the Federal Trade Commission's principle concerning failure to perform as promised or represented in the area of rental housing, mobile home parks, mobile home warranties, land sales, home construction, condominium sales, and rental or mobile home park lots.
distributorship agreements\textsuperscript{147} and auto repair\textsuperscript{148}.

The Cabinet adopts the Commission's principle concerning imposition of contract terms in only one area. The rule on contracts for future consumer services allows cancellation of the contract under certain conditions to avoid unconscionable hardships to consumers.\textsuperscript{149} The rule also requires an escrow account for funds received from the sale of services sold prior to their availability, thus assuring that consumers will not be obligated to pay for something they do not receive.\textsuperscript{150}

The rules adopted pursuant to the Act also incorporate the Federal Trade Commission's standard of unfairness. The rules prohibit a landlord from renting buildings in violation of health codes,\textsuperscript{151} from coercing or harrassing tenants by unlawful entry\textsuperscript{152} and from retaliating against tenants by eviction.\textsuperscript{153} In addition, referral selling\textsuperscript{154} and multi-level selling practices\textsuperscript{155} are prohibited.

\textbf{B. Judicial Guidelines}

When an administrative agency in Florida has been delegated rule-making power by the legislature, it must promulgate those rules within the guidelines established by the courts. The rules cannot exceed the authority conferred by the governing statute.\textsuperscript{156} In other words, the rules under the Deceptive and Unfair Trade Practices Act must fall within the standards imposed upon the executive officers by the legislature in the passage of the Act. As previously discussed, these standards are the decisions of the Federal Trade Commission and the federal courts' review of such decisions.\textsuperscript{157} If the Cabinet's rules under the Act follow these imposed standards, it appears they will be within the authority the legislature has delegated to the executive branch. Normally, where the enabling statute states a broad public policy, the courts have tended to favor the assumption that the promulgated rule falls within the statutory authority.\textsuperscript{158}

\begin{itemize}
  \item[147.] FLA. ADMIN. CODE § 2-17.04(14).
  \item[148.] FLA. ADMIN. CODE §§ 2-19.03, 2-19.05(7).
  \item[149.] FLA. ADMIN. CODE § 2-18.03.
  \item[150.] FLA. ADMIN. CODE § 2-18.07.
  \item[151.] FLA. ADMIN. CODE § 2-11.03.
  \item[152.] FLA. ADMIN. CODE § 2-11.04.
  \item[153.] FLA. ADMIN. CODE § 2-11.07.
  \item[154.] FLA. ADMIN. CODE § 2-17.02.
  \item[155.] FLA. ADMIN. CODE § 2-17.03.
  \item[156.] See FLA. STAT. § 120.05 (1973); Atlantic Coast Line R.R. v. State, 143 So. 255 (Fla. 1932).
  \item[157.] See FLA. STAT. § 501.205(2) (1973).
  \item[158.] The numerous decisions construing FLA. STAT. chs. 350-69 (1973), relating
Another court-imposed guideline on administrative rules is that rules may not conflict with existing Florida statutes, including the enabling statute. The courts take a more conservative approach when dealing with the enabling statute, holding that the rule cannot amend, repeal or modify the act which gave the rule-making authority. Case law indicates, however, that an administrative rule may supplement a statute provided it does not conflict with that statute. If a rule covers the same subject area as another statute, this in itself should not invalidate the rule. Since the legislative intent of the Act is to give "great weight and authority" to the decisions of the Federal Trade Commission and to the federal courts' review of such decisions, it would appear that the Cabinet could promulgate rules covering various subjects, regardless of the reach of other statutes, as long as the rule satisfies the standard. Some of the federal decisions upon which the Florida Act relies have held that the violation of a law outside the Federal Trade Commission's jurisdiction could be declared an unfair trade practice and enforced by the Commission.

The Florida courts also require that any administrative rule bear a reasonable relation to the conduct being regulated. The rule must

to the powers of the Public Service Commission, exemplify the principle. See, e.g., Utilities Operating Co. v. Mayo, 204 So. 2d 321 (Fla. 1967). The Florida Supreme Court seldom overturns the decisions of the PSC even though this body exercises its delegated broad powers with wide discretion.


161. If an administrative rule or regulation is both authorized by statute and "reasonable," it is presumed valid. Florida Citrus Comm'n v. Golden Gift, 91 So. 2d 657, 660 (Fla. 1956). With these standards as the only requirements for a valid regulation, some overlapping is bound to occur in the rules, since many of the enabling statutes themselves overlap and supplement each other. For example, the broad grant of authority to the Department of Pollution Control, see Fla. Stat. § 403.061 (1973), must of necessity supplement the powers and duties of the Department of Natural Resources, see Fla. Stat. § 370.021 (1973).

162. A review of Florida's statutes reveals that laws exist to regulate almost every conceivable trade. The courts have held that one governmental agency's control over an area does not preempt another agency's action. See, e.g., State v. Tampa Electric Co., 291 So. 2d 45 (Fla. 2nd Dist. Ct. App. 1974).

163. The subjects of Fla. Admin. Code chs. 2-11 (rental housing and mobile homes), 2-13 (sale of real property), 2-16 (condominiums and cooperatives), are already regulated by Fla. Stat. chs. 83, 478, 711 (1973), respectively. The Cabinet's rules, however, do not conflict with these statutes and, therefore, appear to be valid. If the legislature had intended to restrict the Cabinet's rule-making powers, it simply could have included subject areas in its list of exemptions, Fla. Stat. § 501.212 (1973). See notes 52-62 supra.

164. See cases cited in note 108 supra.

establish standards or guidance for those members of the public who are affected by it. The state supreme court has stated:

Where a statute and a rule . . . are in accord with the terms and purposes of the State Constitution, the ultimate test of their validity as affording due process of law and equal protection of the laws, as guaranteed by the federal Constitution, is the reasonableness of the statute and the rule with reference to their effect upon property rights.\[166\]

In addition, the rule-making authority must show adequate reasons for regulating an area or industry, and cannot adopt a rule without actual authority to do so or adopt a rule which punishes a person affected by it without due process of law.\[167\] To be reasonable, a rule must be designed to accomplish the purpose of the statute.\[168\] Even though an administrative rule may have the effect of destroying a business, it is not, per se, unreasonable and invalid.\[169\] If, for example, the substantive purpose of a business is an unlawful multilevel or pyramid sales practice, the Cabinet’s rule concerning such activities should not be invalid, even though the operation of the business may be curtailed or eliminated.\[170\]

Another important administrative rule-making principle concerns the exercise of any implied powers that exist under the statute. Implied powers may be derived from the expressed legislative purpose of the statute.\[171\] The powers of administrative agencies include those expressly given and those implied as necessary by the provisions of the statutes. As a rule of construction, neither category is possessed of greater dignity or effect.\[172\]

The legislature’s rejection of previous bills is not indicative of a legislative intent to preclude rule making in the defeated bill’s subject area.\[173\] During the last few years numerous consumer protection bills have been introduced in the legislature only to fail at the committee level or in floor debate. They addressed such areas as

---

166. State v. Atlantic Coast Line R.R., 47 So. 969, 983 (Fla. 1908).
167. Robbins v. Webb’s Cut Rate Drug Co., 16 So. 2d 121 (Fla. 1944).
168. Gillett v. Florida Univ. of Dermatology, 197 So. 852 (Fla. 1940).
169. Id. at 857.
170. See Fla. ADMIN. CODE ch. 2-17.
171. See Fla. STAT. § 501.202 (1973); Deltona Corp. v. PSC, 220 So. 2d 905 (Fla. 1969).
172. City Gas Co. v. Peoples Gas Sys., 182 So. 2d 429, 436 (Fla. 1965), aff’d 167 So. 2d 577 (Fla. 3d Dist. Ct. App. 1964); Cassaday v. Sholtz, 169 So. 487, 490 (Fla. 1936); Martin County v. Hansen, 149 So. 616, 618 (Fla. 1933).
auto repair,\textsuperscript{174} health spas,\textsuperscript{175} dance studios\textsuperscript{176} and condominiums.\textsuperscript{177} These particular bills covered areas where numerous abusive, deceptive and unfair trade practices have occurred. If an administrative agency were precluded from promulgating rules in areas previously rejected by the legislature, it could spend a great deal of its time searching for old bills from previous sessions to determine the extent of its jurisdiction. Such wasteful activities could render enforcement of the law extremely difficult, if not impossible.

\textbf{VII. Conclusion}

The Florida Deceptive and Unfair Trade Practices Act is a dramatic new approach to trade regulation and consumer protection in Florida even though the concept was adopted by the federal government over 60 years ago. The new Act adopts the federal precedents and principles defining “unfair” and “deceptive” and applies them to the major trade problems in Florida. These principles can be summarized as follows:

1. Any dissemination of information which has the tendency to deceive is unlawful.
2. All material facts of a transaction must be affirmatively disclosed.
3. Failure to perform reasonably in accordance with representations is unfair and deceptive.
4. Certain contract provisions, such as the right of contract cancellation during a “cooling-off” period, must be allowed to avoid unconscionable hardships to consumers.
5. Any practice that is within the penumbra of unlawful activity as established by statute or common law, is oppressive and unethical and is damaging to consumers or competitors constitutes an unfair trade practice.
6. Any practice which violates the letter or spirit of the federal antitrust laws is an unfair method of competition regardless of whether interstate commerce is involved.

The new Act delegates considerable, but well defined, powers to the Florida Cabinet, the Attorney General and the state attorneys, and creates private rights of action for private citizens. By declaring a broad public policy that “unfair methods of competition,” “unfair” trade practices and “deceptive” trade practices shall all be un-

\textsuperscript{175} See, e.g., Fla. S. 486 (1973).
\textsuperscript{176} See, e.g., Fla. S. 76 (1973).
\textsuperscript{177} See, e.g., Fla. S. 386 (1973).
lawful, the legislature established a comprehensive and identifiable standard to counter those who would cheat and deceive the public and competitors in the quest for additional profit. Such a broad delegation of power was necessary to deal effectively with Florida's market problems. By imposing the federal precedents in defining this statement of public policy, the legislature constitutionally delegated enforcement and rule-making powers to the executive branch. Such delegation of power gives the executive the needed authority to make Florida's marketplace fairer to consumers and businessmen alike.
APPENDIX*

AMENDMENTS TO FLORIDA UNFAIR AND DECEPTIVE TRADE PRACTICES ACT

A bill to be entitled

An act relating to unfair and deceptive trade practices, repealing parts III and IV of chapter 817, creating part II of chapter 501, Florida Statutes, to prohibit deceptive and unfair trade practices and to provide civil and administrative remedies for consumers, state attorneys and the department of legal affairs; creating section 570.283(10), Florida Statutes, giving certain authority to the division of consumer services of the department of agriculture; providing for certain exceptions; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:


501.201 Short title.—This part shall be known and may be cited as the Florida deceptive and unfair trade practices act.

501.202 Purposes, rules of construction.—The provisions of this part shall be construed liberally to promote the following policies:

(1) To simplify, clarify, and modernize the law governing consumer sales practices;

(2) To protect consumers from suppliers who commit deceptive and unfair trade practices; and

(3) To make state regulation of consumer sales practices consistent with established policies of federal law relating to consumer protection.

501.203 Definitions.—As used in this chapter, unless the context otherwise requires, the term:

(1) "Consumer transaction" means a sale, lease, assignment, award by chance, or other disposition of an item of goods, a consumer service, or an intangible, to an individual for purposes that are primarily personal, family, or household, or that relate to a business opportunity that requires both his expenditure of money or property and his personal services on a continuing basis and in which he has not been previously engaged, or a solicitation by a supplier with respect to any of these dispositions;

(2) "Final judgment" means a judgment, including any supporting opinion, that determines the rights of the parties and concerning which appellate remedies have been exhausted or the time for appeal has expired;

(3) "Supplier" means a seller, lessor, assignor, or other person who regularly solicits, engages in, or enforces consumer transactions, whether or not he deals directly with the consumer;

(4) "Enforcing authority" means the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office's jurisdiction, and the department of legal affairs if the violation occurs in or affects more than one (1) judicial circuit, or if the office of state attorney fails to act upon a violation solely within his judicial circuit within a reasonable period of time after it has been brought to his attention, if a complaint of such violation has been referred to the state attorney by the department of legal affairs. "Enforcing authority" means the department of legal affairs if the violation occurs in or affects more than one judicial circuit, or if the office of state attorney fails to act upon a violation within a reasonable period of time after it has been referred to him by the department of legal affairs.

* In this appendix, the language in italics indicates provisions of the original draft of the bill that were excluded by various amendments. Wording that is underlined indicates those provisions of the bill which were added by various amendments. Language in the text that is in either plain or underlined type is the final wording of the bill as signed by the Governor, but does not reflect minor changes effected in compiling the 1973 edition of the Florida statutes. See FLA. STAT. § 11.242(5) (1973).
“Rule making authority” means the department of legal affairs; “Violation of this part” means either a violation of a provision of this part or a violation of any rule promulgated pursuant to this part; “Department” means the department of legal affairs; “Order” means a cease and desist order issued by the enforcing authority as set forth in section 501.208; “Interested party or person” means any person affected by a violation of this part or any person affected by an order of the enforcing authority.

501.204 Unlawful acts and practices.—
(1) Fraudulent methods of competition and fraudulent or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.
(2) A deceptive act or practice by a supplier in connection with a consumer transaction violates this act whether it occurs before, during, or after the transaction.
(3) It is the intent of the legislature that in construing this section of this part due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

(a) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits it does not have;
(b) That the subject of a consumer transaction is of a particular standard, quality, grade, style or model, if it is not;
(c) That the subject of a consumer transaction is new, or unused, if it is not, or that the subject of a consumer transaction has been used to an extent that is materially different from the fact;
(d) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;
(e) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not;
(f) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;
(g) That replacement or repair is needed, if it is not;
(h) That a specific price advantage exists, if it does not;
(i) That the supplier has a sponsorship, approval, or affiliation he does not have;
(j) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties, particular warranty terms, or other rights, remedies, or obligations if the indication is false;
(k) That the consumer will receive a rebate, discount or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers or otherwise helping the supplier to enter into other consumer transactions, if receipt of the benefit is contingent on an event occurring after the consumer enters into the transaction.
(l) That the supplier took advantage of the inability of any person to reasonably protect his interests because of physical infirmity, ignorance, illiteracy, inability to understand the language of an agreement, or similar factors;
(m) That when the consumer transaction was entered into the price grossly exceeded the price at which similar property or services were readily obtainable in similar transaction by like consumers;
(n) That when the consumer transaction was entered into the consumer was unable to receive a substantial benefit from the subject of the transaction; or
(o) That when the consumer transaction was entered into the supplier had knowledge that there was no reasonable probability of payment of the obligation in full by the consumer.
(1) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

(2) It is the intent of the legislature that in construing subsection (1) of this section due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

501.205 Rule making power—of the department of legal affairs.

(1) The department shall adopt rules that prohibit with specificity acts or practices that violate this part and which prescribe procedural rules for the administration of this part. All rules prescribed and administrative action taken by the department shall be pursuant to chapter 120 unless otherwise specified in this part.

(1) The department shall propose rules to the cabinet that prohibit with specificity acts or practices that violate this part and which prescribe procedural rules for the administration of this part. Such rules shall be adopted by majority vote of the cabinet. All rules prescribed by the cabinet and administrative action taken by the department shall be pursuant to chapter 120, Florida Statutes. The attorney general shall, at least thirty days (30) before the meeting at which such rules are to be considered by the cabinet, mail a copy of such rules to any person filing a written request with the attorney general to receive copies of proposed rules. The attorney general may charge a reasonable rate for providing copies of such rules, which rate shall not exceed the actual cost of printing and mailing.

(2) All substantive rules and regulations promulgated under this part shall be consistent with the rules, regulations and decisions of the Federal Trade Commission and the federal courts in interpreting the provisions of § 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time to time amended.

501.206 Investigative powers of the enforcing authority—

(1) If, by his own inquiries or as a result of complaints, the enforcing authority has reason to believe that a person has engaged in or is engaging in or is about to engage in an act or practice that violates this part, he may administer oaths and affirmations, subpoena witnesses or matter, and collect evidence according to the Florida Rules of Civil Procedure.

(2) If matter that the enforcing authority seeks to obtain by subpoena is located outside the state, the person subpoenaed may make it available to the enforcing authority or his representative to examine the matter at the place where it is located. The enforcing authority may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf, and he may respond to similar requests from officials of other states.

(3) Upon failure of a person without lawful excuse to obey a subpoena and upon reasonable notice to all persons affected, the enforcing authority may apply to the circuit court for an order compelling compliance.

(4) The enforcing authority may request that an individual who refuses to comply with a subpoena on the ground that testimony or matter may incriminate him be ordered by the court to provide the testimony or matter. Except in a prosecution for perjury, an individual who complies with a court order to provide testimony or matter after asserting a privilege against self-incrimination to which he is entitled by law, may not be subjected to a criminal proceeding or to a civil penalty with respect to the consumer transaction concerning which he is required to testify or produce relevant matter.

501.207 Remedies of the enforcing authority—

(1) The enforcing authority may bring:

(a) An action to obtain a declaratory judgment that an act or practice violates this part;

(b) An action to enjoin a supplier who has violated, is violating, or is otherwise likely to violate this part; or

(c) An action on behalf of one or more consumers for the actual damages caused
by an act or practice performed in violation of this part; provided, however, that no damages shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(d) Before bringing an action under paragraphs (a) or (c) of this subsection, the enforcing authority shall pursuant to an administrative hearing determine that there is probable cause to bring the action. Written notice of such hearing shall be served by certified mail upon the party charged with a violation of this part at least thirty (30) days prior to such hearing. The party charged shall have the right to file a written answer to the charges at any time prior to the hearing and shall have the right to be represented by counsel at such hearing and to cross-examine all complaining witnesses. The administrative hearing shall be held in the county in which the party charged resides or in the county in which the violation is alleged to have occurred.

(2) Upon motion of the enforcing authority or any interested party in any action brought under subsection (1), the court may make appropriate orders, including appointment of a master or receiver or sequestration of assets, to reimburse consumers found to have been damaged, or to carry out a consumer transaction in accordance with consumers' reasonable expectations, or to strike or limit the application of clauses of contracts to avoid an unconscionable result, or to grant other appropriate relief. The court may assess the expenses of a master or receiver against a supplier.

(3) If a supplier shows that a violation of this part resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error, recovery under this section is limited to the amount, if any, by which the supplier was unjustly enriched by the violation.

(4) No action may be brought by the enforcing authority under this section more than two (2) years after the occurrence of a violation of this part, or more than one (1) year after the last payment in a consumer transaction involved in a violation of this part, whichever is later.

(5) The enforcing authority may terminate an investigation or an action upon acceptance of a supplier's written assurance of voluntary compliance with this part. Acceptance of an assurance may be conditioned on a commitment to reimburse consumers or take other appropriate corrective action. An assurance is not evidence of a prior violation of this part. However, unless an assurance has been rescinded by agreement of the parties or voided by a court for good cause, subsequent failure to comply with the terms of an assurance is prima facie evidence of a violation of this part. No such assurance shall act as a limitation upon any action or remedy available to a person aggrieved by a violation of this part.

501.208 Cease and desist orders; procedures.—

(1) Whenever the enforcing authority shall have reason to believe that a person has been or is violating this part and if it shall appear to the enforcing authority that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person a complaint or notice stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty (30) days after the service of said complaint. Said hearing shall be held in the county of residence of the party charged or in the county in which the violation is alleged to have occurred. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the enforcing authority requiring such person to cease and desist from the violation of this part so charged in said complaint. Any interested party or person may make application and upon good cause shown may be allowed by the enforcing authority to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the enforcing authority. If upon such hearing the enforcing authority shall be of the opinion that the act is in violation of this act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person an order requiring such person to cease and desist from using such method of competition or such
act or practice. The person affected by the order has ten (10) days from the date of issuance of the order to file a petition for review with the attorney general. When a petition for review is filed, the attorney general shall either affirm, modify or set aside the order within forty-five (45) days after the filing date of the petition for review.

(2) The enforcing authority may modify or set aside its order at any time by rehearing upon its own motion when such rehearing is in the interest of the public welfare.

(3) Judicial review of orders of the enforcing authority shall be by certiorari to the district courts of appeal in accordance with the provisions set forth in section 120.31 of part III of the Administrative Procedure Act, chapter 120, Florida Statutes, and shall take precedence over other civil cases pending, and shall be in every way expedited.

(4) If the alleged violation of this part occurs in a county or municipality having an ordinance covering such unlawful activity with appropriate administrative proceedings to enforce the ordinance then the enforcing authority may initiate any cease and desist action according to the procedural rules of the ordinance, and may hold administrative hearings before the boards or bodies created by the ordinance; however, any appeal of a local administrative body's decision shall be to the attorney general with judicial review through the district court of appeals as provided for in this section.

(5) An order of the enforcing authority to cease and desist shall not become effective until ten (10) days after all administrative action has been concluded, or, if appeal is made to the district court of appeal and bond is posted, until a final order has been entered by that court.

(6) No cease and desist order shall act as a limitation upon any other action or remedy available to a person aggrieved by a violation of this act.

(7) When a court remands an order of the enforcing authority for rehearing, such rehearing shall be held within forty-five (45) days after the remand.

(8) Any person who violates a cease and desist order of the enforcing authority after it has become final, and while such order is in effect, shall forfeit and pay to the state of Florida a civil penalty of not more than five thousand dollars ($5,000) for each violation, which shall accrue to the state of Florida and may be recovered in a civil action brought by the state. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the enforcing authority each day of continuance of such failure or neglect shall be deemed a separate offense.

501.209 Other supervision.—If the enforcing authority receives a complaint or other information relating to noncompliance with this act by a supplier who is subject to other supervision in this state, the enforcing authority shall inform the official or agency having that supervision.

501.2091 Jury trial.—Notwithstanding anything in this act to the contrary, any person made a party to any proceeding brought under the provisions of this act by any enforcing authority may obtain a stay of such proceedings at any time by filing a civil action requesting a trial on the issues raised by the enforcing authority in the circuit court in the county of said party's residence. All parties shall be bound by the final order of the said circuit court.

501.210 Attorney fees.—

(1) In any civil litigation resulting from a consumer transaction involving deceptive and unfair transactions in a violation of this part, except as provided in subsection (5), the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his reasonable attorney's fees and costs from the nonprevailing party.

(2) The attorney for the prevailing party shall submit a sworn affidavit of his time spent on the case, and his costs incurred for all the motions, hearings and appeals to the trial judge who presided over the civil case.

(3) The trial judge shall award the prevailing party the sum of reasonable all costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(4) The trial judge may not award attorney's fees in excess of the amount of the judgment for the prevailing party.
Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the laws of Florida allow.

This section shall not apply to any action initiated by the enforcing authority.

(1) Without regard to any other remedy or relief to which a person is entitled, anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part, enjoin a supplier who has violated, is violating, or is otherwise likely to violate this part.

(2) In any individual action brought by a consumer who has suffered a loss as a result of a violation of this part, such individual may recover actual damages or one hundred dollars ($100), whichever is greater, plus attorney's fees and court costs as provided in section 501.210; provided, however, that no damages, fees or costs shall be recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.

(3) In any action brought under this section, upon motion of the party against whom such action is filed alleging that the action is frivolous, without legal or factual merit, or brought for the purpose of harassment, the court may, after hearing evidence as to the necessity therefore, require the party instituting the action to post a bond in the amount which the court finds reasonable to indemnify the defendant for any damages incurred, including reasonable attorney's fees; provided, however, that this subsection shall not apply to any action initiated by the enforcing authority.

(4) The court may, in its discretion, award punitive damages and may provide such equitable relief as it deems necessary or proper, including enjoining the defendant from further violations of the part. If it appears to the court that the suit brought by the plaintiff was ill-founded or brought for purposes of harassment, the initiating parties shall be liable for court costs and reasonable attorney's fees incurred by the defendant.

(5) Except for consent judgments entered before testimony is taken, a final judgment in favor of the enforcing authority is admissible as prima facie evidence of the facts on which it is based in later proceedings under this section against the same person or a person in privity with him.

An action under this section must be brought within two (2) years after occurrence of a violation of this part, within one (1) year after the last payment in a consumer transaction involved in a violation of this part, or within one (1) year after the termination of proceedings by the enforcing authority with respect to a violation of this part, whichever is later.

When a supplier sues a consumer, the consumer may assert as a counterclaim any claim under this part arising out of the transaction on which suit is brought.

An action may be maintained as a class action under this part only if:

(a) The class is so numerous that joinder of all members is impracticable;

(b) There are questions of law or fact common to the class;
(c) The claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(d) The representative parties will fairly and adequately protect the interests of the class.

(9) No action brought as a class action under this part may be dismissed because:

(a) More than one (1) remedy at law exists for the members of the class; or

(b) The consumer transactions involved are not identical.

501.213 Application.—This part does not apply to:

(1) An act or practice required or specifically permitted by federal or state law;

(2) A publisher, broadcaster, printer, or other person engaged in the dissemination of information or the reproduction of printed or pictorial matter insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated this part;

(3) A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction; or

(4) The credit terms of a transaction otherwise subject to this part.

(5) Any person or activity regulated under laws administered by the department of insurance or the Florida Public Service Commission or banks and savings and loan associations regulated by the Department of Banking and Finance.

501.213 Effect on other remedies.—

(1) The remedies of this part are in addition to remedies otherwise available for the same conduct under state or local law, except that a class action relating to a transaction governed by this part may be brought only as prescribed by this part.

(2) A person alleged to have violated this part has the burden of showing, as a defense in any action brought against him, the inapplicability of this part.

(2) (3) This part is supplemental to and makes no attempt to preempt local consumer protection ordinances not inconsistent with this part.

Section 2. Section 570.283, Florida Statutes, is amended by adding subsection (10) to read:

570.283 Division of consumer services; director; processing of complaints; records.—

(10) If the division by its own inquiry, or as a result of complaints, has reason to believe that a violation of the laws of the state relating to consumer protection has occurred or is occurring, it may conduct an investigation, subpoena witnesses and evidence, and administer oaths and affirmations.

Section 2. Section 3. Part III consisting of sections 817.69, 817.70, 817.71, 817.72, 817.73, 817.74, 817.75, and 817.751 and part IV consisting of sections 817.76, 817.77, 817.771, 817.78, 817.79, 817.80, 817.81, 817.82, 817.83, 817.84 and 817.85 of chapter 817, Florida Statutes, are repealed.

Section 3. Section 4. If any provision of this part or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of this part which can be given effect without the invalid provision or application, and to this end the provisions of this part are severable.

Section 4. Section 5. This part shall take effect on October 1, 1973.