Resolving When Fla. Consumer Statute Gives Cos. Standing

By **Aaron Weiss and Michael Zilber** (October 22, 2021)

Aaron Weiss

Michael Zilber

In his iconic song, Ben E. King proclaimed that his darling could "Stand By Me." While it may seem far afield, the famous refrain from the song helps frame the questions around whether a business has standing to bring a claim under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA.

As we will discuss in this article, courts in Florida have struggled with where to draw the line over the last 20 years. And — spoiler alert — there is a significant argument that the courts have not yet considered — but which could dispose of the whole dispute.

The U.S. District Court for the Southern District of Florida, in its decision in June in Humana Pharmacy Solutions Inc. v. Michelin, noted that "Florida case law indicates that a claimant seeking relief under FDUTPA need not be a consumer."[1] Other recent decisions by federal district courts in Florida have made similar observations.

Before 2015, there was considerable debate within Florida federal courts concerning whether a juridical entity had statutory standing to bring a claim under FDUTPA.[2] However, in 2015 and 2016, three of the five Florida appellate courts found that businesses could potentially have standing under FDUTPA.[3]

Specifically, in Caribbean Cruise Line Inc. v. Better Business Bureau of Palm Beach County Inc., the Fourth District Court of Appeal became the first state appellate court in Florida to address the issue. It held that, although a nonconsumer business entity may have standing to assert a claim for damages under FDUTPA, it must nevertheless allege and prove "that there was an injury or detriment to consumers in order to satisfy all of the elements of a FDUTPA claim."[4]

The Fourth District's recognition of this critical element — harm to the consumer resulting from an alleged deception — is in line with the Florida Supreme Court's definition of "deception" in the context of an FDUTPA claim. In its 2003 decision in PNR Inc. v. Beacon Property Management Inc., the court defined deception as "a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[5]

Thus, a nonconsumer cannot assert a FDUTPA claim based on deception without allegations of harm or detriment to the consumer.[6] With the Florida state appellate courts having addressed the issue, U.S. District Judge Robin Rosenberg of the Southern District of Florida noted, in Chiron Recovery Center LLC v. AmeriHealth HMO of New Jersey Inc. in 2017, that when a party cites some of the older "no nonconsumer standing" case law:

Despite the existence of a split in the federal district courts, the state appellate courts that have ruled on the issue have determined that non-consumers have standing under FDUTPA. When a state supreme court has not ruled on an issue, federal district courts interpreting state law are bound to follow any decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently.[7]

However, that is not the end of the inquiry. Specifically, following Caribbean Cruise Line, decisions issued in all three Florida federal districts have still found that, while a business may have standing to bring an FDUTPA claim, that business still must allege consumer injury.

For instance, in CEMEX Construction Materials Florida LLC v. Armstrong World Industries Inc., U.S. District Judge Marcia Morales Howard of the U.S. District Court for the Middle District of Florida found in 2018 that "to state a FDUTPA claim, the Caribbean Cruise Line decision instructs that [the plaintiff] must allege facts plausibly suggesting that [the defendant's] actions were likely to cause consumer harm."[8]

Likewise, in Sandshaker Lounge & Package Store LLC v. RKR Beverage Inc., U.S. District Judge M. Casey Rodgers of the U.S. District Court for the Northern District of Florida issued a decision in 2018 that applied Caribbean Cruise Line, and found that the 2001 amendments to FDUPTA "did not modify the requirement that the plaintiff allege facts plausibly suggesting consumer injury or detriment in order to state a claim."[9]

Just this August, in Car Body Lab Inc. v. Lithia Motors Inc., U.S. District Judge Federico Moreno of the Southern District of Florida adopted a report and recommendation by Magistrate Judge Jonathan Goodman that cited both CEMEX and Sandshaker, and concluded that dismissal was appropriate where the plaintiff's complaint did not "specifically allege harm to consumers. The closest Plaintiff gets is in its generic allegation that [the defendant's] conduct has 'caused consumer confusion.' But this is not sufficient."[10]

And to bring the issue full circle, in Stewart Agency Inc. v. Arrigo Enterprises Inc., the Fourth District Court of Appeal likewise examined the issue in 2019 and explained that, although a claimant asserting a cause of action under FDUTPA "does not have to be a consumer," the claimant "must show that a consumer was injured or suffered a detriment."[11]

It thus appears that the Florida federal courts have reached a consensus that a juridical entity does not have to assert that it is the consumer that suffered an injury. But if it did not directly suffer the injury, it must demonstrate that the conduct that allegedly violates FDUTPA caused injury to a consumer.[12]

It also appears, though, that one important point may be left to be explored. None of these cases holding that a business entity can establish FDUTPA by demonstrating injury not to themselves, but to consumers, conducted a full analysis to determine if the plaintiff properly demonstrated that it had Article III standing to bring the claim in federal court.

In fairness, it also does not appear that this particular Article III standing question has been presented to any court that has issued a reported decision on the business standing issue.

So, for the significant argument we mentioned earlier: The notion that a business can demonstrate Article III standing by relying on injuries not to itself, but to its consumers, appears to be in direct tension with long-standing U.S. Supreme Court precedent,

established by Warth v. Seldin in 1975, that makes clear that to establish standing, a litigant "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."[13]

As the high court noted in 2014's Lexmark International Inc. v. Static Control Components Inc., this "general prohibition on a litigant's raising another person's legal rights" is a "prudential standing" doctrine.[14]

The U.S. Court of Appeals for the Eleventh Circuit, and district courts within the circuit, have repeatedly enforced this prohibition to preclude claims where plaintiffs attempt to rest standing based on injuries suffered by others.[15] In particular, courts such have adhered to the rule that, as the Middle District of Florida put it in Casaburro v. Volusia County Corp. in 2007, a "plaintiff 'has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others.'"[16]

We will watch closely to see if pushback emerges to the notion that a business can pursue an FDUTPA claim in federal court if that business cannot demonstrate that it suffered any injury, but only that its consumers were injured.

Aaron Weiss is a shareholder and Michael Zilber is an associate at Carlton Fields.

[1] Humana Pharmacy Sols. Inc. v. Michelin, No. 9:20-cv-81361, 2021 WL 3403950, at *9 (S.D. Fla. June 15, 2021) (Cannon, J.); S. Broward Hosp. Dist. v. ELAP Servs. LLC, No. 0:20-cv-61007, 2020 WL 7074645, at *5 (S.D. Fla. Dec. 3, 2020) (Singhal, J.).

[2] District Judge Kenneth A. Marra's decision in Kertesz v. Net Transactions, Ltd., 635 F. Supp. 2d 1339, 1349–50 (S.D. Fla. 2009), covers the issue in detail and surveys Florida district court cases on both sides of the issue. As Judge Marra noted, there was "a line of post–2001 amendment United States District Court cases that … held that only consumers may bring a private suit under FDUTPA." Id. (citing Cannova v. Breckenridge Pharm. Inc., No. 9:08-cv-81145, 2009 WL 64337, at *3 (S.D. Fla. Jan. 9, 2009) (Marra, J.) (finding that only a consumer may bring private suit under FDUTPA)); Goodbys Creek LLC v. Arch Ins. Co., No. 3:07-cv-00947, 2008 WL 2950112, at *8 (M.D. Fla. July 31, 2008) (Covington, J.) (same); Badillo v. Playboy Entm't Grp. Inc., No. 8:04-cv-00591, 2006 WL 785707, at *6 (M.D. Fla. March 28, 2006) (Moody, J.) (same). Likewise, Judge Marra also noted that there was "a line of post–2001 amendment United States District Court cases which hold that the 2001 amendments allow non-consumers to bring claims for damages under FDUTPA." Kertesz, 635 F. Supp. 2d at 1350 (citing Hinson Elec. Contracting Co. v. Bellsouth Telecomms. Inc., No. 3:07-cv-00598, 2008 WL 360803, at *2–3 (M.D. Fla. Feb. 8, 2008) (Corrigan, J.) (noting that FDUTPA's 2001 amendments replaced the word "consumer" with "person" allowing a broader base of complainants to seek damages under FDUTPA)); Furmanite Am. Inc. v. T.D. Williamson Inc., 506 F. Supp. 2d 1134, 1145–46 (M.D. Fla. 2007) (Fawsett, J.) (same); True Title Inc. v. Blanchard, No. 6:06-cv-01871, 2007 WL 430659, at *3 (M.D. Fla. Feb. 5, 2007) (Fawsett, J.) (same).

[3] Caribbean Cruise Line Inc. v. Better Bus. Bureau of Palm Beach Cnty. Inc., 169 So. 3d

164, 169 (Fla. 4th DCA 2015); Off Lease Only Inc. v. LeJeune Auto Wholesale Inc., 187 So. 3d 868, 869 n.2 (Fla. 3d DCA 2016); Bailey v. St. Louis, 196 So.3d 375, 385 (Fla. 2d DCA 2016).

[4] Caribbean Cruise Line Inc. In Caribbean Cruise Line, injury or detriment to the consumer was plainly present based on the plaintiff's allegations that the defendant's website was the "go-to source for consumers seeking to investigate businesses" and "that the consuming public relies on" the information portrayed by the defendant on its website, which allegedly contained false representations regarding the defendant's investigation of businesses and the methods it employed in accrediting businesses. Id. at 166.

[5] PNR Inc. v. Beacon Prop. Mgmt. Inc., 842 So. 2d 773, 777 (Fla. 2003).

[6] A consumer is defined by the Oxford English Dictionary as: "A user of an article or commodity, a buyer of goods or services." Oxford English Dictionary (6th ed. 2007); Pinecrest Consortium Inc. v. Mercedes-Benz USA LLC, No. 1:13-cv-20803, 2013 WL 1786356, at *2 (S.D. Fla. April 25, 2013) (Moreno, J.) ("A 'consumer' is one who has engaged in the purchase of goods or services").

[7] Chiron Recovery Ctr. LLC v. AmeriHealth HMO of N.J. Inc., No. 9:16-cv-82043, 2017 WL 4390169, at *6 (S.D. Fla. Oct. 3, 2017) (Rosenberg, J.). The Florida Supreme Court has held that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." Pardo v. State, 596 So. 2d 665, 666 (Fla. 1992) (quoting Stanfill v. State, 384 So. 2d 141, 143 (Fla. 1980)). The Eleventh Circuit has extended the Pardo rule to federal courts, holding that federal courts applying Florida law "are bound to follow the decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently." McMahan v. Toto, 311 F.3d 1077, 1080 (11th Cir. 2002).

[8] CEMEX Constr. Materials Fla. LLC v. Armstrong World Indus. Inc., No. 3:16-cv-00186, 2018 WL 905752, at *15 (M.D. Fla. Feb. 15, 2018) (Howard, J.).

[9] Sandshaker Lounge & Package Store LLC v. RKR Beverage Inc., No. 3:17-cv-00686, 2018 WL 7351689, at *6 (N.D. Fla. Sept. 27, 2018) (Rodgers, J.) (dismissing plaintiff's FDUTPA claim for failure to allege consumer injury).

[10] Car Body Lab Inc. v. Lithia Motors Inc., No. 1:21-cv-21484, 2021 WL 2658693, at *3 (S.D. Fla. June 22, 2021) (Goodman, M.J.), report and recommendation adopted, No. 1:21-cv-21484, 2021 WL 3403208 (S.D. Fla. Aug. 4, 2021) (Moreno, J.).

[11] Stewart Agency Inc. v. Arrigo Enters. Inc., 266 So. 3d 207, 214 (Fla. 4th DCA 2019).

[12] See, e.g., Michelin, 2021 WL 3403950, at *9; Bluegreen Vacations Unlimited Inc. v. Timeshare Termination Team LLC, No. 1:20-cv-25318, 2021 WL 2476488, at *6 (S.D. Fla. June 17, 2021) (Bloom, J.); S. Broward Hosp. Dist., 2020 WL 7074645, at *5.

[13] Warth v. Seldin, 422 U.S. 490, 499 (1975).

[14] Lexmark Int'l Inc. v. Static Control Components Inc. , 572 U.S. 118, 126 (2014).

[15] See, e.g., U.S. v. Rodriguez, No. 1:17-cr-20904, 2020 WL 1279096, at *10 (S.D. Fla. Jan. 27, 2020) (O'Sullivan, M.J.) ("[T]he defendant cannot make arguments on behalf of his father. A litigant 'must assert his own legal rights and interests, and cannot rest his claim to

relief on the legal rights or interests of third parties'"); Citizens Concerned About Our Children v. Sch. Bd. of Broward Cnty., Fla., 193 F.3d 1285, 1290 (11th Cir. 1999) (holding that plaintiffs could not seek redress for alleged racially discriminatory facilities and funding at public schools they did not attend. "[T]hey cite no law permitting them to complain of race-based disadvantages experienced only by other people").

[16] Casaburro v. Volusia Cnty. Corp., No. 6:07-cv-00056, 2007 WL 3104949, at *3 (M.D. Fla. Oct. 22, 2007) (Spaulding, M.J.) (citing Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166 (1965)).