Confusing Damages Issues In Florida 'Improper Fee' Case

By **Aaron Weiss**

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In one of his earliest and most enduring songs, Frank Sinatra declared that he wanted "all or nothing at all."

While the then very young and blue-eyed crooner was thinking about other things, his words could be used to describe an enduring problem in a certain category of cases under the Florida Deceptive and Unfair Trade Practices Act, specifically, what damages are available in FDUTPA cases involving some type of allegedly improper fee.

We can start with a little bit of background on what damages are available in FDUTPA cases.

Since Florida's Third District Court became the state's first appellate court to weigh in on the issue in its seminal 1984 decision in Rollins Inc. v. Heller,[1] damages under FDUTPA have classically been described as "the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties."[2]

Florida courts have also recognized that an "exception to this general rule applies when the product is rendered valueless as a result of a defect" and found that "[w]hen a plaintiff receives a worthless product, his benefit of the bargain damages will be equal to the entire purchase price of the product."[3]

These formulations fit neatly into FDUTPA cases involving sales of products, but the FDUTPA statute is not limited to these situations.

A few months ago, the U.S. Court of Appeals for the Eleventh Circuit dealt with a case, Fox v. Ritz-Carlton Hotel Co.,[4] that falls into another area: FDUTPA cases involving alleging improper fees.

In Fox, the Eleventh Circuit observed that the law on this area is unsettled. The Eleventh Circuit reviewed a case in which the plaintiff alleged that the restaurants at certain Ritz-Carlton hotels failed to properly disclose that a minimum gratuity of 18% would be added to each bill. The district court dismissed the case upon generally finding that a 15% to 20% gratuity was customary, so there was nothing deceptive.[5]

The Eleventh Circuit reversed on this point, however, noting that "we aren't as sure as the district court about whether [FDUTPA] limits damages to the difference between what customers would have paid and what they were required to pay, or instead allows the class to recover the full amount of the deceptive charge."[6] The court then went on to survey the competing case law but ultimately did not have to take a side on the issue to decide that particular case.

Given that the last and very recent word from the Eleventh Circuit is that this remains an open question, lawyers litigating FDUTPA cases involving allegedly improper fees will likely spill a lot of ink trying to sort out these issues.[7] This is a quick survey of where things stand on what damages are available in these cases.[8]

The U.S. District Court for the Southern District of Florida in 2018 stated that Latman v. Costa Cruise Lines NV[9] "is the seminal Florida state-law case discussing pass-through charges and whether the representations are deceptive under FDUTPA."[10] Latman involved allegedly deceptive "port charges," whereby a cruise line charged a fee in which it described a "port charge" but, according to the plaintiff, kept the entire fee for itself.

Latman, however, did not dive too deep into the details of how much of a fee can be recovered. And while there were a few cases here and there over the next decade and a half, action has picked up considerably in this area over the last five years. Some defendants have tried the "nothing at all" measure of damages but generally have failed with that approach.

In the U.S. District Court for the Southern District of Florida's 2015 decision in Morgan v. Public Storage,[11] the plaintiff alleged that the defendant, charged certain fees for self-storage but suggested that these fees would just be passed on to a third party.

According to the plaintiff's claim, though, the defendant was retaining at least most of the fees for itself. The defendant argued that the type of damages did not fit into the permitted damages formulation set out in Rollins.

The court started its analysis by noting that the Rollins "measure of damages is helpful where there is an actual product or service being provided, and the defendant's deceptive act alters the product's or service's value."[12]

However, "FDUTPA claims [also] exist where the alleged deceptive practice is defendant's misrepresentation of why a fee is being charged and where the money for the fee is being transferred."[13] U.S. District Judge Ursula Ungaro observed that "[c]ourts have held that the measure of actual damages in these cases is the amount retained by defendant despite the representation that the amount will be transferred to a third-party."[14]

In the recent Fox decision, the Eleventh Circuit cited an earlier decision issued in Morgan as emblematic of the more capacious view of damages in these cases: Bowe v. Public Storage.[15] The confusing part is that the Bowe and Morgan decisions were issued by the same judge in the same case, Morgan, on successive motions to dismiss. This case was a class action and at a certain point in the case, the named plaintiff changed.

Now here is where things can quickly get very confusing for lawyers and judges sorting through this morass.

The contrary decision that the Eleventh Circuit cited was a Florida court's 2019 decision in Waste Pro USA Inc. v. Vision Construction Enterprises Inc., in which, as the Eleventh Circuit noted, the court held that:

[T]he measure of actual damages in cases where the alleged deceptive practice is defendant's misrepresentation of why a fee is being charged and where the money for the fee is being transferred is the amount retained by defendant despite the representation that the amount will be transferred to a third-party.[16]

What the Eleventh Circuit left out, however, was that this formulation in Waste Pro USA is itself a direct quote from Morgan. In other words, while suggesting that the law in the area was unclear, the Eleventh Circuit was essentially looking at two threads that came from the same case.

Later in the case, the district court issued an opinion approving a class settlement that perhaps reconciles the discrepancy because the court explained that in the particular case the entire questioned fee was, in fact, an undisclosed profit.[17]

Given that Fox is a published Eleventh Circuit opinion, lawyers on both sides of the issue can be expected to cite the decision as standing for the proposition that the law is unsettled. But I don't think that is quite right.

A perhaps fuller review of Morgan and Bowe and the several decisions that have emanated from the various reported decisions in Fox reveal the following:

1. Returning to our "all or nothing at all" framework: Sorry, defendants, the "nothing at all" isn't going to work. There is a growing chorus of cases finding that damages are available in these circumstances.[18]

2. But defendants still have a viable argument that the damages should not be "all," especially where it is possible to separate the portion of the questioned fee that is a profit for defendants.

3. But if the entire questioned fee is really just a profit for the defendant, then the full amount of the fee may be on the table for damages.

Nonetheless, until the Florida Supreme Court or the Eleventh Circuit squarely weighs in on the issue, we expect that lawyers and judges will be kept busy working through these problems in "improper fee" FDUTPA cases.

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[1] 454 So. 2d 580 (Fla. 3d DCA 1984).

[2] While the Florida Supreme Court has never weighed in, every other Florida intermediate state appellate court and the Eleventh Circuit have followed the Third DCA's lead in Rollins. See Baptist Hosp., Inc. v. Baker, 84 So. 3d 1200, 1204 (Fla. 1st DCA 2012); Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2006); Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So. 2d 311, 314 (Fla. 4th DCA 1998); Collins v. DaimlerChrysler Corp., 894 So. 2d 988, 990 (Fla. 5th DCA 2004); Carriuolo v. Gen. Motors Co., 823 F.3d 977, 986 (11th Cir. 2016). Incidentally, the Third DCA's formulation was borrowed from a decision of an intermediate Texas appellate court. See Raye v. Fred Oakley Motors, Inc., 646 S.W.2d 288 (Tex. App. 1983).

[3] Debernardis v. IQ Formulations, LLC, 942 F.3d 1076, 1084 (11th Cir. 2019). The Eleventh Circuit's discussion in Debernardis provides a helpful look at the "rendered valueless" theory; in that case the plaintiff alleged that a dietary supplement had been rendered valueless because it was allegedly unsafe to consume.

[4] 977 F.3d 1039 (11th Cir. 2020).

[5] Fox v. Ritz-Carlton Hotel Co., No. 1:17-cv-24284, 2019 WL 8331485, at *1 (S.D. Fla. Jan. 22, 2019) (King, J.).

[6] Fox, 977 F.3d at 1048.

[7] Just a few examples of these types of "improper fee" cases include: Fruitstone v. Spartan Race Inc., 464 F. Supp. 3d 1268, 1289 (S.D. Fla. 2020) (Bloom, J.) (finding that FDUTPA claim survived a Rule 12(b)(6) challenge because "a reasonable consumer could be deceived to conclude that [a] Racer Insurance Fee was a pass-through charge"); Jankus v. Edge Inv'rs, L.P., 650 F. Supp. 2d 1248, 1258 (S.D. Fla. 2009) (Hurely, J.) (denying summary judgment upon "find[ing] an issue of material fact as to whether a reasonable consumer would interpret [relevant] language to mean that at least a portion of [a] 'developmen fee' represented a 'pass through' charge which [a] developer collected to pay to [a] relevant title insurer, and whether the developer's retention of part of that fee as profit constitutes a deceptive practice under FDUTPA"); Vorst v. TBC Retail Grp., Inc., No. 9:12-cv-80013, 2012 WL 13026643 (S.D. Fla. Apr. 12, 2012) (Ryskamp, J.) (finding that something described with the title "oil disposal fee" was not actionable under FDUTPA because that title actually implied that the company will "keep the fee for itself"); Townhouse Rest. of Oviedo, Inc. v. NuCO2, LLC, No. 2:19-cv-14085, 2020 WL 5440581, at *12 (S.D. Fla. Sept. 9, 2020) (denying class certification based, in part, on a finding that the defendant had demonstrated that its managers "communicate with its tens of thousands of customers to tell them that [the questioned fees were] part of [defendant's] fee structure").

[8] There are several other significant legal issues in these cases, including class certification. See, e.g., Deere Constr., LLC v. CEMEX Constr. Materials Fla., LLC, No. 1:15-cv-24375, 2016 WL 8542540, at *6 (S.D. Fla. Dec. 1, 2016) (Altonaga, J.) (denying class certification in a deceptive fee case); Maor v. Dollar Thrifty Auto. Grp., Inc., No. 1:15-cv-22959, 2018 WL 4698512, at *5 (S.D. Fla. Sept. 30, 2018) (Martinez, J.) (granting summary judgment upon a finding that a particular fee described as an "administrative fee" was not deceptive).

[9] 758 So. 2d 699 (Fla. 3d DCA 2000).

[10] Coleman v. CubeSmart, 328 F. Supp. 3d 1349, 1358 n.3 (S.D. Fla. 2018) (Martinez, J.).

[11] No. 1:14-cv-21559, 2015 WL 11233111, at *1–2 (S.D. Fla. Aug. 17, 2015) (Ungaro, J.).

[12] Id. (citing Latman, 758 So. 2d at 703 andTurner Greenberg Assocs., Inc. v. Pathman, 885 So. 2d 1004, 1009 (Fla. 4th DCA 2004)).

[13] Id.

[14] Id.

[15] 106 F. Supp. 3d 1252, 1270 (S.D. Fla. 2015) (Ungaro, J.).

[16] 282 So. 3d 911, 920 (Fla. 1st DCA 2019).

[17] Morgan v. Pub. Storage, 301 F. Supp. 3d 1237, 1257 (S.D. Fla. 2016) ("Plaintiff

prevailed at the district court level in arguing that the potential damages consisted of the undisclosed profits, or 'access fees,' that Public Storage kept.").

[18] See Waste Pro, 282 So. 3d 911; Harrison v. Lee Auto Holdings, Inc., 295 So. 3d 857, 864 (Fla. 1st DCA 2020); Coleman, 328 F. Supp. 3d at 1361.