

Forum Selection May Be Viable For Fla. Consumer Claims

By **Aaron Weiss and Michael Zilber** (November 6, 2020)

In 1988, the Beach Boys stormed back into American pop culture by inventing a tropical paradise where they wanted to go: way down off the Florida Keys to a place called Kokomo.

But unlike the Beach Boys, who could get to Kokomo just by wishing it, a defendant cannot always force a plaintiff to litigate where the defendant wants to go. There is an enduring split between Florida appellate and federal district courts on when a forum selection clause applies to a claim under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA.

This article sets out to identify and comment on various decisions where courts have reached differing results. Lawyers should evaluate any operative contracts very early in FDUTPA cases and be prepared to timely address any and every venue argument.[1]

Or said more simply, (1) if you are representing a plaintiff that wants to bring a FDUTPA claim, you should ask your client for a copy of any contract that they have with the potential defendant and look to see what the contract says about venue; and (2) if you are representing a defendant that has been sued under the FDUTPA, one of the first things you should do is ask for any contract they have with the plaintiff and examine any venue provision.

In the 1970s, the Florida Legislature enacted the FDUTPA, which provided both regulators and private individuals a route to address unfair and deceptive practices. The question of proper venue for FDUTPA claims is a problem that comes up frequently in consumer litigation.

The typical setup is that a consumer will file a suit that includes an FDUTPA claim against an entity with whom they have a contractual relationship. The defendant will then note that the contract at issue has a venue provision that provides that any disputes between the parties must be brought in some venue other than Florida. The plaintiff then typically responds that such a setup is not fair, as the protections under the FDUTPA are a substantive right that cannot be contracted away. So what happens?

To begin, Florida courts have noted that FDUTPA claims are not defined by the express terms of a contract but rather encompass unfair and deceptive practices arising out of business relationships.[2] However, the FDUTPA is silent on the issue of forum selection clauses.[3]

As a result, as U.S. District Judge Robert Scola of the U.S. District Court for the Southern District of Florida recognized last year in *Gordon v. Sandals Resorts International Ltd.*, the decision as to whether a forum selection clause applies to an FDUTPA claim depends "on whether Florida has established a clear policy against the use of forum selection clauses to avoid the litigation of [FDUTPA] claims in Florida courts." [4] But Judge Scola noted that Florida has a "muddled" public policy regarding whether a forum selection clause should be enforced against a plaintiff bringing a FDUTPA claim.[5]



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Thus, as expected, Florida courts have arrived at conflicting decisions regarding when and if a forum selection clause is enforceable against a FDUTPA claim.

Much of the enduring controversy stems from a 1999 decision by the Florida First District Court of Appeal in *Management Computer Controls Inc. v. Charles Perry Construction Inc.*, where the court held that a venue clause could not be applied to the plaintiff's FDUTPA claim because the "use of the venue clause as a defense to the statutory claim in this case would undermine the effectiveness of the statute."^[6]

There, since the unfair trade claim was "severable from all the remaining claims" and "it [did] not arise out of the contract," the court concluded that the FDUTPA claim was beyond the scope of the venue clause.^[7]

However, five years later, the same court observed in *America Online Inc. v. Pasieka* that *Management Computer Controls* actually "did not establish an absolute rule against enforcing forum selection clauses in connection with [the] FDUTPA."^[8] Thus, multiple Florida state and federal courts have subsequently held forum selection clauses to be valid, distinguishing *Management Computer Controls* on the basis that, in those cases, the claims arose directly from the underlying contract.^[9]

Some courts have slightly expanded on this reasoning by holding that forum selection clauses apply to FDUTPA claims when the provision at issue unambiguously applies to any proceeding relating to the underlying contract.^[10]

Notwithstanding those subsequent cases, the Florida First District Court of Appeal in *Pasieka* expanded on *Management Computer Controls*' public policy reasoning.^[11] There, the court held that the forum selection clause did not apply to the class action FDUTPA claim because "that would undermine the effectiveness and purpose" of the FDUTPA.^[12]

The *Pasieka* court noted that because the matter involved a class action and the Florida remedy was unavailable in another state, "the policy concerns recognized in *Management Computer Controls* militate against enforcement of the [forum selection] clause here."^[13]

Nevertheless, Florida courts have not consistently applied the First District Court of Appeal's public policy reasoning even in cases that concerned the same forum selection clause as *Pasieka*.^[14]

In *America Online Inc. v. Booker* in 2001, Florida's Third District Court of Appeal held that the forum selection clause at issue was valid and enforceable even if the chosen forum did not have a mechanism for class actions and litigants would be forced to argue individual cases in another state's small claims court.^[15] Specifically, the court reasoned that:

[F]orum selection clauses enhance contractual and economic predictability, while conserving judicial resources and benefiting commercial entities as well as consumers [and, in order to] promote these policy goals, Florida courts are directed to give effect to agreements on forum selection in order to "recognize the legitimate expectations of contracting parties."^[16]

So, where does that leave us? Unfortunately, like the Beach Boys' trip down to Kokomo, that issue remains somewhat unresolved. But, at least at the trial court level, Judge Scolia's decision in *Gordon*^[17] and a 2019 decision from U.S. District Judge Beth Bloom of the Southern District of Florida in *McCoy v. Sandals Resorts International Ltd.*^[18] suggest that Florida federal district courts will enforce and validate forum selection clauses.

Both Gordon and McCoy rely on the U.S. Court of Appeals for the Eleventh Circuit's 2019 opinion in *Davis v. Oasis Legal Finance Operating Company LLC* that: "Public policy is an amorphous concept. ... Accordingly, it has been held that the delicate and undefined power of courts to declare a contract void as contravening public policy should be exercised with great caution." [19]

Thus, because "the Florida public policy is not clear and the courts articulate conflicting policies regarding the application of forum selection clauses to FDUTPA claims and class action claims," [20] both Judge Scola and Judge Bloom "decline[d] to find that the enforcement of the forum selection clause would contravene Florida public policy." [21]

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[1] *Aero Techs., LLC v. Lockton Cos. Int'l Ltd.*, 406 F. App'x 440, 441 (11th Cir. 2010) (holding that defendant waived improper venue defense by failing to raise issue in initial motion to dismiss).

[2] *Cluck-U Chicken, Inc. v. Cluck-U Corp.*, 358 F. Supp. 3d 1295, 1309 (M.D. Fla. 2017) (Pizzo, M.J.) (citing *Siever v. BWGaskets, Inc.*, 669 F. Supp. 2d 1286, 1293 (M.D. Fla. 2009)).

[3] See Fla. Stat. § 501.201, et seq.

[4] 418 F. Supp. 3d 1132, 1140 (S.D. Fla. 2019) (Scola, J.).

[5] *Id.*

[6] 743 So. 2d 627, 632 (Fla. 1st DCA 1999).

[7] *Id.*; See *Contractor's Mgmt. Sys. of NH, Inc. v. Acree Air Conditioning, Inc.*, 799 So. 2d 320 (Fla. 2d DCA 2001) (holding that the FDUTPA claim does not arise out of the agreement, and therefore the forum selection clause does not apply); *Cluck-U Chicken, Inc.*, 358 F. Supp. 3d at 1309 (finding that, since the alleged unfair and deceptive act culminated in the plaintiffs' build-out of a Florida franchise, the application of Florida law applies to the plaintiffs' FDUTPA claim). See also *Motmanco, Inc. v. McDonald's Corp.*, Case No. 3:04-CV-270-J-99HTS, 2005 WL 1027261, at *5 (M.D. Fla. Mar. 30, 2005) (discussing that Florida courts hold that a cause of action under FDUTPA serves as an independent statutory claim that is severable from all the remaining claims).

[8] *Am. Online, Inc. v. Pasiaka*, 870 So. 2d 170, 171 (Fla. 1st DCA 2004).

[9] See *World Vacation Travel, S.A. v. Brooker*, 799 So. 2d 410, 412 (Fla. 3d DCA 2001) (holding that the claims are not severable, the claims arise out of the agreement and "there is no public policy against the contracting parties designating the home state of one of two corporations as the forum for ensuing litigation."); *SAI Ins. Agency, Inc. v. Applied*

Systems, Inc., 858 So. 2d 401, 403 (Fla. 1st DCA 2003) (distinguishing Management Computer Controls and "declin[ing] to construct a rule of public policy that would completely abrogate language selected by the parties to a contract."); Diabetic Care RX, LLC v. Express Scripts, Inc., CASE NO. 18-61331-CIV-MARTINEZ/Snow, 2018 WL 4537203, at *4 (S.D. Fla. July 2, 2018), report and recommendation adopted, 2018 WL 4810147 (S.D. Fla. July 18, 2018) (indicating that "FDUTPA claims are not per se exempt from the applicability of forum-selection clauses and that courts routinely order the transfer of such claims in recognition of the parties' bargained-for contractual terms.").

[10] Fairbanks Contracting & Remodeling, Inc. v. Hopcroft, 169 So. 3d 282, 283 (Fla. 4th DCA 2015). See Gold Crown Resort Mktg. Inc. v. Phillipotts, 272 So. 3d 789, 793, n.7 (Fla. 5th DCA 2019), rehearing denied (June 5, 2019) (holding that the forum selection clause applied to the FDUTPA claim because that claim "relate[d] to the performance of the agreements in that the class seeks damages. . ."); Swim & Sport Retail, Inc. v. Retail Pro Int'l, LLC, Case No. 10CA37557., 2011 WL 13186673, at *3 (Fla. 11th Cir. Ct. Apr. 21, 2011) (Schurr, J.) (enforcing forum-selection clause designating California as forum to claims for FDUTPA violations, breach of contract, fraudulent inducement, and injunctive relief, all relating to contractual relationship); World Vacation Travel, Inc. v. Brooker, 799 So. 2d 410, 412–13 (Fla. 3d DCA 2011) (holding that forum-selection clause applied to FDUTPA claim arising from contractual relationship).

[11] Pasieka, 870 So. 2d at 171.

[12] Id.

[13] Id.

[14] See Am. Online, Inc. v. Booker, 781 So. 2d 423, 424 (Fla. 3d DCA 2001).

[15] Id.

[16] Id. at 424–25 (internal citations omitted).

[17] See 418 F. Supp. 3d at 1140–41.

[18] 19-cv-22462, 2019 WL 6130444, at *9–10 (S.D. Fla. Nov. 19, 2019) (Bloom, J.) appeal dismissed sub nom. Gordon v. Sandals Resorts Int'l, Ltd, 19-14869-GG, 2020 WL 3260707 (11th Cir. Apr. 1, 2020).

[19] 936 F.3d 1174, 1178 (11th Cir. 2019).

[20] 418 F. Supp. 3d at 1141; 19-cv-22462, 2019 WL 6130444, at *10.

[21] 418 F. Supp. 3d at 1141; 19-cv-22462, 2019 WL 6130444, at *10.