How Recent Fla. Consumer Cases Diverge On Improper Fees

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In a 1998 episode of his iconic eponymous sitcom, Jerry Seinfeld purchased a car from his Arby's-loving-sometimes-friend David Puddy and was let in on a secret: "Undercoating" wasn't really a thing but rather just something that car dealers add in to boost the price of the car — and thus their profit.

We **covered** the ongoing confusion over what damages are available in Florida Deceptive and Unfair Trade Practices Act cases involving some type of allegedly improper fee in a previous Law360 guest article.

Seinfeld's experience with undercoating is a good place to frame another split that has emerged in these cases: Is an allegedly improper fee viewed from the perspective of the specific customer or the prototypical reasonable consumer?

Some recent decisions from the U.S. District Court for the Southern District of Florida have focused on the individual circumstances of the particular transaction, while others have focused on the uniform nature of the customer experience.

In Alvarez v. LoanCare LLC,[1] U.S. District Judge Cecilia Altonaga on Jan. 19 addressed the certification of a class of Florida residential mortgage borrowers who paid or were charged a payment processing fee.

Specifically, plaintiff Donna Alvarez claimed that LoanCare's right to charge processing fees did not exist.

Ultimately, Judge Altonaga found that class certification was not appropriate because, since LoanCare entered into separate mortgage agreements with each putative class member, to prevail on their individual claims, each putative class member would have to prove the invalidity of each agreement, which would require individualized inquiries into each mortgage's terms.

Notably, the court also acknowledged that:

In her Reply, Plaintiff argues without evidence that individualized inquiries into each mortgage's terms is unnecessary because "the uniformity of Class members' mortgage documents is evident from the nature of the mortgage industry, which uses uniform documents created, prepared or approved by Fannie Mae and Freddie Mac, and which most residential mortgages utilize."

This helps explain why the court ultimately found that, as to the alleged improper fees at issue in that case, individual issues predominated over class issues.

Three days later in Townhouse Restaurant of Oviedo Inc. v. NuCO2 LLC,[2] U.S. District Judge Robin Rosenberg addressed a motion for reconsideration of her previous denial[3] of class certification of a class of plaintiffs who contended that the defendant used deceptive and unfair practices to calculate certain fees that it charged its customers.

In denying the motion, Judge Rosenberg affirmed her original reasoning that "FDUTPA requires the Court to consider the subjective circumstances surrounding the execution of [each] contract to determine whether 'deception' occurred."

Thus, "when evaluating whether a consumer was likely to have been deceived, a consumer's mindset concerning its interaction with the defendant cannot be divorced from the context in which that individual consumer understands and views that interaction."

Ultimately, Judge Rosenberg found that:

[U]nlike cases that involve an allegedly deceptive or unfair sign or advertisement, the interactions that the Plaintiffs had with the Defendant ... were individualized and unique [and] each transaction warranted a separate analysis and therefore did not lend itself to class certification.[4]

However, just a few weeks later in Fruitstone v. Spartan Race Inc.,[5] U.S. District Judge Beth Bloom addressed the proposed certification of a settlement class of approximately 1 million individuals who paid a mandatory, nonrefundable $14 fee when registering for Spartan Race's event.

Judge Bloom conditionally certified the class because, among other things, the proposed class: (1) was ascertainable because the proposed definition was based on objective criteria, not requiring individual, subjective inquiries to identify who may be a class member; (2) satisfied The Federal Rule of Civil Procedure 23(a)(2)'s commonality requirement because all key issues in the suit arose from the same alleged course of conduct — Spartan Race's various representations regarding the fees; and (3) satisfied Rule 23(a)(3)'s typicality requirement because the plaintiff alleged that he suffered the same injury as every other class member due to the defendant's uniform course of conduct.[6]

Somewhere in the middle is the decision in Cox v. Porsche Financial Services Inc.[7] in which U.S. District Judge Darrin Gayles addressed a class of car lessees who claimed that they did not receive a proper valuation for when they traded in another car as part of the lease.

Porsche moved for summary judgment based on the voluntary payment defense, which requires, in an FDUTPA claim, that Porsche show that the plaintiff, at the time it made its payment, knew all the relevant facts, including the alleged deceptive conduct.

Judge Gayles found that Porsche failed to meet its burden by not proffering evidence for a reasonable jury to find that the plaintiff knew that his trade-in credit would not be applied to the capitalized cost reduction.

Judge Gayles then moved on to class certification and Porsche's argument that "'it is difficult to discern a single common question in the case' and that '[e]ven if one could be found ... individual issues would nevertheless predominate.'"

Judge Gayles disagreed, finding that while:

[T]he Class members' individual interactions with various dealers could be relevant to determining whether defendant's conduct would be "likely to deceive a consumer acting reasonably in the same circumstances," ... this "subjective element does not necessarily

create individualized issues so as to defeat class action" where a defendant "made the same misrepresentations to the entire class."[8]

So where does this leave litigants and judges, working through these issues? There is no clear-cut answer. Cases will depend on if there are any obvious, unique and individualized experiences behind each customer experience and transaction.

Cases may also depend on whether the presiding judge favors a subjective versus objective approach, and litigants should engage in extensive research to determine, as accurately as possible, their judge's approach. What is clear is that the action in class actions under these cases will likely be on the predominance question.

Defendants presumably will try to argue that the experience of each person is different, whereas plaintiffs will argue that anyone who experiences the same practice can be in the class. As cases under the allegedly "improper fee" part of FDUTPA continue to be brought at a high clip,[9] consumer lawyers in Florida should watch closely to see how the law develops.

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[1] No. 1:20-cv-21837, 2021 WL 184547 (S.D. Fla. Jan. 19, 2021).

[2] No. 2:19-cv-14085, 2021 WL 230021 (S.D. Fla. Jan. 22, 2021).

[3] The initial order denying class certification is reported at Townhouse Restaurant of Oviedo, Inc. v. NuCO2, LLC, No. 2:19-cv-14085, 2020 WL 5440581, at *1 (S.D. Fla. Sept. 9, 2020).

[4] Judge Rosenberg's decision relied in significant part on Judge Donald Graham's 2008 decision denying class certification in a case with the same defendant — Pop's Pancakes, Inc. v. NuCO2, Inc., 251 F.R.D. 677 (S.D. Fla. 2008), as well as from Judge Altonaga's 2016 decision denying class certification in Deere Construction, LLC v. CEMEX Construction Materials Florida, LLC, No. 1:15-cv-24375, 2016 WL 8542540, at *2 (S.D. Fla. Dec. 1, 2016), and Judge Paul Huck's 2010 decision in In re Motions to Certify Classes Against Court Reporting Firms, 715 F. Supp. 2d 1265 (S.D. Fla. 2010).

[5] No. 1:20-cv-20836, 2021 WL 354189 (S.D. Fla. Feb. 2, 2021).

[6] Judge Bloom cited to Judge Patricia Seitz's 2004 decision in In re Terazosin Hydrochloride, 220 F.R.D. 672 (S.D. Fla. 2004), for the proposition that the "commonality prerequisite is readily met where defendants have engaged in a standardized course of conduct that affects all class members." Fruitstone, 2021 WL 354189, at *2.

[7] No. 1:16-cv-23409, 2020 WL 8269306 (S.D. Fla. Aug. 17, 2020).

[8] Judge Gayles primarily relied on a decision from a Florida intermediate state appellate

court on this point — Waste Pro USA v. Vision Construction ENT, Inc., 282 So. 3d 911 (Fla. 1st DCA 2019).

[9] We predict that the Eleventh Circuit's decision issued a few months ago in Cherry v. Dometic Corp., No. 19-13242, 2021 WL 346121, at *6 (11th Cir. Feb. 2, 2021), will lead to an uptick in FDUTPA class cases. Since 2015, the Eleventh Circuit's non-binding — but widely followed — requirement to demonstrate administrative feasibility at the class certification stage, as set forth in Karhu v. Vital Pharmaceuticals, Inc., 621 F. App'x 945 (11th Cir. 2015), had sent many putative FDUTPA class actions to the graveyard. In Cherry, the Eleventh Circuit issued a published opinion rejecting the Karhu standard.