A Confusing Split Over 'Reasonable Consumer' In Fla. Courts

By **Aaron Weiss and James Czodli** (June 28, 2021)

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At least since 1903 — when Judge Richard Collins, acting as Master of the Rolls in the English Court of Appeal libel case decision of McQuire v. Western Morning News Co., discussed the "reasonable man" standard as the perspective of "the man on the Clapham omnibus"[1] — lawyers and judges throughout countries with common law traditions have wrestled with this standard.[2]

In this column, we look at different issues under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA, and particularly highlight areas in which courts are split. One place where decisions diverge is on the question of who decides this reasonable man standard: the judge or a jury?

A bit of background to get started. As the U.S. District Court for the Middle District of Florida asserted earlier this year in David Day v. Sarasota Doctors Hospital Inc., to prevail on an FDUTPA claim, a plaintiff must show "(1) a deceptive act or unfair practice, (2) causation and (3) actual damages."[3]

Under the FDUTPA, as the U.S. Court of Appeals for the Eleventh Circuit said in its 2007 opinion in Zlotnick v. Premier Sales Group, "deception occurs if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."[4]

In Zlotnick, the Eleventh Circuit explained that "[t]his standard requires a showing of probable, not possible, deception that is likely to cause injury to a reasonable relying consumer."[5]

In Millennium Communications and Fulfillment Inc. v. Office of the Attorney General, a District Court of Appeal of Florida, Third District, case from 2000, a Florida regulatory agency claimed that a postcard used by the defendant to advertise its credit card program was deceptive for its failure to disclose certain aspects of the program to the consumer.[6]

The agency obtained a temporary injunction under the FDUTPA.[7] However, the Third District Court of Appeal determined that nothing in the language of the postcard would be likely to mislead a consumer acting reasonably under the circumstances to conclude that the credit card to which the postcard refers is a Visa or Mastercard credit card, and reversed the order granting the temporary injunction.[8]

In Zlotnick, the plaintiff filed a class action lawsuit against the vendor, developer and marketing company claiming that the defendants violated the FDUTPA by soliciting "deceptive reservation agreements to secure financing and then terminated the reservation agreements with the sole purpose of reaping the benefits of a rising real estate market."[9]

The defendants filed motions to dismiss for failure to state a claim, which were granted by the district court.[10] On appeal, the plaintiff contended that although the condominium reservation agreement at issue was facially valid under the applicable statute, the

defendants engaged in a scheme that "flouted the intent of [the statute] by canceling the reservation agreements in order to increase prices above the price established in those initial agreements."[11]

The plaintiff argued that "the circumstances surrounding the reservation agreement would have misled a reasonable purchaser into believing that the purchase price listed in the reservation agreement would not be changed."[12]

The Eleventh Circuit rejected the plaintiff's argument, and explained that the "express terms of the reservation agreement undermine [the plaintiff's] claim."[13] The language of the reservation agreement was clear in that it only expressed the plaintiff's interest in purchasing a specific unit, and did not constitute a guaranteed purchase contract.[14] The agreement expressly was "not an agreement to sell the unit, nor does it confer any lien upon or interest in the unit or on the proposed condominium property."[15]

The agreement allowed the defendant to cancel the agreement for any reason whatsoever at any point before entering a purchase contract, and did not contain any assurance that the purchase price would remain the same if the defendant canceled the agreement.[16] The agreement specifically provided that, if the defendant canceled the agreement, "thereafter purchaser shall have no claim of any kind against seller."[17]

The Eleventh Circuit also noted that "Florida courts treat reservation agreements as mere 'agreements to agree,' not as binding purchase contracts."[18] The court found that, "[u]nder these circumstances, no reasonable purchaser would believe that a void reservation agreement established a binding purchase price when it was merely an agreement to agree."[19]

The court concluded that the plaintiff failed to state a claim under FDUTPA because the cancellation of the reservation agreement eliminated any possibility that a reasonable purchaser would be misled.[20]

Earlier this year, U.S. District Judge Virginia Covington of the Middle District of Florida relied on Zlotnick in determining that an act or practice was not deceptive as a matter of law.[21] In Day v. Sarasota Doctors Hospital, the plaintiff alleged that the hospital deceptively represented that the prices in its admissions form were customary charges, insofar as those numbers would be used to determine the plaintiff's payment obligations.[22]

However, the evidence reflected that no such provision existed in the hospital admission form.[23] In contrast, the form explained that in the event the hospital accepted a discounted payment, the payment amount would be determined by the terms of the governmental program or private health insurance plan. The form further provided that, if the patient is uninsured and not covered by a governmental program, the patient "may be eligible to have his or her account discounted or forgiven."

In light of this evidence, the court reasoned that "no reasonable consumer would understand the [hospital admission form] to stand for the proposition that all [hospital] patients pay the same ... rates or that such rates necessarily constitute 'customary charges.'"[24] The district court determined that "no reasonable consumer could be deceived by the Hospital's conduct or the [hospital admission form]" and granted the defendant's summary judgment motion.[25]

Applying the rule adopted in Zlotnick, multiple district courts in this circuit have similarly determined whether an alleged act or practice is deceptive or unfair as a matter of law, and

thus a question to be decided by a judge.[26]

In contrast, other decisions issued within the last few months have found that the first element of an FDUTPA claim is a question of fact for a jury to determine.[27]

In the 2020 case South Broward Hospital District v. Elap Services LLC, U.S. District Judge Raag Singhal of the U.S. District Court for the Southern District of Florida explained that "whether a practice is deceptive or unfair is determined by an objective analysis and ordinarily is a question of fact for the jury to determine."[28]

The plaintiff alleged that the defendants did not disclose important information regarding patients' health plans during the admission process.[29] Specifically, the dispute focused on whether the defendants' insurance cards conspicuously identified terms and policies.[30]

The district court explained that:

> [I]t would be improper for the court to take that decision away from the jury, especially in cases like this, where each side has laid out not only extensive and detailed argument as to how this so-called scheme was (or was not, from defendants' view) unfair or deceptive, but each of their arguments is compelling in its own right.[31]

Judge Singhal determined that dismissal would be unwarranted under these circumstances and reiterated that "whether specific conduct constitutes an unfair or deceptive trade practice is a question of fact for the jury to determine."[32]

In a 2020 case, Phillipe Calderon v. Sixt Rent A Car LLC, also in the Southern District of Florida — and also presided over by Judge Singhal — the court refused to dismiss a plaintiff's claim that the defendant luxury car rental company violated the FDUTPA by imposing unauthorized and fraudulent charges.[33]

Specifically, the plaintiff alleged that the defendant attempted to merge two contracts to perpetuate a systematic scheme of charging customers fraudulent fees to gain revenue.[34]

The plaintiff also argued that the defendant "repeatedly and uniformly marks up loss of use and diminished value charges above the fair market value."[35] The defendant moved to dismiss because the plaintiff could not prove any of the elements for an FDUTPA claim.[36]

The district court rejected that argument, and explained that "dismissal based on these allegations would be improper because '[w]hether [specific] conduct constitutes an unfair or deceptive trade practice is a question of fact for the jury to determine.'"[37]

So what does this all mean? It appears, at least on the surface, that there is a split of authority under Florida law as to whether the first element of an FDUTPA claim is a question of fact for a jury.

But a defendant considering moving for summary judgment on — or even moving to dismiss — an FDUTPA claim may carefully consider whether there is a clear contractual term that would eliminate any possibility that a reasonable consumer would be misled or deceived.

However, even if such contractual terms exist, some courts have indicated that if there is more than one reasonable interpretation of the term, such a question is for the jury to determine. The bottom line is that there is ample case law on both sides of the issue for

each side to cite — just the type of question that keeps lawyers busy and drives clients looking for clear answers crazy.

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[1] [1903] 2 K.B. 100. The "Clapham omnibus" was a horse-drawn bus that shuttled passengers from Clapham to the central London business district during the Victorian and Edwardian periods. In modern times, one could ride a red double-decker on London Buses route 88 if he or she feels the need to step in the shoes of the man on the Clapham omnibus.

[2] While we Americans have renamed the man "John Q. Public," our more imaginative friends in Australia have given him the more memorable names of Fred Nurke or Joe Farnarkle.

[3] Day v. Sarasota Doctors Hosp. Inc., No. 8:19-cv-01522, 2021 WL 288969, at *4 (M.D. Fla. Jan. 28, 2021) (Covington, J.).

[4] Zlotnick v. Premier Sales Grp. Inc., 480 F.3d 1281, 1284 (11th Cir. 2007) (citing PNR Inc. v. Beacon Prop. Mgmt. Inc., 842 So. 2d 773, 777 (Fla. 2003)).

[5] Id. (citing Millennium Commc'ns & Fulfillment Inc. v. Office of the Att'y Gen., 761 So. 2d 1256, 1263 (Fla. 3d DCA 2000)).

[6] Millennium, 761 So. 2d at 1264.

[7] Id. at 1257.

[8] Id. at 1264.

[9] Zlotnick, 480 F.3d at 1283-84.

[10] Id. at 1284.

[11] Id. at 1285.

[12] Id.

[13] Id.

[14] Id.

[15] Id.

[16] Id.

[17] Id. at 1286.

[18] Id.

[19] Id. at 1287.

[20] Id.

[21] Day, 2021 WL 288969, at *4.

[22] Id.

[23] Id.

[24] Id. at *5.

[25] Id. (citing Zlotnick, 480 F.3d at 1287).

[26] See Casey v. Fla. Coastal Sch. of Law Inc., No. 3:14-cv-01229, 2015 WL 10096084, at *6 (M.D. Fla. Aug. 11, 2015) (stating that "[w]hether an alleged act or practice is deceptive or unfair may be decided as a matter of law" and dismissing the case with prejudice after determining that the plaintiff failed to allege facts that stated a plausible deceptive or unfair act or practice under the FDUTPA); PC Cellular Inc. v. Sprint Sols. Inc., No. 5:14-cv-00237, 2015 WL 128070, at *5 (N.D. Fla. Jan. 8, 2015) (dismissing plaintiff's claim for violation of the FDUTPA because all the actions complained of were specifically authorized by contract); Zambrano v. Indian Creek Holding LLC, No. 1:09-cv-20453, 2009 WL 2365842, at *1 (S.D. Fla. July 30, 2009) (granting summary judgment on the grounds that plaintiffs failed to allege any unfair or deceptive act that could be construed as a violation of the FDUTPA); Brett v. Toyota Motor Sales USA Inc., No. 6:08-cv-01168, 2008 WL 4329876, at *7 (M.D. Fla. Sept. 15, 2008) (dismissing plaintiff's claim because practices or acts required or permitted by federal law are specifically exempt under Florida Statutes section 501.212(1)); Silver v. Countrywide Home Loans Inc., 760 F. Supp. 2d 1330, 1343 (S.D. Fla. 2011) (finding that no deception occurred where the loan terms complained of were disclosed in the loan documents signed at closing).

[27] See S. Broward Hosp. Dist. v. ELAP Servs. LLC, No. 0:20-cv-61007, 2020 WL 7074645, at *4 (S.D. Fla. Dec. 3, 2020); Harrison v. Lee Auto Holdings Inc., 295 So. 3d 857, 863 (Fla. 1st DCA 2020).

[28] 2020 WL 7074645, at *4.

[29] See id. at *5.

[30] Id.

[31] Id.

[32] Id. (citing Calderon v. Sixt Rent a Car LLC, No. 0:19-cv-62408, 2020 WL 700381, at *7 (S.D. Fla. Feb. 12, 2020) (Singhal, J.)); see also Harrison, 295 So. 3d at 863 ("Because the [contract] is reasonably susceptible to more than one interpretation, [plaintiff's] claim … was sufficient to go to the jury to determine [how] a reasonable consumer would have" construed the contract.).

[33] Calderon, 2020 WL 700381, at *1.

[34] Id. at *7.

[35] Id.

[36] Id.

[37] Id. (quoting State Farm Mut. Auto. Ins. Co. v. Performance Orthopedics & Neurosurgery LLC, 278 F. Supp. 3d 1307, 1316 (S.D. Fla. 2017)).