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Why Fla. Courts Are Split on Unfairness Under Consumer Law

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It is clear by looking at the newly filed cases and reported decisions in Florida courts that litigation under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA, is quite prevalent and does not appear to be letting up any time soon. What is not clear, however, is what standard a particular trial court will use to evaluate the unfairness prong of the statute.

To explain why there is a split and what this means for lawyers, clients and judges navigating these issues in Florida in 2020, it is useful to take a trip back in time — specifically to the early 1960s — to understand the origin of the FDUTPA's unfairness standard.

The opening scene of the series premiere of the iconic AMC television show "Mad Men" starts with the protagonist — suave Madison Avenue advertising man Don Draper — surveying the scene at a favorite bar and watching the crowd as they enjoy copious quantities of cigarettes. As the story progresses, we learn that the year is 1960, and Draper and his team are frantically trying to figure out how to market cigarettes now that the Federal Trade Commission declared it will crack down on misleading cigarette advertising campaigns.

The FTC action that Draper was working through indeed has its origins in reality. During the first few years of the 1960s, the FTC was engaging in the legwork that would culminate in what would become known as the Cigarette Rule, which the agency issued in 1964.[1]

FTC Standards: 1964 Cigarette Rule and 1980 FTC Policy Statement on Unfairness

The 1964 Cigarette Rule offered the following guidelines to evaluate whether a particular practice was unfair:

- Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise — whether, in other words, it is within at least the penumbra of some common law, statutory or other established concept of unfairness;
- Whether it is immoral, unethical, oppressive or unscrupulous; and
- Whether it causes substantial injury to consumers, or competitors or other businessmen.

While the U.S. Supreme Court suggested in 1972 that these factors were part of a holistic test,[2] in 1976 the U.S. Court of Appeals for the Seventh Circuit took a bright-line approach in *Spiegel Inc. v. FTC* and held that a "practice is unfair when it offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[3]

A few years later, though, the FTC cast the 1964 Cigarette Rule aside with its 1980 policy statement on unfairness,[4] which revised the definition for "consumer unfairness" to state that an act or practice is only unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."[5]

For all its breadth, however, the FTC Act does not have a private right of action. So we turn to the FDUTPA to see unfairness in action in cases brought by individual consumers in Florida.

Florida Enacts FDUTPA

In 1972, the Florida Legislature enacted the FDUTPA, which, among other things, provides private individuals with a remedy to seek recompense for types of practices that they believed were inconsistent with the FTC Act. Rather than setting out pellucid definitions on important elements of the statute, such as unfairness, the Florida Legislature stated that due consideration and great weight shall be given to FTC and federal court interpretations of the standards under the FTC Act.

The first reported[6] decision construing unfairness under the FDUTPA came in 1985 when the First District Court of Appeal issued its decision in *Urling v. Helms Exterminators Inc.*[7] and referred back to *Spiegel*: A practice is unfair under the FTC Act when it "offends established public policy and when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers." Over the next 18 years, dozens of decisions were issued by state and federal courts in Florida, all using this formulation.

The Florida Supreme Court's PNR Decision

The seminal moment for the issue of unfairness under the FDUTPA came in 2003 when the Florida Supreme Court issued its decision in *PNR Inc. v. Beacon Property Management Inc.*,[8] in which a 5-2 majority cited the *Spiegel* line of cases and stated that "an unfair practice is one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."[9]

Over the next decade, more than 150 Florida state and federal trial decisions used this formulation of unfairness and usually cited *PNR* for this proposition.[10] The clear theme was that Florida state and federal courts were using an unfairness formulation based on the 1964 Cigarette Rule, as construed by the Seventh Circuit in *Spiegel* — and were not considering the 1980 FTC policy statement on unfairness.

The Third District Court of Appeal's Porsche Decision

This changed in 2014 when the Third District Court of Appeal issued its decision in *Porsche Cars North America Inc. v. Diamond*.[11] In seeking to reverse an order granting class certification, Porsche essentially argued that state and federal trial and appellate courts, including the Florida Supreme Court, had been doing it all wrong for 34 years by using a standard based on the 1964 Cigarette Rule and not the 1980 FTC policy statement on unfairness, and 1994 congressional codification of the same.

Lo and behold, the Third District Court of Appeal actually agreed[12] and noted that the "issue of whether the updated 1980 definition became part of Florida law was simply not before" the courts that previously considered the unfairness standard under the FDUTPA.[13]

The court got around *PNR* by noting that the FDUTPA had been amended about a year before, and the language in the amendment stated that "the specific purpose of adding to Florida Law interpretations by the [FTC] or federal courts that occurred since the last statutory amendment."

With PNR out of the way, the court then held that the proper definition of unfairness was indeed the three-pronged test for unfairness, which requires that the injury to the consumer (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must be an injury that consumers themselves could not reasonably have avoided.[14]

2014–2020: The Spiegel Standard Continues to Predominate

So, has the *Porsche* decision heralded a difference in how Florida courts construe the unfairness test under the FDUTPA? In a word, no. At best, Florida courts are split on the issue. But that

characterization is probably too generous; the majority of state and federal courts in Florida are still using the 1964 Cigarette Rule/*Spiegel* formulation.

Given that these decisions are binding on the state trial courts, it is important to see what the other intermediate state appellate courts have done after *Porsche*.

In 2015, the neighboring Fourth District Court of Appeal issued a decision in *Caribbean Cruise Line Inc. v. Better Business Bureau of Palm Beach County Inc.* that continued to use the *PNR* formulation derived from the 1964 Cigarette Rule, although without any analysis of the propriety of continuing to use that standard,[15] and again adhered to this formulation in its 2019 decision in *Stewart Agency Inc. v. Arrigo Enterprises Inc.*[16] The Second District Court of Appeal followed suit with its 2020 decision in *Webber v. Bactes Imaging Solutions Inc.*,[17] likewise without any analysis.

Perhaps the most confounding decision, though, was issued last June by the First District Court of Appeal in *Angelo v. Parker*, in which, in the same decision, the court cited standards based on the 1980 FTC policy statement on unfairness and then just a few paragraphs later shifted to the 1964 Cigarette Rule standard.[18] Then, just a few weeks after *Angelo*, the same court issued its opinion in *Hotchkiss v. Blue Cross & Blue Shield of Florida Inc.*, which only used the 1964 Cigarette Rule formulation.[19]

Most of the decisions on the issue, though, have been issued by Florida federal district courts. In the six years since *Porsche*, at least three dozen federal district decisions have continued to rely on the 1964 Cigarette Rule standard. This includes multiple decisions issued in each of the three district courts in the state.[20] Moreover, the U.S. Court of Appeals for the Eleventh Circuit continued this approach in its 2019 decision in *Alhassid v. Nationstar Mortgage LLC*,[21] although through an unpublished opinion.[22]

That said, there have been at least a few decisions from the U.S. District Court for the Middle District of Florida and the U.S. District Court for the Southern District of Florida (although none from the U.S. District Court for the Northern District of Florida) that have cited *Porsche* and used the 1980 FTC policy statement standard. While a few decisions make this move with at least identifying (and rejecting) the older rule,[23] most of these decisions simply cite *Porsche* for the rule and do not include a discussion of the propriety of applying the rule.[24]

Until the Florida Supreme Court weighs in on the issue, we expect to continue to see two different approaches. As for the federal cases, given that there are now post-*Porsche* cases from four of five intermediate state appellate courts, under published authority from the Eleventh Circuit in *Bravo v. U.S.*, a Florida district court applying Florida law is bound to "look to the decisions of the Florida appellate court that would have had jurisdiction over an appeal in this case had it been filed in state

court."[25] We note, though, that not a single one of the many federal trial decisions issued since *Porsche* has followed this approach to determine which standard to apply.

And we also note that a federal district court judge could still find that the Florida Supreme Court has in fact issued a ruling (in *PNR*) that is still controlling, thus rendering moot the need to look down to the intermediate Florida state authority. The combination of a Florida Supreme Court decision, two unpublished Eleventh Circuit decisions, and more than 100 reported district court decisions is a significant hurdle for parties advocating for the 1980 FTC policy statement standard to overcome, especially in federal court.

There is, though, one possible way through the morass, at least at the later stages of a case. In *XTec Inc. v. Hembree Consulting Services Inc.*, U.S. District Judge Cecilia Altonaga of for the Southern District of Florida offered both standards as alternative standards when instructing a jury.[26] While this approach may not help resolve a dispositive motion where the standard makes a difference, it at least protects the record in a case that goes all the way to a jury.[27]

[1] Statement of Basis and Purpose of Trade Regulation,Part408 – Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking. 29 Fed. Reg. 8324, 8355 (1964).

[2] In 1972 the Supreme Court rejected an argument that each of the three factors had to be satisfied to support a showing that a practice was unfair and noted that "all the FTC said in the [1964 Cigarette Rule] referred to was that '[t]he wide variety of decisions interpreting the elusive concept of unfairness at least makes clear that a method of selling violates Section 5 if it is exploitive or inequitable and if, in addition to being morally objectionable, it is seriously detrimental to consumers or others.'" *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

[3] 540 F.2d 287 (7th Cir. 1976).

[4] See *FTC* Policy Statement on Unfairness, https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness.

[5] Congress codified this formulation in 1994. See 15 U.S.C. § 45(n).

[6] We are defining the term "reported," as being either formally reported in a print reporter or in a widely available electronic reporter (LEXIS or Westlaw).

[7] 468 So. 2d 451 (Fla. 1st DCA 1985).

[8] 842 So. 2d 773 (Fla. 2003).

[9] Id. at 777 (internal citations omitted).

[10] This included the Eleventh Circuit's non-precedential decision in *Hetrick v. Ideal Image Development Corp.*, 372 F. App'x 985 (11th Cir. 2010), that favorably cited *PNR* and the 1964 Cigarette Rule formulation.

[11] 140 So. 3d 1090 (Fla. 3d DCA 2014).

[12] Id.

[13] Id. at 1098.

[14] Id.

[15] 169 So. 3d 164 (Fla. 4th DCA 2015).

[16] 266 So. 3d 207 (Fla. 4th DCA 2019).

[17] No. 2D18-2964, 2020 WL 215819 (Fla. 2d DCA Jan. 15, 2020).

[18] 275 So. 3d 752 (Fla. 1st DCA 2019).

[19] 277 So. 3d 760 (Fla. 1st DCA 2019).

[20] Here is just a small sample of these decisions, including three decisions that were issued in just the last month: Fruitstone v. Spartan Race Inc., No. 1:20-cv-20836, 2020 WL 2781614 (S.D. Fla. May 29, 2020) (Bloom, J.) Lombardo v. Johnson & Johnson Consumer Cos., Inc., 124 F. Supp. 3d 1283 (S.D. Fla. 2015) (Scola, J.); Garcia v. Kashi Co., 43 F. Supp. 3d 1359 (S.D. Fla. 2014) (Lenard, J.); Sanchez-Knutson v. Ford Motor Co., 52 F. Supp. 3d 1223 (S.D. Fla. 2014) (Dimitrouleas, J.) Maor v. Dollar Thrifty Auto. Grp., Inc., 303 F. Supp. 3d 1320 (S.D. Fla. 2017) (Martinez, J.); Midway Labs USA, LLC v. S. Serv. Trading, S.A., 1:19-cv-24857, 2020 WL 2494608 (S.D. Fla. May 14, 2020) (Goodman, M.J.); Toca v. Tutco, LLC, 430 F. Supp. 3d 1313 (S.D. Fla. 2020) (Singhal, J.); GolTV, Inc. v. Fox Sports Latin Am., Ltd., 16-cv-24431, 2018 WL 1393790 (S.D. Fla. Jan. 26, 2018) (Altonaga, J.); LLW Enter., LLC v. Ryan, No. 8:19-cv-1641, 2020 WL 2630859 (M.D. Fla. May 4, 2020) (Scriven, J.); In re Brinker Data Incident Litig., 3:18-cv-686, 2020 WL 691848 (M.D. Fla. Jan. 27, 2020) (Corrigan, J.); Valerie's House, Inc. v. Avow Hospice, Inc., 2:19-cv-409, 2019 WL 7293596 (M.D. Fla. Dec. 30, 2019) (Chappell, J.); e-ventures Worldwide, LLC v. Google, Inc., 188 F. Supp. 3d 1265 (M.D. Fla. 2016) (Steele, J.) Kurlander v. Kaplan, No. 8:19-cv-00742, 2019 WL 3944338 (M.D. Fla. Aug. 21, 2019) (Jung, J.); Sandshaker Lounge & Package Store LLC v. RKR Beverage Inc., No. 3:17-cv-00686, 2018 WL 7351689 (N.D. Fla.

Sept. 27, 2018) (Rodgers, J.); Coffey v. WCW & Air, Inc., No. 3:17-cv-90, 2018 WL 4154256 (N.D. Fla. Aug. 30, 2018) (Rodgers, J.).

[21] 771 F. App'x. 965 (11th Cir. 2019). Earlier this month, the Ninth Circuit had occasion to review an FDUTPA case and likewise used the 1964 Cigarette Rule formulation in an unpublished decision. See *Hauck v. Advanced Micro Devices, Inc.*, No. 19-16124, 2020 WL 2510754 (9th Cir. May 15, 2020).

[22] Under 11th Circuit Rule 36-2, "[u]npublished opinions are not considered binding precedent, but they may be cited as persuasive authority."

[23] *Martorella v. Deutsche Bank Nat'l Tr. Co.*, No. 9:12-cv-80372, 2015 WL 11347664 (S.D. Fla. Aug. 6, 2015) (Marra J.); *Donoff v. Delta Air Lines, Inc.*, No. 9:18-cv-81258, 2020 WL 1226975 (S.D. Fla. Mar. 6, 2020 (Middlebrooks, J.). Judge Middlebrooks, who issued the *Donoff* opinion earlier this year, previously issued a post-*Porsche* opinion that used the 1964 Cigarette Rule standard. See *SMS Audio, LLC v. Belson*, 9:16-cv-81308, 2017 WL 1533941 (S.D. Fla. Mar. 9, 2017) (Middlebrooks, J.).

[24] *Harrod v. Express Scripts, Inc.*, No. 8:17-cv-1607, 2019 WL 8273650 (M.D. Fla. Aug. 16, 2019) (Moody, J.); *Envtl. Mfg. Sols., LLC v. Fluid Group, Ltd.*, No. 6:18-cv-156, 2018 WL 3635112 (M.D. Fla. May 9, 2018) (Spaulding, J.); *Casey v. Fla. Coastal Sch. of Law, Inc.*, No. 3:14-cv-1229, 2015 WL 10096084 (M.D. Fla. Aug. 11, 2015).

[25] *Bravo v. U.S.*, 532 F.3d 1154, 1164 (11th Cir. 2008); *Inlet Condo. Ass'n, Inc. v. Childress Duffy, Ltd.*, 615 F. App'x 533, 539 (11th Cir. 2015) (same conclusion).

[26] No. 1:14-cv-21029, at ECF No. 330 (S.D. Fla. Nov. 17. 2015).

[27] And one last item in the food for thought category: In the 2018 election, the voters in Florida passed a ballot referendum that amended the Florida Constitution to create Section 21 of Article V, Florida Constitution, which provides:

Judicial interpretation of statutes and rules. In interpreting a state statute or rule, a state court or an officer hearing an administrative action pursuant to general law may not defer to an administrative agency's interpretation of such statute or rule and, instead, must interpret such statute or rule de novo.

This amendment raises an interesting issue with respect to construing FDUTPA. While the Florida Legislature has repeatedly provided in the statute that courts shall give great weight to *FTC* (an administrative agency) interpretations of the statute, the Florida Constitution now expressly states that deference to an agency interpretation is not permitted. This argument does not appear to have

yet been raised in any FDUTPA case yet, but it will be interesting to see how the courts approach such an argument.

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