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The Federal Character of Florida’s Deceptive and Unfair Trade Practices Act

D. MATTHEW ALLEN,* DAVID L. LUCK** & LEAH A. SEVI***

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I. INTRODUCTION

An increasingly large number of lawsuits, particularly at the federal level, are seeking relief under Florida’s Deceptive and Unfair Trade Practices Act (“FDUTPA”), Florida Statutes sections 501.201–.213 (2010). Many of these lawsuits involve multiple plaintiffs or seek class certification. These factors inevitably intensify the number and complexity of FDUTPA claims.¹ Although FDUTPA is a state consumer-protect-

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1. See, for example, *Law Offices of David J. Stern, P.A. v. Banner*, No. 4D09-3928, 2010 WL 5346669, at *1 (Fla. 4th DCA Dec. 29, 2010), where the court affirmed a FDUTPA class-

tion statute, courts have noted that “the vast majority of cases analyzing FDUTPA are federal.”²

This article provides a broad overview regarding FDUTPA’s purpose and the parameters of a private claim alleging a deceptive, unfair, or unconscionable act or practice “in the conduct of any trade or commerce.”³ In particular, we focus on the tests for deception, unfairness, and unconscionability and how these tests relate to analogous federal consumer-protection law. At least three circumstances have likely contributed to FDUTPA’s “federal flavor.” First, FDUTPA (a) states that it “shall be construed liberally to promote” the policy of making Florida consumer-protection law “consistent with established policies of federal law relating to consumer protection,” (b) defines statutory violations with reference to Federal Trade Commission (“FTC”) rules and federal law which define the “standards of unfairness and deception,” and (c) provides that “great weight shall be given to the interpretations of the [FTC] and the federal courts relating to” analogous provisions of the FTC Act (15 U.S.C. §§ 41–58 (2006)).⁴ Second, FDUTPA cases may

certification order as to a large group of mortgage borrowers that received reinstatement letters from the defendant-law firm, which demanded payment for fees and costs that the plaintiffs contended were unreasonable, excessive, or not currently due and owing.

2. *Kelly v. Palmer, Reifler & Assocs., P.A.*, 681 F. Supp. 2d 1356, 1373 n.8 (S.D. Fla. 2010) (citing *Kertesz v. Net Transactions, Ltd.*, 635 F. Supp. 2d 1339, 1350 n.3 (S.D. Fla. 2009)); *Beacon Prop. Mgmt., Inc. v. PNR, Inc.*, 890 So. 2d 274, 278 (Fla. 4th DCA 2004).

3. FLA. STAT. §§ 501.202(2), 501.203(8), 501.204(1) (2010). Consistent with FDUTPA’s ambitious scope, the statutory definition of “trade or commerce” is particularly broad:

“Trade or commerce” means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise, of any good or service, or any property, whether tangible or intangible, or any other article, commodity, or thing of value, wherever situated. “Trade or commerce” shall include the conduct of any trade or commerce, however denominated, including any nonprofit or not-for-profit person or activity.

Id. § 501.203(8).

4. *Id.* §§ 501.202(3), .203(3)(a)–(b), .204(2), .205(2); see also Mark S. Fistos, *Per Se Violations of the Florida Deceptive and Unfair Trade Practices Act*, FLA. B.J., May 2002, at 62, 66 (describing FDUTPA as a “statute of reference” that incorporates other bodies of law).

trigger federal diversity,⁵ class-action,⁶ or pendant jurisdiction.⁷ Third, federal trial and appellate decisions are often published, while only state appellate decisions⁸ find their way into the Southern Reporter. Because the United States Court of Appeals for the Eleventh Circuit has appellate jurisdiction over Florida's federal district courts,⁹ it may play a significant role in developing FDUTPA precedent—either on its own or by certifying cause-determinative questions of state law to the Supreme Court of Florida.¹⁰

A. History

During the 1960s, certain groups and constituencies, including the FTC and several legal commentators, began to advocate the view that traditional common-law remedies in tort and contract (and the FTC's regulatory efforts) were inadequate to remedy unfair or deceptive trade practices affecting consumers.¹¹ The FTC Act provided only limited relief, as the federal courts had consistently declined to hold that it permitted injured parties a private right of action.¹² Moreover, the FTC had limited enforcement resources.¹³ Accordingly, the agency urged states to pass new legislation giving consumers a private right of action against

5. See 28 U.S.C. § 1332(a) (2006); *Terminix Int'l Co., LP v. Palmer Ranch Ltd. P'ship*, 432 F.3d 1327, 1329 (11th Cir. 2005) (deciding a FDUTPA claim initially filed in the Middle District of Florida under diversity jurisdiction); *Hetrick v. Ideal Image Dev. Corp.*, No. 8:07-cv-871-T-33TBM, 2008 WL 5317363, at *4 (M.D. Fla. 2010) (noting that the plaintiff removed the FDUTPA suit to the Middle District of Florida “on the basis of complete diversity of citizenship”).

6. See 28 U.S.C. § 1332(d); *Francisco v. Numismatic Guar. Corp. of Am.*, No. 06-61677-CIV, 2008 WL 649124, at *6 (S.D. Fla. 2008) (finding that it had subject matter jurisdiction over the FDUTPA claim because “the amount in controversy in [the] class action was alleged to exceed \$5,000,000.00 in the aggregate” and diversity existed among members of the class); *Grillasca v. Hess Corp.*, No. 8:05-cv-1736-T-17-TGW, 2007 WL 2121726, at *5 (M.D. Fla. 2007) (“[I]n the context of a class action[,] District Courts shall have original jurisdiction over any civil matter in which the amount in controversy exceeds \$5,000,000.00 and any member of the plaintiff class is a citizen of a State different than any defendant.”).

7. See 28 U.S.C. § 1367; *Traffic Jam Events, LLC v. Cortes*, No. 6:09-cv-146-Orl-19GJK, 2009 WL 2175640, at *4 (M.D. Fla. July 21, 2009) (exercising supplemental jurisdiction over the FDUTPA claim because the claim “[fell] squarely within the same nucleus of operative fact as the federal claim”).

8. In other words, decisions of the Supreme Court of Florida and Florida's five district courts of appeal.

9. See 28 U.S.C. §§ 41, 1291 (2006).

10. See FLA. CONST. Art. V, § 3(b)(6) (noting that the Supreme Court of Florida “[m]ay review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the supreme court of Florida”).

11. Note, *Toward Greater Equality in Business Transactions: A Proposal to Extend the Little FTC Acts to Small Businesses*, 96 HARV. L. REV. 1621, 1621–22 (1983).

12. *Id.*

13. *Id.*

unfair or deceptive trade practices.¹⁴

In 1964, the National Conference of Commissioners on Uniform State Laws (“NCCUSL”) approved a model “Little FTC Act,” the Uniform Deceptive Trade Practices Act.¹⁵ Subsequently, the Council of State Governments proposed a second model statute, the Unfair Trade Practices and Consumer Protection Act.¹⁶ In 1970, the NCCUSL drafted a third model statute, the Uniform Consumer Sales Practices Act.¹⁷ Within a decade following promulgation of the initial model “Little FTC Act,” every state except Alabama enacted some form of general consumer-protection legislation.¹⁸ Most provided a private right of action.¹⁹

With the “Little FTC Act,” i.e., the Uniform Deceptive Trade Practices Act, as its model, the Florida Legislature enacted FDUTPA in 1973.²⁰ The Legislature has amended FDUTPA several times during the intervening decades,²¹ however, and the Act is now unique in the extent to which it references federal consumer-protection law.²²

B. Purpose

FDUTPA exists “to protect the consuming public and legitimate business enterprises from those who engage in [1] unfair methods of competition, or [2] unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.”²³ Thus, the Act regulates two distinct categories of prohibited business behavior: First, unfair competition (which may include, inter alia, antitrust violations);²⁴ and second,

14. *Id.*

15. *Id.* at 1623.

16. *Id.* at 1624.

17. *Id.* at 1625 n.28.

18. *Id.* at 1622 n.6. Today, Alabama has also enacted a Deceptive and Unfair Trade Practices Act. See ALA. CODE, §§ 8-19-1 to -15 (1975). Alabama initially adopted this legislation in 1981. See generally 1981 Ala. Acts, No. 81-355.

19. Note, *supra* note 11, at 1622 n.6.

20. See 1973 Fla. Laws 189, § 1; David J. Federbush, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, FLA. B.J., May 1999, at 26.

21. See, e.g., 1979 Fla. Laws 1936, § 1; 1983 Fla. Laws 381, § 1; 1985 Fla. Laws 409, § 4; 1990 Fla. Laws 858, §§ 1, 2; 1991 Fla. Laws 2102, § 37; 1993 Fla. Laws 207, 209, 212, §§ 1, 2, 3, 12; 1997 Fla. Laws 638, § 24; 2001 Fla. Laws 113–14, 116, §§ 1, 2, 6; 2001 Fla. Laws 1922–24, §§ 22, 23, 27; 2006 Fla. Laws 2072, §§ 1, 2.

22. David J. Federbush, *Obtaining Relief For Deceptive Practices Under FDUTPA*, FLA. B.J., Nov. 2001, at 29 (“[FDUTPA] is unique among [state “little FTC” consumer-protection laws] in expressing the purpose of achieving consistency with established policies of federal law relating to consumer protection.”).

23. FLA. STAT. § 501.202(2) (2010); see also, e.g., Citibank (S.D.) N.A. v. Nat’l Arbitration Council, Inc., Nos. 3:04-cv-1076-J-32MCR & 3:04-cv-1205-J-20MCR, 2006 WL 2691528, at *3 (M.D. Fla. Sept. 19, 2006).

24. See generally Steven Fox, *Litigation Under Florida's Deceptive and Unfair Trade Practices Act, The Florida Antitrust Act, or Federal Antitrust Statutes*, in BUSINESS LITIGATION IN FLORIDA 20-1 (6th ed. 2010).

(a) unconscionable, (b) deceptive, or (c) unfair acts or practices.²⁵ This article focuses on the tests defining the second category and its three subsets of prohibited business behavior.

While FDUTPA does not explicitly define “deceptive” and “unfair,” it incorporates by reference the FTC’s interpretation of these terms, which have recognized legal meanings.²⁶ According to the FTC, a “deceptive act or practice” encompasses “a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s detriment.”²⁷ Under current FTC authority, an “unfair act or practice” is one that satisfies three tests: “[1] It must be substantial; [2] it must not be outweighed by any counter-vailing benefits to consumers or competition that the practice produces; and [3] it must be an injury that consumers themselves could not reasonably have avoided.”²⁸ In contrast, the FTC has not defined “unconscionability” as a distinct concept, and it is unclear what the Florida Legislature intended when it added “unconscionable acts or practices” as a separate, prohibited business behavior in 1993.²⁹

At a macro level, courts have interpreted FDUTPA as intending to protect the consuming public from deceptive, unfair, or unconscionable business acts or practices.³⁰ Stated rather bluntly, the Act protects “the

25. See also § 501.204(1) (“Unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.”).

26. See § 501.203(3)(b). Despite the fact that these terms have legal meanings, whether an act or practice is “deceptive” or “unfair” under FDUTPA is generally a question of fact. See, e.g., *JDI Holdings, L.L.C. v. Jet Mgmt., Inc.*, No. 3:07cv242/MCR/EMT, 2010 WL 3119793, at *19 (N.D. Fla. Aug. 6, 2010) (noting that conduct constituting an unfair or deceptive trade practice is a question of fact) (citing *Witt v. La Gorce Country Club, Inc.*, 35 So. 3d 1033, 1040 (Fla. 3d DCA 2010)).

27. FTC POLICY STATEMENT ON DECEPTION, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 app. (1984) [hereinafter “FTC DECEPTION POLICY STATEMENT”], available at <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> see also, e.g., *Global Tel*Link Corp. v. Scott*, 652 F. Supp. 2d 1240, 1249 (M.D. Fla. 2009).

28. FTC POLICY STATEMENT ON UNFAIRNESS, *appended to Int’l Harvester Co.*, 104 F.T.C. 949, 1070 (1984) [hereinafter “FTC UNFAIRNESS POLICY STATEMENT”], available at <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm>. However, many Florida decisions still employ the now-abandoned, prior FTC standard: An “unfair act or practice” is “one that offends established public policy and one that is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.” *PNR, Inc. v. Beacon Prop. Mgmt.*, 842 So. 2d 773, 777 (Fla. 2003) (internal quotation marks omitted); see also *Federbush*, *supra* note 20, at 28–32.

29. See 1993 Fla. Laws 209, § 3. See generally David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, FLA. B.J., Aug. 2000, at 49.

30. See, e.g., *Holt v. O’Brien Imports of Fort Myers, Inc.*, 862 So. 2d 87, 89 (Fla. 2d DCA 2003) (“FDUTPA is designed to protect not only the rights of litigants, but also the rights of the consuming public at large.”) (internal quotation marks omitted); *In re Edgewater By The Bay, LLLP*, 419 B.R. 511, 515 (Bankr. S.D. Fla. 2009) (substantially similar).

unwary from being ‘conned’” by “fly-by-night business ventures.”³¹ Individual or class lawsuits for money damages and equitable relief (i.e., the micro level) happen to be a chosen enforcement mechanism.³² Private FDUTPA suits for money damages and equitable relief presumably provide an additional deterrent against such ventures alongside the injunctive, declaratory, and monetary-penalty authority FDUTPA confers on the Florida Department of Legal Affairs and Florida’s twenty State Attorney’s Offices.³³

The Act is remedial in nature and targets consumer exploitation.³⁴ In this regard, section 501.202 provides that FDUTPA “shall be construed liberally”³⁵ to promote the following policies:

- (1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices.
- (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce.
- (3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.³⁶

The Act’s private-action component was originally designed to “make consumers whole” for losses caused by deceptive or unfair consumer practices.³⁷ Subsequent case law, however, has clarified that consequential damages are unavailable and has restricted the type and scope

31. *Packaging Corp. Int’l. v. Travenol Labs., Inc.*, 566 F. Supp. 1480, 1483 (S.D. Fla. 1983); *Black v. Dep’t of Legal Affairs*, 353 So. 2d 655, 656 (Fla. 2d DCA 1977).

32. *See* FLA. STAT. § 501.211 (2010). A private FDUTPA lawsuit may address a consistent deceptive, unfair, or unconscionable business practice or even a “single unfair or deceptive act[] in the conduct of any trade or commerce, even if it involves only a single party, a single transaction, or a single contract.” *PNR, Inc.*, 842 So. 2d at 777.

33. *See* §§ 501.203(2), .206, .207, .2075, .208, .209 (detailing the enforcement powers of the Florida Department of Legal Affairs and the State Attorney under FDUTPA); *see also* S.D.S. *Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 609–10 (Fla. 1st DCA 2007) (“FDUTPA provides for public and private enforcement alike. . . . But public enforcement resources are necessarily limited. Reflecting this reality—and against the backdrop of class action availability—the Act created a private cause of action for consumers aggrieved by FDUTPA violations.”).

34. *See, e.g.*, *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005) (“FDUTPA is a remedial statute designed to protect consumers.”).

35. *Cf., e.g.*, *JPG Enters., Inc. v. McLellan*, 31 So. 3d 821, 825 (Fla. 4th DCA 2010) (“Remedial statutes are entitled to a liberal construction so as to advance the remedy provided where it is consistent with the legislative purpose.”).

36. *See also* *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001); *Bert Smith Oldsmobile, Inc. v. Franklin*, 400 So. 2d 1235 (Fla. 2d DCA 1981).

37. *LaFerney v. Scott Smith Oldsmobile, Inc.*, 410 So. 2d 534, 536 (Fla. 5th DCA 1982) (quoting *Marshall v. W & L Enters. Corp.*, 360 So. 2d 1147, 1148 (Fla. 1st DCA 1978), *disapproved on other grounds by* *Hubbel v. Aetna Cas. & Sur. Co.*, 758 So. 2d 94 (Fla. 2000)).

of damages available under FDUTPA to “actual damages.” These damages are measured by (1) a value differential between the good or service provided and the good or service the consumer bargained for or intended to purchase, or (2) when the good or service is rendered valueless, the purchase price.³⁸ Thus, it appears that the “making whole” rationale is no longer a realistic description of FDUTPA’s purpose and function.³⁹ A more realistic interpretation may be that FDUTPA’s private-damages component removes only the direct taint of the deceptive, unfair, or unconscionable act or practice, while its declaratory, equitable, and monetary-penalty components restrain and discourage the offending act or practice.

C. FDUTPA Exemptions

Despite its broad application to deceptive, unfair, or unconscionable trade acts or practices, FDUTPA is subject to statutory and decisional exemptions. For instance, Florida Statutes section 501.212⁴⁰ provides that FDUTPA does not apply to:

- Acts or practices required or permitted under federal or state law;⁴¹
- A publisher/information disseminator’s provision of information on behalf of another without actual knowledge that the provided information violates FDUTPA;
- Claims for personal injury or death;⁴²

38. See, e.g., *Beale v. Biomet, Inc.*, 492 F. Supp. 2d 1360, 1374 n.12 (S.D. Fla. 2007) (limiting plaintiffs’ potential FDUTPA damages to the value differential—or, perhaps, purchase price—applicable to a prosthetic medical device); *Dorestin v. Hollywood Imps., Inc.*, 45 So. 3d 819, 824–25 (Fla. 4th DCA 2010) (“Proof of actual damages is necessary to sustain a FDUTPA claim. The statute does not allow the recovery of other damages, such as consequential damages.”) (internal citation omitted); *Rodriguez v. Recovery Performance & Marine, L.L.C.*, 38 So. 3d 178, 180–81 (Fla. 3d DCA 2010) (holding that plaintiff-purchaser of defective jet-boat could not recover as damages the down payment, payments on the financing loan, interest, or balance on the loan under FDUTPA—instead, “the proper measure of actual damages [wa]s the difference between the market value of the jet-boat as delivered and market value as it should have been delivered”).

39. See *Dorestin*, 45 So. 3d at 825–30 (Gross, C.J., concurring specially) (recognizing that current FDUTPA damages precedent is not well-tailored to making an injured consumer “whole”); David J. Federbush, *Damages Under FDUTPA*, FLA. B.J., May 2004, at 20, 20–25, 28 (making similar observations).

40. FLA. STAT. § 501.212 (2010).

41. See, e.g., *Prohias v. AstraZeneca Pharm., L.P.*, 958 So. 2d 1054, 1055–56 (Fla. 3d DCA 2007) (affirming dismissal of attempted class action and holding that FDA-approved labeling permitted pharmaceutical company’s challenged advertising and promotional efforts). *But see* Fla. Office of At’y Gen., Dep’t of Legal Affairs v. *Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) (finding that the conclusory averment that healthcare provider’s charges were permitted by Medicare regulations was insufficient to trigger the “required or permitted” FDUTPA exemption).

42. See, e.g., *Fojtasek v. NCL (Bah.) Ltd.*, 613 F. Supp. 2d 1351, 1356 (S.D. Fla. 2009) (granting defense motion to dismiss as to plaintiff’s FDUTPA claim that his decedent perished as the result of a cruise-line shore excursion).

- Claims for property damage, other than damage to the consumer product at issue;
- Persons or activities regulated by the Florida Office of Insurance Regulation;⁴³
- Banks and savings-and-loan associations regulated under federal or state law;⁴⁴
- Persons or activities regulated by the Florida Department of Financial Services;⁴⁵
- Persons or activities regulated by the Florida Public Service Commission;⁴⁶
- Acts or practices involving the sale, lease, rental, or appraisal of real property committed by licensed real-estate agents, brokers, or appraisers that violate applicable portions of Florida Statutes chapter 475;
- Commercial real-property disputes when a written contract provides for a dispute-resolution process;⁴⁷ and
- Claims regarding the failure to maintain real property that are covered by applicable building, housing, and health codes, which already provide effective relief.

In addition, FDUTPA claims may be preempted by federal law. For example, in *Powell v. Home Depot U.S.A, Inc.*,⁴⁸ the Southern District of Florida addressed a patent dispute and granted the plaintiff's summary judgment motion as to the defendant-corporation's FDUTPA counterclaim. The court did so because the defendant's counterclaim implicated the issue of co-inventorship, which "is a field that is governed exclusively by federal patent law."⁴⁹ Florida federal courts also have recog-

43. See, e.g., *Zarella v. Pac. Life Ins. Co.*, No. 10-60754-CIV, 2010 WL 4663296, at *6 (S.D. Fla. Nov. 10, 2010); *Ebeh v. Saint Paul Travelers*, No. 8:09-cv-2628-T-27TBM, 2010 WL 5533687, at *7 (M.D. Fla. Oct. 6, 2010) (describing FDUTPA's insurance exemption).

44. *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 778-79 (Fla. 5th DCA 2007) (recognizing that FDUTPA exempts regulated banks). *But see Acciard v. Whitney*, No. 2:07-cv-476-UA-DNF, 2008 WL 5120898, at *5 (M.D. Fla. Dec. 4, 2008) (holding that issue of whether bank was a regulated bank exempted under FDUTPA could not be resolved through a motion to dismiss but could be raised via a motion for summary judgment).

45. See *Sonic Auto., Inc. v. Galura*, 961 So. 2d 961, 966 (Fla. 2d DCA 2007) (narrowing definition of class to exclude purchasers of auto theft-deterrent etchings where the motor vehicle service agreements memorializing these purchases were regulated by the Florida Department of Insurance, the predecessor of the Department of Financial Services).

46. See *Fla. Power & Light Co. v. Feo*, 24 So. 3d 737, 738 (Fla. 3d DCA 2009) (granting writ of prohibition and ordering FDUTPA claim dismissed because the Florida Public Service Commission had exclusive jurisdiction over the allegations contained in the plaintiffs' FDUTPA claim against a regulated electric utility).

47. See *Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F. Supp. 2d 1215, 1222-23 (S.D. Fla. 2008) (holding that commercial real-estate transaction could not qualify for FDUTPA exemption where the pertinent contract did not expressly specify a dispute-resolution process).

48. Nos. 07-80435-CIV & 08-61862, 2010 WL 375796, at *4-5 (S.D. Fla. Jan. 26, 2010).

49. *Id.* at *4.

nized that the National Bank Acts may preempt certain FDUTPA claims,⁵⁰ that the Bankruptcy Code preempts FDUTPA claims arising from an allegedly abusive bankruptcy filing,⁵¹ that the Copyright Act preempts FDUTPA claims that merely repackage copyright-infringement claims,⁵² and that federal maritime law may preempt certain FDUTPA damages claims.⁵³ One Florida federal court has also held that the provision of traditional legal services generally does not constitute “trade or commerce” within the meaning of Florida Statutes section 501.203(8) and thus does not fall within the ambit of FDUTPA.⁵⁴ Therefore, while FDUTPA’s reach is broad, one must remain cognizant of its jurisdictional limitations and potential arguments that applying FDUTPA would be inconsistent with other existing bodies of law.

D. *Primary Focus and Issues Not Covered*

The remainder of this article addresses the basic tests necessary to establish the first element of a private FDUTPA damages claim alleging a deceptive, unfair, or unconscionable business act or practice.⁵⁵ As noted above, both state and federal courts interpret and apply FDUTPA, which is why interested parties who are addressing FDUTPA issues should examine decisions from federal courts, including the Eleventh Circuit Court of Appeals and Florida’s federal district courts, in addition to decisions from the Supreme Court of Florida and Florida’s state district courts of appeal.

There are, however, a number of FDUTPA issues that we do not address here. Among these are: What constitutes a claim for unfair methods of competition under FDUTPA?⁵⁶ Who is a proper FDUTPA

50. *Spinelli v. Capital One Bank*, 265 F.R.D. 598, 604–05 (M.D. Fla. 2009) (limiting class period based on defendant’s later-acquired status as a nationally chartered bank subject to federal regulation).

51. *Pariseau v. Asset Acceptance, L.L.C.*, 395 B.R. 492, 494–95 (Bankr. M.D. Fla. 2008).

52. *Millennium Travel & Promotions, Inc. v. Classic Promotions & Premiums, Inc.*, No. 6:08-cv-290-Orl-28KRS, 2008 WL 2275555, at *3 (M.D. Fla. June 2, 2008).

53. *F.W.F., Inc. v. Detroit Diesel Corp.*, 494 F. Supp. 2d 1342, 1352–53 (S.D. Fla. 2007) (noting that federal maritime law, not FDUTPA, controlled claims regarding the provision of allegedly deficient yacht-repair services).

54. *Kelly v. Palmer, Reifler, & Assocs., P.A.*, 681 F. Supp. 2d 1356, 1374–77 (S.D. Fla. 2010).

55. See FLA. STAT. §§ 501.204(1), .211(2) (2010).

56. See generally *Fox*, *supra* note 24. See also *Federbush*, *supra* note 39, at 20 (noting that “[i]n unfair methods of competition cases . . . FDUTPA essentially adopts federal antitrust precedent”).

party plaintiff?⁵⁷ Who is a proper party defendant?⁵⁸ To what extent does FDUTPA jurisdiction extend (i.e., what connection to Florida is sufficient to trigger FDUTPA)?⁵⁹ What role does individual reliance play when proving causation and damages?⁶⁰ These are important FDUTPA topics for practitioners, courts, and legal commentators, and by choosing not to focus on those issues, we do not intend to minimize their significance.

II. THE PRIVATE CAUSE OF ACTION

A. *FDUTPA: The Elements of the Cause of Action*

Florida Statutes section 501.204(1) provides that “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce” are unlawful. As alluded to above, the State, through the Department of Legal Affairs and Florida’s State Attorney’s Offices, may regulate unlawful activi-

57. See, e.g., *Intercoastal Realty, Inc. v. Tracy*, 706 F. Supp. 2d 1325, 1335 (S.D. Fla. 2010) (acknowledging, but not resolving, a “split in authority concerning whether individual, non-consumer plaintiffs have standing to seek monetary damages under FDUTPA”); see also *Federbush*, *supra* note 22, at 30 (noting that the 2001 amendments to FDUTPA’s “consumer” definition and their substitution of the term “person” for “consumer” under Florida Statutes section 501.211(2) “may give rise to a rebuttable presumption that nonconsumers are now permitted to seek monetary damages when challenged practices are likely to harm consumers” but explaining that such a reading would likely be inconsistent with FDUTPA’s overall consumer-protection purpose).

58. See, e.g., *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069, 1074 (Fla. 5th DCA 2008) (discussing FDUTPA suits against individuals, as opposed to entity defendants, and explaining that “to proceed against an individual using a FDUTPA violation theory an aggrieved party must allege that the individual was a *direct participant* in the improper dealings”) (emphasis added); *Nationwide Mut. Co. v. Ft. Myers Total Rehab. Ctr., Inc.*, 657 F. Supp. 2d 1279, 1287–88 (M.D. Fla. 2009) (substantially similar).

59. See generally Jennifer C. Erdelyi, Note, *The Extraterritorial Application of the Florida Deceptive and Unfair Trade Practices Act: State Appellate Cases Addressing the Issue*, 28 *Nova L. Rev.* 817 (2004).

60. Florida Statutes section 501.211(2) provides that a person may recover “*actual damages*” if that person establishes he or she “*suffered a loss as a result of a [FDUTPA] violation.*” § 501.211(2) (emphasis added). This language appears, rather clearly, to require that a FDUTPA plaintiff prove individualized, actual damage proximately caused by a FDUTPA violation. However, in the deceptive-practice context, the issue of whether individual reliance is required to establish causation and damages is still questioned in some cases. Compare, e.g., *Black Diamond Props., Inc. v. Haines*, 940 So. 2d 1176, 1179 & n.1 (Fla. 5th DCA 2006) (“[A]lthough reliance might not be an element of one claim, each plaintiff still must demonstrate that the misrepresentation occurred and *actually caused damage* to him or her, which necessitates *individual proof* in each case.”) (emphasis added), and *Philip Morris USA Inc. v. Hines*, 883 So. 2d 292, 294–95 (Fla. 4th DCA 2003) (recognizing that questions of individual causation arise when a plaintiff attempts to prove causation and damages under section 501.211(2)), with *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974–75 (Fla. 1st DCA 2000) (failing to differentiate among the three separate elements of a FDUTPA deceptive-practice damages claim—(1) a deceptive act or practice; (2) causation; and (3) actual damages—and simply stating “members of a class proceeding under [FDUTPA] need not prove individual reliance on the alleged representation”).

ties.⁶¹ In addition, consumers may bring private causes of action seeking equitable or legal relief.⁶² The Act provides that “[i]n any action brought by a person who has suffered a loss as a result of a violation of [FDUTPA], such person may recover actual damages, plus attorney’s fees and court costs. . . .”⁶³ A private damages claim thus requires proof of three elements: (1) a deceptive, unconscionable,⁶⁴ or unfair act or practice; (2) causation; and (3) actual damages.⁶⁵ By contrast, if an individual is seeking injunctive relief, rather than damages, the consumer need not establish that the unlawful act caused a loss.⁶⁶ Private FDUTPA claims are subject to a four-year statute of limitations.⁶⁷

Despite FDUTPA’s broad prohibition, the Florida Supreme Court ruled in 1976 that Florida Statutes section 501.204(1) was neither unconstitutionally vague nor indefinite.⁶⁸ Several aspects of the statute provide the specificity needed to pass constitutional muster. First, FDUTPA section 501.204(2) provides that courts should give “due consideration and great weight” to FTC and federal judicial interpretations of what is unfair or deceptive under the FTC Act.⁶⁹ Furthermore, because FDUTPA’s “unfair” or “deceptive” language mimics the FTC

61. See statutes cited *supra* note 33 (detailing the enforcement authority of the Florida Department of Legal Affairs and the State Attorney under FDUTPA); see also, e.g., Office of the Attn’y Gen., Dep’t of Legal Affairs v. Commerce Commercial Leasing, L.L.C., 946 So. 2d 1253 (Fla. 1st DCA 2007); Millennium Commc’ns. & Fulfillment, Inc. v. Office of the Att’y Gen., 761 So. 2d 1256 (Fla. 3d DCA 2000).

62. § 501.211(1).

63. § 501.211(2). The award of attorney’s fees under FDUTPA is discretionary and is generally based on prevailing-party status. See, e.g., Humane Soc’y of Broward Cnty., Inc. v. Fla. Humane Soc’y, 951 So. 2d 966, 969 (Fla. 4th DCA 2007) (“The plain meaning of section 501.2105(1) admits of only one interpretation, that the legislature gave trial courts the discretion to award prevailing party attorney fees to both plaintiffs and defendants under the same standards.”).

64. For the most part, existing case law does not acknowledge FDUTPA’s separate “unconscionability” subcategory, but consistent with the plain text of section 501.204(1), we have included it here. See also Federbush, *supra* note 29.

65. See Gentry v. Haborage Cottages-Stuart, LLLP, 602 F. Supp. 2d 1239, 1256 (S.D. Fla. 2009); Rebman v. Follett Higher Educ. Grp., 248 F.R.D. 624, 631 (M.D. Fla. 2008); Marino v. Home Depot U.S.A., Inc., 245 F.R.D. 729, 737 (S.D. Fla. 2007); Bookworld Trade, Inc. v. Daughters of Saint Paul, Inc., 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007); Wright v. Emory, 41 So. 3d 290, 292 (Fla. 4th DCA 2010); Kia Motors Am. Corp. v. Butler, 985 So. 2d 1133, 1140 (Fla. 3d DCA 2008); KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008).

66. See § 501.211(1); Kelly v. Palmer, Reifler, & Assocs., P.A., 681 F. Supp. 2d 1356, 1365–66 (S.D. Fla. 2010).

67. See FLA. STAT. § 95.11(3)(f) (2010); Brown v. Nationscredit Fin. Servs. Corp., 32 So. 3d 661, 662 n.1 (Fla. 1st DCA 2010); S. Motor Co. of Dade Cnty. v. Doktorczyk, 957 So. 2d 1215, 1217 (Fla. 3d DCA 2007).

68. Dep’t of Legal Affairs v. Rogers, 329 So. 2d 257, 263 (Fla. 1976). Of note, at that time FDUTPA did not address unconscionable acts or practices. Thus, as to that category, vagueness concerns might persist. See Federbush, *supra* note 29, at 54–55.

69. § 501.204(2).

Act, well-established meanings from the common law and federal trade law apply.⁷⁰ Finally, the Act cabins what constitutes a violation of its terms to a set of limited sources. Section 501.203(3) provides that a “violation of this part”—that is, a finding of deception, unfairness, or unconscionability—may be based on:

- (1) Any rules promulgated pursuant to the FTC Act or FDUTPA;
- (2) The standards of unfairness or deception set forth and interpreted by the FTC or the federal courts; or
- (3) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

To maintain a private cause of action for damages, a consumer must suffer an actual injury or loss (i.e., actual damages) due to the alleged deceptive or unfair trade practice.⁷¹ Concomitantly, to be a member of a FDUTPA damages class action, an individual must have been harmed.⁷² The harm cannot be speculative.⁷³

B. *Pleading Requirements for Private Actions for Damages*

To satisfactorily state a FDUTPA claim, a plaintiff must plead ultimate facts, not conclusions, which establish that the plaintiff was actually aggrieved by an unfair, unconscionable, or deceptive act or practice committed by a defendant in the course of trade or commerce.⁷⁴ As to deceptive acts or practices, the pleaded facts must establish that deception is “probable,” not just “possible.”⁷⁵ Furthermore, to state a deceptive-practice claim, the plaintiff must allege that the defendant’s practice would likely have deceived a reasonable person under the same circumstances.⁷⁶ To recover FDUTPA damages, the plaintiff must allege not only that the complained-of conduct was unfair, unconscionable, or deceptive, but also that the plaintiff was aggrieved by this conduct.⁷⁷

70. *Rogers*, 329 So. 2d at 264–65.

71. See *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1340 (S.D. Fla. 2009) (distinguishing viable FDUTPA claim from the dismissed claim of *Prohias v. Pfizer, Inc.*, 485 F. Supp. 2d 1329 (S.D. Fla. 2007), where the *Prohias* plaintiffs’ purchases would have occurred, regardless of the deception, due to product’s other attributes); see also *Gen. Motors Acceptance Corp. v. Laesser*, 718 So. 2d 276, 277 (Fla. 4th DCA 1998) (“To be actionable[,] an unfair or deceptive trade practice must be the cause of loss or damage to a consumer.”).

72. *Turner Greenberg Assocs. v. Pathman*, 885 So. 2d 1004, 1007 (Fla. 4th DCA 2004).

73. See *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d DCA 1997).

74. See *Tuckish v. Pompano Motor Co.*, 337 F. Supp. 2d 1313, 1320 (S.D. Fla. 2004); *In Re Crown Auto Dealerships, Inc.*, 187 B.R. 1009, 1018 (Bankr. M.D. Fla. 1995).

75. *Zlotnick v. Premier Sales Grp.*, 480 F.3d 1281, 1284 (11th Cir. 2007).

76. See *Morris v. ADT Sec. Servs.*, 580 F. Supp. 2d 1305, 1309–10 (S.D. Fla. 2008).

77. See *Grillasca v. Amerada Hess Corp.*, No. 8:05-cv-1736-T-17TGW, 2006 WL 3313719, at *4 (M.D. Fla. Nov. 14, 2006); *Office of Attn’y Gen., Dep’t of Legal Affairs v. Tenet Healthcare*, 420 F. Supp. 2d 1288, 1309 (S.D. Fla. 2005).

FDUTPA complaints that fail to state how the alleged unfair, unconscionable, or deceptive act or practice caused damage to the plaintiff are subject to dismissal.⁷⁸

Florida state courts appear to have a more relaxed pleading standard than federal courts located in Florida. Several federal decisions have required that FDUTPA plaintiffs comply with the enhanced pleading standard of Federal Rule of Civil Procedure 9(b), even though pleading “fraud” is not necessary in a FDUTPA claim.⁷⁹ State courts appear to relax the pleading standard because it is not necessary to plead the elements of fraud to allege a FDUTPA violation.⁸⁰

C. Deceptive Acts and Practices

Most FDUTPA cases sound in deception or, at least, involve a major deception component.⁸¹ FDUTPA, however, does not define “deception.” Consequently, in keeping with the Act’s stated purpose, the Eleventh Circuit, Florida’s federal district courts, and the Florida state courts have adopted the FTC’s “deception” standard as interpreted under federal regulatory and decisional law.

The FTC promulgated its current “deceptive act” definition in 1983. That year, the FTC issued its “Policy Statement on Deception,” which synthesized prior case law concerning deception to offer a “greater sense of certainty as to how the concept will be applied.”⁸² The policy created a “single definitive statement” as to what constitutes a deceptive act.⁸³ As defined by the FTC, any “representation, omission or

78. See *Kais v. Mansiana Ocean Residences L.L.C.*, No. 08-21492-CIV, 2009 WL 825763, at *1–2 (S.D. Fla. Mar. 26, 2009); *Macias*, 694 So. 2d at 90.

79. See, e.g., *D.H.G. Props., L.L.C. v. Ginn Cos.*, No. 3:09-cv-735-J-34JRK, 2010 WL 5584464, at *5 n.9 (M.D. Fla. Sept. 28, 2010) (“The Court need not determine the extent to which FDUTPA claims in other contexts may or may not be subject to the heightened pleading requirements of Rule 9(b); it suffices to recognize that the allegations of misrepresentation comprising Plaintiff’s FDUTPA claim in this action are grounded in fraud, and thus, required to be plead with particularity.”); *Lawrie v. The Ginn Co., LLC*, No. 3:09-cv-446-J-32JBT, 2010 WL 3746725, at *6 n.26 (M.D. Fla. Sept. 21, 2010) (“A consumer claim for violation of FDUTPA . . . must be pled with particularity pursuant to Rule 9(b).”). But see, e.g., *Nationwide Mut. Co. v. Ft. Myers Total Rehab. Ctr., Inc.*, 657 F. Supp. 2d 1279, 1290 (M.D. Fla. 2009) (noting the trend to apply Rule 9(b)’s heightened pleading standard, but questioning whether this is appropriate under FDUTPA); *Third Party Verification, Inc. v. Signaturelink, Inc.*, 492 F. Supp. 2d 1314, 1327 (M.D. Fla. 2007) (holding that the pleading need not satisfy Rule 9(b)’s heightened requirements); *Fla. Office of the Att’y Gen., Dep’t of Legal Affairs v. Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005) (same).

80. See, e.g., *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st DCA 2000) (“The plaintiff need not prove the elements of fraud to sustain an action under the statute.”).

81. See *Federbush*, *supra* note 22, at 22 (“Deception is by far the most employed prong of Florida’s Deceptive and Unfair Trade Practices Act.”).

82. FTC DECEPTION POLICY STATEMENT, *supra* note 27.

83. *Id.*

practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment" would be deceptive.⁸⁴ The FTC formally adopted this definition in *Cliffdale Associates, Inc.*⁸⁵

Since the early 1980s, the federal courts have fleshed out the nuances of deception.⁸⁶ Deceptive acts, for example, need not be made with the intent to deceive; it suffices that the acts were "likely to mislead" the reasonable consumer.⁸⁷ Similarly, a representation or practice may be deceptive even if actual consumers were not deceived, provided the reasonable consumer would likely have been deceived.⁸⁸ As the FTC explained, "[a]n interpretation may be reasonable even though it is not shared by a majority of consumers in the relevant class, or by particularly sophisticated consumers. A material practice that misleads a significant minority of reasonable consumers is deceptive."⁸⁹

The Supreme Court of Florida and the Eleventh Circuit have followed FTC precedent, stating that "deception" occurs under FDUTPA when "there is a representation, omission, or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."⁹⁰ Hence, the standard for whether a particular practice is "likely to mislead," and thereby deceptive, is an objective one, based on a "reasonable relying consumer."⁹¹ Unreasonable reliance warrants denial of a FDUTPA "deceptive act or practice" claim. Consequently, in *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*,⁹² Florida's Third District Court of Appeal rejected

84. *Id.*

85. 103 F.T.C. 110, 174 (1984); *see also* *Amrep Corp. v. FTC*, 768 F.2d 1171, 1178 (10th Cir. 1985) (discussing the FTC's adoption of a new standard).

86. *See, e.g.*, *FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 63 (2d Cir. 2006); *Novartis Corp. v. FTC*, 223 F.3d 783, 786 (D.C. Cir. 2000); *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

87. *Verity Int'l*, 443 F.3d at 63.

88. *FTC v. Freecom Commc'ns., Inc.*, 401 F.3d 1192, 1202, 1203 (10th Cir. 2005); *Chroniak v. Golden Inv. Corp.*, 983 F.2d 1140, 1147 n.13 (1st Cir. 1993); *FTC v. Wilcox*, 926 F. Supp. 1091, 1099 (S.D. Fla. 1995); *United States v. Vend Direct, Inc.*, No. 06-cv-02423-MSK-MEH, 2007 WL 2176205, at *3 (D. Colo. May 11, 2007).

89. FTC DECEPTION POLICY STATEMENT, *supra* note 27, at n.4. This is not to say, however, that a particular purchasing consumer could recover damages, or even that a damages class action could be certified, on this basis alone. *See, e.g.*, *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices*, 715 F. Supp. 2d 1265, 1283-84 (S.D. Fla. 2010) (refusing to certify FDUTPA damages class, *inter alia*, because several putative class members were aware of the alleged "deceptive" practice, accounted for it in their valuation of the specified product/service, and addressed it in their negotiations with the sellers/purveyors of the product/service). Those issues still require analysis of causation and injury, among other things. *See generally* FLA. STAT. § 501.211(2) (2010).

90. *Zlotnick v. Premier Sales Grp.*, 480 F.3d 1281, 1284 (11th Cir. 2007) (quoting *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003)); *see also* *Scott v. Capital One Bank*, No. 8:08-cv-132-T-30EAJ, 2008 WL 2157037, at *2 (M.D. Fla. May 20, 2008).

91. *See, e.g.*, *Zlotnick*, 480 F.3d at 1284.

92. 761 So. 2d 1256, 1264 (Fla. 3d DCA 2000).

an argument that the reasonable consumer would have been misled by Millennium's offer of proprietary, catalogue-based credit cards. Though the court recognized that factually accurate statements could deceive "by innuendo," it concluded that Millennium's credit representations were sufficiently clear that any conclusion by an actual consumer that the credit card being offered was a Visa or MasterCard was "wishful thinking."⁹³

Similar to its FTC counterpart, the FDUTPA deception standard requires a showing of "probable, not possible, deception that is likely to cause injury to a reasonable relying consumer."⁹⁴ A practice can be deceptive even if it does not occur on a large scale; a deceptive act in violation of FDUTPA can be predicated on a single transaction with a lone consumer.⁹⁵ Further, the act need not violate a rule or regulation to be deceptive under FDUTPA.⁹⁶ However, violations of certain provisions, such as the Interstate Land Sales Full Disclosure Act, may be inherently deceptive.⁹⁷

1. EXPRESS REPRESENTATIONS

A deceptive-practice claim may be based on either affirmative representations or omissions. Affirmative representations may be either express or implied.⁹⁸ Express contractual representations may be actionable.⁹⁹ The economic-loss rule does not bar FDUTPA causes of action regarding transactions based on written contracts.¹⁰⁰ Although contractual representations may serve as the basis for a FDUTPA claim, the

93. *Id.*

94. *Zlotnick*, 480 F.3d at 1284 (quoting *Millennium*, 761 So. 2d at 1263) (internal quotation marks omitted).

95. *See* *Rebman v. Follett Higher Educ. Grp.*, 575 F. Supp. 2d 1272, 1279 (M.D. Fla. 2008); *PNR*, 842 So. 2d at 775.

96. Fla. Office of the Att'y Gen., Dep't of Legal Affairs v. *Tenet Healthcare Corp.*, 420 F. Supp. 2d 1288, 1310 (S.D. Fla. 2005).

97. *See* *Gentry v. Harborage Cottages-Stuart, LLLP*, 602 F. Supp. 2d 1239, 1256 (S.D. Fla. 2009) (stating that violations of ILSFDA are FDUTPA violations as well).

98. *See, e.g., Millennium*, 761 So. 2d at 1264 (noting that "deception may be accomplished by innuendo rather than outright false statements").

99. *See, e.g., Sundance Apartments I, Inc. v. Gen. Elec. Capital Corp.*, 581 F. Supp. 2d 1215, 1220–21, 1225–26 (S.D. Fla. 2008) (refusing to dismiss FDUTPA claim premised on creation and presentation of a deceptive contractual provision).

100. *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 609–10 (Fla. 2d DCA 1997); *Sarkis v. Pafford Oil Co.*, 697 So. 2d 524, 528 (Fla. 1st DCA 1997). The economic-loss rule "does not permit the existence of a cause of action . . . where the party, through the utilization of traditional tort principles, seeks to recover only pure economic damages resulting from the purchase of an allegedly defective product and the claim for damages is not accompanied by any allegation that the product caused physical injury or damage to any other property." *Delgado*, 693 So. 2d at 607; *see also* *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 510 So. 2d 899 (Fla. 1987).

FDUPTA claim cannot be premised on the same conduct and representations that are merely derivative of an unsuccessful contract claim. A plaintiff may convert a breach-of-contract claim into a FDUTPA claim, but the FDUTPA claim must allege that the act underlying the breach, regardless of any contractual agreement, constituted an unfair, unconscionable, or deceptive trade act or practice.¹⁰¹ Thus, challenging an act only to the extent that it constitutes a contractual breach does not produce an actionable FDUTPA claim.¹⁰² As Florida's Fifth District Court of Appeal observed: "To hold otherwise would allow every failed breach of contract claim to morph into a . . . FDUTPA claim. The well-established laws governing contracts should not be so casually dismissed."¹⁰³ Florida's Fourth District Court of Appeal similarly noted that the "tactic" of injecting deceptive-practice claims into a contractual dispute "complicates a lawsuit, raises the stakes, and increases the litigation expenses." It further stated that it "[had] encountered few cases where such claims were successful."¹⁰⁴

Courts often hold that it is unreasonable to rely on misrepresentations that precede or contradict a written agreement. In *TRG Night Hawk Ltd. v. Registry Development Corp.*,¹⁰⁵ for example, Florida's Second District Court of Appeal reversed a finding that the seller in a real-estate transaction had violated FDUTPA, holding instead that the buyer could not have reasonably relied on the seller's oral misrepresentations because the contract terms were inconsistent with these oral statements.¹⁰⁶ As the court explained, "a party who signs a contract whose terms contradict the alleged misrepresentations on which he relied is barred 'from seeking relief pursuant to FDUTPA, as he acted unreasonably.'"¹⁰⁷ Likewise, in *Rosa v. Amoco Oil Co.*,¹⁰⁸ the Southern District of Florida dismissed the plaintiff's FDUTPA claim, holding that the plaintiff's reliance on allegedly false oral statements, which were at variance with written documents, was unreasonable as a matter of law.¹⁰⁹ How-

101. *Rebman v. Follett Higher Educ. Grp.*, 575 F. Supp. 2d 1272, 1278–79 (M.D. Fla. 2008) (granting summary judgment and concluding that college bookstore's rounding practices did not violate FDUTPA because the only basis for complaint was that this rounding resulted in prices inconsistent with contract provisions).

102. *Id.* at 1279.

103. *Bankers Trust Co. v. Basciano*, 960 So. 2d 773, 777–78 (Fla. 5th DCA 2007) (reversing judgment in favor of plaintiff on FDUTPA claim based on pre-contract communications that never materialized into a contract).

104. *Mandel v. Decorator's Mart, Inc. of Deerfield Beach*, 965 So. 2d 311, 313 n.1 (Fla. 4th DCA 2007).

105. 17 So. 3d 782 (Fla. 2d DCA 2009).

106. *Id.* at 784–85.

107. *Id.* at 784 (quoting *Rosa v. Amoco Oil Co.*, 262 F. Supp. 2d 1364, 1368 (S.D. Fla. 2003)).

108. 262 F. Supp. 2d 1364.

109. *Id.* at 1368–69; *accord* *Mac-Gray Servs., Inc. v. DeGeorge*, 913 So. 2d 630, 634 (Fla. 4th

ever, when contractual disclaimers do not directly contradict the allegedly deceptive representations, FDUTPA claims have at least withstood motions to dismiss, with courts reasoning that the disclaimer did not necessarily diminish the probability that a reasonable consumer would be deceived if other evidence could establish the making of false or fraudulent promises.¹¹⁰

Non-contractual express representations may also be actionable. For example, Florida's Third District Court of Appeal held that a car dealer's sales pitch that a vehicle was priced at \$26,500 because it was a special, limited edition, when the suggested sticker price actually was \$21,689, was actionable under FDUTPA.¹¹¹ Such express representations may also occur indirectly, such as through advertisements. Recently, the Southern District of Florida upheld a FDUTPA claim against a chewing-gum company, which represented that its product contained a natural ingredient that was "scientifically proven to help kill the germs that cause bad breath," because the plaintiffs alleged that this claim lacked scientific proof, and the defendant charged a premium for the particular brand of gum based on this representation.¹¹²

2. IMPLIED REPRESENTATIONS

A classic type of implied representation subject to FDUTPA is the "bait and switch." A "bait and switch" scenario involves the implication that the offer to sell the baiting product is bona fide when in fact it is not, and the seller actually wishes to pressure the buyer into purchasing something else (usually something that is more expensive and/or includes fewer or less desirable features). Such an implied representation is clearly deceptive.¹¹³ In *Department of Legal Affairs v. Father and Son*

DCA 2005) (same); *see also* Gentry v. Harborage Cottages-Stuart, LLLP, 602 F. Supp. 2d 1239, 1257 (S.D. Fla. 2009) (stating in the context of an action under Florida Statutes section 718.506 that "[R]eliance on fraudulent misrepresentations is unreasonable as a matter of law where the alleged misrepresentations contradict the express terms of the ensuing written agreement") (alteration in original) (quoting *Garcia v. Santa Maria Resort, Inc.*, 528 F. Supp. 2d 1283, 1295 (S.D. Fla. 2007))).

110. *See* Sewell v. D'Alessandro & Woodyard, Inc., 709 F. Supp. 2d 1251, 1252-53 (M.D. Fla. 2010) (upholding denial to dismiss FDUTPA claims despite inadmissibility of most parol evidence); *Sewell v. D'Alessandro & Woodyard, Inc.*, 655 F. Supp. 2d 1228, 1258 (M.D. Fla. 2009) (denying motion to dismiss); *see also* Morris v. ADT Sec. Servs., 580 F. Supp. 2d 1305, 1311 (S.D. Fla. 2008).

111. *Suris v. Gilmore Liquidating, Inc.*, 651 So. 2d 1282 (Fla. 3d DCA 1995) (reversing directed verdict for car dealer and remanding for jury determination of FDUTPA claim).

112. *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1337-38 (S.D. Fla. 2009).

113. *See* *Fendrich v. RBF, L.L.C.*, 842 So. 2d 1076, 1079 (Fla. 4th DCA 2003); *see also* FTC Guides Against Bait Advertising, 16 C.F.R. § 238.0 (2010) ("Bait advertising is an alluring but insincere offer to sell a product or service which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The

Moving & Storage, Inc.,¹¹⁴ for example, plaintiffs alleged that Father and Son Moving's practice of providing customers with "low ball" moving estimates, and then tacking on additional charges at the time of delivery and payment, constituted a deceptive "bait and switch" practice.¹¹⁵ Florida's Fourth District Court of Appeal suggested that this practice could violate FDUTPA because "customers of Father and Son were confronted with the Hobson's choice of paying an amount far in excess of what was estimated, or risk not being given their belongings from the moving truck."¹¹⁶ Likewise, in *Fendrich v. RBF, L.L.C.*,¹¹⁷ the Fourth District reversed the trial court's dismissal of a deceptive-practice claim, which alleged that the plaintiff reserved a particular lot for purchase at a particular price and was then offered a contract for an inferior lot at a higher price.¹¹⁸ Because a reservation form could communicate that the consumer would be able to purchase the reserved lot at a firm price, it might mislead the reasonable consumer by implication despite express language in the form that it did not create any obligations for either the consumer or the seller.¹¹⁹

3. OMISSIONS

Omissions of material information may also be actionable when a disclosure is necessary to prevent a claim, practice, or transaction from being misleading. In *Marino v. Home Depot U.S.A., Inc.*,¹²⁰ the Southern District of Florida acknowledged that the plaintiff alleged a theory of deception through omission in claiming that Home Depot's deceptive act was its failure to disclose how it calculated carpet-installation costs.¹²¹ Although omissions may be deceptive, the court denied plaintiff's request for class certification for such deception, explaining:

Each class member would have to state whether or not a Home Depot employee informed him of the pricing calculation, and then the Defendant would have to refute that [contention] . . . This process would result in numerous "mini-trials" on the issue of whether the first element of a FDUTPA claim had occurred.¹²²

primary aim of a bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised.").

114. 643 So. 2d 22 (Fla. 4th DCA 1994).

115. *Id.* at 22–23, 26.

116. *Id.* at 25.

117. 842 So. 2d 1076 (Fla. 4th DCA 2003).

118. *Id.* at 1079–80.

119. *See id.*

120. 245 F.R.D. 729 (S.D. Fla. 2007).

121. *Id.* at 737.

122. *Id.*

D. *Unfair Acts and Practices*

1. THE MODERN FTC "UNFAIRNESS" TEST

As noted above, "unfair" acts and practices constitute a separate subcategory of prohibited business behavior, and an act or practice may be "'unfair' without being 'deceptive.'"¹²³ Nevertheless, individual and class-based FDUTPA suits generally focus on "deception."¹²⁴ Indeed, one commentator has described FDUTPA's "unfairness" subcategory as "an available yet neglected and misunderstood basis for state, individual, and commercial litigation."¹²⁵

In the early 1980s, the FTC provided a revised definition for "consumer unfairness," which Congress later codified at 15 U.S.C. § 45(n): 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."¹²⁶ As previously noted, the FTC's Unfairness Policy Statement divides this test into three components: "[1] [The act or practice] must be substantial; [2] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and [3] it must be an injury that consumers themselves could not reasonably have avoided."¹²⁷

Despite this revised FTC standard, many Florida state and federal decisions discussing "unfairness" still refer to the prior, more amorphous standard, which the FTC has abandoned: "An unfair practice is 'one that offends established public policy' and one that is 'immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.'"¹²⁸ Given (1) that FDUTPA incorporates by reference FTC regulatory standards, and (2) that federal precedent recognizes the modern "unfairness" standard, Florida's "unfairness" test is ripe for an update. Recently, the Southern District of Florida appears to have provided that update.

In *In re Motions to Certify Classes Against Court Reporting Firms for Charges Relating to Word Indices ("Court Reporters")*,¹²⁹ the South-

123. Federbush, *supra* note 20, at 26.

124. *Id.*

125. *Id.*

126. 15 U.S.C. § 45(n) (2006); *see also* FTC UNFAIRNESS POLICY STATEMENT, *supra* note 28.

127. FTC UNFAIRNESS POLICY STATEMENT, *supra* note 28.

128. *See, e.g.*, BR-111 Imps. & Exps., Inc. v. Indusparquet Industria E Comercio De Madeiras, LTDA, No. 10-22206-Civ, 2010 WL 4317021, at *7 (S.D. Fla. Sept. 23, 2010) (citing a pre-1980 decision, PNR, Inc. v. Beacon Prop. Mgmt., Inc., 842 So. 2d 773, 777 (Fla. 2003)) (quoting *Samuels v. King Motor Co. of Ft. Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001)); *Spiegel, Inc. v. FTC*, 540 F.2d 287, 293 (7th Cir. 1976)) (attributing this standard to decisions interpreting the FTC Act, which, in fact, has abandoned this test).

129. 715 F. Supp. 2d 1265, 1277-78 & n.3 (S.D. Fla. 2010). Mr. Allen and Carlton Fields,

ern District of Florida recognized that the phraseology of the federal and Florida “unfairness” standards differs and then applied the contemporary federal standard as outlined in 15 U.S.C. § 45(n). *Court Reporters* involved “unfairness” and “deception” claims through which the plaintiffs attempted to certify a class challenging court-reporting firms’ alleged overcharging for index pages appended to transcripts. In refusing to certify the class, the court addressed the three prongs of the current FTC “consumer unfairness” test.¹³⁰

First, the court determined that any overcharges were “reasonably avoidable” because the consumers could have “request[ed] that the court-reporting firms omit (or charge a different per-page rate for) the indices from any transcripts they order” or used the invoices “to easily discover that the charge for index pages was the same as the charge for other pages.”¹³¹ In addition, it explained that those prospective “class members who negotiated special rates likely had an additional opportunity to avoid or reduce index charges.”¹³²

Next, the court applied the “countervailing benefits to users” element of the current FTC “unfairness” standard. Specifically, it determined that “[t]he potential value of [transcript] indices to users varies greatly,” but the class definition failed to account for differences between consumers as to the value they might place on index pages.¹³³ This aspect of the “unfairness” inquiry counseled against certification.

Finally, the *Court Reporters* court found that some of these consumers could not satisfy the “substantial injury” element because “different attorneys value word indices differently[, and] [t]hose attorneys (or the ultimate payors) who value word indices would be uninjured.”¹³⁴ The order denying class certification in *Court Reporters* appears to be the first reported FDUTPA case in which a Florida state or federal court applied the three-pronged, contemporary FTC “unfairness” standard, as is required under Florida Statutes section 501.203(3)(b).¹³⁵ In this regard, *Court Reporters* is a significant example of a federal court developing FDUTPA doctrine and might portend the eventual wholesale adoption of the FTC’s modern “unfairness” standard in Florida

P.A., represent U.S. Legal Support, Inc. in *Court Reporters*, which is now pending on appeal before the Eleventh Circuit. See Case Nos. 10-12943-GG, 10-12944-GG & 10-12998-GG.

130. *Id.* at 1277–80.

131. *Id.* at 1277–78.

132. *Id.* at 1278.

133. *Id.*

134. *Id.* at 1279–80.

135. Section 501.203(3)(b) expressly states that a FDUTPA “violation” includes a violation of “[t]he standards of unfairness . . . set forth and interpreted by the [FTC]” as of “July 1, 2006,” which necessarily requires application of the FTC’s modern unfairness standard because the FTC adopted that standard in 1980. See FTC UNFAIRNESS POLICY STATEMENT, *supra* note 28.

FDUTPA case law.¹³⁶

2. VIOLATIONS OF SPECIFIC FTC RULES

Pursuant to the FTC Act, the FTC has also adopted a wide variety of rules that describe “unfair” conduct. These rules appear in 16 C.F.R. chapter 1, subchapter D, entitled “Trade Regulation Rules.”¹³⁷ Florida Statutes section 501.203(3)(a) creates a private right of action for violation of these rules even though none exists under the FTC Act itself.¹³⁸ These rules address numerous consumer and business-transaction areas, including consumer credit, franchise relationships, the funeral industry, eye examinations and prescriptions, used-car sales, and aspects of home sales.¹³⁹ There is disagreement among commentators as to whether rules promulgated by the FTC pursuant to statutes other than the FTC Act can also provide a basis for FDUTPA violations.¹⁴⁰

E. Unconscionability

Similar to “unfairness,” “unconscionability” appears to constitute a separate subcategory of prohibited business behavior. In 1993, the Florida Legislature amended FDUTPA to forbid “unconscionable” acts or practices and to provide a corresponding cause of action for damages caused by such behavior.¹⁴¹ However, the Legislature did not define the term “unconscionable” as used in FDUTPA, and unlike “deception” and “unfairness,” the FTC has not independently provided a consumer-protection definition for this term.¹⁴²

Nevertheless, Florida appellate decisions involving FDUTPA have construed “unconscionability” in the context of deciding whether to

136. *Court Reporters* also provided a parallel analysis of the “unfairness” issue under the older, more amorphous FTC standard, which the Supreme Court of Florida quoted in dicta in *PNR, Inc. v. Beacon Prop. Mgmt., Inc.*, 842 So. 2d 773, 777 (Fla. 2003). See *Court Reporters*, 715 F. Supp. 2d at 1280.

137. Federbush, *supra* note 20, at 32; see also Trade Regulation Rules, 16 C.F.R. §§ 410.1–460.24 (2010).

138. *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1128–31 (11th Cir. 1999) (recognizing that FDUTPA “defines a violation of that law to include violations of rules promulgated pursuant to the [FTC] Act” but refusing to apply FDUTPA and the FTC’s Franchise Rule, 16 C.F.R. § 436 (1998), extraterritorially to alleged acts in Argentina).

139. Federbush, *supra* note 20, at 33.

140. Compare Federbush, *supra* note 20, at 33 (“By FDUTPA’s terms, rules issued by the FTC pursuant to laws other than the FTC Act . . . as well as FTC industry ‘guides’ . . . would appear not to provide a basis for FDUTPA violations.” (internal citations omitted)), with *Fistos*, *supra* note 4, at 64 (“[T]hey should be equal fodder for per se treatment.”).

141. See FLA. STAT. §§ 501.204(1), .211(2); 1993 Fla. Laws 38, § 3.

142. Federbush, *supra* note 29, at 49–50.

enforce a contract's mandatory arbitration provisions.¹⁴³ In *Hialeah Auto, L.L.C. v. Basulto*, Florida's Third District Court of Appeal applied the established dual "procedural" and "substantive" unconscionability test and decided that the subject agreement was unconscionable because it attempted to waive the buyer's right to seek punitive damages.¹⁴⁴ In *S.D.S. Autos Inc. v. Chrzanowski*, Florida's First District Court of Appeal ruled that an arbitration clause was unconscionable because it purported to waive the right to seek class-action relief.¹⁴⁵ Neither case defined an act as unconscionable under FDUTPA; both simply determined whether a given contract requiring arbitration was unconscionable. Of note, in *Pendergast v. Sprint Nextel Corp.*,¹⁴⁶ the Eleventh Circuit Court of Appeals certified dispositive questions of state law to the Supreme Court of Florida in a FDUTPA case involving prospective class claims that a mobile-phone carrier unlawfully charged the plaintiffs roaming fees and that the arbitration and class-action waiver provisions of their contracts were unconscionable. The case is currently pending before the Supreme Court of Florida and will likely clarify Florida's "unconscionability" doctrine.¹⁴⁷ Oral argument took place on Thursday, February 10, 2011.¹⁴⁸

Additionally, in *Office of Attorney General, Department of Legal Affairs v. Commerce Commercial Leasing*,¹⁴⁹ Florida's First District Court of Appeal held that the state Attorney General sufficiently pled an "unconscionable" act under FDUTPA when it brought an action against equipment-leasing companies, alleging (1) that the defendants were running a Ponzi scheme; (2) that the defendants acted in conjunction with a telecommunications company to sell grossly overpriced telecommunication equipment to small, unsophisticated businesses; (3) that the rental agreements failed to disclose they were being simultaneously and immediately assigned; and (4) that the equipment was not delivered in working order. This appears to be the only Florida case directly addressing what may constitute an "unconscionable" act or practice under

143. *Hialeah Auto., L.L.C. v. Basulto*, 22 So. 3d 586 (Fla. 3d DCA 2009); *S.D.S. Autos Inc. v. Chrzanowski*, 976 So. 2d 600 (Fla. 1st DCA 2007).

144. *See Basulto*, 22 So. 3d at 590. Punitive damages are not provided for in FDUTPA. However, the court felt the agreement was unconscionable for preventing the plaintiff from seeking punitive damages under other theories or causes of action.

145. *See Chrzanowski*, 976 So. 2d at 603-11.

146. 592 F.3d 1119, 1135 (11th Cir. 2010).

147. Case No. SC10-19 (argued Feb. 10, 2011). The Florida Supreme Court's docket is available electronically at http://jweb.flcourts.org/pls/docket/ds_docket_search%20 (last visited Mar. 11, 2011).

148. Oral Argument, *Pendergast v. Sprint Nextel Corp.*, (No. SC10-19) (argued Feb. 10, 2011), available at <http://wfsu.org/gavel2gavel/archives/flash/10-19.php>.

149. 946 So. 2d 1253, 1258-59 (Fla. 1st DCA 2007).

FDUTPA. However, in its analysis, the First District seems to have subsumed “unconscionability” into the “likely to deceive a consumer” standard, which is already used to determine whether an act or practice is “deceptive.”¹⁵⁰ The decision did not define “unconscionability” with reference to existing statutory¹⁵¹ or case-law definitions for this term. In other words, *Commerce Commercial Leasing* does not appear to ascribe any independent meaning to the term “unconscionable,” but rather, has defined it in the same manner as “deceptiveness.”

Reading FDUTPA in this manner likely violates a well-recognized canon of statutory construction: Florida statutes should not be read in a manner that renders any of their terms superfluous.¹⁵² Therefore, the courts or the Legislature should provide better guidance as to what constitutes an “unconscionable” act or practice under FDUTPA. Otherwise, the Act’s “unconscionability” language may face viable vagueness challenges:

The language and legislative history of FDUTPA simply do not permit any clear legislative intent as to the meaning of the term “unconscionable,” as added by the 1993 amendments, to be discerned beyond those instances where the term appears in another statute. Unlike FDUTPA’s “deceptive” and “unfair,” which the Florida Supreme Court in 1976 held to have meanings sufficiently well settled in federal trade regulation law to satisfy the requirements of due process, its use of “unconscionable” fails to give adequate guidance to potential defendants as to what practices are and are not covered. FDUTPA’s use of “unconscionable” thus poses a vagueness problem of constitutional dimension.¹⁵³

F. “Per Se” FDUTPA Violations

In addition to examining the established FTC definitions for “deceptive” and “unfair,” and the somewhat-nebulous term “unconscionable,” one may look to certain statutes, ordinances, and regulations that expressly or impliedly codify so-called “per se” FDUTPA violations.¹⁵⁴ As previously mentioned, the FTC’s rules addressing unfairness

150. *See id.*

151. *Cf., e.g.,* FLA. STAT. § 672.302 (2010) (providing an “unconscionability” defense in contract actions governed by the Uniform Commercial Code).

152. “[W]ords in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words.” *State v. Bodden*, 877 So. 2d 680, 686 (Fla. 2004).

153. *Federbush*, *supra* note 29, at 54 (footnotes omitted). The 1976 Florida Supreme Court decision that the author refers to is *Dep’t of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976).

154. *See generally* *Fistos*, *supra* note 4, at 62. *See also* *Taviere v. Precision Motor Cars, Inc.*, No. 8:09-cv-467-T-BM, 2010 WL 557347, at *4 (M.D. Fla. Feb. 12, 2010) (“[FDUTPA] can be violated in two ways: (1) a per se violation premised on the violation of another law proscribing unfair or deceptive practice, and (2) adopting an unfair or deceptive practice.”).

memorialize one type of “per se” violation.¹⁵⁵ Further, FDUTPA also states that the violation of “[a]ny law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices” constitutes a FDUTPA violation.¹⁵⁶ Based on this statutory language, some commentators predicted that violations of a broad range of Florida or federal laws addressing consumer protection could therefore constitute predicates for FDUTPA violations.¹⁵⁷

This has proven prescient because federal courts sitting in Florida have recognized that violations of certain consumer-protection laws do, in fact, serve as FDUTPA predicates. Indeed, statutes, regulations, and ordinances may provide FDUTPA predicates under section 501.203(3)(c) in two ways.¹⁵⁸ First, a statute, regulation, or ordinance’s text may expressly state that it serves as a FDUTPA predicate.¹⁵⁹ Second, a court may find that such a law prohibits unfair and deceptive trade acts or practices and therefore operates as an implied FDUTPA predicate.¹⁶⁰ However, the predicate law must directly “proscribe[] unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.”¹⁶¹ If not, the law cannot supply the predicate for a FDUTPA violation.¹⁶² For instance, violations of the Interstate Land

155. See FLA. STAT. § 501.203(3)(a) (2010) (defining a FDUTPA violation as a violation of “[a]ny rules promulgated pursuant to the [FTC] Act, 15 U.S.C. ss. 41 *et seq.*”).

156. § 501.203(3)(c).

157. Fistos, *supra* note 4, at 63–66.

158. *Parr v. Maesbury Homes, Inc.*, No. 6:09-cv-1268-Orl-19GJK, 2009 WL 5171770, at *7–8 (M.D. Fla. Dec. 22, 2009) (dismissing action alleging per se FDUTPA violations predicated on purported violations of the federal Securities Act, the Florida Securities Act, and Florida Statutes chapter 718 because plaintiffs failed to allege that these statutory violations caused them harm).

159. See Fistos, *supra* note 4, at 63 n.9 (noting that as of 2002, at least seventeen Florida statutes provided an explicit FDUTPA predicate and collecting statutes); see also, e.g., FLA. STAT. §§ 210.185(5) (cigarette distribution), 316.2128(2) (sale of motorized scooters), 320.27(2) (auto sales), 400.464(4)(c) (licensing of home health agencies), 559.3906 (violations of “Buying Services” Act), 560.309(10) (regulation of check cashing and currency exchange businesses), 560.406(2) (passing of worthless checks), 627.736(11)(b) (regulation of “personal injury protection” benefits), 668.6075 (regulation of commercial emails/electronic communication), 681.111 (auto warranties), 817.487(5)(b) (provision of false telephone caller ID information), 817.62(3)(c) (illegally factoring credit-card transactions) (2010).

160. *Parr*, 2009 WL 5171770, at *7; *Tippens v. Round Island Plantation, L.L.C.*, No. 09-CV-14036, 2009 WL 2365347, at *11 (S.D. Fla. July 31, 2009).

161. § 501.203(3)(c).

162. *Double AA Int’l. Inv. Grp., v. Swire Pac. Holdings, Inc.*, 674 F. Supp. 2d 1344, 1358 (S.D. Fla. 2009) (recognizing that an alleged violation of Florida Statutes section 718.202 (2010) (which addresses pre-closing condo deposits) cannot serve as a FDUTPA predicate because the Legislature did not design section 718.202 to proscribe deceptive or unfair trade acts or practices); *Fehely v. LAI Games Sales, Inc.*, No. 08-23060-CIV, 2009 WL 2474061, at *3–5 (S.D. Fla. Aug. 11, 2009) (finding that Florida Statutes section 849.15 (2010), a criminal statute prohibiting illegal slot machines, could not serve as a per se FDUTPA predicate because section 849.15 did not contain an express declaration that its violation also constituted a FDUTPA violation and, further,

Sales Full Disclosure Act (“ILSFDA”)¹⁶³ have been held to constitute implied, per se FDUTPA violations because ILSFDA, by its own terms, also proscribes unfair or deceptive acts or practices.¹⁶⁴

It is important to bear in mind, however, that while per se status satisfies the first element of a private FDUTPA claim, “a plaintiff is still required to plead the remaining two elements, causation and damages, in order to properly state a claim for a FDUTPA violation.”¹⁶⁵

III. CONCLUSION

Based on this overview of the tests necessary to establish deceptive, unfair, or unconscionable trade acts or practices, it is apparent that private FDUTPA actions are often heavily influenced by federal law and have the potential to be incredibly varied and broad. Further, despite FDUTPA’s existence for nearly four decades, a number of basic, yet significant issues remain subject to development, such as what the appropriate test is for measuring “unfairness,” what the Legislature intended by adding “unconscionable” trade acts and practices as a separate category of prohibited business behavior in 1993, and which statutes, regulations, and ordinances, specifically, may serve as implied, “per se” FDUTPA predicates. If the past is any type of prologue for the future of FDUTPA case law, it is safe to assume that Florida’s federal district courts and the Eleventh Circuit Court of Appeals will play a prominent role in providing some answers.

there was no evidence the statute existed to proscribe unfair or deceptive acts vis-à-vis consumers); *Edgewater by the Bay, LLLP v. Gaunchez (In re Edgewater by the Bay, LLLP)*, 419 B.R. 511, 516 (Bankr. S.D. Fla. 2009) (“Violations of laws or statutes that give rise to a FDUTPA claim must be of the kind that proscribe unfair trade practices or unfair methods of competition; not . . . a violation of any law or statute that may have some benefit to consumers.”).

163. Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701–20 (2006).

164. *See, e.g., Meitis v. Park Square Enters., Inc.*, No. 6:08-cv-1080-Orl-22GJK, 2009 WL 703273, at *2 (M.D. Fla. Jan. 21, 2009); *Dolphin, L.L.C. v. WCI Cmty., Inc.*, No. 07-80241-CIV, 2008 WL 6894512, at *4 (S.D. Fla. Feb. 20, 2008); *cf. Taylor v. Homecomings Fin., LLC*, 738 F. Supp. 2d 1257, 1264 (N.D. Fla. 2010) (“At least in some circumstances, a FDUTPA violation . . . may be based upon the federal Truth in Lending Act [15 U.S.C. §§1601–67f (2006)], a rule adopted under that act by the Board of Governors of the Federal Reserve System, or a published interpretation of that act by the Federal Reserve System’s Division of Consumer and Community Affairs.”).

165. *Parr*, 2009 WL 5171770, at *8.