

Florida Court Peels Away Deceptive Label, Increasing Exposure in Class Actions

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A recent class certification opinion may increase the risk of exposure and liability in class actions for businesses that impose fees using specific labels.

In *Waste Pro USA v. Vision Construction Ent., Inc.*, a Florida appellate court affirmed a trial court order certifying a class action against Waste Pro for claims of deceptive and unfair trade practices associated with an environmental fee it charged customers. The opinion makes clear that fees whose name suggests a specific purpose create exposure if the collected fees are not used for the suggested purpose.

In *Waste Pro*, the underlying dispute centered on two specific charges: a fuel surcharge and an environmental fee. Notably, neither the trial court nor the appellate court found fault with the fuel surcharge because its name did not suggest that it was designed for a specific purpose. Instead, the courts focused on the so-called environmental fee.

The consumer claimed that the environmental fee was deceptively titled because the name suggested that it was a pass-through regulatory or other compliance fee charged to Waste Pro by the government. The plaintiff challenged whether Waste Pro was in fact offsetting or passing through a real fee to customers.

According to the Florida's First District Court of Appeal, Waste Pro executives failed to show that the fee was related to the company's environmental or regulatory costs. Waste Pro began charging the fee in 2009, but the chief financial officer testified that he could not recall Waste Pro incurring any environmental costs that it didn't have before 2009. Moreover, sales representatives and regional managers did not know why the fee was charged. They were, however, authorized to waive the fee if a customer made such a request.

To justify the fee, Waste Pro submitted affidavits from some customers stating that they expected the environmental fee would offset Waste Pro's costs, even if unrelated to environmental issues. These same customers said that they expected Waste Pro to profit from at least some portion of the fee. Waste Pro claimed that individual inquiry into the subjective beliefs of each fee-paying customer was sufficient to overcome class certification. The First District disagreed.

In rejecting Waste Pro's arguments, the First District said: "A class member's subjective sophistication or knowledge is irrelevant [where] the liability inquiry states objective elements. While the determination of whether an act is deceptive requires 'an objective test,' it also specifically requires consideration of whether the defendant's conduct was 'likely to mislead [a] consumer acting reasonably *in the circumstances*,' including the plaintiff's knowledge and level of sophistication."

The court built on this blend of subjective and objective elements to conclude that a hybrid standard applies when an individual plaintiff's state of mind is not a main element of the underlying claim. Citing federal cases, the First District concluded that in those circumstances, whether someone has acted reasonably under the circumstances can be "objectively established as to mindset but subjectively established as to context." In practical terms, that means that an individual customer's subjective understanding of the nature of the fee does not come into play in the class analysis in a deceptive and unfair trade practices claim when the nature of the purported deception itself is not individualized. In the First District's view, individual circumstances can defeat class certification only when the circumstances of the alleged deception vary from customer to customer.

Applying this standard, the First District found that there were no meaningful differences in the method by which Waste Pro had communicated the environmental fee to customers. Accordingly, the commonality and predominance requirements of the class certification rule were satisfied.

Waste Pro should be an eye-opening case for businesses whose fees are titled with a suggested purpose. In this context, if the business discloses the fee's title (or represents the fee's purpose) on a written form provided to all or most customers, the customers' subjective evaluation of whether the fee label would mislead a consumer is not sufficient to defeat class certification. Thus, the decision peels away a powerful argument used against these class cases. Businesses charging uniform fees that suggest a particular purpose should undertake an evaluation of whether those labels objectively could be construed as misleading and therefore could give rise to class claims under *Waste Pro*.

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