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What Court Clash On Fla. Law Means For Lost Profits Claims

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In a 1982 hit single, The Clash's Mick Jones asks his darling a simple, yet complicated, question: "Should I stay or should I go?" After roughly three minutes, Jones and the listeners never learn the answer to that question.

Today, when it comes to lost profits in business-versus-business cases under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA, defendants have recently asked Florida federal courts the same question, and have received conflicting answers — especially in cases involving what have been called "past lost profits."

First things first: There are a lot of cases that have been issued over the last two decades finding that lost profits are not available in business-versus-business FDUTPA cases because (1) the statute does not allow for consequential damages, and (2) lost profits are consequential damages.

A recent example is the decision issued in March in *Wilco Trading LLC v. Shabat*, in which Magistrate Judge Julie Sneed of the U.S. District Court for the Middle District of Florida found that businesses could not recover lost profits in FDUTPA cases.[1]

The plaintiff sought damages for lost sales and profits, along with reputational damage. The court noted, however, that "[s]everal courts in this Circuit, applying Florida law, have found that consequential damages, including lost profits, cannot be recovered under FDUTPA."[2]

Likewise, later that month, in *Wound Care Concepts Inc. v. Vohra Health Services PA,* Judge Rodney Smith of the U.S. District Court for the Southern District of Florida found, in a business-versus-business FDUTPA case, that "[l]ost profits are the quintessential example of consequential damages, and thus, are not recoverable under FDUTPA."[3]

These decisions are merely the most recent in a long line of cases finding that consequential damages in the form of lost profits are not recoverable under the FDUTPA.[4] Moreover, there is federal appellate authority that appears, at least at first glance, to put this issue to bed.

Specifically, in 2017, in *HRCC Ltd. v. Hard Rock Cafe International (USA) Inc.*,[5] the U.S. Court of Appeals for the Eleventh Circuit reviewed a decision issued by Judge Paul Byron of the Middle District of Florida,[6] in which Byron had found "that Florida courts have limited damages under [the FDUTPA] to direct damages, not consequential damages in the form of lost profits."[7]

While the plaintiff/appellant urged that the court adopt a more capacious view[8] and make an *Erie* prediction that "the Florida Supreme Court would adopt a broader interpretation of actual damages that is equivalent to compensatory damages," the Eleventh Circuit affirmed the district court, and held that it was bound by its 2016 decision in *Carriuolo v. General Motors Co.* that firmly established circuit precedent limiting FDUTPA verdicts to "actual damages."[9]

There are three caveats. First, *HRCC* is an unpublished opinion, which means that it is not binding circuit precedent. However, it is considered persuasive authority. Second, while the issue was not raised in the appellate briefs or addressed by the court, *Carriuolo* was a consumer-versus-business case.[10] Third, the potential distinction between past lost profits and future lost profits was not raised in the appellate briefing, nor by the court.

Nonetheless, *HRCC* stands as a powerful case in favor of a broad rule that a Florida district court cannot award lost profits in an FDUTPA case.

For the most part, if there has even been a small division on this issue among courts, it has been limited to some federal district court cases that have distinguished between past lost profits and future lost profits — and found that the former could be available under the FDUTPA, while the latter could not.

Up until now, we have been discussing federal court decisions. Until about a year ago, no Florida state appellate decision had squarely addressed whether lost profits are available under the FDUTPA. This all changed with the Third District Court of Appeal's Dec. 16, 2020, decision in *Digiport Inc. v. Foram Development BFC LLC*.[11]

While the analysis was not particularly thorough, the court concluded that, "to the extent the trial court precluded an award of future lost profits, we discern no error."[12] Interestingly, the court reached back more than 20 years to the first federal district court decision to make that point.[13]

Although the analysis was limited, for now, that really is the end of discussion — at least as to future lost profits. Under controlling Florida Supreme Court and Eleventh Circuit precedent, this decision is now binding on every state trial court in Florida, every federal trial court in Florida and the Eleventh Circuit.[14]

However, the second part of *Digiport* raises an interesting question: Are future lost profits available in business-versus-business FDUTPA cases? The court suggested — in what would perhaps be deemed dicta — that future lost profits and past lost profits are different, and would warrant different results.

However, a few months ago, Chief Judge Cecilia Altonaga of the U.S. District Court for the Southern District of Florida issued a decision in *Tymar Distribution LLC v. Mitchell Group USA LLC*[15] that could substantially upset the apple cart on that issue. The bottom line is that in *Tymar*, the court found that businesses could recover lost profits — or at least past lost profits — in FDUTPA cases.[16]

In *Tymar*, the defendants argued that "FDUTPA only allows for the recovery of actual damages, and lost profits are not actual damages, but instead are merely a type of consequential damages, and therefore are not recoverable under FDUTPA."[17]

The plaintiff, on the other hand, distinguished business-versus-business FDUTPA cases from consumer FDUTPA cases, and argued that "the accepted definition of actual damages in a consumer's FDUTPA case is meaningless in a competitor's case, where actual lost profits are the competitor's actual damages."[18]

The plaintiff also argued: "Florida state courts ... have dispelled the notion that lost profits are always consequential damages, noting that the issue may turn on whether such damages flow directly and immediately from the interference," and "the weight of Florida law holds past lost profits recoverable under FDUTPA."[19]

The court agreed with the plaintiff, and underwent a deep analysis to get there. The court first described the history of allowable damages in FDUTPA cases. In *Rollins Inc. v. Heller*, Florida's Third District Court of Appeal held that the appropriate measure of damages in FDUTPA cases is the benefit-of-the-bargain damages measure,[20] which "utilizes an expectancy theory, evaluating the difference between the value as represented and the value actually received."

Following the *Rollins* decision, other Florida courts "adopted this narrow view on recoverable actual damages" and have held that actual damages under the FDUTPA do not include consequential damages.[21] Yet, after the Florida Legislature amended the FDUTPA, replacing the word "consumer" with "person," businesses became able to seek damages under the law.[22]

The *Tymar* court noted that:

> [I]n a claim brought by a corporate competitor, there is no bargain giving rise to the expectancy measure of damages employed in traditional consumer cases. ... Corporate

> competitors instead suffer lost profits, lost revenue, reputational harm, and other damages commonly observed in business torts claims rather than contract-based causes of action.[23]

But that court also noted that, in *Digiport*, Florida's Third District Court of Appeal "favorably cited a federal district court that awarded past lost profits to a corporate competitor."[24]

Notably, though, the court did not agree with what is at least the suggestion from *Digiport* that there is a difference between past and future lost profits, and instead agreed with the Southern District of Florida's conclusion, in *Midway Labs USA LLC v. South Service Trading SA* in 2020, that "there is no substantive distinction between past lost profits and future lost profits for purposes of determining whether past lost profits are actual damages."[25]

The court then reasoned that:

> Lost profits are certainly compensatory damages [because] with no underlying transaction, such as business torts, lost profits are often directly caused by a defendant's wrongful act and recoverable simply as compensatory damages. ... By contrast, courts generally limit their categorization of damages as "consequential" to claims sounding in contract [where] consequential damages are those that do not flow directly from the parties' immediate transaction. ... [Thus] [w]here, as [in *Tymar*], the claim does not involve any breach of contract, warranty, or similar wrong sounding in contract, any line drawing between expectancy and consequential damages is rather inept.[26]

The court ultimately found that "[t]he above principles suggest a much larger universe of damages available in FDUTPA claims arising outside the consumer transaction context" so "[i]t makes considerable sense to permit a corporate-competitor plaintiff to seek lost profits damages when there is no transaction giving rise to the oft-used expectancy measure of damages."[27]

Accordingly, the court joined other federal district courts in finding that a corporate-competitor plaintiff is able to seek damages for lost profits under the FDUTPA.[28]

The analysis in *Tymar* is perhaps the most thorough treatment that the issue has received in any court. There are a few quibbles, however.

First — and most significant — the train appears to have already left the station, at least on the issue of future lost profits. For better or worse, as of Dec. 16, 2020, the binding case law on all state and federal trial courts in Florida is that future lost profits are not available under the FDUTPA.[29]

Second, the position advocating a wider set of available damages under the FDUTPA was raised by the plaintiff/appellant in the HRCC appeal, but the Eleventh Circuit specifically rejected the argument — albeit in an unpublished opinion — that there were "persuasive reasons to believe the Florida Supreme Court would adopt a broader interpretation of actual damages that is equivalent to compensatory damages."[30]

Third, while the *Tymar* decision adopted the *Midway Labs* position that there is no difference between past and future lost profits, the Third District Court of Appeal strongly suggested otherwise.

Should lost profits damages in business-versus-business FDUTPA cases stay or go? Like Mick Jones, we don't know. But this is a significant and timely issue in business-versus-business FDUTPA cases that should be monitored by both plaintiffs and defendants.

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[1] Wilco Trading LLC v. Shabat , No. 8:20-cv-00579, 2021 WL 1146634, at *7 (M.D. Fla. March 8, 2021) (Sneed, M.J.).

[2] Id.

[3] Wound Care Concepts Inc. v. Vohra Health Services PA , No. 0:19-cv-62078, 2021 WL 4990957, at *11 (S.D. Fla. March 26, 2021) (Smith, J.).

[4] Five for Entm't S.A. v. Rodriguez , 877 F. Supp. 2d 1321, 1331 (S.D. Fla. 2012) (Seitz, J.). Further, just a few of the many cases reaching this conclusion include QSGI Inc. v. IBM Glob. Fin ., No. 9:11-cv-80880, 2012 WL 1150402 (S.D. Fla. March 14, 2012) (Ryskamp, J.); Plain Bay Sales LLC v. Gallaher , No. 9:18-cv-80581, 2020 WL 1042212, at *4 (S.D. Fla. March 2, 2020) (Matthewman, M.J.); Flexstake Inc. v. DBI Servs. LLC , No. 1:17-cv-20858, 2018 WL 6270972, at *3 (S.D. Fla. Nov. 30, 2018) (Scola, J.); Emondson v. 2001Live Inc ., No. 8:16-cv-03243, 2017 WL 10085029, at *3 (M.D. Fla. July 25, 2017) (Kovachevich, J.); Diversified Mgmt. Sols. Inc. v. Control Sys. Rsch. Inc ., No. 9:15-cv-81062, 2016 WL 4256916, at *6 (S.D. Fla. May 16, 2016) (Middlebrooks, J.).

[5] 703 F. App'x 814 (11th Cir. 2017).

[6] See HRCC Ltd. v. Hard Rock Cafe Int'l (USA) Inc ., 302 F. Supp. 3d 1319 (M.D. Fla. 2016) (Byron, J.).

[7] HRCC, 703 F. App'x at 815.

[8] The plaintiff/appellant's briefs to the Eleventh Circuit are available at: HRCC Ltd. v. Hard Rock Cafe Int'l (USA) Inc., 2017 WL 461038 (11th Cir. Jan. 31, 2017) and HRCC Ltd. v. Hard Rock Cafe Int'l (USA) Inc., 2017 WL 2350419 (11th Cir. May 24, 2017).

[9] HRCC, 703 F. App'x at 814 (citing Carriuolo v. Gen. Motors Co. , 823 F.3d 977, 986 (11th Cir. 2016)).

[10] The potential distinction between consumer-vs.-business and business-vs.-business FDUTPA cases was not raised in the appellate briefing.

[11] 314 So. 3d 550 (Fla. 3d DCA 2020).

[12] Id., at 554.

[13] Eclipse Med. Inc. v Am. Hydro-Surgical Instruments Inc ., 262 F. Supp. 2d 1334, 1357 (S.D. Fla. 1999) (Ryskamp, J.).

[14] The Florida Supreme Court has held that "[t]he decisions of the district courts of appeal represent the law of Florida unless and until they are overruled by [the Florida Supreme Court]." Pardo v. State , 596 So. 2d 665, 666 (Fla. 1992). The Eleventh Circuit has extended the Pardo rule to federal courts, holding that for Erie purposes, federal courts applying Florida law "are bound to follow decisions of the state's intermediate appellate courts unless there is some persuasive indication that the highest court of the state would decide the issue differently." McMahan v. Toto , 311 F.3d 1077, 1080 (11th Cir. 2002).

[15] No. 1:21-cv-21976, 2021 WL 4077966 (S.D. Fla. Sept. 8, 2021).

[16] Id. at *8.

[17] Id. at *4.

[18] Id.

[19] Id.

[20] 454 So. 2d 580, 585 (Fla. 3d DCA 1984).

[21] Tymar, 2021 WL 4077966 at *5.

[22] Id.

[23] Id.

[24] Id. (citing Digiport, 314 So. 3d at 554).

[25] Tymar, 2021 WL 4077966 at *6, n.2 (citing Midway Labs USA LLC v. S. Serv. Trading S.A. , No. 1:19-cv-24857, 2020 WL 2494608, at *7 (S.D. Fla. May 14, 2020)).

[26]

[27] Id. at *7.

[28] Id.

[29] One counterpoint to the quibble: The defendant did not cite the binding Digiport decision in its briefing, and instead only relied on other district court decisions, which are not binding.

[30] HRCC, 703 F. App'x at 816.

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