CARLTON FIELDS

What Split on Standing Means for Fla. Consumer Claims

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In 1983, rock legend Elton John debuted his hit song "I'm Still Standing." Rock 'n' roll historians can debate what had previously befallen John and caused him to declare that he was still standing.

However, this question of when one is still standing is particularly relevant to an enduring split among Florida federal district courts on when an individual plaintiff may pursue a claim for injunctive and declaratory relief under the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA.

This column sets out to identify and comment on various issues under the act where courts have reached differing results. As noted in my previous *Law360* guest article, in the 1970s, the Florida Legislature enacted the Deceptive and Unfair Trade Practices Act, which provided both regulators and private individuals a route to address unfair and deceptive practices. The focus here is on the part of the statute that dictates action by private individuals.

Florida state courts have been generous in permitting plaintiffs to pursue injunctive and declaratory relief under the act, taking their lead from the 2000 decision in *Davis v. Powertel Inc.*, in which the First District Court of Appeal noted that the statute "is broadly worded to authorize declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit."[1]

However, for the first three decades after the statute was enacted, class actions in federal court under the FDUTPA were relatively rare, as the governing law required each plaintiff to demonstrate that he or she had suffered the requisite amount in controversy for diversity jurisdiction.[2]

This changed with the enactment of the federal Class Action Fairness Act in 2005. Over the last 15 years, the Class Action Fairness Act has led to many class actions being pursued[3] in federal court where the plaintiff is seeking both classwide monetary damages, as well as injunctive and declaratory relief. Federal courts in Florida, however, have come to differing conclusions as to whether an FDUTPA class plaintiff has standing to pursue injunctive and declaratory relief in federal court.

Some cases have found a plaintiff has standing to seek injunctive and declaratory relief under the FDUTPA regardless of whether the plaintiff is likely to suffer future harm.

One line of federal cases relies on the principles set forth by the state appellate court in *Davis* and generally observes that the Florida state appellate courts have determined that the Florida Legislature has given standing even when the individual plaintiff does not intend to use the product in the future.

In *Jeff Enterprises Inc. v. The Home Depot USA Inc.* in 2008,[4] U.S. District Judge Cecilia Altonaga of the Southern District of Florida evaluated an FDUTPA class action in which the plaintiff alleged that Home Depot's practice of offering a 10% damage waiver charge on tool rental contracts violated the act because no protection was provided for damage to rented tools not already contained in the rental agreement.

In addition to monetary damages, the plaintiff sought declaratory and injunctive relief , wherein it sought to prohibit Home Depot from including the charge at issue in future tool rental contracts. Home Depot claimed that the named plaintiff did not have standing to pursue declaratory or injunctive relief because, as detailed in the complaint, it fully understood the nature of the contested charge and would not be expected to rent tools from Home Depot again.

In the first reported Florida federal trial court decision evaluating this issue in detail, the court first noted that, under controlling Eleventh Circuit law, it is "generally true that in an action for declaratory or injunctive relief, a plaintiff must allege 'facts from which it appears there is a substantial likelihood that he will suffer injury in the future.'"[5]

However, the court then pivoted to the line of Florida appellate case law that authorizes declaratory and injunctive relief even if those remedies might not benefit the individual consumers who filed the suit.[6] The court thus concluded that, to the extent the plaintiff had standing under the FDUTPA for past harm, it has standing under Florida Statutes Section 501.211(1) to seek injunctive or declaratory relief, regardless of whether it is likely to suffer future harm.

Judge Altonaga encountered a similar issue a year later in *Galstaldi v. Sunvest Communities USA LLC*.[7] There, the court rejected the defendants argument that "because Plaintiffs have not alleged an ongoing violation, they lack standing for injunctive or declaratory relief."[8]

In *Galstaldi*, the court also evaluated the Article III aspect of the claim and, while there was not as fulsome of a discussion on the interplay between Article III and declaratory or injunctive relief, the court found in support of Article III standing that the plaintiffs "maintain that if the Court enters a declaratory judgment that Defendants' conduct violates the FDUTPA, Plaintiffs will be able to seek redress for their losses."[9]

A unifying principle with the cases[10] finding broad standing for injunctive and declaratory standing in federal court under the FDUTPA seems to be that these cases have focused on the broad state appellate decisions that allow standing for anyone aggrieved.

So what should a defendant do if faced with an adverse trial court ruling on this issue? First, make sure to point to recent case law finding that a legislature cannot broaden the jurisdiction of the federal courts beyond constitutional limits. Second, make sure to challenge the factual underpinning of the plaintiff's claim that he or she — or even someone else — will use the item at issue in the future.

Other cases have sharply limited standing to seek injunctive and declaratory relief under the FDUTPA where there is no real likelihood of future harm.

The other line of cases generally recognizes that, while the language of the FDUTPA allows anyone aggrieved by a violation of the act to bring an action for declaratory or injunctive relief, there nonetheless is substantial authority against granting a specific plaintiff standing to seek an injunction or declaratory relief under the FDUTPA where it is at no risk of future harm.

The 2018 decision issued by U.S. District Judge James Whittemore of the Middle District of Florida in *Teggerdine v. Speedway LLC* is a detailed example of this view.[11] In *Teggerdine*, the court acknowledged and rejected the *Galstaldi* line of cases and noted that the U.S Court of Appeals for the Eleventh Circuit "is clear that where a plaintiff seeks prospective injunctive relief, it must demonstrate a real and immediate threat of future injury in order to satisfy the injury in fact requirement for Article III standing."[12] Numerous decisions are in accord with *Teggerdine*.[13]

The common thread with these cases is the finding that the plaintiff failed to show that he or she personally intended to purchase the product in question in the future. According to these decisions, the lack of such averment means that there is no constitutional Article III standing, even if the allegation would be sufficient to satisfy standing under the statute in state court.

So what should a plaintiff do if faced with an adverse trial court ruling on this issue? First, draw a distinction between claims in federal court and claims in state court, especially in a case that is removed from state court — the *Teggerdine* approach. And, second, file the case in state court in the first place.

This will put the onus on the defendant to evaluate the propriety of removal and at least give a backup argument if the court is inclined to find there is no Article III standing for injunctive claims under the FDUTPA where the plaintiff does not sufficiently demonstrate that he or she intends to use the product in the future.

The Eleventh Circuit has not squarely addressed the question of declaratory and injunctive relief under the FDUTPA in a class action. However, in June, the Eleventh Circuit held, albeit in a footnote, in *Warren Technology Inc. v. UL LLC*, that in a single-plaintiff case

> [w]hen the threat of future harm dissipates, the plaintiff's claims for equitable relief become moot because the plaintiff no longer needs protection from future injury. Thus, we need not address [the plaintiff's] argument on appeal that its motion for rehearing on its FDUTPA claim should have been granted.[14]

Watch to see if *Warren Tech* starts to be favorably cited by FDUTPA defendants arguing against the expansive view of declaratory and injunctive relief standing under the act.

One last issue to consider in the food for thought category. This issue is not unique to the Florida federal courts and the FDUTPA. The California federal courts have grappled with a similar issue under the state's Unfair Competition Law.

In 2015, U.S. District Judge James Donato of the Northern District of California set forth a novel approach in *Machlan v. Procter & Gamble Co.*,[15] in which he remanded the "portions of plaintiff's claims that seek injunctive relief" alleging unfair, unlawful and deceptive trade practices in violation of California Business and Professions Code Section 17200, which is California's analog to the FDUTPA.[16]

Practical Takeaways

Given that there is a clear split of authority — although perhaps tilted against standing — both plaintiffs and defendants could benefit from an earlier clarification from the judge in their case on the issue. Further, litigants could benefit from a judge granting certification of an interlocutory appeal on the issue pursuant to Title 28 of the U.S. Code, Section 1292(b).

Finally, lawyers with FDUTPA cases should closely watch to see if *Teggerdine* emerges as a possibility to cut through the complicated standing issues in FDUTPA injunctive relief cases.[17]

[1] 776 So. 2d 971, 975 (Fla. 1st DCA 2000); *Orkin Exterminating Co. v. Petsch*, 872 So. 2d 259, 264 (Fla. 2d DCA 2004) (Florida Statutes section "501.211(1) authorizes injunctive relief, even if that relief does not benefit the customer who filed the suit."); *Schauer v. Morse Operations, Inc.*, 5 So. 3d 2 (Fla. 4th DCA 2009) (noting that section "501.211 provides that a person aggrieved by a violation of FDUTPA may obtain a declaratory judgment that an act or practice violates FDUTPA"); *Haney v. Costa Del Mar Inc.*, No. 16- 2017-CA-004794, 2019 WL 1878300, at *34 (Fla. 4th Cir. Ct. Apr. 12, 2019) (Soud, J.) (finding that "[a]n aggrieved party may pursue a claim for declaratory or injunctive relief under FDUTPA, even if the effect of those remedies would be limited to the protection of

consumers who have not yet been harmed by the unlawful trade practice. In other words, Plaintiff and the class members need not demonstrate that they are likely to buy [Defendant's product] in the future.").

[2] See *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546 (2005).

[3] Some of these cases are originally filed in federal court and some are removed to federal court by the defendant.

[4] No. 0:07-cv-60302, 2008 WL 11402017 (S.D. Fla. Mar. 10, 2008).

[5] Id. at *7 (citing *Bowen v. First Family Fin. Servs., Inc.*, 233 F.3d 1331, 1340 (11th Cir. 2000)).

[6] Jeff Enters., 2008 WL 11402017, at *7 (citing *Davis*, *Orkin*, and *Holt*).

[7] 637 F. Supp. 2d 1045 (S.D. Fla. 2009).

[8] Id. at 1058.

[9] Id.

[10] Other cases that come out on the broad side of standing include: *Carroll v. Lowes Home Centers, Inc.*, No. 1:12-cv-23996, 2014 WL1928669 (S.D.Fla.May6,2014) (Gold, J.) (citing *Davis* and finding that the defendant was confusing the requirement for injunctive or declaratory relief under federal statutes with the different requirements under the FDUTPA and thus ruling that the plaintiff had standing to seek injunctive relief on behalf of other individuals who would be subject to future harm as a result of the defendant's misclassification of certain employees as independent contractors, even though the defendant himself was no longer working for the company); *Cox v. Porsche Fin. Servs., Inc.*, 330 F.R.D 322 (S.D. Fla. 2019) (Gayles, J.); *Weiss v. Gen. Motors LLC*, 418 F. Supp. 3d 1173 (S.D. Fla. 2019) (Scola, J.); *Dye v. Bodacious Food Co.*, No. 9:14-cv-80627, 2014 WL 12469954 (S.D. Fla. Sept. 9, 2014) (Dimitrouleas, J.); *KLS Martin, Inc. v. Med. Modeling, Inc.*, No. 3:18-cv-00233, 2018 WL 8139133 (M.D. Fla. Dec. 17, 2018) (Schlesinger, J.); *Kelly v. Palmer, Reif ler & Assocs., P.A.*, 681 F. Supp. 2d 1356 (S.D. Fla. 2010) (Moreno, J.); *Wasser v. All Market, Inc.*, No. 1:16-cv-21238, 2017 WL 11139701 (S.D. Fla. Nov. 13, 2017) (Scola, J.).

[11] No. 8:16-cv-03280, 2018 WL 583114 (M.D. Fla. Jan. 26, 2018).

[12] Id. (citing *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1241 (11th Cir. 2003) (internal citations omitted)).

[13] See *Dapeer v. Neutrogena Corp.*, 95 F. Supp. 3d 1366, 1373 (S.D. Fla. 2015) (Cooke, J.) (finding that FDUTPA's language allowing "anyone aggrieved" to bring an action for declaratory and injunctive relief "cannot supplant Constitutional standing requirements"); *Hardy v. Bed Bath & Beyond, Inc.*, No. 1:17-cv-23315, 2018 WL 1272687, at *2 (S.D. Fla. Mar. 9, 2018); *Lombardo v. Johnson & Johnson Consumer Cos., Inc.*, No. 0:13-cv-60536, 2014 WL 10044838, at *6 (S.D. Fla. Sept. 10, 2014) (Scola, J.); In re Monat Hair Care Prods. Mktg., Sales Practices & Prods. Liab. Litig., No. 1:18-md-02841, 2019 WL 5423457, at *5 (S.D. Fla. Oct. 23, 2019) (Gayles, J.); *Marjam Supply Co. of Fla., LLC v. Pliteq, Inc.*, No. 1:15-cv-24363, 2018 WL 4932871, at *4 (S.D. Fla. Apr. 23, 2018) (Williams, J.); *Marty v. Anheuser-Busch Cos.*, 43 F. Supp. 3d 1333, 1354 (S.D. Fla. 2014) (O'Sullivan, M.J.);*Seidman v. Snack Factory, LLC*, No. 0:14-cv-62547, 2015 WL 1411878, at *5 (S.D. Fla. Mar. 26, 2015) (Cohn, J.); *Herazo v. Whole Foods Market, Inc.*, No. 0:14- cv-61909, 2015 WL 4514510, at *3 (S.D. Fla. July 24, 2015) (Moreno, J.).

[14] 962 F.3d 1324, n.4 (11th Cir. 2020). In a published decision issued earlier this month under New York General Business Law section 349(a) (which is, essentially, New York's analog to the FDUTPA), the Second Circuit held that "injunctive relief is not proper for the group of past purchasers of [defendant's product] — because not every member of that group stands to benefit from the 'fill-line' and disclaimer language included in the settlement proposal — that group cannot be certified as a Rule 23(b)(2) class." Berni v. Barilla S.p.A., No. 19-1921, 2020 WL 3815523, at *7 (2d Cir. July 8, 2020).

[15] 77 F. Supp. 3d 954, 962 (N.D. Cal. 2015) (Donato, J.).

[16] The Ninth Circuit discussed the *Machlan* approach in *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956 (9th Cir. 2018),cert. denied,139 S. Ct. 640 (2018), but ultimately did "not resolve ... whether severance and remand, as opposed to dismissal, is the appropriate option where standing is lacking for only some claims or forms of relief."

[17] Within the last year, the Eleventh Circuit accepted issued two important standing decisions that were on petitions for interlocutory review: *Salcedo v. Hanna*, 936 F.3d 1162 (11th Cir. 2019) and *Cordoba v. DIRECTV, LLC*, 942 F.3d 1259 (11th Cir. 2019).

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