State Consumer Protection Laws
Enforcement and Litigation
Trends in Florida

July 19, 2011
Panel Members:

• **Moderator:**
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• **Presenters:**
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Table of Contents:

I. Overview of FDUTPA

II. Attorney General Enforcement

III. Private Class Litigation
I. Overview of FDUTPA
Road Map:

A. Introduction
B. Policies
C. FDUTPA Policies
D. Elements Under FDUTPA
E. Exemptions
F. Defenses
G. FDUTPA Comparisons
H. Major Changes to FDUTPA
   a. Attorney’s Fees
   b. Actions by Businesses
   c. Role of the FTC
The primary consumer protection statute in Florida is the Florida Deceptive and Unfair Trade Practices Act, or FDUTPA.

- FDUTPA Prohibits:
  - “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.”

§ 501.204(1), Fla. Stat.
FDUTPA Policies:

“Provisions of this part shall be construed liberally 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.” § 501.202, Fla. Stat.
The Prohibition Against Unfair Acts or Practices:

- The standard of “unfair” practices is often criticized as vague. However, in *Department of Legal Affairs v. Rogers*, 329 So. 2d 257 (Fla. 1976), the Supreme Court of Florida upheld FDUTPA against a challenge for vagueness.

- Florida courts have adopted the definition of “unfair” used under the federal scheme, which provides that an unfair practice is “one that ‘offends established public policy’ and one that is ‘immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers.’” *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 499 (Fla. 4th DCA 2001) (citing *Spiegel, Inc. v. Fed. Trade Comm'n*, 540 F.2d 287, 293 (7th Cir.1976)).

- Notwithstanding this definition for “unfair” practices, there is little case law interpreting or applying this prong of FDUTPA.

- Note: FDUTPA does not have the “reasonably avoidable” and “countervailing benefits” limitations imposed by the 1994 amendment to Section 5 of the FTC Act. 15 U.S.C. § 45(n).
The Prohibition Against Deceptive Acts or Practices:

1) There must be a representation, omission or practice that is **likely to mislead** the consumer (actual deception not required). *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006).
   - Factors for evaluation:
     - The representation itself
     - The entire document
     - The juxtaposition of various phrases in the document
     - The nature of the claim
     - The nature of the transactions

2) The representation is examined from the perspective of a **consumer acting reasonably** in the circumstances. *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006).
   - Claims are evaluated in light of the sophistication and understanding to whom they were directed.
   - Examines the entire document, rather than each piece separately- the overall impression.

3) The representation, omission or practice must be **material** enough to affect the consumer's conduct or decision, even though no actual reliance is required. *Rollins, Inc. v. Butland*, 951 So. 2d 860 (Fla. 2d DCA 2006).
   - It is presumptively material when the claims relate to health, safety or cost.
   - A finding of materiality is also a finding that injury is likely to exist because of the representation, omission, sales practice, or marketing technique.

The Prohibition Against Unconscionable Acts or Practices:

- Added in the 1993 amendment and is still an emerging area of law. The statute does not define the term “unconscionable” or provide standards for determining unconscionability.

- There is very little case law defining “unconscionable acts or practices,” and that case law provides little guidance on this issue. See Dep’t of Legal Affairs v. Commerce Commercial Leasing, LLC, 946 So. 2d 1253, 1259 (Fla. 1st DCA 2007) (holding that OAG’s complaint challenging contract terms as unconscionable stated cause of action under FDUTPA without identifying the terms or why they were unconscionable).

- What sources of law might provide guidance?
  - No authority in section 5 of the FTC Act.
  - Common law (procedural and substantive unconscionability).
  - The U.C.C. section 672.302, Florida Statutes provides for an industry and fact specific analysis:
    “…whether, in light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract.”
The Prohibition Against Unfair Methods of Competition:

- Unfair acts or practices can give a company a competitive advantage over rivals that do not resort to the same conduct, thus being synonymous to an unfair method of competition. See *FTC v. R.F. Keppel & Bro., Inc.*, 291 U.S. 304 (1934).

- A claim for relief under FDUTPA can be pled instead of, or along with, a companion antitrust action.

- Benefits to asserting unfair competition claims under FDUTPA:
  1) There is no requirement to show any harm to competition when pursued under an “unfair acts or practices” theory. See *FTC v. Sperry & Hutchinson, Co.*, 405 U.S. 233, 239 (1972).
  2) Certain conduct is beyond the boundaries of state and federal antitrust law but would fall under FDUTPA because it is more of a preventative statute.
  3) Under Florida law, indirect purchasers have standing to maintain an action under FDUTPA. See *Mack v. Bristol-Myers Squibb Co.*, 673 So.2d 100 (Fla. 1st DCA 1996).
A claim for damages under FDUTPA has three elements:

1) A prohibited practice
2) Causation
   • “But for” standard
3) Actual damages
   • In the context of FDUTPA, “actual damages” are defined as “the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract if the parties...[T]his is because FDUTPA is intended to protect a consumer from unfair or deceptive acts or practices which diminish the value or worth of the goods or services purchased by the consumer.” Rodriguez v. Recovery Performance & Marine, LLC, 38 So.3d 178, 180 (Fla. 3d DCA 2010).
   • “FDUTPA does not provide for the recovery of nominal damages, speculative losses, or compensation for subjective feelings of disappointment.” Rollins, Inc. v. Heller, 454 So.2d 580, 873 (Fla. 3d DCA 1984).
4) No reliance required (tempered by the “consumer acting reasonably” standard)

Exemptions:

**FDUTPA does not apply to:**

1) An act or practice required or specifically permitted by federal or state law
2) A publisher, broadcaster, printer, or other persons engaged in the dissemination of information or the reproduction of printed or pictorial matter, insofar as the information or matter has been disseminated or reproduced on behalf of others without actual knowledge that it violated the Act
3) A claim for personal injury or death or a claim for damage to property other than the property that is the subject of the consumer transaction at issue
4) Any person or activity regulated under laws administered by the Office of Insurance Regulation of the Financial Services Commission or by federal agencies
5) Banks and savings and loan associations regulated by the Office of Financial Regulation of the Financial Services Commission or by federal agencies
6) Any person or activity regulated under the laws administered by the former Florida Department of Insurance which are now administered by the Florida Department of Financial Services
7) Any activity regulated under laws administered by the Florida Public Service Commission
8) Acts or practices involving the sale, lease rental, or appraisal of real estate by a person licensed under Florida’s law governing real estate brokers and appraisers
9) Acts or practices involving the sale, lease, rental or appraisal of real estate by a person licensed under Florida’s law governing real estate brokers and appraisers, if the acts or practices would violate the law
10) Causes of action pertaining to commercial real property if the parties executed a written lease or contract that expressly provides for the process of resolution of any dispute
11) Causes of action for failure to maintain real property if the owner is required to maintain that property by other Florida laws.
12) Securities transactions
Defenses:

Possible defenses to a FDUTPA claim:


3) Accord and satisfaction

4) Fraud (*in pari delicto*)


7) Statute of limitations - No action may be brought by the enforcing authority under this section more than 4 years after the occurrence of a violation of this part or more than 2 years after the last payment in a transaction involved in a violation of this part, whichever is later. § 501.207(5), Fla. Stat.

8) Any defense available under the Federal Trade Commission Act, 15 U.S.C.A. §§ 41 et seq., is also available under the FDUTPA.

9) Although an individual may be liable for corporate practices in violation of the FDUTPA it is necessary to show that an individual defendant actively participated in or had some measure of control over the corporation’s deceptive or unfair practices. *Rensin v. Florida Office of Atty. Gen.*, 18 So.3d 572 (Fla. 1st DCA 2009).
Government Remedies:

- The Attorney General may bring an action to obtain a *declaratory judgment* that the practices violate FDUTPA, an *action to enjoin* one from violating FDUTPA, and an action on behalf of one or more consumers for *actual damages* caused by an act or practice in violation of FDUTPA, if it serves the public interest. § 501.207, Fla. Stat.

- In addition to actual damages, the defendant may be required to pay attorney’s fees and court costs. § 501.2105, Fla. Stat.

- If the FDUTPA violation resulted from a “bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid the error,” recovery is limited to the amount of unjust enrichment, if any. § 501.207(4), Fla. Stat.

- In an action brought by the Attorney General under FDUTPA, the court may order other appropriate relief at its discretion. § 501.207(3), Fla. Stat.

- Anyone who willfully violated FDUTPA is liable for a civil penalty of not more than $10,000 for each such violation. *Willful violations* occur when the person knew or should have known that his or her conduct was unfair or deceptive or prohibited by rule. § 501.2075, Fla. Stat.

- Violations involving senior citizens over 60 may result in a civil penalty up to $15,000. § 501.2077, Fla. Stat.
Comparison of FDUTPA: Forum

- **Florida**
  - Actions are brought within the judicial system.
  - There is no administrative court except for limited administrative hearings which the Department of Legal Affairs can initiate if it appears that a cease and desist order would be in the interest of the public.

- **Federal Trade Commission**
  - The FTC has an administrative system for adjudicative proceedings (but cannot seek disgorgement or other monetary relief without going to court).

- **Maryland**
  - The Division of Consumer Protection’s powers include investigating complaints, conciliating matters covered by the Consumer Protection Act, issuing cease and desist orders for all practices found to be unfair or deceptive trade practices, and assessing costs and damages in connection with violations of the Consumer Protection Act.  Md. Code Ann. § 13-204.
Comparison of FDUTPA: Standing

- **Florida**
  - “Anyone aggrieved by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.” § 501.211(1), Fla. Stat.
  - Individuals, including indirect purchasers, have standing under FDUTPA.
    - *See Mack v. Bristol-Myers Squibb Co.*, 673 So. 2d 100 (Fla. 1st DCA 1996) (holding that allowing indirect purchasers to sue under the FDUTPA “effectuates the [statute’s] consumer protection policies” and is not “adverse to the purposes of the Antitrust Act,” which bars indirect purchaser suits under *Illinois Brick*).

- **Texas**
  - Does not allow actions by indirect purchasers.
    - *See Abbott Laboratories, Inc. v. Segura*, 907 S.W. 2d 503 (Tex. 1995) (barring recovery by indirect purchasers under the Texas Deceptive Trade Practices-Consumer Protection Act if the allegations are such that recovery would be barred under Texas’ antitrust statutes).
Comparison of FDUTPA: Damages

- **Florida**
  
  - FDUTPA provides that a plaintiff may recover “actual damages, plus attorney’s fees and court costs.” § 501.211(2), Fla. Stat.
  
  - Actual damages are defined as “the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.” [Rollins, Inc. v. Heller, 454 So. 2d 580, 585 (Fla. 3d DCA 1984)](http://example.com) (internal citations omitted).
  
  - Recovery of consequential or special damages is not permitted. [Smith v. 2001 South Dixie Highway, Inc., 872 So. 2d 992, 994 (Fla. 4th DCA 2004)].
Comparison of FDUTPA: Damages (cont.)

- **California**
  - In addition to injunctive relief, a plaintiff is “entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff.” Cal. Bus. and Prof. Code § 17082.

- **North Carolina**
  - When damages are assessed for injury to a consumer “judgment shall be rendered in favor of the plaintiff and against the defendant for treble the amount fixed by the verdict.” N.C. Gen. Stat. § 75-16.

- **Tennessee**
  - Trial court may award three times the amount of actual damages sustained if a defendant's use of the unfair or deceptive act or practice under the Act was willful or knowing. Tenn. Code Ann. § 47-18-109(a)(3).
  - Plaintiffs may elect between punitive damages under a common-law theory or treble damage under the TCPA. Election is made after the trier of fact determines the amount of damages under both theories. *Concrete Spaces v. Sender*, 2 S.W.3d 901, 909 (Tenn. 1999).
Comparison of FDUTPA: Attorney’s Fees

**Florida**

- FDUTPA provides that the prevailing party “may receive his or her reasonable attorney's fees and costs from the nonprevailing party.” § 501.2105, Fla. Stat.

- If litigation is initiated by the state attorney or Department of Legal Affairs, the “court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.” § 501.2105, Fla. Stat.

- In *Humane Society of Broward County, Inc. v. Florida Humane Society*, 951 So. 2d 966 (Fla. 4th DCA 2007), the court rejected the plaintiff’s argument that a plaintiff who loses its FDUTPA claim should be shielded from liability for attorney’s fees unless the plaintiff’s suit was “frivolous, unreasonable, or without foundation.”
Comparison of FDUTPA: Attorney’s Fees (cont.)

• California
  • When judgment is entered against the defendant, “the plaintiff shall be awarded a reasonable attorney’s fee…” Cal. Bus. and Prof. Code § 17082.

• Maryland
  • Allows any person who brings an action and is awarded damages to seek reasonable attorney’s fees. Md. Code Ann. § 13-408(b).

  • If an “action is brought in bad faith or is of a frivolous nature, the court may order the offending party to pay to the other party reasonable attorney’s fees.” Md. Code Ann. § 13-408(c).
Comparison of FDUTPA: Economic Loss Rule

• Florida
  • Economic loss rule does not preclude an action under FDUTPA that involves consumer transactions based on written sales contracts. See Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So.2d 602 (Fla. 2d DCA 1997).

• North Carolina
  • Economic loss rule bars an unfair or deceptive trade practices claim involving “allegations of a defective product where the only damage alleged is damage to the product itself and the allegations of unfair trade practices are intertwined with the breach of contract or warranty claims.” Bussian v. DaimlerChrysler Corp., 411 F. Supp. 2d 614, 627 (M.D.N.C. 2006).
Comparison of FDUTPA: 
Application to Practice of Law

• Florida
  • Attorneys are not exempt per se under FDUTPA, but legal practice in the usual course does not constitute engaging in “trade or commerce” as required for liability under FDUTPA. *Kelly v. Palmer, Reifler & Assocs., P.A.*, 681 F. Supp. 2d 1356 (S.D. Fla. 2009) (holding that an attorney’s preparation and transmission of pre-lawsuit demand letters was not engaging in “trade or commerce”).

• Arkansas

• Texas
  • “Nothing in this subchapter shall apply to a claim for damages based on the rendering of a professional service, the essence of which is the providing of advice, judgment, opinion, or similar professional skill.” Tex. Bus. & Com. Code § 17.49(c)

• New Mexico
  • Defining “unconscionable trade practice” as “an act or practice in connection with the sale, lease, rental or loan, or in connection with the offering for sale, lease, rental or loan, of any goods or services, including services provided by licensed professionals, or in the extension of credit or in the collection of debts that to a person's detriment: (1) takes advantage of the lack of knowledge, ability, experience or capacity of a person to a grossly unfair degree; or (2) results in a gross disparity between the value received by a person and the price paid.” N.M. Stat. § 57-12-2(E).
Major Changes to FDUTPA: Attorney’s Fees

- Prior to 1994, FDUTPA provided “for the mandatory award of reasonable attorney’s fees to any prevailing party.” Humane Society of Broward County, Inc. v. Florida Humane Society, 951 So. 2d 966, 971 (Fla. 4th DCA 2007).

- Now, the award of attorney’s fees is within the discretion of the court. § 501.2105, Fla. Stat.

- In Humane Society of Broward County, Inc. v. Florida Humane Society, 951 So. 2d 966, 971 (Fla. 4th DCA 2007), the court interpreted the amendment “as a legislative recognition that mandatory fee awards had a chilling effect on consumer plaintiffs bringing suit under FDUTPA.”
Major Changes to FDUTPA: Actions by Businesses

- Prior to 1993, FDUTPA stated, as one of its three purposes, protection of “consumers from suppliers who commit deceptive and unfair trade practices.” FDUTPA now promotes the protection of “the consuming public and legitimate business enterprises.” § 501.202(2), Fla. Stat.

- Additionally, prior to 1993, transactions related to “a business opportunity” in which an individual had been previously engaged were excluded from the definition of “consumer transaction.” By eliminating this language in 1993, more businesses were able to bring suit regardless of any prior experience in a particular industry.
Major Changes to FDUTPA: Role of the FTC

- Prior to 1993, a violation of FDUTPA existed if there was a violation of any provision of the statute or a violation of a rule promulgated by the Department of Legal Affairs.

- In 1993, FDUTPA was amended to allow for a violation based on:
  
  “(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;

  (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; or

  (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.”

The Role of the FTC: Overview

In construing whether a practice is unfair or deceptive under FDUTPA, “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to s. 5(a)(1) of the Federal Trade Commission Act, as of July 1, 2006.”

§ 501.204(2), Fla. Stat.
“Violation of this part” means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2006:

(a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.;

(b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts;

(c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.

The Role of the FTC: Case Examples

- *Millennium Communications & Fulfillment, Inc. v. Office of the Attorney General*, 761 So. 2d 1256 (Fla. 3d DCA 2000):
  - Court looked at the Ninth Circuit’s enunciation of the FTC’s standard for deceptive advertising to determine if the advertisement at issue met the standard

- *KC Leisure, Inc. v. Haber*, 972 So. 2d 1069 (Fla. 5th DCA 2008):
  - Court held that a complaint pled a violation of an FTC rule and thus stated a cause of action under FDUTPA
The Role of the FTC: Rulemaking

- FDUTPA grants rulemaking authority to the Department of Legal Affairs to set forth acts or practices that violate the statute. § 501.205(1), Fla. Stat.
II.

Attorney General Enforcement
Attorney General Enforcement:

Road Map:

A. Divisions within the A.G.’s Office
B. Economic Crimes Management Team
C. Primary Enforcement Authority
D. Overview of Florida Statutes, Consumer Protection, and the A.G.
E. Jurisdiction
F. The Work of the Economic Crimes Division
G. Remedies under FDUTPA
H. Penalties under FDUTPA
I. FDUTPA Investigative Authority
J. Assurance of Voluntary Compliance
K. Trends in Consumer Fraud
L. Statistics
M. Fake News Sites
N. Statistics
O. Case Examples
1. Debt Relief
2. Privacy/ Data
3. Price Gouging
4. Negative Option
5. Loan Modification
P. Post-Transaction Marketing Statute
Divisions within the Florida Attorney General’s Office

- Economic Crimes
- Civil Rights
- Antitrust
- Crime Victims Services
- Criminal Appeals
- General Civil Litigation Division
- Inspector General
- Medicaid Fraud
- Statewide Prosecution
Florida Attorney General:
Economic Crimes Management Team

Richard Lawson
Division Director

Gerard Lockwood
Chief of Investigations

Daniel Halpern
Administrative Assistant III

Gerald Johnson
Business Manager

Mark Campbell
Section Chief, CyberFraud
2 Attorneys, 1 Investigator

Elizabeth Starr
Bureau Chief, Orlando
5 Attorneys, 4 Investigators

Victoria Butler
Bureau Chief, Tampa
5 Attorneys, 4 Investigators

[Vacant]
Bureau Chief, South Florida (Ft. Lauderdale and West Palm Beach)
7 Attorneys, 6 Investigators

Mark Hamilton
Bureau Chief, North Florida (Tallahassee & Jacksonville)
8 Attorneys, 6 Investigators
Florida Attorney General: Primary Enforcement Authority

§ 68.83  Florida’s False Claims Act
§ 812.035 Civil Theft Statute
§ 501.207 FDUTPA
§ 542.27 Florida Antitrust Act of 1980
§ 895.05 Florida RICO Act
The Attorney General is the chief legal officer of the state, and the head of the “Department of Legal Affairs.” See s. 4(c), Art. IV, Fla. Const; §20.11 and Chp. 16, Florida Statutes.

The Office of the Attorney General is named throughout Florida Statutes as the “Department of Legal Affairs” ("DLA"), or simply the “Attorney General,” in consumer protection statutes which specifically grant it enforcing authority.
Florida Attorney General: Jurisdiction

The Economic Crimes Division enforces multi-circuit violations of the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”). Primary jurisdiction for enforcement of FDUTPA for single circuit activity falls with the State Attorney for the judicial circuit. The OAG also has jurisdiction for single circuit activity if the State Attorney defers to the OAG or fails to act within 90 days after a written complaint has been filed.
Florida Attorney General:  
The Work of the Economic Crimes Division

- Economic Crimes Division recovers millions of dollars *per year* on behalf of the state and consumers.

- It is the policy of the Office of the Attorney General to seek full redress for consumers whenever practicable. In 2010 we recovered over $22 million in restitution.

- In 2010, the agency processed a total of 82,927 consumer complaints and/or inquiries. This averages to nearly 7,000 consumer communications per month, to which the Economic Crimes Division must respond.

- Complaints and inquiries, whether written or oral, come mostly from consumers, but are also received frequently from concerned competitors and industry participants, other government agencies and officials, attorneys, and other professionals.
§ 501.207, Fla. Stat.— Remedies of enforcing authority

• Declaratory action
• Injunction (temporary and permanent) against any person who has violated, is violating, or is otherwise likely to violate, this part.
• Damages on behalf of one or more consumers or government entities
Examples of the relief the AG may seek by court order under section 501.207, Florida Statutes include:

- Appointment of receiver
- Asset freeze
- Reimbursement to consumers or governmental entities
- To order business to carry out a transaction in accordance with the reasonable expectations of consumers or governmental entities
- To strike or limit the application of clauses of contracts to avoid an unconscionable result
- To order divestment of any interest in any enterprise, including real estate;
- To impose reasonable restrictions upon engaging in similar endeavors in the future
- To order the dissolution or reorganization of any enterprise
- To grant legal, equitable, or other appropriate relief.
Florida Attorney General: Penalties Under FDUTPA

§ 501.2075, Fla. Stat.:  

- $10,000 per violation ($15,000 if victim is 60 years of age or older)
- Anyone who willfully violated FDUTPA is liable for a civil penalty of not more than $10,000 for each such violation. *Willful violations* occur when the person knew, or should have known, that his or her conduct was unfair or deceptive or prohibited by rule
- Penalties may be recovered in any action brought by the enforcing authority
- Waiver of penalties permissible if the violator has previously made full restitution or reimbursement or has paid actual damages to injured consumers or governmental entities
Under § 501.206, Fla. Stat., the OAG has the authority to administer oaths, subpoena witnesses or matter, and collect evidence.

The standard for issuance of an investigative subpoena: “the enforcing authority has reason to believe that a person has engaged in, or is engaging in, an act or practice that violates this part.”

The OAG can require the production or inspection of records located outside the State, under conditions set out in § 501.206(2).

FDUTPA subpoena must relate to potential violation of that statute.

Major League Baseball v. Butterworth, 181 F.Supp.2d 1316 (N.D. Fla. 2001)(holding that antitrust CID's were improperly issued under FDUTPA); State v. Shapiro & Fishman, 59 So.3d 353 (Fla. 4th DCA 2011)(FDUTPA subpoena must inquire into conduct that would constitute “trade or commerce” within meaning of statute).

An Assurance of Voluntary Compliance or AVC is a pre-litigation agreement by the person being investigated to take certain action to resolve the issues under investigation.

The AVC is a statutory remedy of the enforcing authority under section 501.207, Florida Statutes.

Unless the terms of the AVC state a specific timeframe for expiration or completion, the party to the AVC is bound to comply with the terms of AVC indefinitely and a violation of the terms is prima facie evidence of a violation of 501, Part II.
Trends in Consumer Fraud:

- Mortgage and Foreclosure
- Debt Relief
- Negative Options
- Timeshare Resales — Largest current complaint area— 15% of 2010 complaints
- Prepaid Calling Cards
- Sellers of Travel
- For-Profit Schools
- Cramming
- Electronic Marketing
- Data Security
- State of Emergency— Price Gouging
Statistics:

• Economic Crimes was given a state award in June for over $1 Billion recovered in the last 10 years
• Last year we had over $22 million in restitution and judgments granting nearly $12 million in penalties
• Currently we have approximately 60 active investigations on Mortgage Foreclosure Rescue firms
• We have approximately 48 active or preliminary investigations and 3 cases in litigation on Debt Relief practices
• We have settlements in place with 19 entities in the Timeshare Resale Marketing field, with 10 additional cases in litigation
• 54 Timeshare Resale businesses are under active or preliminary investigation
Are online jobs the next big thing? For Mary Steadman it sure is. Mary, a mother from Richmond, Virginia is thriving, in the middle of an economic recession working in the comfort of her own home.

From her website: "I get paid about $25 for every link I post on Google and I get paid every week... I make around $5500 a month right now."

Mary's story is a very familiar one in these tough times. She lost her job as an account rep for a manufacturing company and a few days later her husband also was laid off from his job as part of cutbacks due to the bad economy.

Mary Steadman lost her "boring" job as an account rep for a manufacturing
Fake News Sites (cont.):

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Case Example: Debt Relief

Hess Kennedy

- Firm was collecting funds from debtors but not negotiating with or paying credit card companies
- Temporary Injunction and Receivership granted
- $15 million in restitution paid to consumers nationwide, plus $150 million in debt write off granted by the credit card companies
- $5 million in fees & costs to the State
- Laura Hess barred from engaging in debt-relief settlement and/or debt management related services for 5 years
Case Example: Privacy/Data Breach
Certegy Check Services, Inc.

• AG alleged that Certegy had not properly protected personal data when 5.9 million records were stolen from the firm

• AVC settlement called for Certegy to establish and implement a comprehensive information security program & meet Payment Card Industry security standards

• Settlement provided $850,000 to the State and $150,000 to Seniors vs. Crime
Case Example: Price Gouging

Amerigas Propane Limited Partnership

- Complaints received about Amerigas raising prices during a declared January, 2010 State of Emergency
- AVC Settlement calls for firm to implement procedures and practices to stay informed of states of emergency and not raise prices unconscionably during such events
- $100,000 paid to the State for fees & costs and future enforcement
Case Example: Negative Option

**Rodale, Inc.**

- Complaints received about books being shipped and then billed without being ordered
- AVC settlement changed advertising to make negative option plans “clear and conspicuous”
- Express and informed consent required
- Refunds given to all involved Florida consumers, plus $1.3 million for fees & costs to the State
Case Example: Loan Modifications
Winberg, Lopez, and Rodriguez Co.

- Firm charging advanced fees for loan modification services, violation of section 501.1377, Florida Statutes
- Final Judgment granted permanently enjoining defendants from collecting advanced fees
- Judgment also requires:
  - Over $1 million in restitution
  - $140,000 for fees & costs to the state
  - Over $3 million in civil penalties
Post-Transaction Marketing

Statute:


• Marketing of goods and services by a third-party seller through an initial merchant after a consumer has initiated a transaction.

• After purchasing a product online or making a phone call to buy a product advertised on TV, the consumer is offered something attractive, usually a discount on a future purchase or a gift card. Millions of online and telephone purchases -- from department stores, movie theaters, big box stores, online retailers and many other sellers -- are now accompanied by follow-up offers of this kind.
Post-Transaction Marketing
Statute:

• The promotions are known as "post-transaction marketing," and it is a lucrative business.

• Many such promotions involve enrolling the consumer in a “membership club” or “discount buying club” without the consumers’ consent or understanding that they will be paying monthly membership fees.

• There are hundreds of clubs. One company that runs such clubs obtained $155 million from Florida consumers during a recent five-year period, after setting up more than three million memberships -- the equivalent of one membership for every six people in this state.
Post-Transaction Marketing Statute:

- Relevant AG enforcement statutes include:
  
  - The ‘Restore Online Shoppers’ Confidence Act’” signed in 2010, provides new requirements for online post-transaction marketing.
  
  - Florida Statutes section 559.95, enacted in 2011, adopts provisions similar to the federal act.
  
  - Violation of Florida Statutes section 559.95 is a violation of FDUTPA.
III.
Private Class Litigation
Private Class Litigation:

Road Map:

A. FDUTPA Class Actions
B. Class Issues under FDUTPA
C. Mortgage Litigation under FDUTPA
D. Personal Jurisdiction Analysis in the Internet Age
E. Recent Florida Supreme Court Decision Analyzing Class Action Requirements
FDUTPA Class Actions:

- Recent FDUTPA class actions involved the following general claims:
  - Manufacturer defects (automobile)
  - Improper charge of a “fee” in a contract, overcharging, and failure to properly disclose costs (landlord/ tenant; automobile service and sales; flooring sales and installation)
  - Misrepresentation (coin dealing)
  - Claims arising from contractual undertakings (pest control; dentistry)
  - Misleading advertising (pest control)
FDUTPA Class Actions (cont.):

- Additional claims that often accompany FDUTPA claims:
  - Landlord Tenant Act
  - Florida Consumer Collection Practices Act
  - Unjust Enrichment
  - Money Had and Received- §86.021, Fla. Stat.
  - Breach of Contract
  - Breach of Express Warranty
  - Breach of Warranty for Economic Losses
  - Breach of Implied Warranty
  - Breach of Implied Covenant of Good Faith and Fair Dealing
  - Negligence
  - Conversion
  - Misleading Advertising
  - RICO
  - Fraud
  - Magnuson Moss Warranty Improvement Act
  - TILA
  - Florida Motor Vehicle Retail Sales Finance Act
  - Florida’s Warranty Association Act
Class Issues Under FDUTPA

*Miami Automotive Retail, Inc., v. Baldwin, 2011 WL 2496609 (Fla. 3d DCA, June 15, 2011)*

The trial court certified a class in a case based upon oral promises made by representatives of an auto dealership to the class representative. The Court of Appeals reversed, holding that:

- because the class representative’s claims were based upon oral representations, and there was no allegation or proof that similar representations were made to the class members, each class member’s claim would have to be individually determined, and thus the predominance test was not satisfied. *(Note – the court distinguished Latman v. Costa Cruise Lines, NV, 758 So.2d 699 (Fla. 3rd DCA 2000), where the FDUTPA allegations were based upon a uniform representation made by the cruise line to all passengers in the ticket contract). Miami Automotive, * 5-6.*

- class treatment was not a superior method for resolving the issues, noting that FDUTPA’s attorney fee provision would allow individual plaintiffs to recover their fees even if their damages were small. *Id.*, * 7.*
The court dismissed a putative class action initiated by borrowers/mortgagors against MERS, a company that took legal title to notes as the nominee for lenders and made demand against mortgagors on those notes. The complaint alleged that MERS violated FDUTPA by engaging in the unlicensed practices of law and by using deceptive means to collect debts on residential mortgages.

The court found that MERS’ actions were not unfair or deceptive for purposes of FDUTPA. Specifically, the statements made by MERS to borrowers that MERS was a “creditor” or “owner” of a note had no effect on the substantial rights of borrowers. Further the court found that MERS’ actions did not qualify as “trade or commerce” under FDUTPA, and that MERS did not “advertise, provide, offer or distribute” anything.
Mortgage Litigation
Under FDUTPA (cont.)

Law Offices of David Stern v. Banner, 50 So.3d 1221 (Fla. 4th DCA 2010)

- The Court of Appeals held that trial court did not abuse its discretion in certifying a class action brought by mortgagors against the lenders’ law firm for alleged violation of the Florida Consumer Collection Practices Act and FDUTPA. The claims were based on the law firm’s transmission of reinstatement letters to mortgagors demanding payment of fees and costs that were allegedly unreasonable and excessive, or not currently due and owing.

- Undisputed that law firm’s activities were common to all class members. *Id.*, at 1222.

- Court of Appeals agreed with trial court that individualized damages issues could be easily resolved. *Id.*
Defendant operated a business in Florida and allegedly made disparaging comments about a competing company, also based in Florida. Defendant’s sales in Florida accounted for approximately 4.4% of its overall sales over a 5 year period, or about $100,000 over that period of time.

The court readily found that it had specific jurisdiction over the defendant based upon defendant’s operation of a business in Florida, and the alleged making of defamatory statements about a competitor in Florida. Id., *8-9.

However, the court was just as quick to hold that the traditional “substantial, continuous and systematic” minimum contacts requirements for general jurisdiction were not satisfied, noting that: (a) the vast majority of defendant’s business comes from its website; (b) only 4.4% of defendant’s sales come from Florida; and (c) there was no evidence that the defendant specifically targeted Florida residents with its website. Id., *12.
**Recent Florida Supreme Court Decision**

**Analyzing Class Action Requirements**


The Florida Supreme Court decided an appeal from a motion for class certification in a case where the consumer alleged that a premium finance company had overcharged consumers in violation of Florida law. The decision provides a thorough analysis of Rule 1.220, Florida’s version of Rule 23, Fed. R. Civ. Proc.

**Commonality**

- Primary concern is whether the representative’s claim arises from the same practices or course of conduct that gave rise to the remaining claims, and whether the claims are based on the same theory.
- Threshold for commonality is not high
- Factual differences between class members does not necessarily preclude satisfaction of commonality requirement
- Individualized damages inquires does not preclude class certification
- Commonality only requires that resolution of a class action affect all or a substantial number of the class members, and that the subject of the class action presents a question of common or general interest.
- “This core of the commonality requirement is satisfied if the questions linking the class members are substantially related to the resolution of the litigation, even if the individuals are not identically situated.”
Recent Florida Supreme Court Decision
Analyzing Class Action Requirements (cont.)

**Predominance**

- Claims of plaintiff and the class pervade the individualized claims because they are based on the common question of whether the defendant engaged in a common course of conduct and business practice that resulted in it overcharging class members in violation of Florida law, which is a claim that required generalized, class-wide proof.

- A class representative establishes predominance if he or she demonstrates a reasonable methodology for generalized proof of class-wide impact.

- A class representative accomplishes this if he or she, by proving his or her individualized case, *necessarily* proves the cases of the class members (emphasis in original).

- It is not the burden of the class representative to illustrate that all questions of fact or law are common. Rather the class representative must only demonstrate that some questions are common and that they predominate over individual questions.
• **Richard P. Lawson** is the Director of the Economic Crimes Division, Office of the Florida Attorney General. He comes from the law firm of Gardner Brewer Martinez-Monfort, where he practiced in the areas of white collar criminal defense, commercial litigation and general criminal defense. He has served as a Special Assistant United States Attorney in the Southern District of New York, Deputy Chief of the Economic Crime Unit for the Hillsborough County State Attorney’s Office, and as an Assistant District Attorney with the Bronx District Attorney’s Office. Lawson’s prosecutorial experience includes RICO cases involving prostitution and internet-based gambling operations, computer-based crimes involving trade secret theft allegations, child pornography cases, and cases involving identity theft and embezzlement. He received his undergraduate degree from the University of Florida, and his law degree from Florida State University. Lawson is a Tampa native and lives there with his wife, Robin, and their three children. *The views expressed are his alone, and not those of the Office of the Attorney General or of Attorney General Pamela Jo Bondi.*
Victoria A. Butler is the Bureau Chief for the Economic Crimes Division’s office in Tampa. Prior to joining the Office of the Attorney General, she was Deputy Court Counsel for the 13th Judicial Circuit, Florida, and was a law clerk to the Honorable Steven D. Merryday, U.S. District Court Judge for the Middle District of Florida. She is the immediate past chair of the Florida Bar’s Consumer Protection Law Committee. Victoria is a 1990 graduate of the Stetson University College of Law, and received her B.A. from Wheaton College. The views expressed are hers alone, and not those of the Office of the Attorney General or of Attorney General Pamela Jo Bondi.
Richard E. Doran is a shareholder in the Tallahassee law firm of Ausley & McMullen P. A. He joined the firm in 2003 after completion of his term as Florida’s 34th Attorney General. Prior to his appointment, Richard served five years as Florida's Chief Deputy Attorney General where he supervised nearly four hundred lawyers and oversaw all major litigation, including the state’s consumer fraud investigations of Ford Motor Company, Rite Aid, MCI, Firestone, Major League Baseball and Excide Battery. Richard’s practice focuses on state government regulation and civil litigation, with an emphasis on investigations by the consumer protection units of state attorney general offices, including matters in the home improvement, rental car, hotel, telecommunications, mortgage finance, and electronic communication industries. Richard is admitted to practice before the United States Supreme Court, the Florida Supreme Court, the Eleventh Circuit Court of Appeals, and all federal district courts in Florida. He is counsel of record in over 200 reported appellate cases. A more complete bio is found at: http://www.ausley.com/attorney_profile.cfm?id=32
John A. Yanchunis practices in Morgan & Morgan’s Tampa, Florida office. He works in the firm’s National Consumer Class Action and Mass Tort Department, and focuses his practice on consumer class action litigation. Prior to joining Morgan & Morgan in 2011, Mr. Yanchunis was a senior partner at James, Hoyer, Newcomer, Smiljanich & Yanchunis, P.A., where he managed the firm’s nationwide consumer class action department. Mr. Yanchunis has served as co-lead counsel in the successful prosecution of the two largest class action cases in the United States: *Fresco v. Automotive Directions, Inc.*, Case No. 03-61063-JEM et al, and *Fresco v. R.L. Polk*, Case 0:07-cv-60695-JEM (Southern District of Florida). Additionally, he has served as lead, co-lead, or class counsel in numerous class actions in a wide variety of areas affecting consumers, including but not limited to antitrust, defective products, life insurance, annuities and unfair and deceptive acts and practices. Mr. Yanchunis is admitted to practice in Florida and Texas. He received his Bachelor’s degree from the University of Florida in 1976, and his Juris Doctor from the South Texas College of Law in 1980, where he graduated magna cum laude.
Bruce Hoffman, a former Deputy Director of the FTC's Bureau of Competition, is the head of Hunton & Williams' antitrust and competition practice. He has extensive experience with antitrust and unfair competition matters, including merger review, government investigations and litigation. He also represents clients in unfair competition and deceptive trade practices investigations and litigation involving state and federal government enforcers as well as private litigants. Mr. Hoffman received a J.D. with High Honors from the University of Florida College of Law. He earned a BA from Penn State University.

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