THE CONSUMER LAW BENCH BOOK

Presented by:

THE CONSUMER PROTECTION LAW COMMITTEE

A Standing Committee of The Florida Bar

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# TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 6

II. CONTRIBUTIONS AND ACKNOWLEDGMENTS ......................................................... 6

III. FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT ............................. 8
   A. Purpose ..................................................................................................................... 8
   B. Deceptive Act or Unfair Practice ........................................................................... 8
   C. Elements .................................................................................................................. 9
      1. In General ............................................................................................................ 9
      2. Actual Damages .................................................................................................. 9
      3. Declaratory or Injunctive Relief ....................................................................... 9
   D. Application ............................................................................................................. 10
   E. Distinguished from Claim for Fraud .................................................................... 10
   F. Provisions for Enforcing Authorities ................................................................... 10
      1. Defined ............................................................................................................... 10
      2. Investigative Powers of Enforcing Authority ................................................... 10
      3. Condition Precedent for Enforcing Authority Action ...................................... 11
      4. Remedies of Enforcing Authority .................................................................... 11
      5. Civil Penalties ................................................................................................. 11
   G. Limitations ............................................................................................................ 11
   H. Defenses ............................................................................................................... 11
   I. Exemptions ............................................................................................................ 12

IV. AUTO SALES AND FINANCE .................................................................................. 12
   A. Overview ............................................................................................................... 12
   B. Pre-Sale Disclosures and Warranties ................................................................... 12
      1. Pre-Sale Disclosures: Window Stickers ........................................................... 12
      2. Warranty of Title ............................................................................................... 13
      3. Express Warranties ......................................................................................... 13
      4. Implied Warranties ......................................................................................... 14
      5. Magnuson Moss Warranty Act ....................................................................... 15
      6. Remedies for Breach of Warranty .................................................................... 16
   C. Motor Vehicle Financing and Leasing ................................................................. 16
      1. In General .......................................................................................................... 16
      2. Financing a Vehicle Purchase ........................................................................... 17
         a. In General .................................................................................................... 17
         b. The Truth in Lending Act and Regulation Z ............................................... 17
         c. Florida Motor Vehicle Retail Sales Finance Act ....................................... 18
      3. Leasing a Motor Vehicle ............................................................................... 18
         a. In General .................................................................................................... 18
b. The Consumer Leasing Act and Regulation M .................................. 18
  c. Florida Motor Vehicle Lease Disclosure Act .................................. 19
D. Unfair or Deceptive Acts or Practices Specific to Motor Vehicles .... 20
  1. In General .................................................................................. 20
  2. Applicability ............................................................................. 20
  3. Presuit “Demand Letter” ......................................................... 20
  4. Attorney’s Fees ....................................................................... 21
E. Other Common Claims Arising from Car Sales .............................. 22
  1. Breach of Contract ................................................................. 22
  2. Fraud and Misrepresentation .................................................... 22
  3. Odometer Tampering ............................................................... 23
  4. Revocation of Acceptance ....................................................... 23
  5. Dealer Bond Claims ............................................................... 24
V. LEMON LAW .................................................................................. 25
A. Overview .................................................................................... 25
B. Elements .................................................................................... 25
C. Presumptions ............................................................................. 25
D. The Process ............................................................................... 26
E. Remedies ................................................................................... 27
F. Appeals and Fees ..................................................................... 28
G. Final Thoughts .......................................................................... 28
VI. CREDIT CARD ACTIONS ............................................................. 29
A. Causes of Action ................................................................. 29
B. Defenses/Sufficiency of Complaint .......................................... 30
  1. Conditions Precedent ............................................................. 30
    a. Cost Bond ........................................................................... 30
  2. Documents ............................................................................. 30
C. Discovery — Evidence of Assignment ......................................... 31
D. Prevailing Party Fees on Quasi-Contract COA ............................. 32
VII. RESIDENTIAL EVICTIONS .......................................................... 33
A. Grounds for Eviction ............................................................... 33
B. Conditions Precedent/Presuit Notices ....................................... 33
C. Tenant’s Defenses .................................................................... 35
  1. Condition Precedent to Raising Defenses — Deposit of Rent .... 35
  2. Defenses — § 83.60, Fla. Stat. ................................................. 35
  3. Effect of Dismissal of Eviction Action ..................................... 36
D. Security Deposit — See generally § 83.49, Fla. Stat. ................. 37
  1. Effect ....................................................................................... 37
2. Requirements of Notice of Landlord’s Intent to Impose Claim on Security Deposit .......................................................... 37
3. Failure to Satisfy Requirements ........................................... 37
E. Attorney’s Fees .................................................................... 38
F. Removal of Tenant’s Personal Property Post-Eviction — §§ 83.67(5) and § 715.104, Fla. Stat. ........................................... 38

VIII. FLORIDA CONSUMER COLLECTION PRACTICES ACT .......... 39
A. Scope/Purpose ..................................................................... 39
B. Elements ............................................................................ 39
C. Standard ............................................................................... 39
D. Definitions .......................................................................... 40
E. Collection Activity ............................................................... 40
F. Prohibited Acts .................................................................... 42
G. Actual Knowledge ............................................................... 42
H. Bona Fide Error Defense ..................................................... 42
I. Enforcement ......................................................................... 42
J. Statute of Limitations ........................................................... 43
K. Damages .............................................................................. 43
L. Injunctive Relief ................................................................... 43
M. Proposals for Settlement .................................................... 43

IX. HOMEOWNER’S AND CONDOMINIUM ASSOCIATION ISSUES 44
A. In General ........................................................................... 44
B. Injunctions/Emergency Relief .............................................. 44
   1. In General ........................................................................ 44
      a. Procedure .................................................................. 44
      b. Restrictive Covenants ............................................... 44
      c. Bond Requirement for Injunctions .............................. 45
   2. Presuit Mediation for HOA Disputes Under § 720.311, Fla. Stat..... 45
   3. Claims Against HOA Board of Directors ....................... 46
   4. Association Foreclosures ................................................ 46
   5. Official Records of Condominium Associations ................ 47

X. HOME SOLICITATION SALES ................................................. 47
A. Overview ............................................................................. 47
B. Scope .................................................................................. 48
   1. In General ....................................................................... 48
   2. The Florida Act .............................................................. 48
   3. The Federal Rule ............................................................. 48
C. Substantive Requirements .................................................. 49
   1. The Florida Act .............................................................. 49
2. The Federal Rule .......................................................................................... 51
D. Remedies...................................................................................................... 53
I. INTRODUCTION

The Consumer Protection Law Committee of The Florida Bar has undertaken the preparation of this Bench Manual as an aid and resource to Florida judges who deal with consumer law issues. In an effort to keep the manual usable, each section has been condensed to the most prominent issues for the topical areas. It is our goal to add additional topics each year, to update the prior topics as case law is reported, and to solicit feedback from the judiciary that will enable this committee to continue improving this resource from year to year.

II. CONTRIBUTIONS AND ACKNOWLEDGMENTS

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This manual has been drafted over several years with changing membership from the Committee. The following is a non-exhaustive list of contributing authors:

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III. FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

A. Purpose


The purpose of FDUTPA is to simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices; 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; and to make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection. § 501.202, Fla. Stat.

B. Deceptive Act or Unfair Practice

Florida has adopted the FTC definition of a deception as an act or practice that is likely to deceive a consumer acting reasonably under the circumstances. See PNR, Inc v. Beacon Property Management, 842 So. 2d 773, 777 (Fla. 2003). The Florida Supreme Court and the Eleventh Circuit have held the test for deception to be an objective test to be weighed by a jury. Id.; Democratic Republic of the Congo v. Air Capital Group, LLC, 614 Fed. Appx. 460, 471 (11th Cir. 2015).

Following the FTC’s 1964 policy directive re: an “unfair practice,” the Florida Supreme Court held that an act or practice is “unfair” when it “offends established public policy and is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers.” PNR, Inc v. Beacon Property Management, 842 So. 2d 773, 777 (Fla. 2003). More recently, in Porsche Cars North America, Inc. v. Diamond, 140 So. 3d 1090, 1098 (Fla. 3d DCA 2014), review denied, 157 So. 3d 1042 (Fla. 2014), the Third District Court of Appeal adopted the revised definition of unfairness from the FTC’s 1980 policy directive. Under this definition the injury to the consumer (1) must be substantial; (2) must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and (3) must be an injury that consumers themselves could not reasonably have avoided.
C. Elements

1. In General

Section 501.202 does not set forth the elements of a claim; thus the elements for private litigants have been derived from case law. FDTUPA claims for relief by a private litigant and the enforcing authority include actions for actual damages, declaratory judgment, or injunctive relief. The elements for each claim are different.

2. Actual Damages

For private litigants who have suffered a loss and are seeking actual damages, the majority of courts have established the following elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. E.g., Mazzeo v. Nature’s Bounty, Inc., 2015 WL 1268271, at *3–*4 (S.D. Fla. 2015); KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008); Rollins, Inc. v. Butland, 951 So. 2d 860, 869 (Fla. 2d DCA 2006), review denied, 962 So. 2d 335 (Fla. 2007). There is an apparent split of authority on whether the element of causation requires proof of reliance on a deceptive act or practice. Davis v. Powertel, Inc., 776 So. 2d 971, 975 (Fla. 1st DCA 2001); cf. Philip Morris USA Inc. v. Hines, 883 So. 2d 292, 294 (Fla. 4th DCA 2003), as clarified on denial of reh’g (Oct. 6, 2004).

Generally, the measure of actual damages is the difference in market value of the product or service as it was delivered, compared to its value as contracted. Rollins, Inc. v. Heller, 454 So. 2d 580, 584 (Fla. 3d DCA 1984), review denied, 461 So. 2d 114 (Fla. 1985). Actual damages do not include consequential damages under FDUTPA. Fort Lauderdale Lincoln Mercury, Inc. v. Corgnati, 715 So. 2d 311, 315 (Fla. 4th DCA 1998). The enforcing authority may also obtain consumer restitution. Outreach Housing, LLC v. Office of the Attorney General, Department of Legal Affairs, 221 So. 3d 671, 676 (Fla. 4th DCA 2017). The appropriate measure for restitution is the benefit unjustly received by the defendants. F.T.C. v. Verity Intern., Ltd., 443 F.3d 48, 67 (2d Cir. 2006).

3. Declaratory or Injunctive Relief

Any individual “aggrieved” by a violation of FDUTPA may bring an action for a declaratory judgment or for an injunction. § 501.211, Fla. Stat. To bring a claim for injunctive or declaratory relief, the plaintiff must show (1) a deceptive act or unfair practice, and (2) that the plaintiff is a person aggrieved by the deceptive

When the enforcing authority seeks declaratory or injunctive relief it is not required to plead actual damages or to identify the consumers on whose behalf it is litigating. *State v. Beach Blvd Automotive Inc.*, 139 So. 3d 380, 394 (Fla. 1st DCA 2014); *Taubert v. State, Office of Atty. Gen.*, 79 So. 3d 77, 79 (Fla. 1st DCA 2012). Cf. *Outreach Housing, LLC v. Office of the Attorney General, Department of Legal Affairs*, 221 So. 3d 691, 697 (Fla. 4th DCA 2017).

D. Application

In 2003, the Florida Supreme Court held that “the FDUTPA applies to private causes of action arising from single unfair or deceptive acts 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. v. Beacon Property Management*, 842 So. 2d 773, 777 (Fla. 2003) (emphasis added).

E. Distinguished from Claim for Fraud

FDUTPA has been distinguished from a claim for fraud in that the plaintiff need not prove actual reliance, at least in a case where the alleged misrepresentation consists of remaining silent instead of making an affirmative misrepresentation. *Davis v. Powertel, Inc.*, 776 So. 2d 971, 974 (Fla. 1st DCA 2000), review denied, 794 So. 2d 605 (Fla. 2001). There is an apparent split among the Florida DCAs as to whether reliance is required in the event of an affirmative misrepresentation. *Egwuatu v. South Lubes, Inc.*, 976 So. 2d 50, 52 (Fla. 1st DCA 2008).

F. Provisions for Enforcing Authorities

1. Defined

The enforcing authority is defined as the office of the state attorney if the violation occurs in one judicial circuit. If the violation occurs in or affects multiple circuits, or if the state attorney defers in writing or fails to act on a violation within 90 days of a written complaint, the enforcing authority is defined as the Attorney General’s Department of Legal Affairs. § 501.203(2), Fla. Stat.

2. Investigative Powers of Enforcing Authority
The enforcing authority may subpoena witnesses or matter and collect evidence when it has reason to believe a person is engaging in practices that violate FDUTPA. § 501.206, Fla. Stat.

3. Condition Precedent for Enforcing Authority Action

As a condition precedent for an enforcing authority action, the head of the enforcing authority must review the matter and determine in writing that the enforcement action serves the public interest. § 501.207(2), Fla. Stat.

4. Remedies of Enforcing Authority

The enforcing authority may seek a declaratory judgment that an act or practice violates FDUTPA, an injunction against any person who has violated, is violating, or is likely to violate FDUTPA, and/or damages on behalf of consumers. § 501.207(1), Fla. Stat. In any action brought under FDUTPA, the enforcing authority may also seek legal, equitable, and other appropriate relief, including reimbursement for consumers. § 501.207(1) and (3), Fla. Stat. The enforcing authority may also obtain consumer restitution. Outreach Housing, LLC v. Office of the Attorney General, Department of Legal Affairs, 221 So. 3d 691, 697 (Fla. 4th DCA 2017).

5. Civil Penalties

The enforcing authority may seek up to $10,000 for each willful violation of FDUTPA and up to $15,000 for each willful violation against a senior citizen or person with a disability, or for willful actions directed at a military service member or family member of a military service member. Willful violations occur when the person knew or should have known that his or her conduct was deceptive or unfair. §§ 501.2075–501.2077, Fla. Stat.

G. Limitations

The enforcing authority’s statute of limitations is four years after the occurrence of a violation or two years after the last payment in a transaction involved in a violation, whichever is later. § 501.207(5), Fla. Stat.

The statute of limitations for private litigants is not expressly defined within the statute, and therefore defaults to section 95.11(3)(f), Florida Statutes, which provides a four-year limitation on “[a]n action founded on a statutory liability.”

H. Defenses
Defenses set out in the statute, as of November, 2016, include a “good faith defense” (§ 501.211(2), Fla. Stat.): “In any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney’s fees and court costs as provided in s. 501.2105. However, damages, fees, or costs are not recoverable under this section against a retailer who has, in good faith, engaged in the dissemination of claims of a manufacturer or wholesaler without actual knowledge that it violated this part.”

I. Exemptions

FDUTPA does not apply to several different entities. Section 501.212, Florida Statutes, lists multiple entities that are not covered by FDUTPA. Some examples are: any person regulated by the Office of Insurance Regulation; banks regulated by the Office of Financial Regulation; and any person regulated by the Department of Financial Services. Notably, neither nonprofits nor attorneys are exempt under FDUTPA.

IV. AUTO SALES AND FINANCE

A. Overview

Buying or leasing a motor vehicle is one of the largest investments many consumers will ever make. Consumer claims relating to auto sales deal with the condition of the vehicle, financing disclosures, vehicle status and pricing disclosures, bait-and-switch tactics, and other claims.

B. Pre-Sale Disclosures and Warranties

1. Pre-Sale Disclosures: Window Stickers

All new cars must have the “Monroney sticker” attached to their windshield or side windows, which must include the vehicle’s identification number, manufacturer’s suggested retail price for the vehicle and its options, safety ratings, and other information. 15 U.S.C. § 1232; 49 C.F.R. § 575.301. There are additional disclosure requirements relating to many other vehicle aspects, including safety and compliance with federal standards, tire pressure and ratings, weight and load ratings, fuel efficiency, and many other matters. See generally 49 C.F.R. part 575.

All used cars sold by a dealer must contain a “Buyers Guide,” sometimes referred to as a used-car “window sticker.” The content of this form is prescribed in detail by federal law. 16 C.F.R. § 455.2. The dealer must disclose whether the car is
being sold with or without an express warranty. *Id.* If the dealer provides a warranty requiring the consumer to pay a portion of the repair costs, such as in a Buyers Guide, the method of determining the percentage of repair costs to be assumed by each party must also be disclosed. § 501.976(6), Fla. Stat.

It is not sufficient for the dealer to provide this form to the consumer when the documents are signed; instead, the “Buyers Guide shall be displayed prominently and conspicuously in any location on a vehicle and in such a fashion that both sides are readily readable.” 16 C.F.R. § 455.2(a)(1). Failure to comply with this requirement, or other requirements of that section, is automatically an unfair act or practice. 16 C.F.R. § 455.1. As such, it is also a per se violation of the Florida Deceptive and Unfair Trade Practices Act. §501.203(3), Fla. Stat.

2. Warranty of Title

Under the Florida UCC, every contract for the sale of a vehicle includes a warranty of title, that the title is good, its transfer is rightful, and that the goods are free of any undisclosed security interest, lien, or other encumbrance. § 672.312, Fla. Stat. This warranty is exceedingly difficult to disclaim; even in writing. *Lawson v. Turner*, 404 So. 2d 424, 425 (Fla. 1st DCA 1981).

3. Express Warranties

Express warranties can arise from written warranties. However, express warranties are much broader than the typical written warranty, and can be created in any of the following ways:

- Any affirmation of fact or promise made by the seller to the buyer that relates to the goods and becomes part of the basis of the bargain.
- Any description of the goods that is made part of the basis of the bargain.
- Any sample or model that is made part of the basis of the bargain.

§ 672.313(1), Fla. Stat.

It is not necessary that words such as “warrant” or “guarantee” be used in order to create an express warranty. § 672.313(2), Fla. Stat. If there is an inconsistency between words or conduct that creates an express warranty and an attempted disclaimer or limitation of that warranty, the disclaimer or limitation is ineffective. § 672.316, Fla. Stat.
4. Implied Warranties

A warranty of merchantability is implied into every contract unless it is properly excluded or modified. § 672.314(1), Fla. Stat. An implied warranty of merchantability may also arise from a course of dealing or usage of trade. § 672.314(3), Fla. Stat. To be “merchantable,” the vehicle must pass without objection in the trade, be of fair average quality, and be fit for its ordinary purposes. § 672.314(2), Fla. Stat.

An implied warranty of fitness for a particular purpose may arise if the dealer has reason to know of the consumer’s particular purpose for the vehicle and that the consumer is relying on the dealer’s skill or judgment to select or furnish the vehicle. § 672.315, Fla. Stat.

Dealers often attempt to disclaim or modify implied warranties, often by using “as is” clauses. However, there are many circumstances where such disclaimers are ineffective:

- The dealer may not disclaim or modify an implied warranty if it makes any written warranty to the consumer. 15 U.S.C. § 2308(a).

- The dealer may not disclaim or modify an implied warranty if it enters into a service contract for that vehicle within 90 days of its sale date. Id.

- An “as is” clause or other attempted disclaimer does not necessarily defeat a claim for fraud in the inducement. E.g., D & M Jupiter, Inc. v. Friedopfer, 853 So. 2d 485, 489 (Fla. 4th DCA 2003) (“We take from that holding that where there is fraudulent inducement of a contract, the fraudulent misrepresentation vitiates every part of the contract, including any ‘as is’ clause”); Jackson v. Shakespeare Foundation, Inc., 108 So. 3d 587, 596 (Fla. 2013); Tinker v. De Maria Porsche Audi, Inc., 459 So. 2d 487, 491–492 (Fla. 3d DCA 1984); Lou Bachrodt Chevrolet, Inc. v. Savage, 570 So. 2d 306 (Fla. 4th DCA 1990).

- An oral express warranty based on statements by a dealer’s employee may be sufficient to overcome an “as is” disclaimer. Knipp v. Weinbaum, 351 So. 2d 1081 (Fla. 3d DCA 1977).

- Any disclaimer of the implied warranty of merchantability must actually use the word “merchantability” and must be conspicuous. § 672.316(2),
Any disclaimer of the implied warranty of fitness for a particular purpose must be in writing and must be conspicuous. § 672.316(2), Fla. Stat.

If it is unreasonable to construe express and implied warranties as being consistent and cumulative, the intention of the parties shall determine which warranty is dominant. § 672.317, Fla. Stat.

Any limitation of remedies for breach of implied warranties is presumed to be optional unless the contract expressly notes they are intended to be exclusive. § 672.719(1)(b), Fla. Stat.

Where circumstances cause an exclusive or limited remedy to fail of its essential purpose, any exclusions or limitations are ineffective. § 672.719(2), Fla. Stat.

Whether a particular disclaimer is conspicuous depends on factual circumstances, including the use of capital letters, font contrasting with surrounding text, larger font size, different color, contrast to surrounding text, set-off from surrounding text, the timing of the disclosure, the location within the document, proximity to signature, and use of a separate paragraph. § 671.201(10), Fla. Stat.; Bert Smith Oldsmobile, Inc. v. Franklin, 400 So. 2d 1235, 1237 (Fla. 2d DCA 1981); Rehurek v. Chrysler Credit Corp., 262 So. 2d 452 (Fla. 2d DCA 1972); Orange Motors of Coral Gables, Inc. v. Dade County Dairies, Inc., 258 So. 2d 319, 320 (Fla. 3d DCA 1972); Rudy's Glass Const. Co. v. E. F. Johnson Co., 404 So. 2d 1087 (Fla. 3d DCA 1981); Hirsch v. Klosters Rederi A/S, 521 So. 2d 316 (Fla. 3d DCA 1988).

5. Magnuson Moss Warranty Act

The federal Magnuson Moss Warranty Act (“MMWA”) creates important rights for consumers who purchase products, including automobiles. 15 U.S.C § 2301 et seq. The MMWA requires the conspicuous disclosure of the terms and conditions of any written warranty prior to the sale, including the parts covered, remedies, what the warrantor will do, duration of the warranty, any exceptions or exclusions, procedure for obtaining warranty service, and other terms. 15 U.S.C. § 2302; 16 C.F.R. part 702. All warranties must be conspicuously designated as either a full warranty or a limited warranty. 15 U.S.C. § 2303.
To meet the federal minimum standards for a written warranty, the product must be remedied within a reasonable time and without charge. 15 U.S.C. § 2304(a)(1). No duration on implied warranties is permitted. 15 U.S.C. § 2304(a)(2). Any exclusion or limitation of consequential damages must be conspicuous on the face of the warranty. 15 U.S.C. § 2304(a)(3). If the product is not fixed after a reasonable number of attempts, the dealer must permit the consumer to elect a refund or replacement. 15 U.S.C. § 2304(a)(4).

If a written warranty is provided to the consumer or if the seller enters into a service contract within 90 days of the date of sale of the vehicle, the warrantor may not disclaim any implied warranty for the vehicle. 15 U.S.C. §2308(a). However, if certain conditions are met, implied warranties may be limited to the duration of the written warranty. 15 U.S.C. § 2308(b). Any disclaimer, modification or limitation that violates the MMWA is ineffective, including for purposes of state law. 15 U.S.C. § 2308(c); § 501.976(6), Fla. Stat.

There is a private right of action by a consumer who is damaged as a result of a violation of the Magnuson Moss Warranty Act. 15 U.S.C. §2310(d). A violation of a written warranty, implied warranty, or service contract is also a violation of the MMWA. 15 U.S.C. § 2310(d)(1).

6. Remedies for Breach of Warranty

The remedy for a dealer’s breach of warranty includes the remedies typically available under the UCC, including the difference in the value of goods as delivered versus as promised, cover damages or benefit of the bargain damages, and, in a proper case, incidental and consequential damages. §§ 672.711–672.715, Fla. Stat. Where the vehicle was unique, the remedies available to a consumer include specific performance and replevin. § 672.716, Fla. Stat.

In addition, many warranty issues also constitute a violation of the FUDTPA, sections 501.976(6), (7), and (8), Florida Statutes. Remedies for violation of that statute include actual damages, attorney’s fees and costs, and declaratory and injunctive relief. §§ 501.2105 and 501.211, Fla. Stat.

Remedies for violations of the Magnuson Moss Warranty Act include damages, and other legal or equitable relief, as well as reasonable attorney’s fees and costs. 15 U.S.C. § 2310(d).

C. Motor Vehicle Financing and Leasing

1. In General
Although some consumers purchase vehicles (especially used cars) by paying for them in full at the time of purchase, others enter into financing agreements to pay them off by making periodic payments. Still other consumers choose to lease rather than purchase their vehicles. Federal law and Florida law prescribe strict requirements on disclosure of the terms of such financing. The federal statutes are also supported by federal regulations relating to the financing and leasing of motor vehicles.

2. Financing a Vehicle Purchase
   a. In General

The Truth in Lending Act (“TILA”) is the primary federal statute governing the financing of a motor vehicle purchase. 15 U.S.C. § 1601 et seq. Regulation Z is the federal regulation that implements TILA. The Florida counterpart to TILA is the Motor Vehicle Retail Sales Finance Act (“MVRSFA”). §§ 520.01–520.10, 520.12, 520.125, and 520.13, Fla. Stat.

   b. The Truth in Lending Act and Regulation Z

In 1968, Congress enacted TILA to promote the informed use of consumer credit. TILA is “a transition in congressional policy from a philosophy of ‘Let the buyer beware’ to one of ‘Let the seller disclose.’” Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973). TILA’s purpose is “to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.” 15 U.S.C. § 1601(a). The Federal Reserve Board promulgated Regulation Z to help implement TILA. The Federal Reserve Board also published official staff commentary which “is dispositive in TILA cases unless the commentary is demonstrably irrational.” Gregory v. Metro Auto Sales, Inc., 158 F. Supp. 3d 302, 306 (E.D. Pa. 2016); Regulation Z similarly serves “to promote the informed use of consumer credit by requiring disclosures about its terms and cost.” 12 C.F.R. § 1026.1(b). Regulation Z requires companies that provide credit to disclose any “finance charge” for the credit. 12 C.F.R. § 1026.18. A “finance charge” is “the dollar amount the credit will cost.” Id.

TILA applies to consumer credit transactions, meaning “primarily for personal, family, or household purposes.” 15 U.S.C. § 1602(i); 12 C.F.R. § 1026.2(a)(12). It applies not only to transactions where interest is charged, but also to any
transaction payable by written agreement in more than four installments. 15 U.S.C. § 1602(g)(1); 12 C.F.R. § 1026.2(a)(17)(i).

Both TILA and Regulation Z contain detailed requirements of the financial disclosures that must be made to a consumer purchasing a motor vehicle on credit. For example, TILA mandates the use of certain specific terms and their accurate disclosure, including “amount financed,” “finance charge,” “annual percentage rate,” “total of payments,” and “total sale price.” 15 U.S.C. § 1638(a)(2)–(a)(5) and (a)(7). The creditor must also disclose the number, amount, and due dates or period of payments required to repay the loan. 15 U.S.C. § 1638(a)(6). All required information must be “disclosed clearly and conspicuously.” 15 U.S.C. § 1632(a).

Failure to comply with TILA entitles a consumer to recover actual damages, statutory damages of twice the finance charge (subject to minimum and maximum amounts), costs, and fees. 15 U.S.C. § 1640(a)(1), (a)(2)(A), (a)(3).

c. Florida Motor Vehicle Retail Sales Finance Act

Florida has passed an analogous statute referred to as The Motor Vehicle Retail Sales Finance Act (“MVRSFA”). §§ 520.01–520.10, 520.12, 520.125, and 520.13, Fla. Stat. The MVRSFA also mandates disclosure of many financing terms and noticing requirements. E.g., § 520.07, Fla. Stat. However, this statute also imposes substantive limits on finance charges, which vary depending on whether the vehicle is new or used, and the vehicle age. § 520.08, Fla. Stat. A statutory penalty equal to the sum of the finance charge and delinquency fees can be imposed for willful violations. § 520.12, Fla. Stat.

3. Leasing a Motor Vehicle

a. In General

To ensure consumers can make informed leasing decisions, federal and state statutes and regulations governing lease transactions, including the federal Consumer Leasing Act (Chapter 5 of the Truth in Lending Act), Regulation M; the Florida Motor Vehicle Lease Disclosure Act; the Florida Deceptive and Unfair Trade Practices Act, and other laws.

b. The Consumer Leasing Act and Regulation M

In 1976, Congress enacted the Consumer Leasing Act (“CLA”), 15 U.S.C. § 1667 et seq., as an amendment to TILA, in response to an emerging trend toward
leasing motor vehicles as an alternative to installment credit sales. 15 U.S.C. § 1601(b). The CLA extends TILA’s disclosure requirements to consumer leases. *Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1280 (11th Cir. 2002). Its purpose is “to assure a meaningful disclosure of the terms of leases . . . so as to enable the lessee to compare more readily the various lease terms available to him, limit balloon payments in consumer leasing, enable comparison of lease terms with credit terms where appropriate, and to assure meaningful and accurate disclosures of lease terms in advertisements.” 15 U.S.C. § 1601(b) (emphasis added).

Like TILA, “the CLA is a consumer protection statute which ‘is remedial in nature and therefore must be construed liberally in order to best serve Congress’ intent.’” *Carmichael v. Nissan Motor Acceptance Corp.*, 291 F.3d 1278, 1280 (11th Cir. 2002) (quoting *Ellis v. General Motors Acceptance Corp.*, 160 F.3d 703, 707 (11th Cir. 1998)). Additionally, “[c]ourts have used the TILA’s definitions and general rules of construction, when possible, in interpreting the CLA” and applying it to consumer leases. *Id.* (citation omitted).

The specific required disclosures are set forth in § 1667a of the CLA and Regulation M, 12 C.F.R. part 213.1 If a lessor fails to comply with the law, a consumer may bring an individual or class action to recover actual damages, statutory damages, and attorney’s fees and costs. 15 U.S.C. § 1640(a). Or an action may be brought by an appropriate state attorney general. 15 U.S.C. § 1640(e). Any action must be brought “within one year of the termination of the lease agreement.” 15 U.S.C. § 1667d(c). Unintentional violations or bona fide errors, however, may be a defense to liability if the violator maintained “procedures reasonably adapted to avoid any such error” and certain other conditions are met. 15 U.S.C. § 1640(c).

c. Florida Motor Vehicle Lease Disclosure Act

Florida Motor Vehicle Lease Disclosure Act also imposes disclosure requirements on motor vehicle lessors. §§ 521.001–521.006, Fla. Stat. If a lessor violates the Act, a consumer may bring an individual or class action to recover actual damages, a civil penalty of up to $1,000 per lease transaction, and

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1 On July 21, 2011, the Dodd-Frank Act transferred rulemaking authority for the CLA from the Board of Governors of the Federal Reserve System to the Consumer Financial Protection Bureau. Although the CLA’s implementing regulation, Regulation M, was originally published as 12 C.F.R. part 213, the Bureau has since republished Regulation M as 12 C.F.R. part 1013. In applying Regulation M, courts should be guided by case law interpreting both 12 C.F.R. part 213 and 12 C.F.R. part 1013.
reasonable attorney’s fees and costs. The Act may also be enforced by Florida’s Department of Legal Affairs. § 521.006(3), Fla. Stat. Any action must be brought within one year from the date of the last payment under the lease. § 521.006(4), Fla. Stat. A “bona fide printing error,” may be a defense to liability. § 521.006(5), Fla. Stat.

D. Unfair or Deceptive Acts or Practices Specific to Motor Vehicles

1. In General

In addition to FDUTPA’s general prohibition against unfair or deceptive acts or practices, the Act also prohibits certain enumerated unfair or deceptive acts or trade practices specific to car dealers. § 501.976(1)–(19), Fla. Stat. These include misrepresenting the usage and status of the vehicle, misrepresenting the quality or condition of the vehicle, misrepresenting warranty coverage, failing to conspicuously disclose any warranty disclaimer, obtaining the consumer’s signature on forms that are not fully completed or which do not accurately reflect the negotiations or agreement, altering the odometer, and many other provisions.

2. Applicability

These prohibitions apply to a “motor vehicle dealer” as defined in section 320.27, Florida Statutes, but does not include a “motor vehicle auction” as defined in section 320.27(1)(c)4. § 501.975(2), Fla. Stat. “‘Vehicle’ means any automobile, truck, bus, recreational vehicle, or motorcycle required to be licensed under chapter 320 for operation over the roads of Florida, but does not include trailers, mobile homes, travel trailers, or trailer coaches without independent motive power.” § 501.975(5), Fla. Stat. (emphasis added). In addition to suing a dealer for a FDUTPA violation, suit may also be brought against the dealer’s “employees, agents, principals, sureties, and insurers.” § 501.98(1), Fla. Stat. See also, e.g., Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc., 123 So. 3d 1149 (Fla. 5th DCA 2012); Rensis v. State, Office of Atty. Gen., Dept. of Legal Affairs, 18 So. 3d 572, 575 n.2 (Fla. 1st DCA 2009); KC Leisure, Inc. v. Haber, 972 So. 2d 1069, 1073 (Fla. 5th DCA 2008); Home Loan Corp. v. Aza, 930 So. 2d 814, 815 (Fla. 3d DCA 2006); La Pesca Grande Charters, Inc. v. Moran, 704 So. 2d 710, 712 (Fla. 5th DCA 1998).

3. Presuit “Demand Letter”

Section 501.98, Florida Statutes, provides that if the dealer gave the consumer the written notice mandated by section 501.98, then the consumer claimant must
serve a written demand letter, return receipt requested, at least 30 days before initiating litigation. However, the demand letter requirement “does not apply to any action brought as a class action that is ultimately certified as a class action or to any action brought by the enforcing authority.” § 501.98(7), Fla. Stat. (emphasis added). The specific requirements of the demand letter are set forth in section 501.98(2). A “demand letter shall be deemed satisfactory if it contains sufficient information to reasonably put the dealer on notice of the nature of the claim and the relief sought.” Id.

A claimant may not sue a dealer for a FDUTPA claim “if, within 30 days after receipt of the demand letter, the dealer pays the claimant the amount sought in the demand letter, plus a surcharge of the lesser of $500 or 10 percent of the damages claimed.” § 501.98(4)(a), Fla. Stat.

A demand letter “expires 30 days after receipt by the dealer, unless renewed by the claimant,” and does not limit the damages that the claimant may seek in any subsequent proceeding. § 501.98(5), Fla. Stat. If a dealer pays the damages claimed in the demand letter, plus the mandatory surcharge, within 30 days after receipt of the demand letter, such payment: (a) does not constitute an admission of any wrongdoing or liability; (b) may not be introduced as evidence during any proceeding; and (c) releases the dealer from any other claims that could have been brought in connection with the specific transaction described in the demand letter, except for claims for damages that were not recoverable under FDUTPA. Id.

4. Attorney’s Fees

The party who prevails on a FDUTPA claim is generally entitled to reasonable attorney’s fees and costs from the nonprevailing party. § 501.2105(1), Fla. Stat. However, a dealer may not be liable for a claimant’s attorney’s fees if: (1) within 30 days after receipt of the demand letter, the dealer notifies the claimant in writing (and a court or arbitrator subsequently agrees) that the amount sought in the demand letter “is not reasonable in light of the facts of the transaction or event described in the demand letter or if [it] includes items and amounts not properly recoverable” under chapter 501, Consumer Protection; or (2) if the claimant “fails to sufficiently comply” with the demand letter requirement, although a demand letter “shall be deemed satisfactory if it contains sufficient information to reasonably put the dealer on notice of the nature of the claim and the amount and relief sought such that the dealer could appropriately respond.” § 501.98(4)(b), Fla. Stat.
E. Other Common Claims Arising from Car Sales

1. Breach of Contract

The elements of a breach of contract claim are offer, acceptance, consideration. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004). These claims may be based on a breach of either a written contract or an oral contract.

One common issue is whether the contract was modified after initial execution. For example, the parties may have orally agreed on a different payment schedule. It is now well established that “written contracts can be modified by subsequent oral agreement of the parties, even though the written contract purports to prohibit such modification.” *Pan American Engineering Co. v. Poncho’s Const. Co.*, 387 So. 2d 1052, 1053 (Fla. 5th DCA 1980). Accord *Husky Rose, Inc. v. Allstate Ins. Co.*, 19 So. 3d 1085, 1088 (Fla. 4th DCA 2009); *J. Lynn Const., Inc. v. Fairways at Boca Golf & Tennis Condominium Ass’n, Inc.*, 962 So. 2d 928, 930 (Fla. 4th DCA 2007). A written contract can also be modified by the course of dealing between the parties. *Kiwanis Club of Little Havana v. de Kalafe*, 723 So. 2d 838, 841 (Fla. 3d DCA 1999). Evidence of post-contract modifications is not barred by the parol evidence rule. *H. I. Resorts, Inc. v. Touchton*, 337 So. 2d 854, 855 (Fla. 2d DCA 1976). Whether the contract was modified, and the terms of any such modification, is usually a question of fact for the jury. *St. Joe Corp. v. McIver*, 875 So. 2d 375, 381 (Fla. 2004); Fla. Std. Jury Instr. (Cont. & Bus.) 416.13.

2. Fraud and Misrepresentation

Consumer claims relating to both new and used cars may include a claim for fraud and/or misrepresentation. The elements of common law fraud are: (1) a false statement concerning a material fact; (2) that the representor knew or should have known that the representation was false; (3) an intention that the representation induce another to act on it; and (4) consequent injury to the party acting in reliance on the representation. *Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d 587, 595 n.2 (Fla. 2013); *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So. 2d 489, 497 (Fla. 4th DCA 2001). Fraud relating to future promises is similarly actionable “where the promise to perform a material matter in the future is made without any intention of performing or made with the positive intention not to perform.” *Vance v. Indian Hammock Hunt & Riding Club, Ltd.*, 403 So. 2d 1367, 1371–1372 (Fla. 4th DCA 1981). Accord *Weaver v. State*, 981 So. 2d 508, 509 (Fla. 4th DCA 2008). A material omission can also form the basis for a fraudulent misrepresentation claim. See, e.g., *United States Fire Ins. Co. v. ADT*
3. Odometer Tampering

The primary federal statute dealing with odometer tampering is the Motor Vehicle Information and Cost Savings Act, better known as the “Odometer Act.” 49 U.S.C. § 32701 et seq. The federal Odometer Act is supplemented by additional regulations. E.g., 49 C.F.R. part 580. The federal Odometer Act prohibits odometer tampering, selling devices that alter a vehicle’s odometer, and even operating a vehicle knowing that its odometer is not working. 49 U.S.C. §§ 32703 and 32705. That Act also requires the disclosure of the vehicle’s mileage and odometer status when title is transferred, generally on the title itself, and prohibits false statements with those disclosures, 49 U.S.C. § 32705. The prohibitions extend to predecessors in the chain of title, even if the consumer had no direct dealings with them and is not in privity with them. E.g., Ryan v. Edwards, 592 F.2d 756 (4th Cir. 1979). Florida has adopted its own odometer statute that also prohibits unlawful acts relating to odometers and odometer tampering. § 319.35, Fla. Stat.

Vehicles more than ten years old are exempt from certain disclosure requirements (but not other requirements). 49 C.F.R. § 580.17(a)(3). However, if a seller chooses to make the disclosures even if the vehicle is exempt, the disclosures must then be “accurate and truthful.” Coleman v. Lazy Days RV Center, Inc., 2006 WL 889736 at *4 (M.D. Fla. 2006). Moreover, communications of a vehicle’s mileage, even in an advertisement, is sufficient to qualify as an odometer disclosure subject to the requirements and prohibitions of the federal Odometer Act. Ryan v. Edwards, 592 F.2d 756, 761 (4th Cir. 1979).

A private right of action exists for violations of the odometer laws. E.g., 49 U.S.C. § 32710. Under the federal Odometer Act, damages are trebled if the violation was made with intent to defraud. 49 U.S.C. § 32710(a). A prevailing consumer is also entitled to recover reasonable attorney’s fee and costs. 49 U.S.C. § 32710(b). Odometer claims are often brought in conjunction with other claims, including fraud, misrepresentation, breach of contract, FDUTPA, and others.

4. Revocation of Acceptance

Under the Uniform Commercial Code, a consumer purchasing a motor vehicle is entitled to revoke acceptance under certain circumstances. § 672.608, Fla. Stat. A
purchaser is allowed to revoke acceptance of the vehicle “whose nonconformity substantially impairs its value to him or her,” even though they previously accepted it if either of the following are met:

- The acceptance was based on “the reasonable assumption that the nonconformity would be cured and it has not been seasonably cured”; OR
- The purchaser did not discover the nonconformity and the acceptance was “reasonably induced either by the difficulty of discovery before acceptance or by the seller’s assurances.”

§ 672.608(1), Fla. Stat.

The revocation “must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects.” § 672.608(2), Fla. Stat.

5. Dealer Bond Claims

Under Florida law, each motor vehicle dealer must post a surety bond in the amount of $25,000 annually. § 320.27(10)(a), Fla. Stat. Pursuant to the statute, the bond covers only certain type of violations:

(1) The failure of the dealer to comply with the conditions of the written contract made by the dealer in connection with the sale or exchange of any motor vehicle; or

(2) The failure of the dealer to comply with any provision of chapter 319 of the Florida Statutes; or

(3) The failure of the dealer to comply with any provision of chapter 320 of the Florida Statutes.

§ 320.27(10)(b), Fla. Stat. There is no requirement that the consumer first obtain a judgment against the dealer before proceeding against the surety bond. § 320.27(10), Fla. Stat.; Snow v. Jim Rathman Chevrolet, Inc., 39 So. 3d 368 (Fla. 5th DCA 2010).

The actual terms of the bond may have broader scope, and their breach could lead to an additional breach of contract claim against the surety. A surety is also
considered to be an insurer, and is therefore subject to the Insurance Code. *Id.* Accordingly, a surety who issues a motor vehicle dealer bond is subject to the attorney’s fee statute applicable to other insurers, section 627.428, Florida Statutes. *Snow v. Jim Rathman Chevrolet*, supra, 39 So. 3d at 370–371. Moreover, a surety who fails to timely pay a claim against the bond is liable not only for the dealer’s misconduct, but also for its own misconduct in unreasonably delaying the payment. *Nichols v. Preferred Nat. Ins. Co.*, 704 So. 2d 1371, 1374 (Fla. 1998). In an action against the surety under such circumstances, the surety may be liable for the consumer’s attorney’s fees and costs even though they exceed the amount of the bond. *Id. at 1374–1375*. The delay that was found to be unreasonable in *Nichols* was 6 months.

V. LEMON LAW

A. Overview

Chapter 681, Florida Statutes, provides remedies for consumers who purchase or lease new or demonstrator motor vehicles with “nonconformities” that have not been corrected by the manufacturer, or its authorized service agent (typically a dealership), within a reasonable number of repair attempts. A “nonconformity” under the Lemon Law is defined as a defect or condition that substantially impairs the use, value, or safety of the vehicle, § 681.102(15), Fla. Stat., and can include problems such as faulty paint, leaks, and electrical or mechanical problems.

B. Elements

In order to qualify under the Lemon Law, the vehicle in question must have been sold (or leased) in Florida. The purchase must not have been for resale purposes and must fall into one of the following categories: (1) the vehicle is used for personal, family or household purposes; (2) the vehicle was acquired from the first owner for the same purposes during the first owner’s first 24 months of ownership; or (3) the owner or lessee is a person who is entitled to enforce the warranty. § 681.102(4), Fla. Stat.

C. Presumptions

Section 681.104(3) creates two presumptions for when a vehicle has not been repaired within “a reasonable number of attempts.” Under the first presumption, if a consumer has taken the vehicle to an authorized service agent for repair of the same nonconformity on at least three occasions, and the nonconformity has
not been repaired, then the vehicle owner or lessee must notify the manufacturer of the nonconformity in writing, by registered or express mail, in order to give the manufacturer a final opportunity to repair the defect. The manufacturer has 10 days from receipt of the notification to direct the vehicle owner or lessee to a reasonably accessible repair facility. After the vehicle is delivered to the repair facility, the manufacturer has no more than 10 days to fix the nonconformity (45 days for a recreation vehicle). If the manufacturer fails to correct the nonconformity, the vehicle is presumed to be a lemon.

Under the second presumption, if a consumer’s vehicle is out of service for repair of one or more nonconformities for a cumulative total of 15 or more days, the vehicle owner or lessee must send written notification of this fact to the manufacturer by registered or express mail. After receipt of the notification, the manufacturer or authorized service agent (usually the dealer) must have at least one opportunity to inspect and to repair the vehicle. Once the vehicle is out of service by reason of repair of one or more nonconformities for a cumulative total of 30 days (60 days for a recreation vehicle), the vehicle is presumed to be a lemon.

D. The Process

When providing the statutory written notification to the manufacturer, consumers should use the Motor Vehicle Defect Notification form found in the “Consumer Guide to the Florida Lemon Law” booklet. State law requires the selling/leasing dealer to provide this booklet to the consumer at the time the vehicle is acquired, and the guide may be requested via the Lemon Law Hotline at (800) 321-5366. The form also can be found online at the Attorney General’s website, http://www.myfloridalegal.com/lemonlaw.

In order to qualify for relief under the Lemon Law, there are certain steps that must be taken by the vehicle owner or lessee.

If the manufacturer has in effect a state-certified informal dispute settlement program, and the owner or lessee has been informed in writing how and where to file a claim with the program, then the owner or lessee must first seek relief through the certified informal dispute settlement program. This information is typically found in the vehicle’s warranty booklet or owner’s manual. If the manufacturer’s certified informal dispute settlement program does not decide the dispute within 40 days of the date the dispute is filed, or if the owner or lessee is not satisfied with the decision, the vehicle owner or lessee can then apply to the Florida Attorney General’s Office to have the dispute arbitrated by the Florida
New Motor Vehicle Arbitration Board. If the manufacturer does not have a state-certified informal dispute settlement program, the vehicle owner or lessee can apply directly to the Florida Attorney General’s Office to have the dispute arbitrated by the Florida New Motor Vehicle Arbitration Board. § 681.109, Fla. Stat.

Vehicle owners or lessees can obtain a Request for Arbitration form from the Attorney General’s Office by calling the Lemon Law Hotline at (800) 321-5366, or (850) 414-3500. The form and additional information about the Lemon Law are also available online via the website of the Attorney General’s Office at http://www.myfloridalegal.com/lemonlaw.

Once the request is approved for arbitration by the Florida New Motor Vehicle Arbitration Board, the board will hear the dispute generally within 40 days. The consumer may ask for a continuance of the hearing, but this will waive the 40-day period. The consumer does not need to have a lawyer for this hearing but may do so if desired. If the board decides the case in favor of the vehicle owner or lessee, the manufacturer must comply with the decision within 40 days of its receipt.

Requests for arbitration MUST be filed with the manufacturer’s certified program (if applicable), or with the Attorney General’s Office if there is no certified program, within 60 days after the expiration of the Lemon Law Rights Period, which is two years after the date of delivery of the motor vehicle. Failure to timely file will result in rejection of the request.

E. Remedies

Remedies awarded to consumers through a manufacturer’s certified program will vary, and consumers should contact the particular program directly if they have questions. In cases heard by the Florida New Motor Vehicle Arbitration Board, if a consumer’s vehicle is found to be a lemon, the manufacturer must either replace the vehicle or refund the full purchase price, depending upon the wishes of the vehicle owner/lessee. Both the refund and the replacement vehicle remedies include payment by the manufacturer of collateral charges (reasonable expenses wholly incurred as a result of the acquisition of the vehicle) and incidental charges (reasonable expenses directly caused by the substantial defects) incurred by the owner/lessee. An offset for use of the vehicle is charged to the owner/lessee based upon a formula contained in the statute. § 681.104(2), Fla. Stat.
In a refund remedy, the consumer will be paid only for non-financed collateral charges; financed collateral charges are paid off by the manufacturer through payoff of the loan. As applicable, the amount of any net trade-in allowance, cash down payment, and periodic loan or lease payments will be included in a refund remedy. If the purchase was financed, the manufacturer must also pay the lienholder according to its interest (which is the balance due or payoff of the loan). If the vehicle was leased, the manufacturer must pay the lessor an amount specified by the statute. The lessor cannot charge the lessee an early termination penalty.

Before filing a civil action in court under the Lemon Law, consumers must attempt to seek relief through arbitration under chapter 681, Florida Statutes.

F. Appeals and fees

Adverse decisions of the Arbitration Board can be appealed to the circuit court. A petition to appeal must be filed within 30 days of the receipt of the decision. If a decision of the board in favor of the owner or lessee is upheld by the circuit court, the owner or lessee can recover against the manufacturer the amount awarded by the board, plus attorney’s fees, court costs, and $25 per day for each day beyond the 40-day period following the manufacturer’s receipt of the board’s decision. § 681.1095(13), Fla. Stat.

NOTE: If the motor vehicle is a recreational vehicle (RV), towable RVs are not covered by the Lemon Law, and the Lemon Law also does not cover the “living facilities” of motorized RVs (those portions of the RV designed, used, or maintained primarily as living quarters). In addition, disputes must be submitted to the RV Mediation/Arbitration Program (not the Florida New Motor Vehicle Arbitration Board), which is administered by DeMars & Associates (800-279-5343). The dispute will be submitted to mediation first, during which the parties can, with the help of a neutral mediator, agree to attempt to resolve both living facility complaints and mechanical complaints. If no resolution is reached during mediation, the dispute will be referred to arbitration. The arbitrator will not be the same person who served as the mediator. The arbitrator will be limited to consideration of matters that are covered by the Lemon Law, unless both parties agree in writing to expand the scope of the arbitration hearing to include claims involving the living facilities. § 681.1097(4), Fla. Stat. The time limits for compliance with and appeal of arbitration awards are the same as those for decisions of the Florida New Motor Vehicle Arbitration Board.

G. Final thoughts
The Lemon Law also provides that an owner or lessee can file an action in court to recover damages caused by a violation of the Lemon Law. If the owner or lessee wins such an action, recovery will include the amount of any pecuniary losses, litigation costs, reasonable attorney’s fees, and other relief the judge decides is fair and just. § 681.112, Fla. Stat. However, a separate suit to collect only attorney’s fees the consumer has incurred in the hearing before the board is not allowed.

Vehicles taken back by a manufacturer must have their vehicle titles marked to show that they had been repurchased under the Lemon Law. This fact must be disclosed to persons purchasing these vehicles after they have been repurchased by the manufacturer. § 681.114, Fla. Stat.

The statutory procedure for getting relief under the Lemon Law is technical, and there are strict time limits and other requirements. The time frames and dispute resolution programs differ if the motor vehicle is a recreational vehicle.

VI. CREDIT CARD ACTIONS

A. Causes of Action

<table>
<thead>
<tr>
<th>COA</th>
<th>Elements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Breach of contract</td>
<td>(1) a valid contract; (2) a material breach; and (3) damages. <em>In re Standard Jury Instructions—Contract &amp; Business Cases</em>, 116 So. 3d 284, 306 (Fla. 2013), citing <em>Friedman v. New York Life Ins. Co.</em>, 985 So. 2d 56, 58 (Fla. 4th DCA 2008).</td>
</tr>
<tr>
<td>Account stated</td>
<td>Prior to the action, the parties had business transactions and agreed to the resulting balance. Plaintiff rendered a statement of it to defendant. Defendant did not object to the statement. The form requires that a copy of the account showing the items, time of accrual of each, and amount of each be attached. Fla. R. Civ. P. Form 1.933; <em>Mercado v. Lion’s Enterprises, Inc.</em>, 800 So. 2d 753 (Fla. 5th DCA 2001).</td>
</tr>
<tr>
<td>Open account</td>
<td>Unsettled debt arising from items of work or labor, goods sold and other open transactions that are NOT reduced to writing, the sole record of which is the account books of the owner of the demand. Fla. R. Civ. P. Form 1.932. To state a valid claim on an open</td>
</tr>
</tbody>
</table>
account, the claimant must attach an “itemized” copy of the account. Moore v. Boyd, 62 So. 2d 427 (Fla.1952).

| Money lent | Money was lent to consumer, on a specific date; a certain amount is due plus interest since a specific date. Fla. R. Civ. P. Form 1.936. |
| Unjust enrichment | Plaintiff conferred a benefit to defendant, who had knowledge of the benefit; defendant voluntarily accepted and retained that benefit; and it would be inequitable for defendant to retain the benefit unless defendant paid plaintiff the value of the benefit. |

B. Defenses/Sufficiency of Complaint

1. Conditions Precedent
   a. Cost Bond

A cost bond is no longer required. Section 57.011, Florida Statutes, was repealed by the legislature in 2016.


Section 559.715 requires an assignee of debt to give the debtor written notice of such assignment at least 30 days before any action to collect the debt. This has historically been held as a condition precedent for credit card cases. Recent DCA opinions have distinguished the 559.715 requirements in credit card cases as compared to mortgage foreclosure. Brindise v. U.S. Bank Nat. Ass’n, 183 So. 3d 1215, 1220 (Fla. 2d DCA 2016), review denied, 2016 WL 1122325 (Fla. Mar. 22, 2016). In Bank of America, N.A. v. Siefker, 201 So. 3d 811, 818 (Fla. 4th DCA 2016), the Fourth DCA found that section 559.715 does not create a condition precedent. Although the DCA limited its opinion to foreclosure cases which have an independent statutory scheme under chapter 702, the court’s reasoning could be applied to other cases.

2. Documents

The documents to be attached are (1) agreement signed by borrower; (2) the credit card terms; (3) the account statements; and (4) evidence of standing.

Attachments required for all COA’s, including quasi-contract and even if account was assigned. Discover Bank v. Patts, 22 Fla. L. Weekly Supp. 1062b


**Evidence of Standing.** Must be evidence attached to complaint (typically bill of sale or assignment) to create nexus between the debt and assignee; otherwise, attachments to complaint control, which normally reflect that debt is enforceable by non-party. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240, 1242 (Fla. 2000); *Hunt Ridge at Tall Pines, Inc. v. Hall*, 766 So. 2d 399, 401 (Fla. 2d DCA 2000).

C. **Discovery — Evidence of Assignment**

For assigned debts, the bill of sale will often make reference to other documents, such as a list of accounts included in the transfer and a term sheet for the transfer (often called a “forward flow agreement”). Courts have consistently held that a borrower is entitled to complete evidence of the assignment, including the referenced documents. *Portfolio Recovery Associates LLC v. Gerbing*, 23 Fla. L. Weekly Supp. 28a (Fla. 15th Cir. Ct. 2015); *Portfolio Recovery Assc LLC aao Citibank NA Home Depot v. Hampton*, 23 Fla. L. Weekly Supp. 792a (Fla. Seminole Cty. Ct. 2015); *Portfolio Recovery Associates, LLC v. Catano*, 23 Fla. L. Weekly Supp. 276a (Fla. Palm Beach Cty. Ct. 2015). If a plaintiff is unable to produce the documents, judgment may be proper in favor of the defendant. *CACH, LLC v. Herrera*, 22 Fla. L. Weekly Supp. 121a (Fla. Orange Cty. Ct.)
D. Prevailing Party Fees on Quasi-Contract COA

Entitlement Under Reciprocal Fee Provision of 57.105, Fla. Stat.: 

Credit card companies and credit card debt buyers routinely bring claims under an account stated action, rather than breach of contract, and in those cases where the consumer is found to prevail, the creditors argue the action is not “with respect to the contract” so as to trigger section 57.105(7), Florida Statutes. In opposition, the defendants argue that the contract still necessarily underlies the action, which is evidenced in part because the amount sought includes interest, which is calculated at the rate authorized by the contract, as well as fees or other charges which are derived from the contract. This dispute is presently pending appeal in the Second District Court of Appeal in Bushnell v. Portfolio Recovery Assoc., LLC, Case No. 2D17-0429 (jurisdiction accepted, 234 So. 3d 716).


Conversely, some courts have opted not to apply section 57.105, especially in cases where the plaintiff was unable to show standing. Balog v. CACH, LLC, 24

## VII. RESIDENTIAL EVICTIONS

### A. Grounds for Eviction

- Failed payment
- Material noncompliance with lease terms
- Expiration of lease period

### B. Conditions Precedent/Presuit Notices

- Failed payment — three-day notice — § 83.56(3), Fla. Stat. — Three days excludes Saturday, Sunday, and legal holidays.

- Material noncompliance with lease terms — seven-day notice — § 83.56(2), Fla. Stat. — The seven-day notice can be either with a right to cure or without a right to cure, depending on the nature of the noncompliance. Examples given under the statute which do not require an opportunity to cure include, but are not limited to:
  - destruction, damage, or misuse of the landlord’s or other tenants’ property by intentional act; or
  - a subsequent or continued unreasonable disturbance.


- Effect of improper notice
Insufficiency of presuit notice requires an opportunity to cure. § 83.60(1)(a), Fla. Stat.

There has been little published case law after the 2013 statutory changes providing for the opportunity to cure. One court has found dismissal is warranted without an opportunity to cure when a three-day notice is incurable. *Orozco v. Estrada*, 23 Fla. L. Weekly Supp. 490a (Fla. Miami-Dade Cty. Ct. 2015) (three-day notice impossible to cure where landlord demanded rent from tenant who received federal subsidy and had no personal obligation to contribute to rent);

It remains unclear whether the statutory opportunity to cure would allow a landlord with a defective complaint to create a cause of action that did not exist on the date of filing. Prior case law holds that a plaintiff cannot cure the defect of the nonexistence of a cause of action when suit began. *See Jasiurkowski v. Harris*, 17 Fla. L. Weekly Supp. 1253a (Fla. Broward Cty. Ct. 2010) (citing *Rolling Oaks Homeowner’s Ass’n, Inc. v. Dade County*, 492 So. 2d 686 (Fla. 3d DCA 1986), and *Investment and Income Realty, Inc. v. Bentley*, 480 So. 2d 219 (Fla. 5th DCA 1985)).

A Manatee County court found a distinction in the “opportunity to cure” where the basis of the eviction was for a purpose other than the nonpayment of rent. In *Desha v. Smith*, 24 Fla. L. Weekly Supp. 238a (Fla. Manatee Cty. Ct. 2016), the court granted the tenants’ motion to dismiss without an opportunity to cure where the landlord sought eviction on a nonmonetary basis without providing appropriate notice.

- Effect of payment by tenant after three-day/seven-day notice

  On nonpayment: (§ 83.56(5)(a), Fla. Stat.) — Does not result in waiver *IF* the landlord:

  - provides the tenant with a receipt stating the date and amount received and the agreed upon date and balance of rent due before filing an action for possession;

  - places the amount of partial rent accepted from the tenant in the registry of the court upon filing the action for possession; or

  - posts a new three-day notice reflecting the new amount due.
• On noncompliance — Payment in full results in waiver for the existing noncompliance, but not future noncompliance; partial payment does not result in waiver. § 83.56(5)(a), Fla. Stat.

C. Tenant’s Defenses

1. Condition Precedent to Raising Defenses — Deposit of Rent

A condition precedent to a tenant raising defenses is payment of the accrued rent into the court registry, or the filing of a motion to determine rent, within five days of service of process of the action by the landlord. § 83.60(2), Fla. Stat.

Even for the defense of a landlord’s failed condition precedent (e.g., improper notice), the tenant is still required to post rent. Stanley v. Quest Intern. Inv., Inc., 50 So. 3d 672 (Fla. 4th DCA 2011) (answering certified question); Dreyer v. Dunne, 17 Fla. L. Weekly Supp. 594a (Fla. Broward Cty. Ct. 2010).

Exceptions:


• Deposit into court registry is excused where the landlord fails to allege overdue or disputed rent. Gillespie v. Figuiredo, 22 Fla. L. Weekly Supp. 690a (Fla. 13th Cir. Ct. 2014) (in appellate capacity).

• Motion to determine rent (§ 83.60(2), Fla. Stat.)
  • Must be filed within five days of service.
  • Tenant is required to document support of the allegation that the rent as alleged in the complaint is in error.

Failure to deposit rent when required results in mandatory immediate default judgment. Indopal, LLC v. Oliphitant, 23 Fla. L. Weekly Supp. 912a (Fla. 17th Cir. Ct. 2016) (in appellate capacity).

• Material noncompliance with landlord’s obligation to maintain premise — § 83.51(1), Fla. Stat.
  o Condition precedent as a defense — Seven-day notice by tenant to landlord (see § 83.60(1)(b), Fla. Stat.).
  o When supported, a “material” noncompliance operates as a complete defense to eviction.

Material Noncompliance is an objective standard: whether the breach materially impairs the essence of the lease agreement to provide residence for tenants. The tenant must produce objective evidence. This is discussed in depth in Murphy v. Logiudice, 16 Fla. L. Weekly Supp. 966a (Fla. 15th Cir. Ct. 2009).

• Retaliatory Eviction — § 83.64, Fla. Stat.
  o Landlord cannot retaliate for reasons set out in section 83.64(1) by increasing rent, decreasing services, or evicting.
  o Good cause exception — Section 83.64 protections do not apply if the landlord has “good cause” for eviction action, including “good faith” action nonpayment, violation of the rental agreement or reasonable rules, or violation of chapter 83, Florida Statutes. See § 83.64(3), Fla. Stat.; see also Salmonte v. Eilertson, 526 So. 2d 179 (Fla. 1st DCA 1988).

“Good faith” — Sections 83.60 and 83.64(2) expressly state that retaliatory conduct serves as a defense to eviction; however, it would be nearly impossible for the landlord to bring a prima facie case for eviction without some basis in what section 83.64(3) refers to as “good cause” (e.g., nonpayment of rent, violation of the agreement or reasonable rules, or statutory requirements) so as to avoid the retaliatory conduct defense. The only way to give meaning to both the retaliatory defense and the good cause exception would be for the fact finder to examine whether the essence of the eviction is in “good faith,” which should be a case-by-case analysis.

3. Effect of Dismissal of Eviction Action
Upon dismissal of the eviction case, absent an agreement to the contrary the funds held in registry should be returned to the tenant. *Noimbie v. Harvey*, 137 So. 3d 606 (Fla. 4th DCA 2014).


1. Effect

The security deposit typically does not affect the eviction process, as its return would not be triggered until after the tenant has vacated.

2. Requirements of Notice of Landlord’s Intent to Impose Claim on Security Deposit

- Must be a written notice (ONLY if the lease has expired, not if it was broken). § 83.49(3)(a), Fla. Stat. However, while early termination of the lease may release the landlord of the obligation to send the Notice of Intention to Retain Security Deposit, the landlord still must have an economic basis to retain the security deposit. See generally § 83.595, Fla. Stat., on choice of remedies, and § 83.49(5), Fla. Stat.

- Must be sent via certified mail; however, Florida courts have consistently overlooked a “certified” requirement where the intended recipient actually received the information that was sent. See generally *Patry v. Capps*, 633 So. 2d 9 (Fla. 1994); Wolle v. MacDougall, 15 Fla. L. Weekly Supp. 1217b (Fla. 15th Cir. Ct. 2008); *Brown v. Long*, 13 Fla. L. Weekly Supp. 608a (Fla. Duval Cty. Ct. 2006).

- Must identify all bases for retention.

- Must be sent to the last known address for the tenant (which may be the address of the rental property).

- Must be sent within 30 days of vacation of the premises. § 83.49(3)(a), Fla. Stat.

3. Failure to Satisfy Requirements

If the landlord fails to give the required notice within the 30-day period, he or she forfeits the right to impose a claim on the deposit, but may file an action for damages after return of deposit. § 83.49(3)(a), Fla. Stat.
E. Attorney’s Fees

The prevailing party typically is entitled to fees. § 83.48, Fla. Stat.

- The right to attorney’s fees may not be waived in the lease agreement.

- For the landlord to secure entitlement to fees, he or she must have in personam jurisdiction. A default judgment in an in rem action for possession only will not result in fee entitlement. See generally Montano v. Montano, 520 So. 2d 52, 53 (Fla. 3d DCA 1988), citing Davis v. Dieujuste, 496 So.2d 806, 808 (Fla. 1986).

- Multiplier — Attorneys who represent tenants on a contingency in defense of eviction actions or in actions on security deposits have been found to be entitled to a fee enhancer. Duvall v. Mercado, 21 Fla. L. Weekly Supp. 77a (Fla. Volusia Cty. Ct. 2013) (1.5 multiplier); Yussuff v. Octave, 20 Fla. L. Weekly Supp. 1224a (Fla. Orange Cty. Ct. 2013) (2.0 multiplier); Wilson v. Plummer, 20 Fla. L. Weekly Supp. 1084a (Fla. Orange Ct. Ct. 2013) (1.5 multiplier); see generally Joyce v. Federated National Insurance Co., 228 So. 3d 1122 (Fla. 2017) (multiplier not reserved for rare and exceptional circumstances).


- Section 83.67(5), Florida Statutes, prohibits a landlord from “remov[ing] the tenant’s personal property from the dwelling unit unless such action is taken after surrender, abandonment, recovery of possession of the dwelling unit due to the death of the last remaining tenant in accordance with section 83.59(3)(d), or a lawful eviction.”

- The landlord need not provide notice to the tenant prior to removing the belongings if the lease includes the language set out in section 83.59(5) AND the tenant vacates as a result of surrender or abandonment.

- If the tenant vacates as a result of eviction, the landlord must comply with the notice provision of section 715.104 to address the disposition
of the tenant’s personal property. The statutory form is provided in section 715.105.

VIII. FLORIDA CONSUMER COLLECTION PRACTICES ACT

A. Scope/Purpose

The Florida Consumer Collection Practices Act (FCCPA) (sections 559.55–559.785, Florida Statutes) is Florida’s supplement to the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692 et seq. Section 559.552 provides “[t]his part is in addition to the requirements and regulations of the federal act. In the event of any inconsistency between any provision of this part and any provision of the federal act, the provision which is more protective of the consumer or debtor shall prevail.” Section 559.77(5) provides that “great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the [FDCPA].”

B. Elements

To state a claim for violation of the FCCPA, a plaintiff must show that (1) the plaintiff was the object of collection activity arising from consumer debt, and (2) the defendant engaged in an act or omission prohibited by FCCPA. Garrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d 1282, 1290 (M.D. Fla. 2017).

C. Standard

Alleged violations under FDCPA and FCCPA are measured under the “least-sophisticated-debtor standard,” which is an objective test. Garrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d 1282, 1297 n.11 (M.D. Fla. 2017) (citing LeBlanc v. Unifund CCR Partners, 601 F.3d 1185, 1194 (11th Cir. 2010), and Leahy-Fernandez v. Bayview Loan Servicing, LLC, 159 F. Supp. 3d 1294, 1303-04 (M.D. Fla. 2016). Courts have found that even in circumstances where the plaintiff is sophisticated party, such as a lawyer, the court is to maintain the objective “least sophisticated consumer” standard. Sparks v. Phillips & Cohen Associates, Ltd., 641 F. Supp. 2d 1234, 1244 (S.D. Ala. 2008) (discussed). In applying the least sophisticated consumer standard to determine whether the wording in a collection notice is misleading, the court is to consider whether the wording may be “open to more than one reasonable interpretation, at least one of which is inaccurate.” Avila v. Riexinger & Associates, LLC, 817 F.3d 72 (2d Cir. 2016). See also Easterling v. Collecto, Inc., 692 F.3d 229, 233 (2d Cir. 2012).
D. Definitions

See generally § 559.55, Fla. Stat.

- “Person”: The FCCPA is broader in scope than the FDCPA because it regulates all “persons” engaged in consumer debt collection, rather than “debt collectors” as that term has been defined. *Morgan v. Wilkins*, 74 So. 3d 179, 181 (Fla. 1st DCA 2011) (“Appellees concede that the trial court was in error when it ruled that the FCCPA pertains only to debt collectors”). Case law has defined “persons” to include natural personals and legal entities. *Cook v. Blazer Financial Services, Inc.*, 332 So. 2d 677, 679 (Fla. 1st DCA 1976).

- “Consumer Debt”: FCCPA applies only to conduct within the course of collecting on a consumer debt, which has been defined as “obligations of a (1) consumer arising out of a (2) transaction in which the money, property, insurance, or services at issue are (3) primarily for personal, family, or household purposes.” *Oppenheim v. I.C. System, Inc.*, 627 F.3d 833, 837 (11th Cir. 2010).

- “Debtor” or “Consumer”: As used in the FCCPA, “[d]ebtor’ or ‘consumer’ means any natural person obligated or allegedly obligated to pay any debt.” § 559.55(8), Fla. Stat. (emphasis added). Therefore, the FCCPA applies even if the consumer is not the actual debtor as long as the person taking the prohibited action asserts that the consumer is obligated on the debt. *Desmond v. Accounts Receivable Management, Inc.*, 72 So. 3d 179, 181 (Fla. 2d DCA 2011).

E. Collection Activity

Section 559.72 prohibits activities that occur “[i]n collecting consumer debts.” Case law has clarified in some circumstances when an activity is considered debt collection:

2016); *Bank of America, N.A. v. Siefker*, 201 So.3d 811, 815 (Fla. 4th DCA 2016); *Goodin v. Bank of America, N.A.*, 114 F. Supp. 3d 1197, 1206 (M.D. Fla. 2015) (finding “statements that contained payment instructions, a payment due date, and an amount due” were attempts to collect debt, even though they also were labeled “FOR INFORMATION PURPOSES” and stated that if debtors were currently in bankruptcy, statement should not be construed as attempt to collect from them personally).

- Litigation: Litigation is “debt collection” if the case seeks anything more than strict *in rem* relief. So an attorney’s notice of appearance for the defendant in a foreclosure action can be sufficient notice that the defendant is represented by counsel *with respect to the (mortgage) debt* where a foreclosure complaint seeks (1) to enforce a promissory note and not solely enforce a mortgage, (2) a deficiency judgment, and/or (3) an amount beyond the collateral of the mortgage. *Brindise v. U.S. Bank Nat. Ass’n*, 183 So. 3d 1215, 1223 (Fla. 2d DCA 2016); *Battle v. Gladstone Law Group, P.A.*, 951 F. Supp. 2d 1310, 1313 (S.D. Fla. 2013) (“money owed on a promissory note secured by a mortgage is a debt for purposes of the FDCPA”); *Gann v. BAC Home Loans Servicing LP*, 145 So. 3d 906, 909-910 (Fla. 2d DCA 2014). See also *Bank of America, N.A. v. Siefker*, 201 So. 3d 811, 815 (Fla. 4th DCA 2016) (“Given that the bank brought the suit in order to obtain what it was owed, through the sale of the property and, if necessary, a deficiency judgment, the suit is an action to collect a debt and thus falls within the requirements of the [FCCPA]”).

- Action on a deficiency judgment: The Second District has held in two opinions that deficiency collection following entry of final judgment of foreclosure is not “debt collection” for the purpose of FCCPA, finding that the deficiency suit is an action on the final judgment of foreclosure, rather than on the note. *Aluia v. Dyck-O’Neal, Inc.*, 205 So. 3d 768, 773 (Fla. 2d DCA 2016); *Dyck O’Neal, Inc. v. Ward*, 216 So. 3d 664 (Fla. 2d DCA 2017). The Second District did not cite any authority to support the conclusion that a deficiency judgment is not a “debt” within the meaning of FCCPA, and every other court which has examined the issue has found otherwise. See, e.g., *TD Bank, N.A. v. Graubard*, 172 So. 3d 550, 553 (Fla. 5th DCA 2015); *Hernandez v. Dyck-O’Neal, Inc.*, No. 3:14-cv-01124, 2015 U.S. Dist. LEXIS 58738 (M.D. Fla. May 5, 2015); *Baggett v. Law Offices of Daniel C. Consuegra, P.L.*, No. 3:14-
F. Prohibited Acts

Section 559.72, Florida Statutes, provides the enumerated list of actions and omissions prohibited by the FCCPA. In summary, the FCCPA regulates whom a creditor may contact concerning a consumer debt and when, where, and how a creditor may communicate with a debtor and other persons. Garrison v. Caliber Home Loans, Inc., 233 F. Supp. 3d 1282, 1290 (M.D. Fla. 2017).

G. Actual Knowledge

Certain of the provisions of section 559.72 require a showing of knowledge. See §§ 559.72(5), (6), (9), (18), Fla. Stat. Courts have found that a violation of these subsections requires a showing of “actual knowledge.” See generally Schauer v. Morse Operations, Inc., 5 So. 3d 2, 6 (Fla. 4th DCA 2009); Hurtubise v. P.N.C. Bank, N.A., 2015 WL 3948192 at *4 (Fla. 6th Cir. 2015) (in appellate capacity).

H. Bona Fide Error Defense

Subsection (3) of section 559.77 provides for a defense based on a “bona fide error.” The bona fide error defense has three elements; all must be proven to support the defense. Specifically, a defendant has the burden to show that: (1) “its errors were not intentional,” (2) “its errors were bona fide,” meaning that the errors were “made in good faith and [were] objectively reasonable;” and (3) the “errors occurred despite the maintenance of procedures reasonably adapted to avoid any such errors.” Goodin v. Bank of America, N.A., 114 F. Supp. 3d 1197, 1208 (M.D. Fla. 2015). To prevail on this defense, the defendant must show that “it actually employed procedures, and that those procedures were reasonably adapted to avoid the specific errors at issue.” Id. (citing Owen v. I.C. System, Inc., 629 F.3d 1263, 1274 (11th Cir. 2011) (interpreting FDCPA)).

I. Enforcement

The FCCPA allows debtors to act as private attorneys general. Dish Network Service L.L.C. v. Myers, 87 So. 3d 72, 76 (Fla. 2d DCA 2012). A debtor may bring a civil action against any person in violation of section 559.72 in the county
where the alleged violator resides or has its principal place of business or in the county where the alleged violation occurred. § 559.77(1), Fla. Stat.

J. Statute of Limitations

The debtor must commence the action within two years after the date the alleged violation occurred. § 559.77(4), Fla. Stat.

K. Damages

Section 559.77(2) Fla. Stat. provides for actual damages, statutory damages not exceeding $1,000, court costs, and plaintiff’s reasonable attorney’s fees. Actual damages include those for emotional distress and related harm. Goodin v. Bank of America, N.A., 114 F. Supp. 3d 1197, 1212 (M.D. Fla. 2015). The court may also award punitive damages if the defendant’s actions “evidence a purpose to inflict insult and injury, or are wholly without excuse.” Story v. J. M. Fields, Inc., 343 So. 2d 675, 677 (Fla. 1st DCA 1977). Under section 559.77(2), fees are “one way” to the plaintiff, unless the court finds that the suit fails to raise a justiciable issue of law or fact, in which case the plaintiff will be liable for court costs and reasonable attorney’s fees incurred by the defendant.

L. Injunctive Relief

The FCCPA allows a court to “provide such equitable relief as it deems necessary or proper.” § 559.77 Fla Stat. The equitable relief authorized includes the authority to grant injunctive relief. Sanz v. Fernandez, 633 F. Supp. 2d 1356, 1364 (S.D. Fla. 2009); Berg v. Merchants Ass’n Collection Div., Inc., 586 F. Supp. 2d 1336, 1345 (S.D. Fla. 2008).

M. Proposals for Settlement

Multiple courts have confirmed the invalidity of proposals for settlement in FCCPA cases, and have stricken them upon motion by the FCCPA plaintiff. Clayton v. Bryan, 753 So. 2d 632 (Fla. 5th DCA 2000); Cusseaux v. Motor Credit Corporation, 15 Fla. L. Weekly Supp. 897a (Fla. 6th Cir. Ct. Oct. 11, 2004); Hyson v. Bank of America, N.A., 18 Fla. L. Weekly Supp. 521b (Fla. 6th Cir. Ct. March 15, 2011); Hall v. W.S. Badcock Corporation, 19 Fla. L. Weekly Supp. 290b (Fla. Hillsborough Cty. Ct. Dec. 15, 2011); Walker v. Burgess Carriage House, Inc., 15 Fla. L. Weekly Supp. 919b (Fla. Polk Cty. Ct. Feb. 12, 2007). These decisions reason, among other grounds, that section 559.77 Florida Statutes, providing a successful plaintiff with an award of attorney’s fees, is in direct conflict with section 768.79(3) Florida Statutes, providing attorney’s fees.
to a plaintiff or defendant on grounds as discussed therein. As such, section 768.71 Florida Statutes, is controlling, which states: “If a provision of this part is in conflict with any other provision of the Florida Statutes, such other provision shall apply.”

IX. HOMEOWNER’S AND CONDOMINUM MINIMUM ASSOCIATION ISSUES

A. In General

Condominium associations are governed by chapter 718, Florida Statutes, the Condominiums Act; the Homeowners’ Associations Act is embodied in chapter 720, Florida Statutes.

B. Injunctions/Emergency Relief

1. In General

   a. Procedure


Florida courts have come to the general consensus that “[t]he purpose of a temporary or preliminary injunction is not to resolve disputes, but rather to prevent irreparable harm by maintaining status quo until a final hearing can occur when full relief may be given.” Michele Pommier Models, Inc. v. Diel, 886 So. 2d 993, 996 (Fla. 3d DCA 2004); Monsanto Co. v. Geertson Seed Farms, 561 U.S. 139, 142 (2010) (“injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course”). As such, the issuance of this relief requires the petitioner to make a showing of the following criteria: (1) the likelihood of irreparable harm; (2) the unavailability of an adequate remedy of law; (3) substantial likelihood of success on the merits; and (4) consideration of public interest. Hadj v. Liberty Behavioral Health Corp., 927 So. 2d 34 (Fla. 1st DCA 2006). The movant’s burden is one of persuasion, and Florida law is clear that the failure to satisfy that burden with respect to any one of the four essential elements will be fatal to a motion for injunctive relief. Hiles v. Auto Bahn Federation, Inc., 498 So. 2d 997 (Fla. 4th DCA 1987) (holding that absent showing of irreparable injury, entry of preliminary injunction constitutes abuse of discretion); Sasso v. Milhollan, 735 F. Supp. 1045, 1047-1048 (S.D. Fla. 1990).

   b. Restrictive Covenants
The Supreme Court held in *Stephl v. Moore*, 114 So. 455 (Fla. 1927), that restrictive covenants will be enforced “when the restriction applies to the location of buildings to be erected on the land, and such restrictions are carried in all deeds with a view to preserve the symmetry, beauty, and general good of all interested in the scheme of development.”

When a party seeks an injunction to prevent the violation of a restrictive covenant, the party challenging enforcement of the covenant must show that the enforcing authority has acted in an unreasonable or arbitrary manner. *Killearn Acres Homeowners Ass’n, Inc. v. Keever*, 595 So. 2d 1019 (Fla. 1st DCA 1992); *See Prisco v. Forest Villas Condominium Apartments, Inc.*, 847 So. 2d 1012, 1014 (Fla. 4th DCA 2003); *Robertson v. Countryside PUD Residential Homeowners*, 751 So. 2d 674, 677 (Fla. 5th DCA 2000) (noting that enforcement of restrictive covenants cannot be unreasonable); *Anderson v. Rosetree Village Ass’n, Inc.*, 540 So. 2d 173 (Fla. 2d DCA 1989).

c. Bond Requirement for Injunctions

“No temporary injunction shall be entered unless a bond is given by the movant in an amount the court deems proper, conditioned for the payment of costs and damages sustained by the adverse party if the adverse party is wrongfully enjoined.” Fla. R. Civ. P. 1.610(b). However, temporary injunctive relief may be granted without the posting of a bond in the following situations: (1) injunctions entered “on the pleading of a municipality or the state or any officer, agency, or political subdivision thereof”; or (2) injunctions “issued solely to prevent physical injury or abuse of a natural person.” *Id.* The trial court cannot waive the bond requirement nor can it comply by setting a nominal amount. *See Florida High School Activities Ass’n v. Mander by and through Mander*, 932 So. 2d 314, 316 (Fla. 2d DCA 2006) (citing cases).


Section 720.311(2)(a), Florida Statutes, provides: “Disputes between an association and a parcel owner regarding use of or changes to the parcel or the common areas and other covenant enforcement disputes, disputes regarding amendments to the association documents, disputes regarding meetings of the board and committees appointed by the board, membership meetings not including election meetings, and access to the official records of the association shall be the subject of a demand for presuit mediation served by an aggrieved party before the dispute is filed in court.”
Presuit mediation is not required for collection of assessments, fines, or other financial obligations.

When emergency relief is required, a motion for temporary injunctive relief can be filed first without complying with presuit mediation, and then the court may refer the parties to a mediation program administered by the courts or required under section 720.311.

An aggrieved party shall serve on the responding party a written demand to participate in presuit mediation in the form provided in section 720.311(2)(a).

A party refusing to take part in the mediation, or failing to respond to the request within the 20 days as provided in the statute, will lose any claim it may have for attorney’s fees and costs if it is the prevailing party in the ensuing lawsuit.

3. Claims Against HOA Board of Directors

Section 720.303(1), Florida Statutes, provides that board members have a fiduciary relationship to the members who are served by the association.

Section 720.305 provides that a member may bring an action at law against any director or officer of an association who willfully and knowingly fails to comply with chapter 720, the governing documents of the community, and the rules of the homeowners’ association.

Association directors can be found personally liable upon allegation of criminal activity, fraud, willful misconduct, or self-dealing. Perlow v. Goldberg, 700 So. 2d 148 (Fla. 3d DCA 1997); Sonny Boy, L.L.C. v. Asnani, 879 So. 2d 25, 29 (Fla. 5th DCA 2004) (failure to include words “willful and knowing” was basis for trial court’s dismissal of all three counts, and court refused Sonny Boy’s motion to amend pleadings to include those words because it was “too late”).

The business judgment rule “only protects the Association’s decisions so long as the Association acts in a reasonable manner.” Garcia v. Crescent Plaza Condominium Ass’n, Inc., 813 So. 2d 975, 978 (Fla. 2d DCA 2002).

4. Association Foreclosures

There is joint and several liability for unpaid assessments, with a claim for contribution against only the previous owner.

Section 718.116(1)(a), Florida Statutes: “A unit owner, regardless of how his or her title is acquired, including by purchase at a foreclosure sale or by deed in lieu
of foreclosure, is liable for all assessments which come due while he or she is the unit owner. Additionally, a unit owner is jointly and severally liable with the previous owner for all unpaid assessments that came due up to the time of transfer of title.”

A purchaser is jointly and severally liable with the association for unpaid assessments dating back to when the association took title to the units, but not for the assessments pre-dating the association’s taking title. *Park West Professional Center Condominium Ass’n, Inc. v. Londono*, 130 So. 3d 711 (Fla. 3d DCA 2014). *See also Bona Vista Condominium Ass’n, Inc. v. FNS6, LLC*, 194 So. 3d 490 (Fla. 2d DCA 2016) (finding joint and several liability with only immediate prior owner, where prior owner was condominium association).

In 2017 the Florida Legislature amended section 718.111(9), Florida Statutes, to prohibit board members, managers, or management companies from purchasing a condominium unit at a foreclosure sale resulting from an association’s foreclosure of a lien for unpaid assessments and from taking title by a deed in lieu of foreclosure.

5. Official Records of Condominium Associations

The 2017 Florida Legislature amended section 718.111(12) of the Florida Statutes to provide that by July 1, 2018, condominium associations of 150 or more units must create a website on which owners can obtain various official documents. In 2018 the legislature made further amendments to the statute.

X. HOME SOLICITATION SALES

A. Overview

Home solicitation sales involving personal solicitation of the sale of consumer goods or services are subject to very specific requirements under both Florida law and federal law. The applicable Florida Home Solicitation Sales Act is codified as sections 501.021–501.055, Florida Statutes. The federal law derives from a rule promulgated pursuant to the U.S. Federal Trade Commission (FTC) Act which is codified at 16 C.F.R. part 429, entitled “Rule Concerning Cooling-Off Period for Sales Made at Homes or at Certain Other Locations,” often referred to as the “Home Solicitation Sales Rule.” That federal rule generally requires sellers who make a personally solicited sale at a consumer’s home to provide very specific disclosures and forms to those consumers/buyers, and provides consumers with an unequivocal right to cancel a transaction within three days.
following receipt of a proper notice of the right to cancel. The Florida Act imposes similar requirements, but also requires certain sellers to obtain a permit to conduct home solicitation sales.

B. Scope

1. In General

Although typically referred to as home solicitation or door-to-door sales requirements, the scope of both the Florida act and federal rule is actually significantly broader. Both generally apply to sales that are personally solicited and conducted not only at a person’s home, but also at any location other than the seller’s fixed business location. § 501.021(1)(a)–(1)(b), Fla. Stat.; 16 C.F.R. § 429.0(a), (d). Both generally apply to sales, leases, and rentals. § 501.021(1), Fla. Stat.; 16 C.F.R. § 429.0(a). The Florida act and federal rule apply to consumer goods and services, which are those used primarily for personal, family, or household purposes. § 501.021(1), Fla. Stat.; 16 C.F.R. § 429.0(a)–(b).

2. The Florida Act

The Florida act applies to transactions having a purchase price of $25 or more. § 501.021(1), Fla. Stat. The following transactions are exempted from the Florida act:

- Transactions at any fair or similar commercial exhibit. § 501.021(1), Fla. Stat.
- Transactions resulting from a buyer’s request, but only as to the specific goods or services that were requested by the buyer. § 501.021(1), Fla. Stat.
- Transactions by a licensed motor vehicle dealer which occur at a location open to the public or to a designated group. § 501.021(1), Fla. Stat.
- Sale of farm equipment or machinery. § 501.035(2), Fla. Stat.
The federal Rule applies to transactions having a purchase price of $25 or more if the sale is conducted at the buyer’s home, and $130 or more if the sale is conducted at other locations (other than the seller’s place of business). 16 C.F.R. § 429.0(a). The following transactions are exempted from the federal Rule:

- Transactions pursuant to prior negotiations at the seller’s fixed permanent business location. 16 C.F.R. § 429.0(a)(1).


- Transactions to meet a buyer’s bona fide immediate personal emergency. In order to qualify for this exemption, the buyer must initiate the contact and must furnish a separate signed and dated personal statement in the buyer’s handwriting describing the emergency and expressly acknowledging and waiving the right to cancel the sale within 3 business days. 16 C.F.R. § 429.0(a)(3).

- Transactions conducted and consummated entirely by mail or telephone. 16 C.F.R. § 429.0(a)(4).

- Transactions in which the buyer initiated the contact and specifically requested the seller to visit the buyer’s home for repairs or maintenance. However, this exemption does not apply if the seller sells additional goods or services beyond those necessarily used in the specifically requested repairs or maintenance. 16 C.F.R. § 429.0(a)(5).

- Transactions pertaining to the sale or rental of real property, sale of insurance, or the sale of securities or commodities by a registered broker. 16 C.F.R. § 429.0(a)(6).

- Certain sales of motor vehicles at auctions, tent sales, or other temporary locations. 16 C.F.R. § 429.3(a).

- Sales of arts or crafts sold at fairs or similar places. 16 C.F.R. § 429.3(b).

C. Substantive Requirements

1. The Florida Act
Subject to numerous exceptions, the Florida Act prohibits home solicitation sales without a valid home solicitation sale permit obtainable from the County Clerk. § 501.022, Fla. Stat. A business must ensure that all applicable employees obtain any required permit and comply with all provisions of section 501.022. § 501.046(1)(a), Fla. Stat. Whether a permit is required or not, a buyer has the right to cancel a home solicitation sale until midnight of the third business day following their signing an agreement or offer. § 501.025, Fla. Stat. The notice of cancellation must be in writing, but need not take a particular form as long as it evidences an intent not to be bound by the sale; it may be delivered in person, by telegram, or by mail. Id.

The notice of the right to cancel must appear on every note or evidence of indebtedness given pursuant to the home solicitation sale. § 501.025, Fla. Stat. The notice must appear under the conspicuous caption “BUYER’S RIGHT TO CANCEL,” and must read as follows:

BUYER’S RIGHT TO CANCEL

This is a home solicitation sale, and if you do not want the goods or services, you may cancel this agreement by providing written notice to the seller in person, by telegram, or by mail. This notice must indicate that you do not want the goods or services and must be delivered or postmarked before midnight of the third business day after you sign this agreement. If you cancel this agreement, the seller may not keep all or part of any cash down payment.

§ 501.031(2), Fla. Stat. The seller must obtain the buyer’s signature on the agreement or offer, including the date of the transaction and the actual date of signature. § 501.031(2), Fla. Stat. If the seller is a business, it must direct all employees engaged in home solicitation sales to leave a business card, contract, or receipt containing the full Buyer’s Right to Cancel and identifying the employee’s and business’s names, addresses, and telephone numbers. § 501.046(1)(b), Fla. Stat. The Florida Act also prohibits misrepresentations during the sale. § 501.047, Fla. Stat.

If the buyer exercises the right to cancel, the seller may not recover compensation for its services prior to cancellation. The seller must take all of the following steps within ten business days after receiving the notice of cancellation:

- Tender to the buyer a refund of all payments made.
• Tender to the buyer any note or other evidence of indebtedness.

• Tender to the buyer any goods traded-in by the buyer, in substantially the same condition as when received by the seller. If the goods are not tendered, the buyer may elect to recover the trade-in allowance amount stated in the agreement.


Until the seller complies with these obligations, the buyer may retain possession of any delivered goods for a reasonable time, and has a lien on them. § 501.041, Fla. Stat. Upon seller’s demand made within a reasonable time after cancellation, the buyer must tender the delivered goods to the seller, but only at the buyer’s residence. § 501.045, Fla. Stat.

2. The Federal Rule

The federal Rule also provides buyers with the right to cancel a home solicitation sale until midnight of the third business day following the transaction. 16 C.F.R. § 429.1(b). However, it also contains additional, detailed requirements. The seller must furnish the buyer with a copy of the fully-completed receipt or contract at the time of execution, which must be in the same language principally used in the oral presentation. 16 C.F.R. § 429.1(a). The document must include the date of the transaction, name and address of seller, and the following statement in immediate proximity to the space for the seller’s signature on the contract or, if a receipt is used in lieu of a contract, on the front page in a bold, 10-point or larger font:

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction. See the attached notice of cancellation form for an explanation of this right.

16 C.F.R. § 429.1(a). The seller is also required to provide two copies of a “Notice of Right to Cancel” or “Notice of Cancellation”. 16 C.F.R. § 429.1(b). The form is required to be in bold, minimum 10-point font, must be in the language used in the contract, and must use the following language:

NOTICE OF CANCELLATION

[enter date of transaction]
You may CANCEL this transaction, without any Penalty or Obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be cancelled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale, or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller’s expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed and dated copy of this Cancellation Notice or any other written notice, or send a telegram, to [Name of seller], at [address of seller’s place of business] NOT LATER THAN MIDNIGHT OF [date].

I HEREBY CANCEL THIS TRANSACTION.

(Date) ______________________
(Buyer’s Signature) ___________________

16 C.F.R. § 429.1(b). Before providing the two copies to the buyer, the seller must enter the name and address of the seller, the date of the transaction, and the deadline for cancellation (which cannot be earlier than three business days). 16 C.F.R. § 429.1(c). The seller must also orally inform the buyer of this right to cancel, 16 C.F.R. § 429.1(e), and may not misrepresent the buyer’s right to cancel, 16 C.F.R. § 429.1(f). The seller may not include a waiver of these rights.
or a confession of judgment. 16 C.F.R. § 429.1(d). The seller may not transfer or assign the contract within five business days, 16 C.F.R. § 429.1(h), in order to provide time for the consumer to exercise their right to cancel.

If the consumer exercises the right to cancel, the seller must take all of the following steps within ten business days after receiving the notice of cancellation:

- Refund all payments made. 16 C.F.R. § 429.1(g)(i).

- Return any goods or property traded in by the buyer, in substantially the same condition as when received by the seller. 16 C.F.R. § 429.1(g)(ii).

- Cancel and return any negotiable instrument executed in connection with the sale, and take action to promptly terminate any security interest. 16 C.F.R. §429.1(g)(iii).

- Notify the buyer whether the seller intends to repossess or abandon any shipped or delivered goods. 16 C.F.R. § 429.1(i).

Virtually every federal court to consider the issue has ruled that the failure to provide the required notice of the right to cancel results in a continuing right to cancel, even if such cancellation occurs years later. E.g., Cole v. Lovett, 672 F. Supp. 947 (S.D. Miss. 1987) (allowing cancellation more than two years after signing of contract by buyers who had not received statutorily required notice of right to cancel), aff’d without op., 833 F.2d 1008 (5th Cir. 1987); Reynolds v. D & N Bank, 792 F. Supp. 1035 (E.D. Mich. 1992) (allowing cancellation 14 months after purchase when seller failed to provide properly completed notice of cancellation); Domestic Bank v. Johnson (In re Johnson), 239 B.R. 255, 259 (Bankr. D. R.I. 1999) (allowing cancellation three years after contract completed due to seller’s failure to provide proper notice of right to cancel, and expressly noting that right to cancel “is not time restricted”).

The Rule expressly allows similar state laws regarding home solicitation sales except to the extent they are directly inconsistent with the federal Rule or provide fewer rights than the federal Rule. 16 C.F.R. § 429.2.

D. Remedies

Under the Florida Act, if the seller fails to demand possession of the goods within a reasonable time after receiving the buyer’s cancellation, the goods become the property of the buyer without obligation to pay for them; 40 days is presumed to
be a reasonable time. § 501.045, Fla. Stat. Under the federal Rule, if the buyer makes the goods available to the seller and the seller does not pick them up within 20 days, the buyer can retain or dispose of the goods without being obligated to pay for them. 16 C.F.R. § 429.1(b).

The federal Rule specifies that the failure to comply with its requirements constitutes an unfair and deceptive act or practice. 16 C.F.R. § 429.1. A violation of the Rule, promulgated pursuant to the federal FTC Act, is also a violation of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA). §§ 501.203(3)(a), (b), and (c), Fla. Stat. A violation of the Florida Act is also likely to constitute an unfair, deceptive, or unconscionable act or practice, and therefore a FDUTPA violation. § 501.203(3)(c), Fla. Stat. A violation of FDUTPA allows the aggrieved party to recover actual damages and obtain declaratory and injunctive relief, as well as to recover reasonable attorney’s fees and court costs. § 501.211, Fla. Stat. Please refer to the separate section on FDUTPA for more detailed discussion of that Act.