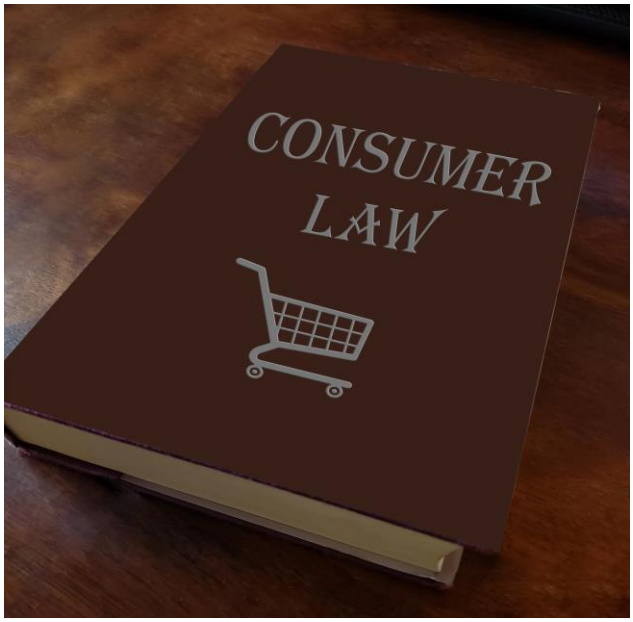
THE CONSUMER LAW BENCH BOOK



Presented by:

THE CONSUMER PROTECTION LAW COMMITTEE

A Standing Committee of The Florida Bar

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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 useable, 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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III. FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

A. Purpose

The Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201–213, Fla. Stat., like its federal counterparts, the Federal Trade Commission Act (FTC Act), 15 U.S.C §§ 45–58, and the Consumer Financial Protection Act of 2010, 12 U.S.C. §§ 1001–1100H, among other things, gives consumers legal protection against unfair and deceptive acts in the conduct of trade or commerce. Unlike its federal counterparts, the FDUTPA provides for both a private right of action and an enforcement action by a state "enforcing authority."

The purpose of the 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.

There are two approaches to analyzing FDUTPA liability: one is to determine whether the conduct violates the court-developed standards relating to unfairness, deception, unconscionable acts or practices, or unfair methods of competition; a second is to assess whether conduct in trade or commerce constitutes a per se violation of a law, statute, rule, regulation, or ordinance. § 501.203(3)(c), Fla. Stat.

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 Prop. Mgmt.*, 842 So. 2d 773, 777 (Fla. 2003).

B. Unfair or Deceptive Acts or Practices

Florida has adopted the FTC Act's definition of deception as an act or practice that is likely to deceive a consumer acting reasonably under the circumstances. *See* § 501.203(3)(b), Fla. Stat. (providing that "any violation of this act . . . may be based upon . . . "[t]he standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts"); *PNR, Inc.*, 842 So. 2d at 777. Florida courts and the Eleventh Circuit have held that the test for deception is

an objective test. *See, e.g.*, *Waste Pro USA v. Vision Constr. ENT, Inc.*, 282 So. 3d 911, 917 (Fla. 1st DCA 2019); *Democratic Republic of the Congo v. Air Cap. Grp., LLC*, 614 Fed. Appx. 460, 470 (11th Cir. 2015). "No proof of subjective reliance is needed." *Air Cap. Grp.*, 614 Fed. Appx. at 470.

In accordance with the Florida Statutes, §§ 501.203(3)(b) & 501.204(2), Fla. Stat., Florida courts have adopted the standard for "unfair" acts and practices expressed in the FTC's 1980 policy directive. Under this definition, for there to be a violation of the FDUPTA's prohibition on unfair acts or practices, 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. *Porsche Cars N. Am., Inc. v. Diamond*, 140 So. 3d 1090, 1096–98 (Fla. 3d DCA 2014).

C. Per Se Violations of FDUTPA

A per se violation of FDUTPA occurs where conduct violates a specific statute, ordinance, or rule. The violation is said to be "automatic," or "per se," because the statute, ordinance, or rule constitutes unfair, deceptive, or unconscionable conduct and, when violated, automatically constitutes a FDUTPA violation, without the need to allege that the conduct is deceptive or unfair.

Statutes may serve as predicates for an FDUTPA claim under § 501.203(3)(c) in one of two ways. First, the text of a statute may expressly state that it is to serve as an FDUTPA predicate. Second, a court may find that a statute proscribes unfair and deceptive trade practices and therefore operates as an implied FDUTPA predicate. *See* *Hucke v. Kubra Data Transfer Ltd., Corp.*, 160 F. Supp. 3d 1320, 1328 (S.D. Fla. 2015).

But a statute, ordinance, or rule need not expressly state that it proscribes "unfair" or "deceptive" conduct, as long as the law prohibits conduct that could qualify as unfair or deceptive. *State Farm Mut. Auto. Ins. Co. v. Performance Orthapaedics & Neurosurgery, LLC*, 315 F. Supp. 3d 1291, 1307 (S.D. Fla. 2018) (holding that violations of the Florida Health Care Clinic Act and the Florida Anti-Rebate Statute could serve as statutory predicates for *per se* FDUTPA violations, even though they did not explicitly reference FDUTPA or use the terms "unfair or deceptive").

D. Elements

The FDUTPA does not set forth the elements of a claim; instead, the elements have been developed through case law.

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 or unfair act or practice; (2) causation; and (3) actual damages. *Waste Pro USA*, 282 So. 3d at 917; *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).

"To satisfy the first element, the plaintiff must show that 'the alleged practice was likely to deceive a consumer acting reasonably in the same circumstances.'" *Carriuolo v. Gen. Motors*, 823 F.3d 977, 983–84 (11th Cir. 2016) (quoting *State, Off. of the Att'y Gen. v. Commerce Comm. Leasing, LLC*, 946 So.2d 1253, 1258 (Fla. 1st DCA 2007)).

As for the second element, causation, courts have generally found that actual reliance is not required when establishing a deceptive or unfair act. *Waste Pro USA*, 282 So. 3d at 917 ("'Under Florida law, an objective test is employed in determining whether the practice was likely to deceive a consumer acting reasonably.'") (quoting *Carriuolo*, 823 F.3d at 983–84 (11th Cir. 2016)). Thus, unlike with a claim for fraud, a "party asserting a deceptive trade practice claim need not show actual reliance on the representation or omission at issue." *Id.* (internal citations omitted.)

Finally, 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 or, for a valueless good or service, the total price paid. *Harrison v. Lee Auto Holdings, Inc.*, 295 So. 3d 857, 864 (Fla. 3d DCA 2020); *Rollins, Inc. v. Heller*, 454 So. 2d 580, 584 (Fla. 3d DCA 1984). Actual damages do not include consequential damages. *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 824–25 (Fla. 4th DCA 2010).

Any individual "aggrieved" by a violation of FDUTPA may bring an action for a declaratory judgment or for an injunction. § 501.211, Fla. Stat; *Caribbean Cruise Line, Inc. v. Better Business Bureau of Palm Beach County, Inc.*, 169 So. 3d 164, 166–167 (Fla. 4th DCA 2015).

E. 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 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 materials and collect evidence when it has reason to believe a person has engaged in, or is engaging in, acts or practices that violate FDUTPA. § 501.206, Fla. Stat.

3. Prerequisite for Enforcing Authority Action in Certain Instances

As a prerequisite for an enforcing-authority action under § 501.207(1)(a) or 501.207(1)(c), the head of the enforcing authority must review the matter and determine in writing that an enforcement action would serve 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 the FDUTPA, an injunction against any person who has violated, is violating, or is likely to violate the FDUTPA, and actual 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) & (3), Fla. Stat. The enforcing authority may also obtain consumer restitution. *Outreach Hous., LLC v. Off. of the Att'y Gen., Dep't of Legal Affairs*, 221 So. 3d 691, 697 (Fla. 4th DCA 2017). The appropriate measure for restitution is the benefit unjustly received by the defendants. *FTC v. Verity Intern., Ltd.*, 443 F.3d 48, 67 (2d Cir. 2006).

Enforcing authorities seeking declaratory or injunctive relief are not required to plead actual damages or to identify the consumers on whose behalf it is litigating. *State v. Beach Blvd. Auto., 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 Hous.*, 221 So. 3d at 697.

5. Civil Penalties

The enforcing authority may seek up to $10,000 for each willful violation of the 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.

H. Statute of 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 § 95.11(3)(f) of the Florida Statutes, which provides a four-year limitation on "[a]n action founded on a statutory liability." *See e.g.*, *S. Motor Co. of Dade County v. Doktorczyk*, 957 So. 2d 1215, 1216–17 (Fla. 3d DCA 2007) ("Section 95.11(3)(f), Florida Statutes (1996), covers an action founded on a statutory liability, which would apply to [plaintiff's] FDUTPA claim.").

I. Defenses

The statute provides a specific "good faith defense" for retailers when a consumer brings a claim for actual damages. § 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 § 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. *Id.*

J. Exemptions

The FDUTPA does not apply to certain types of conduct and entities. *See* § 501.212, Fla. Stat. For example, an FDUTPA claim cannot be brought based on "an act or practice required or specifically permitted by federal or state law." § 501.212(1). Nor can an FDUTPA claim be brought based on a personal injury or for damage to property other than the property that was the subject of the consumer transaction. § 501.212(3).

In addition, the FDUTPA lists multiple entities that are exempt from liability. These include any person regulated by the Office of Insurance Regulation; banks, credit unions, and savings and loan associations regulated by the Office of Financial Regulation or federal agencies § 501.212(3)(b)-(c); and any person regulated by the Department of Financial Services § 501.212(3)(d). *See e.g. Hotchkiss v. Blue Cross & Blue Shield of Fla., Inc.*, 277 So. 3d 760, 762 (Fla. 1st DCA 2019) ("In determining whether FDUTPA applies, courts must look to the alleged activities in the lawsuit and determine if that activity is subject to

regulation by [the Office of Insurance Regulation]"). 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, and nearly every aspect of the transaction is subject to regulation, from advertising and sales practices to financing and contract terms to issues with the warranty and condition of the vehicle. Both federal and state laws apply to potential consumer claims relating to auto sales and leasing.

B. Pre-Sale Disclosures and Warranties

1. Pre-Sale Disclosures: Window Stickers

Under federal law, 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, (including incorporating the warranty into the Buyers Guide), the method of determining the percentage of repair costs to be assumed by each party must also be disclosed under Florida law. § 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 to establish 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 in every vehicle sales 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 may attempt to disclaim or modify implied warranties, often by using "as is" clauses. Those disclaimers, however, are often ineffective. The following are examples of 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.*

- Words or conduct relating to the creation of an express warranty and words or conduct tending to negate or limit it shall be construed wherever reasonable to be consistent, but to the extent they are inconsistent, the negation or limitation fails. § 672.316(1), Fla. Stat. Thus, a seller may not provide an express warranty (whether through words or conduct), and then attempt to use an "as is" disclaimer.

- An "as is" clause or other attempted disclaimer does not necessarily defeat a claim for fraud in the inducement. *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," referring to *Oceanic Villas Inc. v. Godson*, 4 So. 2d 689 (Fla. 1941)); *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 "as is" disclaimer also cannot defeat statutory protections such as those under the Florida Deceptive and Unfair Trade Practices Act. *White v. Ferco Motors Corp.*, 260 So. 3d 388 (Fla. 3d DCA 2018).

- 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); § 672.316(1), Fla. Stat.

- Any disclaimer of the implied warranty of merchantability must actually use the word "merchantability" and must be conspicuous. § 672.316(2), Fla. Stat.; *McCormick Machinery, Inc. v. Julian E. Johnson & Sons, Inc.*, 523 So. 2d 651, 653–654 (Fla. 1st DCA 1988).

- 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.

- If there is conflicting evidence as to the parties' understanding of the purpose of the "as is" disclaimer, that creates a jury question as to the effectiveness of the disclaimer. *Knipp v. Weinbaum*, 351 So. 2d 1081 (Fla. 3d DCA 1977).

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.; *Hirsch v. Klosters Rederi A/S*, 521 So. 2d 316 (Fla. 3d DCA 1988); *Rudy's Glass Const. Co. v. E. F. Johnson Co.*, 404 So. 2d 1087 (Fla. 3d DCA 1981); *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).

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 warrantor must permit the consumer to elect a refund or replacement. 15 U.S.C. § 2304(a)(4). A warrantor's settlement offers made after a lawsuit is filed do not "cure" the non-compliance, even if they offer the full relief available under another law, such as the lemon law. *Mack v. Hyundai Motor Am. Corp.*, 346 So. 3d 661 (Fla. 2d DCA 2022).

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 MMWA. 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 FDUTPA, sections 501.976(6), (7), and (8), Fla. Stat. Remedies for violation of those provisions 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 MMWA include damages, and other legal or equitable relief, as well as reasonable attorney's fees and costs. 15 U.S.C. § 2310(d). Even if no damages are proven, a prevailing consumer is entitled to an

award of nominal damages. *Kia Motors Am., Inc. v. Doughty*, 242 So. 3d 1172, 1177 (Fla. 2d DCA 2018).

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 requiring 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. Applicable Statutes

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

The Florida MVRSFA, §§ 520.01–520.10, 520.12, 520.125, and 520.13, Fla. Stat., also mandates disclosure of many financing terms and noticing requirements. *E.g.*, § 520.07, Fla. Stat. However, MVRSFA 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 TILA), Regulation M, the Florida Motor Vehicle Lease Disclosure Act, FDUTPA, 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

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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.

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 case to recover actual damages, a civil penalty of up to $1,000 per lease transaction, and 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, FDUTPA 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. These provisions are sometimes referred to as the "Vehicle UDAP" law. The violation of any of these provisions is a per se violation of FDUTPA. § 501.203(3), Fla. Stat.

2. Applicability

These prohibitions apply to a "motor vehicle dealer" as defined in § 320.27, Fla. Stat., 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, a lawsuit may also be brought against the dealer's employees, owners, and others in control of the dealer's practices. *See e.g.*, *Wyndham Vacation Resorts, Inc. v. Timeshares Direct, Inc.*, 123 So. 3d 1149 (Fla. 5th DCA 2012); *Rensin 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. Pre-suit "Demand Letter"

Section 501.98, Fla. Stat., 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. This provision also applies to the dealer's employees, agents, principals, sureties, and insurers. § 501.98(1), Fla. Stat. 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 Chapter 501 of the Florida Statutes. *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 non-prevailing 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, and 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. Under the Uniform Commercial Code adopted by Florida, the definition of contract is not limited just to the specific document that is labeled as a contract or purchase agreement but means "the total legal obligation that results from the parties' agreement as determined by this code [the Uniform Commercial Code, or UCC] and as supplemented by any other applicable laws." § 671.201(12), Fla. Stat.

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.

It should be noted that a breach of a contract by one party releases the other party from performing any future contractual obligations. *Reinhart v. Miller*, 548 So. 2d 1176, 1177 (Fla. 4th DCA 1989) ("The breach by one party to a contract releases the other party from performing any future contractual obligations."); *Lucite Center, Inc. v. Mercedes*, 606 So. 2d 492, 493 (Fla. 4th DCA 1992) ("The breach

by one party to a contract releases the other party from performing any future contractual obligations"); *TDM of Cent. Fla., LLC v. Saul Holdings, Ltd. P'ship*, 106 So. 3d 498, 500 (Fla. 5th DCA 2013) ("The breach by one party to a contract releases the other party from performing any future contractual obligations.") (citing *Lucite Center*). In order for a breach to be actionable, it must be a material breach. *Burlington & Rockenbach, P.A. v. Law Offices of E. Clay Parker, 160 So. 3d 955, 960 (Fla. 5th DCA 2015).*

2. Fraud and Misrepresentation

Consumer claims relating to both new and used cars may include a clam 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 Sec. Services, Inc.*, 134 So. 3d 477, 480 n.6 (Fla. 2d DCA 2013); *Humana, Inc. v. Castillo*, 728 So. 2d 261 (Fla. 2d DCA 1999).

The parol evidence rule does not apply to claims of fraud in the inducement. *See e.g.*, *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, 307-308 (Fla. 4th DCA 1990); *Horan v. Horan*, 464 So. 2d 224, 227 (Fla. 4th DCA 1985); *Baggett v. Electricians Loc. 915 Credit Union*, 620 So. 2d 784, 785-786 (Fla. 2d DCA 1993).

3. Odometer Tampering

The primary federal statute dealing with odometer tampering is the Motor Vehicle Information and Cost Savings Act, better known as the "Federal 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 was 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. The Florida odometer statute is generally similar to the Federal Odometer Act, but also makes it unlawful to knowingly possess, sell, or offer to sell a vehicle with an odometer that has been tampered with to reflect a lower mileage. § 319.35(1)(c), Fla. Stat. In addition, the Florida odometer statute makes it unlawful to knowingly operate a vehicle with an odometer that has been tampered with to reflect a lower mileage unless the title and registration have been conspicuously stamped to indicate the mileage is inaccurate and written notice has been applied to the vehicle pursuant to the odometer repair or replacement provisions. § 319.35(3), Fla. Stat. The alteration or changing of the odometer mileage of a vehicle is also actionable under FDUTPA. § 501.976(12), Fla. Stat.

Both the Federal Odometer Act and the Florida odometer statute allow repairs or replacements to a non-functional odometer. However, in order to comply with those statutes, the replacement odometer must be reset to the same mileage as the one being replaced; if that is not possible, then the replacement odometer must be set to zero miles and a notice applied to the driver door frame. § 319.35(2), Fla. Stat.; 49 U.S.C. § 32704(a). There is nothing in either statute that allows the seller or transferor to guess or estimate the vehicle's mileage as part of the odometer disclosure.

Previously, vehicles more than ten years old were exempt from certain disclosure requirements (but not other requirements). 49 C.F.R. § 580.17(a)(3). However, that rule has been changed so that odometer disclosures will be required for vehicles up to twenty years old, but this is being phased in over a period of 10 years. 49 C.F.R. § 580.17(4). Moreover, 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, communication 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.

If any person, with intent to defraud, possesses, sells, or offers to sell any vehicle with an illegally adjusted, set back, or tampered odometer with lower mileage, the vehicle is contraband and may be seized. §319.35(4), Fla. Stat. An intentional violation of the Florida odometer statute is a felony. §319.35(5), Fla. Stat.

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 reasonably 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. However, a 2-year delay in revoking acceptance may be reasonable if a buyer complains of the defects soon after purchase and the seller repeatedly promises to repair them. *Bair v. A.E.G.I.S. Corp.*, 523 So. 2d 1186 (Fla. 2d DCA 1988).

If a plaintiff prevails in a revocation claim and a FDUTPA claim, but elects the remedy under revocation rather than FDUTPA, the plaintiff may nonetheless be

entitled to recover attorney fees under FDUTPA. *Gardner v. Nimnicht Chevrolet Co.*, 532 So. 2d 26 (Fla. 1st DCA 1988).

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 the following types 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. Fraud, misrepresentations, deception, and similar conduct by a dealer may be sufficient to state a valid claim against the bond, because they may also violate Chapter 320. *Williams v. CVT, LLC*, 295 So. 3d 883 (Fla. 2nd DCA 2020).

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, § 627.428, Fla. Stat.; *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 also 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.

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).

V. LEMON LAW

A. Overview

Chapter 681, Florida Statutes, provides remedies for consumers who purchase or lease new or demonstrator motor vehicles (and can include motorized recreation vehicles), with "nonconformities" that have not been corrected by the manufacturer, or its authorized service agent, 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. Whether a particular defect or condition is a nonconformity will depend on the facts of each case. A nonconformity does not include defects or conditions resulting from an accident, abuse, neglect, modification, or alteration of a vehicle by persons other than a manufacturer or authorized service agent. *Id*.

Vehicles accepted for return by a manufacturer as part of a settlement or decision under the Lemon Law must have their vehicle titles marked to reflect a return under the Lemon Law. No party may lease, sell, or transfer title to a returned vehicle unless the nature of the nonconformity is clearly and conspicuously disclosed to the prospective transferee, lessee, or buyer. § 681.114, Fla. Stat.

The statutory procedure for getting relief under the Lemon Law is technical with strict time limits and written notification requirements. The time frame and dispute resolution programs differ if the motor vehicle is a recreational vehicle.

B. Elements

To qualify under the Lemon Law, the vehicle in question must have been sold or leased in Florida. Considering vehicles are now being sold or leased online to Florida residents through dealerships that may be located outside of Florida, the issue of whether the vehicle was sold in Florida will depend on the facts of the case in these instances. The purchase must not have been for resale purposes.

To qualify as a "consumer" protected under the Lemon Law, the party must be: (1) a purchaser other than for purposes of resale or the lessee of a motor vehicle primarily used for personal, family, or household purposes; or (2) any person to whom the vehicle is transferred to for the same purposes during the duration of the Lemon Law rights period; or (3) any other person who is entitled to enforce the warranty. § 681.102(4), Fla. Stat.

C. Presumptions

Section 681.104, Fla. Stat., creates two presumptions for whether a vehicle has not been repaired within "a reasonable number of attempts." The first presumption focuses on the number of attempts to repair the same nonconformity. It is presumed that a reasonable number of attempts have been undertaken 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 continues to exist. The consumer must give the manufacturer one final opportunity to repair the defect by notifying the manufacturer of the continued nonconformity in writing—by registered or express mail. Under § 681.104(1)(a), Fla. Stat., the manufacturer has 10 days from receipt of the notification to direct the consumer 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." If the manufacturer fails to respond to the consumer and give the consumer the opportunity to have the motor vehicle repaired at a reasonably accessible repair facility or perform the repairs within the time periods prescribed, the requirement that the manufacturer be given a final attempt to cure the nonconformity does not apply.

The second presumption, found in § 681.104(1)(b), Fla. Stat., focuses on the length of time that a consumer's vehicle has been out of service. If a consumer's vehicle is out of service for repair of one or more nonconformities for a cumulative total of 15 or more calendar days, the consumer 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 must have at least one opportunity to inspect and repair the vehicle. Once the vehicle is out of service for repair of one or more of the nonconformities for a cumulative period of 30 days (60 days for a recreation vehicle), the vehicle is presumed to be a "lemon." Regarding the days out of service, it is not required that any nonconformity continue to exist.

D. The Process

The Lemon Law Rights Period means the period ending 24 months after the date of the original delivery of a motor vehicle to a consumer. § 681.102(9) Fla. Stat. Failure to timely file a claim during the Lemon Law Rights Period will result in rejection of the request.

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 dealership to provide this booklet to the consumer at the time the vehicle is acquired. Consumers can obtain the Guide and a Request for Arbitration form from the Attorney General's Office by calling the Consumer Hotline at (800) 321-5366, or the Lemon Law Arbitration Division at (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.

To qualify for relief under the Lemon Law, there are certain steps that must be taken by the consumer. If the manufacturer has a certified procedure in effect, and the consumer has been informed in writing how and where to file a claim with the certified procedure, then the consumer must first seek relief through that procedure. This information is typically found in the vehicle's warranty booklet or owner's manual. If a manufacturer has a certified procedure, a consumer claim arising during the Lemon Law rights period must be filed pursuant to that certified procedure no later than 60 days after the expiration of the Lemon Law rights period. If a manufacturer does not have a certified procedure or if the certified procedure does not have jurisdiction to resolve the dispute, a consumer may apply directly to the Attorney General to have the dispute submitted to the board for arbitration. If the manufacturer's certified procedure does not decide the dispute within 40 days of the date the claim is filed, or if the consumer is not satisfied with the decision, the consumer 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 certified program, the consumer 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.

A consumer must request arbitration before the board with respect to a claim arising during the Lemon Law rights period no later than 60 days after the expiration of the Lemon Law rights period, or within 30 days after the final action of a certified procedure, whichever date occurs later.

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. § 681.1095(6), Fla. Stat. The consumer may ask for a continuance of the hearing, but this will waive the 40-day period. The Board may also continue the hearing on its own motion. 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 consumer, the

manufacturer must comply with the decision within 40 days of its receipt. § 681.1095(9), Fla. Stat.

E. Remedies

Remedies awarded to consumers through a manufacturer's certified procedure will vary. 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 consumer's request. Both the refund and the replacement remedies include payment by the manufacturer of collateral charges (reasonable expenses wholly incurred because of the acquisition of the vehicle) and incidental charges (reasonable expenses directly caused by the substantial defects) incurred by the consumer. An offset for use of the vehicle is charged to the consumer 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 (outlined above in V.D.) under Chapter 681, Fla. Stat.

The Lemon Law also provides that a consumer can file an action in court to recover damages caused by a violation of the Lemon Law. If the consumer is successful, 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.

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. § 681.1095(10), Fla. Stat. If a decision of the Board in favor of the consumer is

upheld by the circuit court, the consumer 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: Different procedures may apply 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 and Arbitration Program under § 681.1096-97, Fla. Stat. (not the Florida New Motor Vehicle Arbitration Board).

The dispute will be submitted to mediation first. The parties may, by agreement, consent to expand the scope of mediation to attempt to resolve warranty claims by the consumer which may not be covered under the chapter. § 681.1097(4), Fla. Stat. If no resolution is reached during mediation, the dispute will be referred to arbitration. *Id*. The arbitrator cannot 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 by the consumer that may not be covered under the chapter, provided such claims were first reported by the consumer to the manufacturer or its authorized service agent during the term of the manufacturer's express warranty. *Id*. 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.

VI. CREDIT CARD ACTIONS

Florida's "Credit Card Bank Act," Fla. Stat. § 658.995, provides general requirements and obligations for banks that issue credit cards in Florida. However, there are no specific statutes relating to actions against consumers for payment of credit card debt. Such actions are typically brought under various common law claims.

A. Typical Causes of Action

Causes of Action	Elements/Requirements
Breach of Contract	(1) a valid contract; (2) a material breach; and (3) damages. *In re Standard Jury Instructions—Contract & Business Cases*, 116 So. 3d 284, 306 (Fla. 2013), citing *Friedman v. New York Life Ins. Co.*, 985 So. 2d 56, 58 (Fla. 4th DCA 2008). Where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument, or an adequate portion thereof, is attached to or incorporated in the complaint. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 500 (Fla. 4th DCA 2001) (citing Fla. R. Civ. P. 1.130(a), which provides that all contracts or documents "upon which an action may be brought . . . shall be incorporated in or attached to the pleading.").
Account Stated	To state a cause of action, a party has to show it had a business relationship with the debtor, the creditor sent a bill to the debtor, and the debtor expressed or implied agreement to the amount owed. *Ham v. Portfolio Recovery Associates, LLC*, 260 So.3d 450, 456 (Fla. 1st DCA 2018) (rev'd in part on other grounds). When an account statement has been "rendered to and received by one who made no objection thereto within a reasonable time," a prima facie case for the correctness of the account and the liability of the debtor has been made. *Daytona Bridge Co. v. Bond*, 36 So. 445, 447 (Fla. 1904). Debtor's failure to object only becomes an implied agreement when the plaintiff establishes that it had a practice of periodic

	billing in the regular course of dealing with the defendant. *Burt v. Hudson Keyse*, 138 So. 3d 1193 (Fla. 5th DCA 2014) *citing* *F.D.I.C. v. Brodie*, 602 So. 2d 1358, 1361 (Fla. 3d DCA 1992). An itemized statement of underlying charges is not required to establish a claim for account stated. *Farley v. Chase Bank, U.S.A, N.A.*, 37 So.3d 936, 937 (Fla. 4th DCA 2010).
Open Account	To state a valid claim on an open account, the claimant must attach an "itemized" copy of the account. *H&H Design Builders, Inc. v. Traverlers' Indem. Co.*, 639 So.2d 697, 700 (Fla. 5th DCA 1994). This claim concerns an unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlements and adjustment." *Farley v. Chase Bank, U.S.A., N.A.*, 37 So.3d 936, 937 (Fla. 4th DCA 2010) (internal citations omitted). In commercial transactions, an "open account" should refer to an unsettled debt, arising from items of work or labor, goods sold, and other open transactions not reduced to writing, the sole record of which is usually the account books of the owner of the demand. *H&H Design Builders, Inc. v. Travelers' Indem. Co.*, 639 So.2d 697, 700 (Fla. 5th DCA 1994).
Money Lent	The elements of a claim: (1) Money was delivered to the defendant, (2) the money was intended as a loan, and (3) the loan was not repaid when due. *Wane v. Loan Corp.*, 926 F.Supp.2d 1312, 1324 (M.D. Fla. 2013).
Unjust Enrichment	The elements of a claim: (1) Plaintiff has conferred a benefit on the defendant, who has knowledge thereof; (2) defendant voluntarily accepts and retains the benefit conferred; and (3) the circumstances are such that it would be inequitable for the defendant to retain the benefit without first paying the value thereof to the plaintiff. *Agritrade, LP v. Quercia*, 253 So.3d 28, 33 (Fla. 3d DCA 2017).

B. Defenses

a. Statute of Limitations:

A cause of action accrues when the last element constituting the cause of action occurs. Fla. Stat. § 95.0131(1). There are limited circumstances that can toll a statute of limitations under Fla. Stat. § 95.051(1)(a)-(i).

i. Actions based on written contract (i.e. Breach of Contract): 5 years plus the "breach" time period (generally 30 days from the date of Defendant's last payment). Fla. Stat. § 95.11(2)(b).

ii. Actions not based on written contract (i.e. Account Stated): 4 years (generally 30 days from the date of the most recent statement attached to the complaint in an Account Stated action). Fla. Stat. § 95.11(3)(k).

b. Dispute the Amount of Debt:

A defendant can challenge the amount claimed to be owed in the complaint.

c. Failure to attach contract:

Where a complaint is based on a written instrument, the complaint does not state a cause of action until the instrument or an adequate portion thereof is attached to or incorporated in the complaint. *Samuels v. King Motor Co. of Fort Lauderdale*, 782 So.2d 489, 500 (Fla. 4th DCA 2001) (citing Fla. R. Civ. P. 1.130(a), which provides that all contracts or documents "upon which an action may be brought . . . shall be incorporated in or attached to the pleading.").

d. The Plaintiff is not a Licensed Debt Collector:

Under the Florida Consumer Collection Practices Act ("FCCPA"), "no person shall engage in business in this state as a consumer collection agency without first registering in accordance with this part … and thereafter maintaining a valid registration." *LeBlanc v. Unifund CCR* Partners, 601 F.3d 1185, 1191 (11th Cir. 2010) (*citing* Fla. Stat. § 559.553(1) and (2)). Despite the unavailability of a state cause of action, Section 559.785 of the FCCPA provides that it is a misdemeanor for "any person not exempt from registering . . .to engage in collecting consumer debts in this state without first registering." *Id.* (*citing* Fla. Stat. § 559.785).

e. Accord and Satisfaction:

Requires proof of two elements: (1) the parties mutually intended to settle an existing dispute by entering into a superseding agreement, and (2) there was actual performance with satisfaction of the new agreement discharging the debtor's prior obligation. *U.S. v. Morrison*, 29 So.3d 94, 102 (Fla. 1st DCA 2009); *Martinez v. south Bayshore tower, L.L.L.P.*, 979 So.2d 1023, 1024 (Fla. 3d DCA 2008).

f. Failure to Mitigate.

g. Failure to Exhaust Administrative Remedies.

Typically applies where the plaintiff has filed a lawsuit instead of initiating arbitration and an arbitration clause exists in the underlying contract. *Bal Harbour Village v. City of North Miami*, 678 So.2d 356, 364 (Fla. 3d DCA 1996).

3. Conditions Precedent

Notice of Assignment is no longer a condition precedent to filing a collection lawsuit. Section 559.715 requires an assignee of debt to give the debtor written notice of such assignment as soon as practical after the assignment is made, but at least 30 days before any action to collect the debt. This was historically a condition precedent for credit card cases. Recent court opinions, however, 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 court 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. In fact, the Fifth DCA subsequently held that section 559.715, Florida Statutes, does not create a condition precedent to the filing of a lawsuit to collect an unsecured debt. *National Collegiate Student Loan Trust v. Lipari*, 224 So.3d 309 (Fla 5th DCA 2017). As a result, it is well-settled across the state of Florida that Florida Statutes, Section 559.715, is not a condition precedent to the filing of a lawsuit to collect a consumer debt in the state of Florida.

C. Discovery

1. 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"). When a debt collector files a lawsuit to

collect on this debt, 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 a/a/o 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 for the defendant may be proper. *CACH, LLC v. Herrera*, 22 Fla. L. Weekly Supp. 121a (Fla. Orange Cty. Ct. 2014); *CACH, LLC v. Scott*, 21 Fla. L. Weekly Supp. 1052c (Fla. Orange Cty. Ct. 2014); *Portfolio Recovery Associates LLC v. Vallejos*, 21 Fla. L. Weekly Supp. 1052c (Fla. Orange Cty. Ct. 2014); *CACH LLC v. Kowatch*, 22 Fla. L. Weekly Supp. 121b (Fla. Orange Cty. Ct. 2014). Further, where a clear break in chain of assignment of debt can be shown, the credit card action can be dismissed for lack of standing. *HFC Collection Center v. Stephanie Alexander*, 19 Fla. L. Weekly Supp. 479b (Fla. 9th Cir. Ct. 2011).

D. Prevailing Party Fees on Quasi-Contract Cause of Action

1. Entitlement to Attorney's Under Reciprocal Fee Provision of 57.105, Fla. Stat.:

Many written credit card agreements contain a provision allowing for the recovery of attorney's fees if the creditor sues to collect on a defaulted credit card debt. Credit card companies and credit card debt buyers routinely bring claims under an account stated cause of action, rather than breach of contract, and in cases where the consumer is found to prevail, the creditors or debt buyers argued the "account stated" cause of action was not "with respect to the contract" so as to trigger the reciprocal fee provision under Fla. Stat. §57.105(7), as it related to the attorney's fee provision in the credit card agreement.

There was a prior split in the district courts regarding whether an account stated cause of action triggered the reciprocal fee provision of 57.105(7) which was resolved by the Florida Supreme Court in *Ham v Portfolio Recovery Associates*, 308 So.3d 942 (Fla. 2020).

In *Ham*, the Florida Supreme Court held that a unilateral fee provision in a credit card agreement was made reciprocal by 57.105(7) when the consumer prevailed, even where the creditor had filed an account stated cause of action. The Court

observed that "There is no tenable argument that a provision authorizing fees for action to collect a debtor's account does not encompass account stated claims" and "it is a fair reading to say that the account stated actions on which the debtors prevailed were actions 'with regard or relation to' those credit card contracts."

The holding in *Ham* is consistent with the intent of section 57.105(7) to "level the playing field between parties of unequal bargaining power and sophistication." *Port-A-Weld, Inc. v. Padula & Wadsworth Const., Inc.*, 984 So. 2d 564, 570 (Fla. 4th DCA 2008).

VII. RESIDENTIAL EVICTIONS

The Florida Residential Landlord and Tenant Act, found at §§ 83.40-83.683, Florida Statutes, generally governs evictions from a residential setting. Some common exceptions include transient occupancy, occupancy based on a contract for sale, and occupancy as a mobile homeowner of a rented lot in larger mobile home parks. In a residential eviction action, the landlord is entitled to the summary procedure provided in § 51.011, Florida Statutes.

A. Grounds for Eviction

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

B. Conditions Precedent/Pre-suit Notices

- Failed payment plus a default continues for three days after delivery of written demand for rent or possession; the three days excludes Saturday, Sunday, and legal holidays, which include only those observed by the clerk of court. § 83.56(3), Fla. Stat.
- Material noncompliance with lease terms plus a seven-day notice specifying the noncompliance and indicating intention to terminate § 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.
- Expiration of lease period. A tenancy without a specific duration may be terminated by either party giving written notice in the manner provided in § 83.57, Fla. Stat.

- Effect of improper notice

  - Insufficiency of pre-suit 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), distinguished on another issues in *Matheson v. Miami-Dade County*,258 So.3d 516 (Fla. 3rd DCA 2018) 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.) (2019 Florida Senate Bill No. 1974 (NS) (March 13, 2019; proposes changes to this statute.) — 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 (excluding Saturdays, Sundays, and legal holidays) 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).

There are exceptions to requirement that a tenant post rent, including:

- Payment. *See* § 83.60(2), Fla. Stat.; *Desha v. Smith*, 24 Fla. L. Weekly Supp. 238a (Fla. Manatee Cty. Ct. 2016) (no registry deposit necessary when three-day notice reflects $0 balance); *Green v. Liberty City Community Economic Development Corp.*, 21 Fla. L. Weekly Supp. 122a (Fla. 11th Cir. Ct. 2013).

- 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).

- Filing of a motion to determine rent (§ 83.60(2), Fla. Stat.).The motion 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).

2. Defenses — § 83.60, Fla. Stat.

- Material noncompliance with landlord's obligation to maintain premise or material noncompliance with the rental agreement — § 83.51(1), Fla. Stat.

  - Condition precedent as a defense — Seven-day notice by tenant to landlord (*see* § 83.60(1)(b), Fla. Stat.).

  - 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.

  - Landlord cannot retaliate for reasons set out in section 83.64(1) by increasing rent, decreasing services, or evicting.

  - 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. Prohibited Practices

A landlord is prohibited from discontinuing a tenant's utilities, regardless of who makes payment, from preventing tenant's access to the unit, and from removing a current tenant's personal belongings from the property. A landlord who violates this provision is liable for actual damages or three times the rent, whichever is greater, along with the tenant's costs and attorney fees. §83.67, Fla. Stat.

4. 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).

D. Security Deposit — *See generally* § 83.49, Fla. Stat.

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.

- A default judgment in an in rem action for possession only will not result in entry of a money judgment. *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) §83.625, Fla. Stat. (no money judgment shall be entered unless service of process has been effected by personal service or, where authorized by law…").

- Multiplier — In the past, 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). New rule HB 837 provides that multipliers will only be considered "in a rare and exceptional circumstances with evidence that competent counsel could not otherwise be retained." §57.104(2), Fla. Stat. (2023).

- Representation by legal aid — Tenant's counsel still entitled to fee recovery when represented by legal aid attorney. *Conway v. Sutton Place 2008, LLC*, 23 Fla. L. Weekly Supp. 503b (Fla. 5th Cir. Ct. 2015) (in appellate capacity).

F. Removal of Tenant's Personal Property Post-Eviction — §§ 83.67(5) and § 715.104, Fla. Stat.

- 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.

G. Tenant Eviction After Foreclosure

The Federal and Florida versions of the Protecting Tenants at Foreclosure Act provide protection to bona fide tenants after a foreclosure sale. Depending on the circumstances, bona fide tenants—not squatters—may be entitled to remain in the foreclosed property for the duration of their existing lease or an additional 90 days after service of the notice to vacate. § 83.5615, Fla. Stat. (2022).

VIII. FLORIDA CONSUMER COLLECTION PRACTICES ACT

A. Scope/Purpose

The Florida Consumer Collection Practices Act (FCCPA) (Fla. Stat. §§ 559.55–559.785, *et seq*., is Florida's supplement and counterpart to the federal Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692, *et seq*. "[T]he purpose and intent of the FCCPA, like the FDCPA, is to eliminate abusive and harassing tactics in the collection of debts." Trent v. Mortgage Elec. Registration Sys., Inc., 618 F.Supp.2d 1356, 1361 (M.D. Fla. 2007) *aff'd,* 288 F. App'x 571 (11th Cir. 2008).

"[T]he FDCPA and the FCCPA are not identical, and a violation of one act does not automatically constitute a violation of the other." *Read v. MFP, Inc.*, 85 So. 3d 1151, 1153 (Fla. 2d DCA 2012). There are differences between the FDCPA and FCCPA, and a violation of the federal statute does not automatically constitute a violation of the state statute in situations where the FCCPA is distinguishable. *Beeders v. Gulf Coast Collection Bureau, Inc*., No. 8:09–cv–00458–EAK–AEP, 2010 WL 2696404, at *6 (M.D. Fla. July 6, 2010) aff'd, 432 Fed. Appx. 918 (11th Cir.2011).

Section 559.552 provides that if there is an inconsistency between the FDCPA and FCCPA, "the provision which is more protective of the consumer or debtor shall prevail." Section 559.77(5) provides "great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts relating to the [FDCPA]."

B. Elements of a FCCPA Cause of Action

To state a claim under the FCCPA, the plaintiff must allege facts plausibly suggesting: (1) the defendant is a "person" within the meaning of the FCCPA; (2) the defendant collected or attempted to collect a "consumer" debt from the plaintiff; and (3) the defendant committed an act or omission prohibited by the FCCPA when it collected or attempted to collect the debt. Fla. Stat.§ 559.72; *Gause v. Medical Business Consultants, Inc*., 424 F. Supp. 3d 1175 (M.D. Fla. 2019).

Certain provisions of section 559.72 have an additional element that the person attempting to collect the debt have *actual* knowledge. *See* Fla. Stat. §§ 559.72(5), (6), (9), (18). To state claim against a debt collector under those sections of the FCCPA, the complaint must contain an allegation of "actual knowledge of the impropriety or overreach of a claim." *Bacelli v. MFP, Inc*., 729 F. Supp. 2d

1328, 1333 (M.D. Fla. 2010) (citing In re Cooper, 253 B.R. 286, 290 (N.D. Fla. 2000)); *e.g.*, *Schauer v. Morse Operations, Inc.*, 5 So. 3d 2, 6 (Fla. 4th DCA 2009) (statute does not provide for recovery if the creditor merely should have known the debt was not legitimate).

Fla. Stat. § 559.55 contains several key definitions:

- "Person": The FCCPA is broader in scope than the FDCPA. 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").

- "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); Fla. Stat. § 559.55(6).

- "Debtor" or "Consumer": As used in the FCCPA, "'[d]ebtor' or 'consumer' means any natural person obligated or *allegedly obligated* to pay any debt." Fla. Stat. § 559.55(8) (emphasis added). 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).

C. Standard of Scrutiny

Alleged violations under the 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). Courts have found that even in circumstances where the plaintiff is a 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 n.14 (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 should 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). "The purpose of the least-sophisticated-consumer standard … is to ensure that the [FDCPA] protects the gullible as well as the shrewd." *In re: Hathcock*, 437 B.R. 696 (Bankr. M.D. Fla. 2020) (citing Jacobson v. Healthcare Fin. Servs., Inc., 516 F.3d 85, 90 (2d Cir. 2008)). The objective standard serves the FCCPA's dual purpose of protecting consumers against deceptive debt collection practices and preventing unreasonable constructions of communications "by preserving a quotient of reasonableness." (Id.) (citing *LeBlanc v. Unifund CCR Partners*, 601 F.3d 1185, 1194 (11th Cir. 2010)).

D. Collection Activity

The FCCPA enumerates nineteen prohibited actions or omissions. Generally, the FCCPA regulates when, where, how, and who a creditor can contact concerning a consumer debt. Fla. Stat. § 559.72, *et seq.* "When determining whether a communication is 'in connection with the collection of any debt,' [courts] look to the language of the communication in question—specifically the statements that demand payment and discuss additional fees if payment is not tendered." Farquharson v. Citibank, N.A., 664 Fed.Appx. 793, 801 (11th Cir. 2016).

For instance, to be "in connection with the collection of a debt," a letter need not make an explicit demand for payment. *Sharp v. Premiere Credit of N. Am., LLC*, 3:16-cv-849-J-39PDB, 2017 WL 11025885, at *2 (M.D. Fla. Jan. 30, 2017) ("communications that include discussions of the status of payment, offers of alternatives to default, and requests for financial information may be part of a dialogue to facilitate satisfaction of the debt and hence can constitute debt collection activity") (internal citations omitted). A letter can constitute "debt collection" when it includes a due date, a total amount due, instructions for making payment, and potential penalties if no payment is received. *Prindle v. Carrington Mortgage Services, LLC*, No. 3:13-cv-1349-J-34PDB, 2016 WL 4369424, at *15 (M.D. Fla. Aug. 16, 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).

Certain types of correspondence related to a debt may not fall within the FCCPA ambit. *See e.g., Green v. Specialized Loan Servicing LLC*, 766 Fed. Appx. 777 (11th Cir. 2019) ("We find nothing in the language in question from the mortgage statement, beyond what is required by TILA, which rises of the level of being unlawful debt collection language); *Lamirand v. Fay Servicing, LLC*, 38 F.4th 976 (11th Cir. 2022) (if servicers use periodic statements to collect a debt, they can be held liable for misleading or unconscionable representations they make in those statements).

Condominium assessments can fall within the FCCPA. *See Williams v. Salt Springs Resort Assoc.*, 298 So.3d 1255 (Fla. 5th DCA 2020) (holding owner's ongoing obligation to pay assessments could be a "consumer debt" for purposes of the FCCPA, but noting that not *all* assessments are automatically consumer debts). Conversely, the Second District held in two opinions that deficiency collection following entry of final judgment of foreclosure is not "debt collection" for the purpose of FCCPA as 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).

E. Statute of Limitations

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

F. Bona Fide Error Defense

Section 559.77(3) provides for a defense based on a "bona fide error." The bona fide error defense has three elements, and 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." *E.g.*, *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)).

G. 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. Notably, $1,000 is the maximum amount a plaintiff may be awarded in statutory damages even when a series of FCCPA violations exist. *Castro v. Capital One Services, LLC, 8:16-CV-889-T-17TGW*, 2017 WL 4776973, at *4 (M.D. Fla. Aug. 3, 2017). Section 559.77(2), Fla. Stat., further states that "[i]n determining the defendant's liability for any additional statutory damages, the court shall consider the nature of the defendant's noncompliance with s. 559.72, the frequency and persistence of the noncompliance, and the extent to which the noncompliance was intentional.

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 only 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). "A defendant may be held liable for punitive damages only if the trier of fact, based on clear and convincing evidence, finds that the defendant was personally guilty of intentional misconduct or gross negligence." Fla. Stat. § 768.72(2). *Goodin*, 114 F. Supp. 3d at 1212 ("Punitive damages may be imposed on a corporation for conduct of an employee only if an employee was personally guilty of intentional misconduct or gross negligence and (1) the corporation actively and knowingly participated in that conduct; (2) the officers, directors, or managers of the corporation knowingly condoned, ratified, or consented to the conduct; or (3) the corporation engaged in conduct that constituted gross negligence and that contributed to the loss suffered by the claimant. § 768.72(3)."

"If the court finds that the suit fails to raise a justiciable issue of law or fact, the plaintiff shall be liable for court costs and reasonable attorney's fees incurred by the defendant." Fla. Stat. § 559.77(2); *see also Carner v. MCG Mortgage, Inc.*, Case No. 19-61131, 2020 WL 7481269 at *1 (S.D. Fla., Feb. 23, 2020).

H. 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).

I. Proposals for Settlement

Multiple courts have confirmed the invalidity of proposals for settlement in FCCPA cases and granted motions to strike the proposals. *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).

IX. HOMEOWNER'S AND CONDOMINIUM ASSOCIATION ISSUES

A. Applicable Statutes

Condominium associations are governed by chapter 718, Florida Statutes, the Condominiums Act. Homeowner's associations are governed by chapter 720, Florida Statutes, the Homeowner's Associations Act.

B. Injunctions/Emergency Relief

1. In General

a. Procedure

Rule 1.610, Florida Rules of Civil Procedure, governs the procedure for seeking a temporary injunction.

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 private plaintiff 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).

a. 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 party or entity 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).

b. 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). However, some courts have recognized that the bond requirement can be dispensed with if waived by both sides or based on financial ability to pay. *Castillo Grand Residences Condo. Ass'n v. Stern*, 304 So. 3d 23 (Fla. 4th DCA 2020) (citing *Duber v. Ferraro*, 242 So 3d. 444 at 444-48 (Fla. 4th DCA 2018) ("a bond is ordinarily required for a temporary mandatory injunction absent evidence of financial inability to maintain a bond, agreement of both sides, or any other recognized ground.").

2. Presuit Mediation for HOA Disputes Under § 720.311, Fla. Stat.

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 any assessment, fine, or other financial obligation, including attorney's fees and costs, claimed to be due or any action to enforce a prior mediation settlement agreement between the parties.

When *emergency relief* is required, a motion for temporary injunctive relief can be filed first without complying with presuit mediation. After any issues regarding emergency or temporary relief are resolved, the court may either 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. Importantly, at least one Circuit Court sitting in its appellate capacity has held that where presuit mediation does not occur, the Homeowners' Mediation Act precludes *either* party from recovering attorney's fees and costs even where it was the homeowner who did not respond to the request for mediation as provided in the statute. *Northton Grove Homeowners Ass'n, Inc. v. Shelton* (25 Fla. L. Weekly Supp. 377b) (affirmed by *Shelton v. Northton Grove Homeowners' Ass'n, Inc*., 16-CA-4834, (May 8, 2017).

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 may protect Association directors from personal liability but "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) (citing *Farrington v. Casa Solana Condo. Ass'n, Inc.*, 517 So. 2d 70, 72 (Fla. 3d DCA 1987)).

4. Association Foreclosures

a. Presuit notices prior to foreclosure or levy of attorney's fees:

In both condo association and homeowners' association foreclosures for delinquent assessments, the association is required to provide the owner statutory notices prior to recording a lien and prior to initiating a foreclosure. *See e.g.*, §§ 718.116 (6)(b), 718.121(6) and 720.3085(4)(a) and (5).

In July of 2021, significant amendments to the Condominium Act and Homeowners' Association Act were passed which, amongst other changes, added additional notice requirements before an association may charge an owner attorney's fees related to past due assessments.

Prior to being assessed attorney's fees for past due assessments, an association must now send the owner a statutorily prescribed "Notice of Late Assessment" providing notice to the owner and a 30-day opportunity to cure the assessment delinquency without the addition of attorney's fees. *See* § 720.3085(3)(d) for HOA and § 718.121(5) for COA.

In addition, the notice periods in § 718.121(6) and §718.121(6)(b) for condo association Notices of Intent to Lien and Notices of Intent to Foreclose were increased to 45 days from 30 days to be in harmony with the reciprocal requirements for HOAs contained in § 720.

b. Liability for unpaid assessments of prior owner

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."

Section 720.3085(2)(b), Florida Statutes: "A parcel 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. This liability is without prejudice to any right the present parcel owner may have to recover any amounts paid by the present owner from the previous owner."

Both § 718.116(1)(a) and § 720.3085(2)(b) were amended in 2017 and, in the event the association acquires title to the delinquent property through foreclosure or a deed in lieu of foreclosure, the term "previous owner" above does *not* include the association and the present owner's liability is limited to any unpaid assessments that accrued *before* the association acquired title to the delinquent property.

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.

c. Tenants in foreclosed properties

On June 23, 2018, the Federal law known as "Protecting Tenants at Foreclosure Act" was restored. The law provides that a bona fide tenant is authorized to remain in a residential unit that was acquired by a new party through foreclosure for the balance of the unexpired term of the lease, unless the unit is acquired by a party that intends to occupy the unit, in which case the tenant is authorized to remain in the unit for ninety (90) days after receiving a notice to vacate. Florida has its own "Protecting Tenants at Foreclosure Act" *See* § 83.5615.

Both the Condominium Act and the Homeowners' Association Act allow an association to send a written demand to any tenant occupying a unit or parcel for which the owner is delinquent in the payment of any monetary obligation to the association and to demand the tenant pay any rent due the owner over to the association until such monetary obligation is satisfied. *See* §720.3085(8) (HOA)

and § 718.116(11) (COA). The owner must also be provided a copy of the association's demand. If the tenant complies with the association's demand, the tenant is immune from any claim by the landlord or unit owner related to rent paid to the association. Likewise, if the tenant fails to comply after a lawful demand, the association may evict the tenant using the procedures of Ch. 83 for residential evictions.

5. Official Records of Condominium Associations

The 2018 Florida Legislature amended section 718.111(12) of the Florida Statutes to provide that by January 1, 2019, condominium associations of 150 or more units must create a website on which owners can obtain various official documents.

Any written document, including complaints made to the Association, are "official records" of the Association and thus may be viewed by any owner. Section 718.111(12)(c)(1) of the Florida Statutes provides "[t]he official records of the association are open to inspection by any association member or the authorized representative of such member at all reasonable times." "The right to inspect the records includes the right to make or obtain copies, at the reasonable expense, if any, of the member or authorized representative of such member." *Id.*

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 at 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." Generally, the federal rule requires sellers who make a personally solicited sale at a consumer's home to provide specific disclosures and forms to that consumer, providing the consumer 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 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 also apply to sales, leases, and rentals. § 501.021(1), Fla. Stat.; 16 C.F.R. § 429.0(a). In addition, the Florida Act and Federal Rule apply to consumer goods and services 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 insurance. § 501.035(1), Fla. Stat.

- Sale of farm equipment or machinery. § 501.035(2), Fla. Stat.

3. The Federal Rule

The Federal Rule, also known as the Home Solicitation Sales 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 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 covered by the right of rescission provided by the U.S. Consumer Credit Protection Act (15 U.S.C. § 1635). 16 C.F.R. § 429.0(a)(2).

- Transactions to meet a buyer's bona fide immediate personal emergency. 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. § 501.022, Fla. Stat. A business must ensure that all applicable employees obtain any required permit from the County Clerk 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 the signing of 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. The notice of cancellation 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.

§ 501.041, Fla. Stat.

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.

Section 501.047 of the Florida Act also prohibits certain specific practices:

- Misrepresenting the terms or conditions of the sale, lease, or rental.
- Misrepresenting the seller's affiliation with the parent company or sponsor.

- Misrepresenting the seller's reason for soliciting the sale, lease, or rental of goods or services, such as participation in a contest or inability to perform any other job, when such is not a fact.

- Alleging or implying that the agreement to purchase, lease, or rent goods or services is non-cancelable when such is not a fact.

- Performing any other act that constitutes misrepresentation.

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 contact 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" to the buyer. 16 C.F.R. § 429.1(b). The form must 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]
>
> _____
> (Date)
>
> 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 after execution in order to provide time for the consumer to exercise their right to cancel. 16 C.F.R. § 429.1(h).

If the consumer exercises the right to cancel, the seller must take all of the following steps within 10 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 Federal Rule expressly allows similar state laws regarding home solicitation sales except to the extent the applicable state law is directly inconsistent with the Federal Rule or provides 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 notice of 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. *State Farm Mut. Auto. Ins. Co. v. At Home Auto Glass LLC*, No. 8:21-cv-239-TPB-AEP, 2021 U.S. Dist. LEXIS 245584, at *16 (M.D. Fla. Dec. 27, 2021). 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.; *State Farm Mut. Auto. Ins. Co. v. At Home Auto Glass LLC*, No. 8:21-cv-239-TPB-AEP, 2021 U.S. Dist. LEXIS 245584, at *16 (M.D. Fla. Dec. 27, 2021). 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 a more detailed discussion of that Act.