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## The Extraterritorial Application of the Florida Deceptive and Unfair Trade Practices Act: State Appellate Cases Addressing the Issue

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# THE EXTRATERRITORIAL APPLICATION OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT: STATE APPELLATE CASES ADDRESSING THE ISSUE

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## I. INTRODUCTION

The Florida Deceptive and Unfair Trade Practices Act ("FDUTPA") is a consumer protection law based upon the Federal Trade Commission Act.<sup>1</sup> It is designed to govern consumer protection by prohibiting "unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce."<sup>2</sup> It is used by the Office of the State Attorney and the Department of Legal Affairs to prosecute violators, and it also provides a private cause of action to individuals and businesses.<sup>3</sup> This Act does not contain express language restricting its protection to Florida residents only.<sup>4</sup> Courts in Florida, both federal and state, have addressed matters involving the application of the FDUTPA to out-of-state and even international parties.<sup>5</sup> The issue of the use of the FDUTPA by non-residents of the state has not been consistently settled as of today and in fact, a recent decision by the Fourth District Court of Appeal may have further complicated the matter.<sup>6</sup>

The extraterritorial use of this law is an important issue for individuals and businesses that reside in and out of the State of Florida. The amount of international and interstate trade that is performed in and involves Florida makes it important to highlight the history and current status of court opin-

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1. 15 U.S.C. § 45 (2000); FLA. STAT. § 501.201-.213 (2002); David J. Federbush, *The Unexplored Territory of Unfairness in Florida's Deceptive and Unfair Trade Practices Act*, 73 FLA. B.J. 26, 28 (1999) [hereinafter Federbush I].

2. § 501.202(2).

3. § 501.203(2), .211(1). The Department of Legal Affairs is headed-up by the Attorney General of the State of Florida. § 20.11.

4. See § 501.201-.213.

5. See, e.g., *Guyana Tel. & Tel. Co. v. Melbourne Int'l Communications, Ltd.*, 329 F.3d 1241, 1243 (11th Cir. 2003); *Nieman v. Dryclean U.S.A. Franchise Co.*, 178 F.3d 1126, 1128-29 (11th Cir. 1999); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1093 (Fla. 4th Dist. Ct. App. 2003); *Millennium Communications & Fulfillment, Inc. v. Dep't of Legal Affairs*, 761 So. 2d 1256, 1257 (Fla. 3d Dist. Ct. App. 2000); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

6. See *Hutson*, 837 So. 2d at 1093-94 (explaining the court's decision in *Glassman* four years earlier).

ions to determine the effective scope of the Florida Deceptive and Unfair Trade Practices Act.

This article provides a summary of the Act by describing its purposes, types of violations, enforcement power, and available remedies. The pertinent state appellate case history is then explored, including a discussion of two Fourth District Court of Appeal cases, which examine why the court held it was appropriate for the Act to extend to non-residents of Florida in one case, while not in the other.<sup>7</sup> The court's rationale in each case, and an analysis of factors to be considered in determining if the FDUTPA would apply in future cases, is analyzed.

## II. OVERVIEW OF THE FLORIDA DECEPTIVE AND UNFAIR TRADE PRACTICES ACT

### A. Purposes of the Act

As its name suggests, the Florida Deceptive and Unfair Trade Practices Act is a Florida Statute intended to provide a means of protection against unfair, deceptive, and unconscionable trade practices.<sup>8</sup> Specifically, the law states its purposes as:

(1) To simplify, clarify, and modernize the law governing consumer protection, unfair methods of competition, and unconscionable, deceptive, and unfair trade practices. (2) To protect the consuming public and legitimate business enterprises from those who engage in unfair methods of competition, or unconscionable, deceptive, or unfair acts or practices in the conduct of any trade or commerce. (3) To make state consumer protection and enforcement consistent with established policies of federal law relating to consumer protection.<sup>9</sup>

By its definition under the FDUTPA, “[c]onsumer’ means an individual; child, by and through its parent or legal guardian; business; firm; association; joint venture; partnership; estate; trust; business trust; syndicate; fiduciary; corporation; any commercial entity, however denominated; or any other group or combination.”<sup>10</sup> Thus, through its definition of “consumer”

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7. *Id.* at 1094 (distinguishing the facts of this case from those in *Glassman* in support of the court's determination that the FDUTPA should not apply to all claims in a national class action).

8. § 501.202(1)-(3).

9. *Id.*

10. § 501.203(7).

which includes business entities, and by its stated goal of shielding business enterprises from unfair competition, this statute extends beyond the protection of the mere individual consumer and into the area of civil antitrust as well.<sup>11</sup>

### B. *Violations of the FDUTPA*

The FDUTPA is known as a “little FTC act” because it is the State of Florida’s version of the Federal Trade Commission Act (“FTC Act”).<sup>12</sup> As such, the Florida Legislature intended that “due consideration and great weight shall be given to the interpretations of the Federal Trade Commission and the federal courts” in determining the types of conduct that constitute violations of the FDUTPA.<sup>13</sup> On its face, the statute prohibits “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce.”<sup>14</sup> The Supreme Court of Florida upheld the constitutionality of the FDUTPA, despite its lack of specificity as to the types of conduct that are considered to be violations, in *Department of Legal Affairs v. Rogers*.<sup>15</sup>

The statute allows for, but does not require, the adoption of rules that specify violating practices by the Department of Legal Affairs.<sup>16</sup> All substantive rules created by the Department of Legal Affairs must be consistent with those created by the FTC and the federal courts in their interpretations of the FTC Act.<sup>17</sup> Supplementing the holding in *Rogers*, the Fourth District Court of Appeal held in *Department of Legal Affairs v. Father & Son Moving & Storage, Inc.*<sup>18</sup> that “a specific rule or regulation is not necessary to the determination of what constitutes an unfair or deceptive practice.”<sup>19</sup> Subsequent to the decision in *Father & Son*, the Department of Legal Affairs repealed rules that it had previously adopted and cited this case as the justification for its repeal.<sup>20</sup>

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11. *Id.*; § 501.202(2); see David J. Federbush, *FDUTPA for Civil Antitrust: Additional Conduct, Party, and Geographic Coverage; State Actions for Consumer Restitution*, 76 FLA. B.J. 52, 53 (2002) [hereinafter Federbush II].

12. Federbush I, *supra* note 1; 15 U.S.C. § 45 (2000).

13. FLA. STAT. § 501.204(2) (2003).

14. § 501.204(1).

15. 329 So. 2d 257, 267 (Fla. 1976).

16. §§ 501.203(4), .205(1).

17. § 501.205(2).

18. 643 So. 2d 22 (Fla. 4th Dist. Ct. App. 1994).

19. *Id.* at 24.

20. FLA. ADMIN. CODE ANN. R. 2-2.001 (2000) (stating “[i]t is neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by Part II,

While the FDUTPA does not contain a list of practices that are considered to be violations, it does provide some broad guidelines in its definitions:

“Violation of this part” means any violation of this act or the rules adopted under this act and may be based upon any of the following as of July 1, 2001: (a) Any rules promulgated pursuant to the Federal Trade Commission Act, 15 U.S.C. ss. 41 et seq.; (b) The standards of unfairness and deception set forth and interpreted by the Federal Trade Commission or the federal courts; (c) Any law, statute, rule, regulation, or ordinance which proscribes unfair methods of competition, or unfair, deceptive, or unconscionable acts or practices.<sup>21</sup>

The last category of “per se violations” potentially provides wide latitude as a basis for FDUTPA violations, because the statutes, rules, or ordinances breached do not need to contain definite references to the FDUTPA, but rather, need only prohibit conduct that is deceptive, unfair, or unconscionable.<sup>22</sup> The type of practices that the FDUTPA seeks to regulate are also quite broad, as demonstrated by its definition:

“Trade or commerce” means the advertising, soliciting, providing, offering, or distributing, whether by sale, rental, or otherwise of *any* good or service, or *any* property, whether tangible or intangible, or *any* other article, commodity, or thing of value, *wherever situated*. “Trade or commerce” shall include the conduct of *any* trade or commerce, however denominated, including *any* nonprofit or not-for-profit person or activity.<sup>23</sup>

Judging by the language used on its face, the intended scope of the FDUTPA is therefore far-reaching.<sup>24</sup>

### C. Enforcement of the FDUTPA and Allowable Remedies

The Office of the State Attorney and the Department of Legal Affairs have power to uphold the FDUTPA.<sup>25</sup> The statute reads:

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Chapter 501, Florida Statutes.” (citation omitted)). The *Florida Administrative Code Annotated* also states that the repeal does not modify or restrict the application of Chapter 501 of the *Florida Statutes*, to deceptive and unfair trade practices. *Id.*

21. § 501.203(3)(a)-(c).

22. Mark S. Fistos, *Per Se Violations of the Florida Deceptive and Unfair Trade Practices Act*, 76 FLA. B.J. 62, 63–64 (2002).

23. § 501.203(8) (emphasis added).

24. *See id.*

“[e]nforcing authority” means the office of the state attorney if a violation of this part occurs in or affects the judicial circuit under the office’s jurisdiction. “Enforcing authority” means the Department of Legal Affairs if the violation occurs in or affects more than one judicial circuit or if the office of the state attorney defers to the department in writing, or fails to act upon a violation within 90 days after a written complaint has been filed with the state attorney.<sup>26</sup>

The “enforcing authority” can bring an action against a willful violator of the Act for a civil penalty of up to \$10,000, and may also seek a declaratory judgment, enjoin a violator, or pursue actual damages on behalf of consumers or governmental entities.<sup>27</sup>

A private cause of action is also provided for by the Act.<sup>28</sup> The FDUTPA states “*anyone aggrieved* by a violation of this part may bring an action to obtain a declaratory judgment that an act or practice violates this part and to enjoin a person who has violated, is violating, or is otherwise likely to violate this part.”<sup>29</sup> Additionally, “[i]n 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.”<sup>30</sup> The relaxed threshold of “anyone aggrieved” allows for the use of the FDUTPA by business entities for unfair, deceptive, or unconscionable practices of competitors.<sup>31</sup>

### III. EXTRATERRITORIAL APPLICATION IN PERTINENT CASES

One aspect of the Florida Deceptive and Unfair Trade Practices Act that has been debated in the courts is the issue of its extraterritorial application.<sup>32</sup> The FDUTPA does not contain express language limiting its reach within the

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25. § 501.203(2).

26. *Id.*

27. § 501.2075; § 501.207(1)(a)-(c).

28. § 501.211(1).

29. *Id.* (emphasis added).

30. § 501.211(2).

31. *See* § 501.211(1); *Federbush II*, *supra* note 11, at 52.

32. *See, e.g.,* *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1091 (Fla. 4th Dist. Ct. App. 2003); *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1260 (Fla. 3d Dist. Ct. App. 2000); *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

State of Florida, as opposed to the Florida Antitrust Act, for example.<sup>33</sup> There are various scenarios in which the FDUTPA could potentially apply, for example: an out-of-state plaintiff (alleged victim) versus an in-state defendant (alleged violator), or an in-state plaintiff (alleged victim) versus an out-of-state defendant (alleged violator).<sup>34</sup> The situation becomes more complicated when there are plaintiffs from both within and outside the state, as well as when the violative conduct occurs solely within the state or both within and outside the state.<sup>35</sup> Court decisions have swayed back and forth between allowing the application of the FDUTPA to cases involving out-of-state parties and not doing so, because of the need for other states' consumer protection laws to govern instead.<sup>36</sup> A careful review of relevant cases may shed some light on the factors that the courts have considered when determining whether or not to allow the application of the FDUTPA to litigation involving non-resident parties. This Note reviews relevant appellate level cases that decided the issue of whether the FDUTPA may be used as the basis of a cause of action by non-resident plaintiffs.

#### A. *FDUTPA Not Applied Extraterritorially in Coastal Physician Services of Broward County, Inc. v. Ortiz*

The 1999 case of *Coastal Physician Services of Broward County, Inc. v. Ortiz*<sup>37</sup> involved a claim by a patient against a physician staffing service for alleged violations of the FDUTPA incurred in the collection of medical bills.<sup>38</sup> A discovery order was entered by the circuit court, instructing the physician staffing service to provide documents naming all people to whom the service sent a certain form bill.<sup>39</sup> The staffing service petitioned for a writ of certiorari, arguing that the information they were required to provide

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33. Federbush II, *supra* note 11, at 60. Compare § 501.201-.213, with § 542.18 (stating “[e]very contract, combination, or conspiracy in restraint of trade or commerce in this state is unlawful.”) (emphasis added);

34. See, e.g., *Fendrich v. RBF, L.L.C.*, 842 So. 2d 1076, 1079 n.2 (Fla. 4th Dist. Ct. App. 2003) (out-of-state plaintiffs v. in-state defendants); *Execu-Tech Bus. Sys. Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 583 (Fla. 2000) (in-state-plaintiffs v. out-of-state defendants).

35. See, e.g., *Hutson*, 837 So. 2d at 1094; *Glassman*, 738 So. 2d at 437.

36. Compare *Hutson*, 837 So. 2d at 1094 (holding that class certification in Florida was not appropriate because the alleged wrong took place in all fifty states and therefore, Florida law would not apply to all claims), with *Glassman*, 738 So. 2d at 439 (finding that although a majority of plaintiffs were not residents of Florida, the FDUTPA applied to all members of the class).

37. 764 So. 2d 7 (Fla. 4th Dist. Ct. App. 1999).

38. *Id.* at 8.

39. *Id.*



under the discovery request should be limited to Florida residents only.<sup>40</sup> Their initial attempt to limit discovery was unsuccessful; however, on motion for rehearing, the Fourth District Court of Appeal granted Coastal's petition for certiorari of the discovery order, limited to the names of those recipients outside the State of Florida.<sup>41</sup> In granting certiorari, the court agreed with the staffing service that non-Florida residents could not make claims under the Florida Deceptive and Unfair Trade Practices Act.<sup>42</sup> The court concluded that together with another state law at issue, the FDUTPA is "for the protection of in-state consumers from either in-state or out-of-state debt collectors. Other states can protect their own residents, as Florida itself does with regard to out-of-state collectors."<sup>43</sup>

In *Ortiz*, the Fourth District Court of Appeal was therefore quite limiting in its determination of who can utilize the Florida Deceptive and Unfair Trade Practices Act, holding that non-residents of the state were not entitled to benefit from its protections, but rather, must rely on the laws of their respective states.<sup>44</sup> The court's holding may, or may not, still stand, as shall be discussed below.<sup>45</sup>

#### B. *FDUTPA Applied in Renaissance Cruises, Inc. v. Glassman*

The next relevant case at the state appellate level was *Renaissance Cruises, Inc. v. Glassman*,<sup>46</sup> also decided in 1999.<sup>47</sup> Here, the Fourth District Court of Appeal upheld a class certification by travelers against a cruise line for claims of deceptive trade practices under the FDUTPA, even though many class members were not residents of Florida.<sup>48</sup> The conduct in question was the collection by the cruise line of a "port charge" which was supplemental to the cost of the cruise itself.<sup>49</sup> The alleged deceptive conduct was the representation by the cruise line that the entire port charges were

40. *Id.*

41. *Id.*

42. *Ortiz*, 764 So. 2d at 8.

43. *Id.* (citations omitted).

44. *See id.*

45. Compare *Millennium Communications & Fulfillment, Inc. v. Dep't of Legal Affairs*, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000) (characterizing the subsequent Fourth District Court of Appeal decision in *Glassman* as a rescission of its previous holding in *Ortiz*), with *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003) (clarifying that its holding in *Ortiz* was not superceded by its holding in *Glassman*, but rather, both opinions stand and the cases are distinguishable).

46. 738 So. 2d 436 (Fla. 4th Dist. Ct. App. 1999).

47. *Id.*

48. *See id.* at 439.

49. *Id.* at 437.

paid to the ports, when actually an amount less than that collected was paid out and the cruise line kept the difference.<sup>50</sup> The plaintiffs commenced an action for what they deemed to be a deceptive trade practice and sought class certification of “[a]ll U.S. residents who traveled upon any vessel owned or operated by Renaissance on or after April 22, 1992, and paid port charges to Renaissance in connection with such cruise.”<sup>51</sup>

### 1. Requirements for Certification of the Class

In order to certify a class, it must meet the requirements of rule 1.220(a) of the *Florida Rules of Civil Procedure*, which reads:

(1) the members of the class are so numerous that separate joinder of each member is impracticable, (2) the claim or defense of the representative party raises questions of law or fact common to the questions of law or fact raised by the claim or defense of each member of the class, (3) the claim or defense of the representative party is typical of the claim or defense of each member of the class, and (4) the representative party can fairly and adequately protect and represent the interests of each member of the class.<sup>52</sup>

In addition to meeting those elements, a claim can only be maintained on behalf of the class if,

individual adjudications for proposed class members would be inconsistent; or the defendant’s actions make injunctive or declaratory relief as a whole appropriate; or the common questions of law or fact “predominate over any question of law or fact affecting only individual members of the class, and class representation is superior to other available methods for the fair and efficient adjudication of the controversy.”<sup>53</sup>

### 2. Application of Florida Law to All Members of the Class

In *Glassman*, based on data provided by the cruise line, ninety-two percent of tickets were sold to non-residents of the State of Florida.<sup>54</sup> The cruise line argued against class certification on the basis of the inapplicability of

50. *Id.*

51. *Id.*

52. FLA. R. CIV. P. 1.220(a); *Glassman*, 738 So. 2d at 438.

53. *Glassman*, 738 So. 2d at 438 (quoting FLA. R. CIV. P. 1.220(b)).

54. *Id.* at 437.

Florida law to every proposed class member, as so many were non-residents of Florida who purchased their tickets outside of the state.<sup>55</sup> If Florida law did not pertain to their claims, then the “commonality” and “predominance” requirements of rules 1.220(a)(2) and (b)(3) would not be met and the class could not be certified.<sup>56</sup>

The travelers, however, demonstrated that while not in the majority, still over 6000 potential class members were residents of the State of Florida.<sup>57</sup> Numerous other factors helped to establish that the use of Florida law for all claims would be proper: the location of Renaissance’s principal place of business and site of most of its business operations being in Florida; the traveler’s ultimate payment being made to the cruise line in Florida; and a forum selection clause in the terms of each cruise ticket, specifying Broward County, Florida as having jurisdiction over claims arising out of the ticket sale.<sup>58</sup>

Here on appeal, the “significant contact or significant aggregation of contacts” test developed in *Phillips Petroleum Co. v. Shutts*<sup>59</sup> was relied upon by the cruise line as the standard that needed to be met in order “to apply a state’s substantive law to a class action without offending the Due Process or Full Faith and Credit Clauses.”<sup>60</sup> The cruise line contended that “there were insufficient contacts with Florida to warrant application of Florida law to apply to the entire class so that common questions of law and fact would not predominate over individual claims.”<sup>61</sup> For the reasons mentioned above that were asserted by the travelers, and other reasons as well, the Fourth District Court of Appeal found that there were significant contacts with the State of Florida to warrant the application of its law to claims by the class members,

55. *Id.*

56. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 437 (Fla. 4th Dist. Ct. App. 1999); FLA. R. CIV. P. 1.220(a)(2), (b)(3).

57. *Glassman*, 738 So. 2d at 437.

58. *Id.* at 438. While the claim under the FDUTPA that was asserted by the class did not arise under the ticket sale transaction, the presence of the forum selection clause was argued by the potential class members to be additional justification for applying Florida law, since the cruise line had chosen to avail itself of the jurisdiction for those disputes which did originate under the ticket transaction, and so should be held for this action. *Id.*

59. 472 U.S. 797, 818 (1985).

60. *Glassman*, 738 So. 2d at 439 (referencing *Shutts*, 472 U.S. at 818–19). The Court in *Shutts* quoted its plurality opinion in *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981), “for a State’s substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair.” *Shutts*, 472 U.S. at 818; *Hague*, 449 U.S. at 312–13.

61. *Glassman*, 738 So. 2d at 438–39 (citing *Shutts*, 472 U.S. at 818–19).

so “[t]here [was] nothing arbitrary nor fundamentally unfair in applying the law of Florida to all of the members of the class.”<sup>62</sup>

The cruise line asserted two other reasons that class certification was not proper: based on Florida choice of law standards, Florida substantive law would not apply; and the statute of limitations varied between states and thus, it would be unmanageable to apply to individual class members.<sup>63</sup> These claims were both denied by the court, which found that the significant relationship test to determine which state’s substantive law applies.<sup>64</sup> The test, as outlined in *Bishop v. Florida Specialty Paint Co.*,<sup>65</sup> was met here and so Florida substantive law applies to all claims.<sup>66</sup> With respect to the varying statutes of limitation issue, the court cited *Bates v. Cook, Inc.*,<sup>67</sup> in which the significant relationship test in *Bishop* was used to determine which state’s statute of limitation applies, and since here that test allowed for the use of Florida substantive law, Florida’s statute of limitation would apply to all class members as well.<sup>68</sup>

One note that becomes important in the later discussion of the *Hutson* case,<sup>69</sup> is that in *Glassman*, the Fourth District Court of Appeal mentioned in its account of the trial court’s opinion that the common injury occurred in Florida because all cruise payments were made to the cruise line in Florida.<sup>70</sup> There was no further discussion of this determination in the Fourth District Court of Appeal’s opinion as it was not specifically an issue raised by *Glassman* on appeal.<sup>71</sup> In *Hutson*, the court refers to the place of injury as a determining factor as to whether the FDUTPA applies to a class action involving non-residents of Florida.<sup>72</sup>

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62. *Id.* at 439. Other factors that the court considered in determining that there were significant contacts between Florida and the litigation included: the port charges in question were paid by the cruise line by checks issued from Fort Lauderdale; overages above the port charges paid out were kept by the cruise line in Fort Lauderdale; the cruise ticket contract and marketing material were from Broward County, and included the cruise line’s Fort Lauderdale address. *Id.*

63. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 439–40 (Fla. 4th Dist. Ct. App. 1999).

64. *Id.* at 439.

65. 389 So. 2d 999, 1001 (Fla. 1980).

66. *Glassman*, 738 So. 2d at 439.

67. 509 So. 2d 1112, 1114–15 (Fla. 1987).

68. *Glassman*, 738 So. 2d at 440.

69. *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090 (Fla. 4th Dist. Ct. App. 2003).

70. *Id.* at 438.

71. *See id.* at 436–40.

72. *See Hutson*, 837 So. 2d at 1094.

### 3. Conclusion: Application of the FDUTPA to Non-Resident Class Members

In *Glassman*, the Fourth District Court of Appeal affirmed the Seventeenth Judicial Circuit Court's "well-reasoned order."<sup>73</sup> In granting the class certification, the trial court

concluded that there was sufficient commonality of factual and legal issues and that Florida had sufficient contacts, creating state interest, such that application of Florida law to the entire class was not arbitrary or unfair. The court noted that Florida has a great interest in protecting *people dealing with corporations doing business within Florida*.<sup>74</sup>

The affirmation by the Fourth District Court of Appeal of the lower court's holding, emphasizing the State of Florida's interest in protecting people dealing with Florida businesses, demonstrates a shift in the court's approach to the use of the FDUTPA from that expressed in *Ortiz*.<sup>75</sup> There, the court characterized the purpose of the Act as being "for the protection of in-state consumers" in granting certiorari to limit discovery to only residents of the state because non-residents were not entitled to make claims under the FDUTPA.<sup>76</sup> Here, the state's interest in "protecting people dealing with corporations doing business within Florida" was applicable to the entire class, Florida residents and non-residents alike, and their claims under the Florida Deceptive and Unfair Trade Practices Act were permitted.<sup>77</sup>

#### C. *FDUTPA Not Applied Extraterritorially in Océ Printing Systems USA, Inc. v. Mailers Data Services, Inc.*<sup>78</sup>

The Second District Court of Appeal decided *Océ* in June of 2000.<sup>79</sup> This case was brought by a group of users, brokers, and servicers of high speed printers against the company that manufactured, sold, and financed the

73. *Glassman*, 738 So. 2d at 437.

74. *Renaissance Cruise, Inc. v. Glassman*, 738 So. 2d 436, 438 (Fla. 4th Dist. Ct. App. 1999) (describing the 17th Circuit Court's holding of class certification and the application of Florida law to all claims) (emphasis added).

75. *See id.* at 437-38. *But see* *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999).

76. *Ortiz*, 764 So. 2d at 8.

77. *Glassman*, 738 So. 2d at 438.

78. 760 So. 2d 1037 (Fla. 2d Dist. Ct. App. 2000).

79. *Id.*

printers.<sup>80</sup> The complaint alleged violations of both the FDUTPA and the Florida Antitrust Act for conduct by the defendants involving their maintenance service, replacement parts, and lease financing.<sup>81</sup> The plaintiffs sought nationwide class certification, which was granted by the lower court and appealed here.<sup>82</sup>

In determining whether the FDUTPA would apply to the claims of non-residents, the Second District Court of Appeal acknowledged the lack of limiting language in the Act itself, but limited the use of the statute to Florida residents nonetheless.<sup>83</sup> The sole authority that the court cited for justification of its decision was *Coastal Physician Services of Broward County, Inc. v. Ortiz*.<sup>84</sup> Referring to *Ortiz*, the Second District said “the court concluded that the Unfair Trade Act was enacted to protect in-state consumers. ‘Other states can protect their own residents.’ We agree that only in-state consumers can pursue a valid claim under the Unfair Trade Act.”<sup>85</sup> The court rejected cases referred to by the proposed class by distinguishing them because they were based on common law, rather than statutory law.<sup>86</sup> In doing so, the court stated:

The Plaintiffs point to several cases in which nationwide classes have been certified to argue that the trial court did not abuse its discretion in certifying such a class. However, in those cases, none of the plaintiffs pursued claims under a state statutory scheme. Rather, the plaintiffs alleged claims under common law theories that could be applied nationwide. In contrast, the applicable statutes in this case limit who can bring an action under the statute. A nationwide class that allows entities to circumvent the express statutory language is impermissible. Therefore, the trial court's or-

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80. *Id.* at 1039. At least one of the plaintiffs was a Florida corporation, and at least one contract between plaintiff and defendant was executed in the State of Florida. *Id.* at 1037, 1040.

81. *Id.* at 1039–42.

82. *Océ*, 760 So. 2d at 1040.

83. *Id.* at 1042.

84. *Id.*

85. *Id.* (quoting *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (citation omitted)).

86. *Id.* (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. 3d Dist. Ct. App. 1994); *Cox v. Shell Oil Co.*, No. CIV.A.18844, 1995 WL 775363, at \*1 (Tenn. Ch. Nov. 17, 1995)).

der certifying a nationwide class pursuant to the Unfair Trade Act must be reversed.<sup>87</sup>

The result in *Océ*, the non-application of the FDUTPA to non-residents, is in agreement with that of *Ortiz*, but conflicts with that of *Glassman*.<sup>88</sup>

#### D. *FDUTPA Applied in Millennium Communications & Fulfillment, Inc. v. Department of Legal Affairs*

An important decision regarding the extraterritorial application of the Florida Deceptive and Unfair Trade Practices Act was *Millennium Communications & Fulfillment, Inc. v. Department of Legal Affairs*.<sup>89</sup> In this July, 2000 case, Millennium Communications & Fulfillment, Inc. (“Millennium”), a Florida corporation, advertised and marketed a credit card program by mail and phone to residents solely outside the State of Florida.<sup>90</sup> Millennium sent postcards to consumers with poor credit histories to promote a credit card program that could assist the consumers in rebuilding positive credit reports.<sup>91</sup> The wording on the postcard said: “**CONGRATULATIONS! YOU HAVE BEEN SELECTED TO RECEIVE A CREDIT CARD** with an unsecured credit limit of **\$4,000 Guaranteed** regardless of your past credit history!” as well as other representations.<sup>92</sup> Upon receipt of the postcard, consumers were instructed to call an “800” number for further information and were then told they could receive an unsecured credit card with a \$4000 credit limit that could be used to charge the purchase of goods from catalogs which would be provided by the company that issued the credit card.<sup>93</sup> After providing information to the phone representatives, including payment of a \$129 fee that was automatically withdrawn from their checking accounts, consumers would receive an Advantage credit card which could only be used to order from catalogs that were subsequently sent with the Advantage credit card.<sup>94</sup> Along with the card and catalogs, consumers were given a list of re-

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87. *Océ*, 760 So. 2d at 1042 (referencing *Shutts*, 472 U.S. at 797; *Broin*, 641 So. 2d at 888; *Cox*, 1995 WL 775363, at \*1).

88. Compare *Océ*, 760 So. 2d at 1042, and *Ortiz*, 764 So. 2d at 8, with *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439–40 (Fla. 4th Dist. Ct. App. 1999).

89. 761 So. 2d 1256 (Fla. 3d Dist. Ct. App. 2000).

90. *Id.* at 1257. Millennium was licensed by a Nevada company, Continental Consumer Credit Corporation (“Continental”), to “promote Continental’s Advantage credit card program in all states except Florida, Kansas, Wisconsin, and North Carolina.” *Id.*

91. *Id.*

92. *Id.* at 1258 n.2.

93. *Millennium*, 761 So. 2d at 1258 n.3.

94. *Id.* at 1258.

quirements that they had to fulfill in order to become eligible to apply for a Visa or MasterCard credit card.<sup>95</sup> The requirements included the down payment of fifty percent of the total amount of orders, payment of an additional eight percent charge on orders for shipping and handling, total charges (excluding down payments) of at least \$500 that are then completely paid for, and six months of timely payments.<sup>96</sup> Once a consumer met these requirements, the consumer could then apply for a Visa or MasterCard credit card, and if approved, the consumer would be required to pay an additional fee, separate from the \$129 fee paid to Millennium for the Advantage credit card.<sup>97</sup>

The Department of Legal Affairs alleged that the language in the postcard was likely to mislead consumers reasonably acting under the circumstances to believe that they would be receiving a Visa or MasterCard credit card, and so the mailing was deceptive and a violation of the FDUTPA.<sup>98</sup> The Department also claimed that representations were expressly or impliedly made to consumers who called the “800” number that they would receive a Visa or MasterCard.<sup>99</sup> The complaint also alleged that few, if any, consumers received a Visa or MasterCard through the program touted by Millennium, because they did not meet the necessary requirements.<sup>100</sup> The Department of Legal Affairs sought injunctive relief, namely to enjoin Millennium from continuing to engage in the alleged deceptive conduct, civil penalties of \$10,000 for each act or practice found to be a violation of the FDUTPA, and reimbursement to consumers.<sup>101</sup>

The trial court found the postcard that Millennium sent out to be deceptive and granted the motion of the Department of Legal Affairs for a temporary injunction to enjoin Millennium from continuing to use it.<sup>102</sup> The parties were also ordered, in consultation with a special master, to create a revised postcard that would include disclosures and disclaimers to consumers on what they would and would not receive, as well as other changes that the court ordered.<sup>103</sup> This revised version of Millennium’s postcard was to be

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95. *Id.* at 1258–59.

96. *Id.* at 1258.

97. *Id.* at 1259.

98. *Millennium*, 761 So. 2d at 1263.

99. *Id.* at 1258.

100. *Id.* at 1259.

101. *Id.*

102. *Id.*

103. *Millennium*, 761 So. 2d at 1259. The trial court ordered the new postcard to have a street address, rather than the post office box address previously used, and the “sales pitch script” was to conform to the newly created postcard. *Id.*



subject to the approval of the Department of Legal Affairs.<sup>104</sup> Millennium appealed the trial court's injunctive order.<sup>105</sup>

### 1. Application of the FDUTPA to Conduct Directed to Non-Residents

On appeal, Millennium argued first that the FDUTPA does not apply to consumers who reside outside of the State of Florida and therefore, the temporary injunction should not have been granted.<sup>106</sup> Millennium argued in the alternative that if the FDUTPA does apply to its conduct, the injunctive order was still improper because its postcard was not deceptive.<sup>107</sup> Finally, they asserted that should the postcard be found deceptive, it was erroneous for the trial court to have ordered that the Department of Legal Affairs have approval over the revised postcard because that directive "constituted an improper delegation of judicial authority to the executive branch."<sup>108</sup>

The Third District Court of Appeal first considered the claim related to the extraterritorial application of the FDUTPA.<sup>109</sup> To determine the intended scope of the Act, the court looked to the legislative intent as expressly stated in the purpose section of the statute, as interpreted by case law, and as explained in secondary material.<sup>110</sup> The court also took notice of the way that key terms were defined and the use of certain words throughout the statute, for example, "'interested party or person' means *any* person affected by a violation of this part or *any* person affected by an order of the enforcing authority."<sup>111</sup> The court also recognized that the statute lacked any expression of limitation in terms of confining the enforcement power of the Department of Legal Affairs to only trade conduct that affects Florida residents.<sup>112</sup> The court stated, "[i]n the absence of any such limiting language, we decline to construe chapter 501 as limiting the Department's enforcement authority to commercial transactions involving only Florida."<sup>113</sup>

104. *Id.*

105. *Id.*

106. *Id.* at 1260.

107. *Millennium*, 761 So. 2d at 1260.

108. *Id.*

109. *Id.*

110. *Id.* at 1261 (citing FLA. STAT. § 501.202 (1997); *Acosta v. Richter*, 671 So. 2d 149, 153 (Fla. 1996); *Aetna Cas. & Sur. Co. v. Huntington Nat'l Bank*, 609 So. 2d 1315, 1317 (Fla. 1992); *Macias v. HBC of Fla., Inc.*, 694 So. 2d 88, 90 (Fla. 3d Dist. Ct. App. 1997); David J. Federbush, *The Unclear Scope of Unconscionability in FDUTPA*, 74 FLA. B.J. 49, 49 (2000) [hereinafter *Federbush III*]).

111. *Millennium*, 761 So. 2d at 1261 (citing § 501.203(6)).

112. *Millennium*, 761 So. 2d at 1261.

113. *Id.* (citing *Holly v. Audle*, 450 So. 2d 217, 219 (Fla. 1984); *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610, 612 (Fla. 5th Dist. Ct. App. 1991)).

## 2. Reconciling the Court's Holding with Other Decisions

Millennium referred the court to *Coastal Physician Services of Broward County, Inc. v. Ortiz*, discussed above, in which the Fourth District Court of Appeal granted certiorari to limit discovery to only Florida residents for claims made under the FDUTPA.<sup>114</sup> In regards to Millennium's citation to the Fourth District Court of Appeal's opinion in *Ortiz*, the Third District Court of Appeal stated:

[w]ith due respect to our sister court, we are not persuaded by this holding as it applies to FDUTPA because as we have earlier noted, there are no geographical or residential restrictions contained in the express language of section 501.202. Moreover, in its later decision of *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436 (Fla. 4th DCA 1999), wherein the same court found that FDUTPA had applicability to both in-state and out-of-state residents in a class action, it appears to us that the fourth district has receded, *sub silentio*, from its earlier holding in *Ortiz*.<sup>115</sup>

In addition to rejecting the Fourth District Court of Appeal's decision in *Ortiz*, the Third District Court of Appeal distinguished decisions from other state and federal courts that Millennium presented to demonstrate that state consumer protection statutes were not extended to trade conduct that occurred outside of the state.<sup>116</sup> The reason that the court provided for the distinction was that the cases that Millennium cited were each based upon a state consumer protection statute which *did* contain language limiting its reach to only conduct within its state.<sup>117</sup> The court provided citations to other cases which held the state consumer protection statutes of Illinois, New Hampshire, and Ohio were also not restricted to the protection of in-state residents only.<sup>118</sup>

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114. *Id.* at 1261 (citing *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999)).

115. *Id.* at 1261–62 (referring to *Ortiz*, 764 So. 2d at 8).

116. *Id.* at 1262 (citing *Att'y Gen. of Md. v. Dickson*, 717 F. Supp. 1090, 1101 (D. Md. 1989); *Bass v. Hendrix*, 931 F. Supp. 523, 536 (S.D. Tex. 1996); *Goodrich v. E.F. Hutton Group, Inc.*, 542 A.2d 1200, 1203 (Del. Ch. 1988).

117. *Millenium*, 761 So. 2d at 1262.

118. *Id.* at 1262 n.5 (citing *Perry v. Household Retail Servs., Inc.*, 953 F. Supp. 1370 (M.D. Ala. 1996); *Cirone-Shadow v. Union Nissan of Waukegan*, No. 94 C 6723, 1995 WL 238680 (N.D. Ill. Apr. 20, 1995); *Pacamor Bearings, Inc. v. Minebea Co.*, 918 F. Supp. 491, 504 (D.N.H. 1996); *Brown v. Mkt. Dev., Inc.*, 322 N.E.2d 367, 369 (1974).

### 3. Conclusion: Justification for the Protection of Non-Residents by the FDUTPA

By its holding in *Millennium*, the Third District Court of Appeal allowed the application of the Florida Deceptive and Unfair Trade Practices Act to a scenario in which the parties injured by the alleged deceptive trade practices were *solely* residents outside of the State of Florida. The court explained its rationale for allowing the FDUTPA to apply:

[a]s we read FDUTPA, it seeks to prohibit unfair, deceptive and/or unconscionable practices which have transpired within the territorial boundaries of this state without limitation. Therefore, where the allegations in this case reflect that the *offending conduct* occurred entirely within this state, we can discern no legislative intent for the Department to be precluded from taking corrective measures under FDUTPA *even where those persons affected by the conduct reside outside of the state*.<sup>119</sup>

It is interesting to note that the court characterized the “offending conduct” as having occurred entirely within the State of Florida, without specifying which exact act performed by Millennium was the “offending conduct,” particularly when you consider the fact that the receipt of the postcards by the consumers occurred wholly outside the state.<sup>120</sup> Incidentally, after determining that the FDUTPA applied to the claims of the non-residents, the court considered the other claims on appeal in *Millennium*, found that the postcard that Millennium sent to the non-resident consumers was not sufficiently deceptive and therefore reversed the injunction that had been ordered by the circuit court.<sup>121</sup>

#### E. *FDUPTA Not Applied* in *Hutson v. Rexall Sundown, Inc.*

A more recent case, *Hutson v. Rexall Sundown, Inc.*,<sup>122</sup> was decided by the Fourth District Court of Appeal in February 2003. Similarly to *Glassman*, one aspect of this case involved whether Florida law applied to the claims of all potential class members, even those who did not reside within the state, in order to determine if the requirements of class certification were met.<sup>123</sup> However, unlike the Fourth District Court of Appeal’s decision in

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119. *Id.* at 1262 (emphasis added).

120. *See id.*

121. *Id.* at 1264.

122. 837 So. 2d 1090 (Fla. 4th Dist. Ct. App. 2003).

123. *Id.* at 1093.

*Glassman*, here, the court held that the FDUTPA did not apply to the claims of non-residents of Florida.<sup>124</sup>

The facts of *Hutson* involve the purchase, by nationwide consumers, of calcium supplements manufactured by Rexall Sundown, Inc. (“Rexall”), a company headquartered in Florida.<sup>125</sup> The alleged deceptive trade practice arose out of the labeling of two particular products as “Calcium 900” and “Calcium 1200.”<sup>126</sup> The class representatives allege that Rexall’s labeling of these products and their point of purchase marketing and advertising misled consumers into erroneously believing that they would obtain 900 and 1200 milligrams of calcium by taking one softgel of each respective product, when in fact it was necessary to take three softgels of the Calcium 900 to obtain 900 milligrams of calcium, and two softgels of the Calcium 1200, in order to obtain 1200 milligrams of calcium.<sup>127</sup> *Hutson* alleges that this deceptive conduct therefore resulted in the cost of a dose being higher than represented and the consumers receiving less than the amount of calcium they believed they were consuming.<sup>128</sup>

### 1. Certification of the Class

As in *Glassman*, rule 1.220(a) and (b) of the *Florida Rules of Civil Procedure* needed to be met in order to grant class certification.<sup>129</sup> The trial court found that “the typicality, adequacy, predominance, superiority, and manageability requirements” of these rules were not met and therefore, denied *Hutson*’s motion to certify the class.<sup>130</sup> The predominance element of rule 1.220(b) involved a question of whether Florida law applied to the entire class; it states: “the questions of law or fact common to the claim or defense of the representative party and the claim or defense of each member of the class predominate over any question of law or fact affecting only individual

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124. *Id.* at 1094.

125. *Id.* at 1091. The case opinion does not provide the reason the FDUTPA is used as a basis for the claims, the business location of Rexall Sundown, Inc., its principal place of business, or the state in which it is incorporated; however, the company maintains a website on the internet which states that it is “one of South Florida’s leading businesses” and that its headquarters are located in Boca Raton, Florida. See *id.* at 1090–95; Company Profile of Rexall Sundown, Inc., available at <http://www.rexallsundown.com/pages/locations.aspx> (last visited Apr. 1, 2004).

126. *Hutson*, 837 So. 2d at 1091.

127. *Id.*

128. *Id.*

129. FLA. R. CIV. P. 1.220(a)-(b).

130. *Hutson*, 837 So. 2d at 1091.

members of the class.”<sup>131</sup> If it was determined that the laws of their respective states would apply to the non-resident class members, rather than Florida law, then common questions of law would not predominate and the class could not be certified.<sup>132</sup> The class representatives appealed the decision of the lower court which found the laws of other states did apply to those non-resident class members and therefore rejected class certification.<sup>133</sup>

## 2. *Hutson* in Relation to *Glassman*, *Ortiz*, and *Océ*

The appellants in *Hutson* argued that the holding of *Glassman*, in which the FDUTPA applied to the claims of non-residents of Florida, applied to their case as well.<sup>134</sup> The Fourth District Court of Appeal distinguished *Glassman* from *Hutson* on the grounds that sufficient contacts with Florida existed in *Glassman* to warrant the application of Florida law to the whole class and because in *Glassman*, “the common injury occurred in Florida.”<sup>135</sup> The appellants referred the court to the statement by the Third District Court of Appeal in *Millennium* which recognized the apparent overruling of *Ortiz*, the case now being relied upon by the court.<sup>136</sup> In response, the Fourth District Court of Appeal proclaimed their disagreement with their sister court’s assessment of their holding in *Glassman* as superceding their decision in *Ortiz*.<sup>137</sup> The court went on to distinguish *Glassman* from *Ortiz* based upon the location of the claimed injuries.<sup>138</sup> The court said that the injuries in *Ortiz* occurred inside and outside the State of Florida, preventing the use of Florida law for all claims, and analogized *Océ* in this regard, as well.<sup>139</sup> The injuries claimed in *Glassman*, on the other hand, occurred only in Florida, per the trial court’s determination in that case.<sup>140</sup>

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131. FLA. R. CIV. P. 1.220(b)(3); *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1092 (Fla. 4th Dist. Ct. App. 2003).

132. *Hutson*, 837 So. 2d at 1093.

133. *Id.*

134. *Id.*

135. *Id.* at 1093–94 (citing *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 438–39 (Fla. 4th Dist. Ct. App. 1999)).

136. *Id.* at 1094 (citing *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000) (discussing *Coastal Physician Servs., Inc. v. Ortiz*, 764 So. 2d 7 (Fla. 4th Dist. Ct. App. 1999)).

137. *Hutson*, 837 So. 2d at 1094.

138. *Id.*

139. *Id.* (citing *Ortiz*, 764 So. 2d at 8; *Océ Printing Sys. USA, Inc. v. Mailers Data Servs., Inc.*, 760 So. 2d 1037, 1042 (Fla. 2d Dist. Ct. App. 2000)).

140. *Id.* (citing *Glassman*, 738 So. 2d at 438).

In *Hutson*, the Fourth District Court of Appeal discussed the extraterritorial location of the injuries claimed and resulting non-application of the FDUTPA:

[h]ere, the alleged deceptive unfair trade practice involved the nationwide sale of products with a misleading label and with misleading point of purchase marketing techniques. The claims asserted in the national class action occurred both in the state of Florida and in 49 other states. The alleged wrong was committed, and the damage done, at the site of the sale of appellees' products; that is, in the various states where members of the purported class made their purchases. We hold that the trial court correctly concluded that common issues of law do not predominate because the claims of non-resident consumers would require the application of consumer protection laws from each of the states where the deceptive trade practice occurred and the non-resident claimants suffered injury.<sup>141</sup>

### 3. *Hutson* Analogized to *Stone v. CompuServe Interactive Services, Inc.*<sup>142</sup>

The court cited their decision in *Stone* as applying similar reasoning to a similar set of facts.<sup>143</sup> There, an attempt was made at class certification for plaintiffs who alleged breach of contract as a result of not receiving, or not timely receiving, a rebate offered by CompuServe to purchasers of particular computers who also selected internet service with CompuServe.<sup>144</sup> The class was not certified by the Circuit Court because of the failure to meet all needed requirements of Rule 1.220 of the *Florida Rules of Civil Procedure*.<sup>145</sup> The lower court's decision not to certify the class was affirmed by the Fourth District Court of Appeal, which stated, "Florida has insufficient contacts with the purported class members of other states to justify the application of Florida's contract law to a nationwide class."<sup>146</sup>

In *Stone*, the Court distinguished the matter from *Glassman*, because there, Florida had significant contacts to the case to justify the use of Florida law.<sup>147</sup> By then applying Florida law, namely, the FDUTPA, "a single statute

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141. *Id.*

142. 804 So. 2d 383 (Fla. 4th Dist. Ct. App. 2001).

143. *See id.* at 385, 389–90; *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003).

144. *Stone*, 804 So. 2d at 385.

145. *Id.* at 387.

146. *Id.* at 389.

147. *Id.* (discussing its decision in *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1999)).

applied to all claims, so there was a predominance of common legal issues.”<sup>148</sup> In *Stone*, however, the Court found that the various states represented by the potential class members would apply varying standards to determine if there was a breach of contract. The difference between the state laws eliminated the presence of common issues of law that would predominate in a nationwide class, as required for class certification.<sup>149</sup> Though the Fourth District Court of Appeal referred to *Stone* in its *Hutson* decision, perhaps an important difference between *Hutson* and *Stone* is that in *Hutson*, all claims were based upon the FDUTPA as opposed to *Stone*, where the claims were made for breach of contract, a common law basis.<sup>150</sup> According to Florida’s conflict of law rules, the determination of a breach of contract is governed by the state’s law where the contract was made or performed.<sup>151</sup> Therefore, in *Stone*, the use of each consumer’s state law was appropriate, and the differences between the state laws eliminated the presence of common issues of law that would predominate and allow class certification.<sup>152</sup> The FDUTPA, however, has been applied to cases where non-residents of the state of Florida commenced action against Florida companies and it was determined that the “offending conduct” or the “common injury” occurred within the state.<sup>153</sup> The court in *Hutson* decided that the “common injury” had not occurred within the State, because its determination of the place of injury was at the place of purchase in each of the fifty states.<sup>154</sup>

#### 4. Significance of the Court’s Decision

*Hutson* is important for its clarification by the Fourth District Court of Appeal that it did not intend for its holding in *Glassman* (allowing the FDUTPA to apply to claims made by non-residents of Florida), to supercede its earlier decision in *Ortiz*, where discovery was limited to the alleged FDUTPA violations of Florida residents only.<sup>155</sup> Additionally, it raises issues about what factors the courts should consider when faced with claims

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148. *Id.*

149. *Stone*, 804 So. 2d at 389.

150. *Compare Hutson*, 837 So. 2d at 1091, with *Stone v. CompuServe Interactive Servs., Inc.*, 804 So. 2d 383, 389 (Fla. 4th Dist. Ct. App. 2001).

151. *Stone*, 804 So. 2d at 389.

152. *Id.*

153. *See Glassman*, 738 So. 2d at 439; *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1262 (Fla. 3d Dist. Ct. App. 2000).

154. *Hutson*, 837 So. 2d at 1094.

155. *Id.*

based upon the Florida Deceptive and Unfair Trade Practices Act by non-residents of the state.<sup>156</sup>

#### IV. CONCLUSION: COMPARISON OF THE VARIOUS DECISIONS

Both *Glassman* and *Millennium* held that the protection offered by the Florida Deceptive and Unfair Trade Practices Act is available to consumers who are not residents of the State of Florida.<sup>157</sup> While the Third District Court of Appeal in *Millennium* determined that the “offending conduct” or practices must have occurred within the state in order for the FDUTPA to provide a claim to injured persons, regardless of their residency status, other decisions have relied on seemingly different factors.<sup>158</sup>

In *Glassman*, the Fourth District Court of Appeal mentioned the determination by the Seventeenth Circuit Court that the “common injury” occurred in Florida as one reason for allowing the application of the FDUTPA to claims of out-of-state residents.<sup>159</sup> The Fourth District Court of Appeal, however, applied a “significant contact” test as developed in *Shutts* to decide the issue of whether common questions of law existed such that class certification should have been granted.<sup>160</sup>

*Hutson* seemed to consider both the “offending conduct”, like in *Millennium*, and the “place of injury” as in *Glassman*, evidenced by the court’s statement that “[t]he alleged wrong was committed, and the damage done, at the site of the sale of appellees’ products.”<sup>161</sup> In *Hutson*, the court explained

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156. See *id.* (determining that the alleged wrong took place in all fifty states, and so the various states’ laws should apply); *Glassman*, 738 So. 2d at 438 (considering the “common injury” took place in Florida and also applying a “significant contact” test to determine that state interest was created, allowing the application of Florida law); *Millennium*, 761 So. 2d at 1262 (finding that the “offending conduct” occurred within the state by a Florida corporation, and so the application of the FDUTPA was appropriate to claims made entirely by non-residents of the state).

157. *Renaissance Cruises, Inc. v. Glassman*, 738 So. 2d 436, 439 (Fla. 4th Dist. Ct. App. 1999); *Millennium*, 761 So. 2d at 1262.

158. Compare *Millennium*, 761 So. 2d at 1262, with *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (finding the availability of the FDUTPA as a statutory basis for a consumer’s claim is determined by whether the consumer is a Florida resident), and *Glassman*, 738 So. 2d at 438, 439–40 (noting that the common injury to all potential class members occurred in Florida, and holding that Florida had sufficient contacts and state interest in the claims of the entire class, such that the application of its law was proper to all potential class members, both residents and non-residents).

159. *Glassman*, 738 So. 2d at 438.

160. *Id.* at 439 (referring to *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 818–19 (1985)).

161. *Hutson*, 837 So. 2d at 1094.



that it was using the place of sale to determine where the “wrong was committed” and the “damage done.”<sup>162</sup> In *Glassman*, a similar logic seems to have been employed, as the site of the “common injury” was the place (Florida) where payment was made of the port charges in question.<sup>163</sup>

But, in *Millennium*, the Third District Court of Appeal held that the “offending conduct occurred *entirely* within this state” when the postcards in question were mailed only to non-residents, and presumably received by them solely outside of the state.<sup>164</sup> The offending conduct therefore, must have been some act that Millennium performed prior to receipt by the non-residents, as its operations were located within Florida.<sup>165</sup> If the same analysis were applied to *Hutson*, it would seem that marketing, manufacturing, or other operations performed by Rexall Sundown, Inc. at their Florida business location could have provided the source of “offending conduct” needed to allow the FDUTPA to apply to the claims of non-residents in that case.<sup>166</sup> Perhaps, based upon the conflicting decisions between the various district courts of appeal, the time may be ripe for certification to the Supreme Court of Florida, or legislative amendments to the statute to determine what the reach of the Florida Deceptive and Unfair Trade Practices Act should be in relation to non-residents of the State of Florida.<sup>167</sup>

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162. *Id.*

163. *Glassman*, 738 So. 2d at 438.

164. *Millennium Communications & Fulfillment, Inc. v. Dep’t of Legal Affairs*, 761 So. 2d 1256, 1257, 1262 (emphasis added).

165. *See id.* at 1262.

166. *See id.*; Company Profile, Locations & Facilities, available at Corporate Website of Rexall Sundown, Inc., <http://www.rexallsundown.com/pages/locations.aspx>.

167. *Compare Millennium*, 761 So. 2d at 1262 (finding that the “offending conduct” occurred within the state by a Florida corporation, and so the application of the FDUTPA was appropriate to claims made entirely by non-residents of the state), and *Glassman*, 738 So. 2d at 439 (noting that the common injury to all potential class members occurred in Florida, and holding that Florida had sufficient contacts and state interest in the claims of the entire class, such that the application of its law was proper to non-residents), with *Coastal Physician Servs. of Broward County, Inc. v. Ortiz*, 764 So. 2d 7, 8 (Fla. 4th Dist. Ct. App. 1999) (finding the availability of the FDUTPA as a statutory basis for a consumer’s claim is determined by whether the consumer is a Florida resident), and *Hutson v. Rexall Sundown, Inc.*, 837 So. 2d 1090, 1094 (Fla. 4th Dist. Ct. App. 2003) (determining that the alleged wrong took place in all fifty states, and so the various states’ laws should apply).