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Commercial And Consumer Litigation In Florida – A Summary Guide To Key Florida Statutory Provisions And Common Law Doctrines

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This memorandum provides in-house counsel and out-of-state counsel with an introduction to a number of key issues that may affect their early evaluation of consumer and commercial disputes. Obviously, these comments have an indeterminate shelf-life, and they are not intended to be comprehensive.

KEY STATUTORY ATTORNEY-FEE SHIFTING PROVISIONS

Florida's Proposal For Settlement Statute

Attorney's fees often drive consumer and commercial cases. This is particularly true when contracts or statutes contain prevailing-party attorney's fee provisions. But where contracts or statutes are silent on the issue of fees, courts cannot – in most instances – award attorney's fees. Florida litigants can, however, put attorney's fees at issue by serving "proposals for settlement" pursuant to Florida Statute Section 768.79, and Rule 1.442, Fla. R. Civ. Proc.

A properly drafted proposal for settlement can be an extremely effective tool when attempting to resolve a commercial dispute. Section 768.79 allows fee shifting to parties (plaintiffs or defendants) making good faith, unambiguous offers.¹ In essence, parties may recover fees where the "net" judgment is 25% better for the moving party than the offer. This statute does not, however, apply to cases where non-monetary relief is also sought.²

The statute helps facilitate settlement for parties making good-faith offers; the higher the amount, the greater likelihood that fee shifting will apply if the opposing party does not accept. Critically, however, Florida courts interpret the statute closely scrutinizing offers for any slight ambiguity which will render the offer ineffective. As noted, good faith is also a component, but even nominal offers will satisfy this standard if there is a valid defense. The rules regarding

1 *TGI Friday's Inc. v. Dvorak*, 663 So. 2d 606, 612-13 (Fla. 1995) (award of attorney's fees is mandatory, if conditions met holding that reasonableness of rejection is not relevant as to entitlement issue).
2 *See Diamond Aircraft Industries, Inc. v. Horowitz*, 107 So. 3d 362, 371-376 (Fla. 2013).

joint offers are confusing at best, and often make fee shifting particularly difficult in cases with joint parties.

As mentioned, proposals for settlement are most effective where attorney's fees are not at issue by statutes or contracts. They can also be helpful in cases where plaintiffs have statutory claims authorizing fee awards, but nominal quantifiable damages. A party can make an offer for a specific amount which would include any recoverable attorney's fees and costs.³ Alternatively, a party can make a proposal for a specific amount of damages and allow the court to determine the amount of attorney's fees and costs with an express statement that entitlement to fees and costs is stipulated. The cases are unclear whether the second strategy will result in an effective offer.⁴ Either approach has a chance of shifting fees, even if the plaintiff prevails, and normally would allow a defendant to recover most of his or her fees. This strategy may be useful because Florida courts rarely give much weight to the proportionality of the value of the claim compared to the legal fees spent pursuing the claim. At worst, the offer may help reduce the amount of fees awarded.

Rule 1.442 sets guidelines for the timing of service of the proposal. For example, parties must wait about ninety days after the case filing before serving a settlement proposal. If the offeree does not accept within thirty days, the attorney fee "clock" begins running as of the date of the offer. This can provide significant leverage at mediation, even if a plaintiff is judgment proof. This follows because a fee award can likely be set-off from a judgment for a plaintiff. Additionally, coordinated offers by defendants where one or the other, but not both defendants are liable can be particularly effective. In such cases, the plaintiff will be forced to pay at least one party's fees. Finally, section 768.79 also applies to diversity cases in federal court.⁵

Reciprocal Attorney's Fees (Section 57.105 (7))

Many contracts have clauses allowing parties to recover attorney's fees if they prevail in a legal dispute. Often, these provisions are one-sided. However, Florida law contains an equalizer, making these provisions reciprocal. More specifically, Florida Statute Section 57.105(7)

3 *White v. Steak and Ale of Florida, Inc.*, 816 So. 2d 546, 549-50 (Fla. 2002) (net judgment calculated on cost and fees incurred up to the date of the offer of judgment).

4 Compare *State Farm Life Ins. Co. v. Bass*, 605 So. 2d 908, 910 (Fla. 3d DCA 1992) (proposal which included fees as the court may determine failed to "state the total amount needed to settle all pending claims," and was therefore, ineffective); *McMullen Oil Co., Inc. v. ISS Int'l Serv. Sys.*, 698 So. 2d 372, 373-74 (Fla. 2d DCA 1997) (offer was improperly conditional since it did not stipulate to entitlement to fees); *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (Rule 68 offer of judgment for damages and fees, as the Court may award, effective to moot case even when Plaintiff rejected offer).

5 *Menchise v. Ackerman Senterfitt*, 532 F. 3d 1146, 1150-52 (11th Cir. 2008) (Section 768.79 is substantive law that applies to diversity cases and is not preempted by Rule 68.).

provides that if a contract contains a provision allowing attorney's fees to party when he or she is required to take any action to enforce a contract, the court also may allow reasonable attorney's fees to the *other party* when that party prevails in any action with the respect to the contract. (This applies to contracts entered after October 1, 1988). The case law has developed favorably for creditors because it enforces "collection fee clauses," as to allow fees only as to the collection aspect of the case. Thus, the reciprocal provisions of Section 57.105(7) would not allow a collection fee clause to shift fees in a dispute over a different contractual obligation.⁶

FLORIDA'S DECEPTIVE AND UNFAIR TRADE PRACTICES ACT (§501.201 ET SEQ.)

Commercial disputes commonly include claims under the Florida Deceptive and Unfair Trade Practices Act ("FDUTPA" or the "Act"). First enacted in 1973, the statute tracks the Federal Trade Commission Act, 15 U.S.C.A. §45(a)(1). As such, it is sometimes referred to as the "Little FTC Act".

FDUTPA declares unlawful "unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce".⁷ The statute authorizes "actual" damages in an action brought by "a person who has suffered a loss as a result of a violation of this part."⁸ "Actual damages" have been defined narrowly to exclude all consequential or special damages and are measured by the actual value of the product or service compared to the value as represented and damages may not exceed the purchase price.⁹ Section 501.211(1) also authorizes declaratory and injunctive relief for a person aggrieved by a violation. The Act provides for a discretionary award of attorney's fees for the prevailing party under either § 501.211(1) or (2).¹⁰

The Act is not just a consumer statute, although it began as one. Initially, its scope was restricted by the terms "consumer transaction" and "supplier."¹¹ Thus, the Act applied only to traditional consumer protection issues.

Now, litigants not only use the statute in typical consumer disputes, but in many garden variety business disputes. This strategy puts attorney's fees at issue, where they otherwise wouldn't be available. The statute is also a means to justify wider-ranging discovery on the grounds that the

6 *Delguidice v. Orkin Exterminating Co., Inc.*, 790 So. 2d 1158, 1162 (Fla. 5th DCA 2001) (stigma damages not recoverable under FDUTPA), *rev. denied*, 821 So. 2d 294 (Fla. 2002).

7 Fla. Stat. § 501.204(1) (2011).

8 Fla. Stat. § 501.211(2) (2011).

9 *Orkin Exterminating Co., Inc. v. Petsch*, 872 So. 2d 259, 263 (Fla. 2nd DCA 2004) *rev. denied*, 884 So. 2d 23 (Fla. 2004).

10 *See* Fla. Stat. § 501.2105(1) (2011).

11 Compare Fla. Stat. §§ 501.203(1), (3) (1993) and Fla. Stat. § 501.211(2) (1973).

defendant's alleged misconduct was part of a pattern or practice, even if such evidence is not required to find a violation. The FTC Policy Statement uses the term "consumer," while Section 501.211(2) (2012) allows recovery for "a person who has suffered a loss as a result of a violation of this part" for actual damages. Florida cases have generally required strict evidence of causation in fact to recover actual damages.¹²

Significantly, by alleging FDUTPA violations, plaintiffs can avoid the economic loss doctrine ("ELD") defense.¹³ This is particularly important if the alleged "bad act" involves post-contract performance, because the economic loss doctrine bars "fraud in the performance" of a contract and limits a party's remedy to contractual remedies.

Unlike common law fraud, an FDUTPA claim does not require proof of actual reliance or scienter.¹⁴ Because reliance is not a technical element of the Act, class actions under the FDUTPA may avoid Florida's prohibition on fraud class-action claims based on individual contracts.¹⁵ Under the FTC Deception Policy Statement, the plaintiff must prove a "material" "representation, omission, or practice, that is likely to mislead a person acting reasonably in the circumstances, to his or her detriment."¹⁶ Further, a single act can be the basis for cause of action. The plaintiff is not required to prove a public injury or a pattern or practice.¹⁷ However, something more than a breach of contract must be proven for the statute to apply.¹⁸

Pure "unfairness" cases are rarely brought and when they are, they usually relate to contractual terms, price unconscionability, or the failure to perform some implied duty creating substantial

12 *General Acceptance Corp. v. Laesser*, 718 So. 2d 276, 277-78 (Fla. 4th DCA 1998); *Rollins, Inc. v. Butland*, 951 So. 2d 860, 869, 871-73 (Fla. 2^d DCA 2006), *rev. denied*, 962 So. 2d 335 (Fla. 2007.) But see *Fitzpatrick v. General Mills, Inc.*, 635 F. 3d 1279, 1283 (11th Cir. 2011) (applying price-inflation [fraud-on-the-market] theory to establish injury if customer purchased product during the time period when challenged advertisements ran).

13 *See Delgado v. J.W. Courtesy Pontiac GMC-Truck*, 693 So. 2d 602 (Fla. 2^d DCA 1997) (ELD does not bar legislatively created remedies).

14 *Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st DCA 2000); *Office of Attorney General, Dept. Legal Affairs v. Wyndham Int'l Inc.*, 869 So. 2d 592 (Fla. 1st DCA 2004); *Donald Frederick Evans and Associates, Inc. v. Continental Homes, Inc.*, 785 F. 2d 897 (11th Cir. 1986); *Southwest Sunsites, Inc. v. F.T.C.*, 785 F. 2d 1431, 1435-1436 (9th Cir. 1986).

15 *Compare Lance v. Wade*, 457 So. 2d 1008 (Fla. 1984) (reliance issue is individualistic and precludes certification of a fraud claim based upon individual contracts because materiality of the representation will vary between each customer) *with Davis v. Powertel, Inc.*, 776 So. 2d 971 (Fla. 1st DCA 2000) (reliance not required under FDUTPA, so the class was proper for certification based upon a uniform defect).

16 *PNR, Inc. v. Beacon Property Management Inc.*, 842 So. 2d 773, 777 (Fla. 2003).

17 *See id.* at 776.

18 *Id.* at 872, n. 2.

consumer injury. The 1980 FTC Policy Statement on Unfairness requires proof of (1) substantial consumer injury, that is (2) not balanced by countervailing net benefits of the challenged practice, and (3) that the consumer could not reasonably avoid the injury.¹⁹ However, Florida cases in *dicta* consistently define an “unfair practice” as one that “offends established public policy” and that is “immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers....”²⁰ This language originated from the *FTC v. Sperry & Hutchinson Co.*²¹ decision, which related to the FTC’s unfair competition authority. In any event, the FTC’s 1980 Policy Statement on Unfairness repudiated the *S&H Standard* for consumer protection cases and emphasized that consumer injury was the primary focus of the FTC in applying its consumer protection unfairness authority. Subsequent cases in other jurisdictions recognize that the FTC can no longer rely upon the vague *S&H Standard* relating to consumer protection policy.²²

Finally, the Act exempts actions either expressly permitted or required by state or federal law and certain regulated industries.²³ Retailers also have a safe-harbor provision, if they are disseminating statements by a manufacturer or distributor in good faith.²⁴

CREDIT AGREEMENT STATUTE OF FRAUDS (SECTION 687.0304)

The Florida Legislature enacted a specific statute of frauds applicable to credit agreements.²⁵ The intent of this provision is to make lender liability claims based on alleged oral statements more difficult. Section 687.0304(2) states that debtors may not maintain actions unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and debtor. Section 687.0304(3) provides that rendering financial

19 See *FTC Policy Statement on Unfairness* (1980) (attached as an appendix to *In re International Harvester, Co.*, 104 F.T.C. 949 (1984)); *Orkin Exterminating Co., Inc. v. F.T.C.*, 849 F. 2d 1354 (11th Cir. 1988).

20 *Spiegel, Inc. v. Fed. Trade Comm.*, 540 F. 2d 287, 293 (7th Cir. 1976).

21 405 U.S. 233 (U.S. 1972)

22 See *F.T.C. v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 950-951, n. 17 (N.D. Ill. 2008); see also *In re Motions to Certify Classes Against Court Reporting Firms For Charges Relating to Word Indices* (“Court reporters”), 715 F. Supp. 2d 1265, 1277-1278, n. 3 (S.D. Fla. 2010) (referring to the FTC Unfairness Policy, but noting PNR court referred to *S & H Standard*); *Office of the Attorney General v. Bonita Bay Group*, 10-CA-1113 (Fla. 20th Cir. 07-11-2011) (expressly applying FTC unfairness doctrine). Additionally, the FTC Unfairness Policy has been incorporated into the FTC Act since 1994. See 15 U.S.C. §45(n). Also see *Dept. of Legal Affairs v. Rogers*; 329 So. 2d 257, 267 (Fla. 1976) (Federal law must be followed as a matter of constitutional law to provide proper notice of what conduct is “unfair” or “deceptive”); Fla. Stat. § 501.204(2) (Great weight and authority shall be given to “the interpretations of the Federal Trade Commission and the Federal Courts relating to Section 5(a)(1) of the Federal Trade Commission Act... as of July 1, 2013.”) (2012). See HB 1147.

23 See Fla. Stat. § 501.212.

24 See Fla. Stat. § 501.211(2).

25 Fla. Stat. § 687.0304.

advice to a debtor, consultation by a creditor with a debtor, or agreeing to take certain actions or forgo certain actions, does not create a new credit agreement. The doctrine of promissory estoppel cannot be used to avoid a statute of frauds defense.²⁶ However, section 687.0304 does not necessarily preclude debtors from asserting affirmative defenses to avoid summary judgment based upon oral credit representations that provide a basis for estoppel, fraud, or bad faith.²⁷

FLORIDA CONSUMER COLLECTION PRACTICES ACT ("FCCPA") (SECTIONS 559.55 – 559.785)

The Florida Consumer Collection Practices Act ("FCCPA") governs the collection of consumer debt in Florida. The FCCPA is modeled after the federal Fair Debt Collection Practices Act ("FDCPA") but differs from it in two important respects. First, it applies "to any person" who collects consumer debt -- even original creditors. The FCCPA is not restricted to debt collectors. Second, it requires an intent to violate the Act as opposed to the FDCPA, which is largely a strict liability standard. The FCCPA, like the FDCPA, provides for class action but shares the statutory damages cap of the lesser of \$500,000 or 1 percent of the defendant's net worth.²⁸ This, however, includes a minimum statutory damage award of at least \$1,000 for each named class representative. Commercial collection practices are regulated by Florida Statute Sections 559.541 – 548, which require registration of a commercial collection agency.

FLORIDA'S STATUTE OF LIMITATIONS, CHAPTER 95

There are a number of somewhat unusual characteristics of Florida's statute of limitations. The general time limitations as to the causes of action most commonly asserted include:

- 1) Within 20 years -- an action based on a judgment or decree of a Court of this state.²⁹
- 2) Within 5 years -- (1) an action on a judgment or decree of any court not of record -- of this state ... or other jurisdictions (2) a legal or equitable action on a contract

26 *DK Arena, Inc. v. EB Acquisitions I, LLC*, 112 So. 3d 85, 96-97 (Fla. 2013) (promissory estoppel could not be applied as an avoidance to the statute of frauds to extend due diligence period).

27 *See Maynard v. Central National Bank*, 640 So. 2d 1212, 1213 (Fla. 5th DCA 1994) (statute did not preclude defenses of waiver, estoppel, and bad faith); *Metro Building Materials Corp. v. Republic Nat. Bank*, 919 So. 2d 595, 599 (Fla. 3d DCA 2006), (rejecting attempt to assert oral representations as a set-off or counterclaim because lender claimed oral loan for additional money on a different account).

28 *See* Fla. Stat. § 559.77(2)

29 *See* Fla. Stat. § 95.11(1).

obligation, or a liability founded on a written instrument, except certain bonds, or (3) an action to foreclose a mortgage.³⁰

- 3) Within 4 years -- (1) an action founded on negligence,³¹ (2) a product liability claim; (3) an action based on statutory liability; (4) a legal or equitable action for fraud; (5) a legal or equitable action for breach of contract not founded on a written contract; (6) an action to rescind a contract; and (7) an action not provided for in these statutes.³²

Critically, a cause of action does not accrue until the “the last element constituting the cause of action occurs.”³³ However, there is an exception for causes of action based upon a negotiable or non-negotiable note.³⁴ In breach of contract cases, most recent Florida decisions hold that the cause of action accrues on the date of breach, because nominal damages are available.³⁵

Some sections of Chapter 95 provide that causes of action accrue only when plaintiffs knew or should have known about an invasion of their rights. This standard applies for fraud,³⁶ as well as other statutes. Generally, if the cause of action does not accrue until the plaintiffs discover or should have discovered the invasion of their rights, the Legislature has included a statute of repose, which runs from a certain date, such as the fraudulent statement or sale of the product, or completion of construction, and precludes a cause of action from ever accruing if the suit is not brought by within the statute of repose period. The repose period is 12 years for fraud.³⁷

The Florida Supreme Court has held that the “delayed discovery” rule does not prevent the accrual of a cause of action unless the statute expressly provides that accrual occurs when plaintiff knew or should have known of the violation of their rights.³⁸ Additionally, Florida

30 See Fla. Stat. § 95.11(2).

31 See Fla. Stat. § 95.11(3)(a).

32 See Fla. Stat. § 95.11(3).

33 See Fla. Stat. § 95.031(1).

34 See Fla. Stat. § 95.031(1).

35 *Medical Jet, S.A. v. Signature Flight Support Palm*, 941 So. 2d 576 (Fla. 4th DCA 2006) (breach of contractual duty triggers statute of limitations, even if only nominal damages have occurred); *Margolis v. Andromides*, 732 So. 2d 507, 511 (Fla. 4th DCA 1999) (An action accrues when a plaintiff suffers damages or fails to gain the entire benefits, whichever accrues first.”).

36 See Fla. Stat. § 95.031(2).

37 See Fla. Stat. § 95.031(1)(a).

38 *Davis v. Monahan*, 832 So. 2d 708, 709 (Fla. 2002) (No “delayed discovery” tolling of statute of limitations in action asserting claims for breach of fiduciary duty, conversion, civil conspiracy, unjust enrichment, and civil theft.); *Yusuf Mohammad Excavation, Inc. v. Ringhaver Equipment*, 793 So. 2d 1127, 1128 (Fla. 5th DCA 2001) (“The delayed discovery doctrine is not applicable to causes of action for tortious interference and unfair and deceptive trade practices because Fla. Stat. §95.11(3) is silent on

courts have limited the “tolling” of the statute of limitations, in § 95.051, to the specifically-listed events. These events include pendency of arbitration claims, concealment, incompetency, bankruptcy, and other specifically listed items.³⁹

There are no equitable defenses to the statute of repose.⁴⁰ The primary avoidances to the statute of limitations is fraudulent concealment, which must be pled with specificity in the complaint or reply to an affirmative defense, and estoppel.⁴¹ However, estoppel (sometimes referred to as “equitable tolling”) has limited utility because it only applies when the plaintiff knew that it had a cause of action and was convinced by the defendant not to assert the claim.⁴²

ARBITRATION

Florida’s courts consistently enforce arbitration provisions, except in narrow circumstances. More recent decisions by Florida’s appellate courts follow federal court rulings which enforce class action waiver provisions in all but the most extreme circumstances.⁴³

Additionally, the Florida Supreme Court has recently decided that the statute of limitations does apply to arbitrators, overruling a troubling decision by the Second District Court of Appeal.⁴⁴ Significantly, a right to arbitrate can found to have been waived in Florida, even though the adverse party suffers no prejudice.⁴⁵

FRAUD – NO REASONABLE RELIANCE WHEN ORAL STATEMENT CONTRADICTS WRITTEN AGREEMENT

Florida courts consistently hold that fraud claims fail to state causes of action, or may be subject to summary judgment, if a pre-contract oral statement contradicts the express terms of a

the issue.”); *In re Receivership of Armor Ins. Co.*, 775 So. 2d 367, 368 (Fla. 2d DCA 2000) (“The legislature did not provide for a discovery rule in the statute of limitations for actions based on a written contract” and statute of limitations was “the biggest roadblock ever seen.”).

39 *Hearndon v. Graham*, 767 So. 2d 1179, 1185 (Fla. 2005) (“The tolling statute specifically precludes application of any tolling provision not specifically provided herein.”).

40 *See Florida Dept. of Health & Rehabilitative Services v. S.A.P.*, 835 So. 2d 1091 (Fla. 2002).

41 *John Doe No. 23 v. Archdiocese of Miami, Inc.*, 965 So. 2d 1186-1187 (Fla. 4th DCA 2007).

42 *Black Diamond Properties, Inc. v. Haines*, 69 So. 3d 1090, 1093 (Fla. 5th DCA 2011); *Ryan v. Lobo De Gonzalez*, 841 So. 2d 510, 518 (Fla. 4th DCA 2003).

43 *McKenzie Check Advance of Florida, LLC v. Betts*, ___ So. 3d ___, 2013 WL 1457843 (Fla. April 11, 2013) (holding FAA preemption precluded state court from invalidating class action waiver as unconscionable).

44 *See Raymond James Financial Services, Inc. v. Phillips*, __ So. 3d ___, 2013 WL 2096252 (Fla. May 16, 2013) (holding that the term “civil action or proceeding” in statute of limitations applied to arbitration).

45 *Raymond James Financial Services, Inc. v. Saldukas*, 896 So. 2d 707, 711 (Fla. 2005).

contract, or if the contract comprehensively covers the topic.⁴⁶ Some courts applied the same principle to FDUTPA claims on the theory either that the Plaintiff failed to prove an injury in fact, or that reliance on oral statements contradicting the written agreement is objectively unreasonable.⁴⁷

THE ECONOMIC LOSS DOCTRINE IN FLORIDA

Florida's Supreme Court has recently limited the reach of the loss doctrine ("ELD"). For many years, an alleged tort such as fraud in the performance of a contract, breach of fiduciary duty, and other torts were barred by the ELD because the breach of duty was based solely on the existence of the contractual duty. However, in *Tiara Condominium Ass'n Inc. v. Marsh & McClennon Companies, Inc.*,⁴⁸ the Florida Supreme Court expressly limited the ELD to product liability economic claims, as opposed to claims based upon services. In other words, the ELD bars a tort claim for economic injuries based on a defect in a product that does not cause personal injury or damage to "other" property.

The concurring opinion in *Tiara* suggests that the same result will apply even though traditional contract principles – rather than the ELD – will supply the basis for dismissal. In her concurrence, Justice Pariente stated that "[t]he majority conclusion . . . does not undermine Florida's contract law or provide for an expansion in viable tort remedies."⁴⁹ It is unlikely even under *Tiara* that a party can avoid contractual limitations of liability by pleading a breach of contract claim as a negligence theory. On the other hand, species of negligence, breach of fiduciary duty, and fraud in the performance claims are now likely to be viable if an "independent" duty can be plead and ultimately established.

PUNITIVE DAMAGES IN FLORIDA AND THE SPECIAL PLEADING REQUIREMENTS AND PRESUMPTIVE LIMITS OF SECTIONS 768.72 AND 768.73

Section 768.72 provides that Plaintiffs cannot seek punitive damages in Florida, until the court conducts a hearing to determine whether proffered or cited record evidence establishes a basis for the claim. Until the court grants leave to amend, plaintiffs may not seek discovery regarding

46 Compare *Hillcrest Pacific Corp. v. Yamamura*, 727 So. 2d 1053, 1056 (Fla. 4th DCA 2001) (no reasonable reliance as a matter of law); *Mejia v. Jurich*, 781 So. 2d 1175, 1178 (Fla. 3d DCA 2001) (merger clause insufficient to establish lack of reasonable representation).

47 Compare *Dorestin v. Hollywood Imports, Inc.*, 45 So. 3d 819, 825 (Fla. 4th DCA 2010); with *Adriana Roggenbuck Trust v. Development Resources Group, LLC*, 2013 WL 335990 (11th Cir. 2013) (rejecting argument that written provisions could bar reliance for FDUTPA claim because objective reliance standard applied).

48 110 So. 3d 399, 407 (Fla. 2013).

49 *Id.* at 408.

net worth absent some independent basis. This statute generally has not been applied in federal courts on the grounds that it is procedural, at least as to the pleading requirements of the statute.⁵⁰ The standard to award punitive damages is clear and convincing evidence of intentional misconduct or gross negligence.⁵¹ Employers are insulated from liability for punitive damages unless they knowingly “participated in, approved, or ratified the conduct, or were grossly negligent.”⁵² A breach of contract, no matter how egregious, is not the basis for a punitive damage claim unless there is an independent tort.⁵³

Section 768.73 creates presumption limits on punitive damages, not to exceed the greater of three times actual damages, or \$500,000. A more liberal standard for punitive damages applies if the conduct is particularly egregious; in that instance, punitive damages may not exceed four times compensatory damages for each claimant or \$2 million, whichever is greater.

FLORIDA HAS ABOLISHED JOINT AND SEVERAL LIABILITY (SECTION 768.81 (2)) FOR NEGLIGENCE CLAIMS

Florida has long been a pure comparative fault state.⁵⁴ However in 2011, Florida abrogated the rule of joint and several liability for negligence and product liability actions.⁵⁵ This change does not affect intentional torts, or certain statutory causes of action.⁵⁶ This can be significant in construction or professional malpractice cases where a solvent entity finds itself a defendant with other parties with little ability to satisfy a judgment.

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50 *Porter v. Ogden, Newell & Welch*, 241 F. 3d 1334, 1340-42 (11th Cir. 2001) (stating that the Eleventh Circuit has held that Rule 8(a)(2) Fed. R. Civ. Proc. preempts Section 768.72 pleading requirements, but the court has not decided whether federal discovery rules preempt Section 768.72 restrictions on discovery of financial assets).

51 *See* Fla. Stat. §§ 768.72(2), 768.725; *Mee Industries v. Dow Chemical Co.*, 608 F. 3d 1202, 1221 (11th Cir. 2010).

52 *See* Fla. Stat. § 768.72(3).

53 *Lewis v. Guthartz*, 428 So. 2d 222, 224 (Fla. 1982).

54 *See* Fla. Stat. § 768.81(2) (2012).

55 *See* Fla. Stat. § 768.81(3) (2012).

56 *See* Fla. Stat. § 768.81(4) (2012).

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