DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MARCUS BODIE,

Appellant,

v.

CRICKET WIRELESS, LLC,

Appellee.

No. 2D22-64

November 16, 2022

Appeal pursuant to Fla. R. App. P. 9.130 from the Circuit Court for Hillsborough County; Christopher C. Nash, Judge.

Allison J. Davis of Silber & Davis, West Palm Beach, for Appellant.

John A. Schifino of Gunster, Tampa, for Appellee.

PER CURIAM.

Affirmed.

KELLY and BLACK, JJ., Concur.
LaROSE, J., Concurs with opinion.

LaROSE, Judge, Concurring.

I concur in the per curiam affirmance of the trial court's nonfinal order compelling arbitration. I write separately to address what is, in my view, a consequential issue.

Marcus Bodie sued his cellular phone company, Cricket Wireless, LLC, under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), §§ 501.201-.213, Fla. Stat. (2020). In a nutshell, Mr. Bodie alleged that Cricket engaged in a bait-and-switch scheme; Cricket misleadingly advertised BridgePay, its late-payment billing option, resulting in overcharges to Mr. Bodie's account. The trial court granted Cricket's motion to compel arbitration, concluding that the parties were bound by the arbitration agreement contained in the "Terms and Conditions of Service" signed by Mr. Bodie.

The arbitration agreement contains a class-action waiver, as well as prohibition on representative actions.[1] On appeal, Mr. Bodie

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[1] The arbitration provision at issue provides as follows:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. **YOU AND CRICKET AGREE THAT EACH MAY BRING CLAIMS**

claims that the prohibition on representative actions on behalf of the consuming public violates public policy and, therefore, is unenforceable. The relevant portion of the provision provides as follows:

> The arbitrator may award declaratory or injunctive relief only in favor of the individual party seeking relief and only to the extent necessary to provide relief warranted by that party's individual claim. YOU AND CRICKET AGREE THAT EACH MAY BRING CLAIMS AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING. Further unless both you and Cricket agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding.

Mr. Bodie contends that limiting injunctive and declaratory relief solely to the aggrieved individual suing under FDUTPA prevents him from pursuing and securing relief on behalf of the

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> **AGAINST THE OTHER ONLY IN YOUR OR ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS OR REPRESENTATIVE PROCEEDING**. Further, unless both you and Cricket agree otherwise, the arbitrator may not consolidate more than one person's claims, and may not otherwise preside over any form of a representative or class proceeding. If this specific provision is found to be unenforceable, then the entirety of this arbitration provision shall be null and void.

larger consuming public. Consequently, he maintains, the arbitration agreement stymies FDUTPA's remedial purpose. *See* § 501.202(2) ("The provisions of this part shall be construed liberally to . . . protect the consuming public . . . 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.").

"Generally, [w]e review an order granting or denying a motion to compel arbitration de novo." *UATP Mgmt., LLC v. Barnes*, 320 So. 3d 851, 855 (Fla. 2d DCA 2021) (alteration in original) (quoting *Chaikin v. Parker Waichman LLP*, 253 So. 3d 640, 643 (Fla. 2d DCA 2017)). Similarly, "[o]ur review of the validity of an arbitration agreement on the challenge that it violates public policy is a question of law subject to de novo review. If an arbitration agreement violates public policy, then no valid agreement exists." *Anderson v. Taylor Morrison of Fla., Inc.*, 223 So. 3d 1088, 1091 (Fla. 2d DCA 2017) (citations omitted). There seems to be no dispute that an arbitration agreement is unenforceable "when it defeats the remedial purpose of a statute or prohibits the plaintiff from obtaining meaningful relief under the statutory scheme." *Id.*

(citing *S.D.S. Autos, Inc. v. Chrzanowski*, 976 So. 2d 600, 606 (Fla. 1st DCA 2007)).

"A remedial statute is designed to correct an existing law, redress an existing grievance, or introduce regulations conducive to the public good. It is also defined as [a] statute giving a party a mode of remedy for a wrong, where he had none, or a different one, before." *Hochbaum ex rel. Hochbaum v. Palm Garden of Winter Haven, LLC*, 201 So. 3d 218, 222 (Fla. 2d DCA 2016) (alteration in original) (quoting *Fonte v. AT&T Wireless Servs., Inc.*, 903 So. 2d 1019, 1024 (Fla. 4th DCA 2005)). FDUTPA is such a statute. *Fonte*, 903 So. 2d at 1024 ("FDUTPA is a remedial statute designed to protect consumers.").

Mr. Bodie identifies no provision of FDUTPA giving him the right to seek "public" injunctive relief.[2] Nor does he cite any authority showing that the arbitration agreement's prohibition on representative actions violates FDUTPA's remedial purpose. *Cf. id.*

[2] For that matter, I observe that "an incidental public benefit from what is otherwise class-wide private injunctive relief is not sufficient to establish that the requested injunction is actually public relief." *Hodges v. Comcast Cable Commc'ns, LLC*, 21 F.4th 535, 546 (9th Cir. 2021) (citing *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)).

at 1024-25 (concluding that the arbitration clause's preclusion of class relief did not defeat FDUTPA's remedial purposes, because the public enforcement authority FDUTPA provides "presents an added deterrent effect to violators if private enforcement actions should fail to fulfill that role" and "gives another possible avenue of recovery for consumers"); *Cruz v. Cingular Wireless, LLC*, No. 2:07-cv-714-FtM-29DNF, 2008 WL 4279690, at *3 (M.D. Fla. Sept. 15, 2008) ("Although FDUTPA's claims are susceptible to class action litigation, the statute does not give a 'blanket right' to litigate on a class wide basis. . . . Florida courts have held that "neither the text nor the legislative history of FDUTPA suggests that the legislature intended to confer a non-waivable right to class representation." (first citing *Fonte*, 903 So. 2d at 1024-25; and then quoting *Fonte*, 903 So. 2d at 1025)).

FDUTPA, however, permits an "enforcing authority"[3] to obtain declaratory and injunctive relief, as well as actual damages

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[3] Section 501.203(2) defines an "enforcing authority" as

> 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

sustained by consumers. *See* § 501.207; *Sanders v. Drivetime Car Sales Co.*, 221 So. 3d 718, 719 (Fla. 1st DCA 2017) ("FDUTPA states that a cause of action can be brought by a person who has suffered a loss or has been aggrieved by a violation of FDUTPA, an interested party, or an enforcing authority."). And, FDUTPA allows an individual to seek redress under the statute, so long as that individual has suffered a loss or been aggrieved by a FDUTPA violation. *See* §§ 501.207(1), .211.

In the context of declaratory and injunctive relief, section 501.207 provides that "[t]he enforcing authority may bring . . . [a]n action to obtain a declaratory judgment that an act or practice violates this part," as well as "[a]n action to enjoin any person who has violated, is violating, or is otherwise likely to violate, this part." § 501.207(1)(a)-(b). Thus, the enforcing authority is not limited solely to seeking such relief for its own benefit or because it is the aggrieved party. Instead, the enforcing authority may obtain relief that would necessarily benefit a consumer or entity that is or could

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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.

be impacted by a FDUTPA violation. Mr. Bodie concedes as much, telling us that "under consumer protection statutes, such as § 501.207 and § 501.211, it is inherent in granting declaratory or injunctive relief to benefit the consuming public."

Section 501.211(1), addressing "individual remedies," provides in relevant part that

> [w]ithout regard to any other remedy or relief to which a person is entitled, *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.

(Emphasis added.) Thus, the statute's plain language does not authorize an individual to bring a FDUTPA action on behalf of another. To sustain a cause of action, the claimant must have suffered harm.

Mr. Bodie may not maintain a FDUTPA claim on behalf of the consuming public at large; the prohibition on representative actions precludes it. Moreover, Mr. Bodie certainly is not an "enforcing authority." *See, e.g.*, *Sanders*, 221 So. 3d at 719 ("Based on the definition, an individual does not qualify as an enforcing authority. Thus, an individual's private claims for violations of FDUTPA

cannot be deemed a private attorney general action since a person has no statutory right to represent the enforcing agency or another person under FDUTPA."). Had the legislature intended to provide an individual with the right to seek and obtain an injunction on behalf of others, it could have easily done so. *See Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995) ("When the legislature has used a term, as it has here, in one section of the statute but omits it in another section of the same statute, we will not imply it where it has been excluded."). The absence of any language to this effect clearly evinces the legislature's intent to exclude an individual from seeking and obtaining an injunction on behalf of others. *See Moonlit Water Apartments, Inc. v. Cauley*, 666 So. 2d 898, 900 (Fla. 1996) (stating statutory construction principle of "expressio unius est exclusio alterius," i.e., "the mention of one thing implies the exclusion of another"). Under the circumstances before us, Mr. Bodie may assert his own individual claims for relief under FDUTPA. Such action, if successful, will advance FDUTPA's public policy.

As important, the parties' arbitration agreement does not prohibit an action by an enforcing authority to benefit the

consuming public. *Cf. Fonte*, 903 So. 2d at 1024-25 (quoting *Randolph v. Green Tree Fin. Corp.–Ala.*, 244 F.3d 814, 817 (11th Cir. 2001)). Indeed, no enforcing authority is a party to, or bound by, the agreement.

Additionally, because FDUTPA permits an enforcing authority to bring an action on behalf of consumers, the statutory purpose in "protect[ing] the consuming public" is served. § 501.202(2). In other words, should an enforcing authority seeking declaratory or injunctive relief because of an act or practice violating FDUTPA, then any relief obtained would necessarily benefit the consuming public writ large. And, "[t]his additional enforcement mechanism presents an added deterrent effect to violators if private enforcement actions should fail to fulfill that role" as it "gives another possible avenue of recovery for consumers." *Fonte*, 903 So. 2d at 1025.

Mr. Bodie relies on California law, specifically *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017). I am not persuaded. In *McGill*, the California Supreme Court held that an arbitration agreement waiving an individual's right to seek "public injunctive relief," that is, "injunctive relief that has the primary purpose and

effect of prohibiting unlawful acts that threaten future injury to the general public," in any forum violated California's consumer protection laws. 393 P.3d at 951-52, 956 (first citing *Cruz v. PacifiCare Health Sys., Inc.*, 66 P.3d 1157 (Cal. 2003); and then citing *Broughton v. Cigna Healthplans of Cal.*, 988 P.2d 67 (Cal. 1999)). However, I see no analog to California's "public injunctive relief" in Florida law. *Cf. DiCarlo v. MoneyLion, Inc.*, 988 F.3d 1148, 1158 (9th Cir. 2021) ("*McGill*'s reasoning—an individual requesting relief for the entire public is suing *only* on her own behalf—is peculiar."). Moreover, California law simply bears no relevance to FDUTPA. *See Barnes v. StubHub, Inc.*, No. 19-80475, slip op. at 4 (S.D. Fla. Oct. 3, 2019) ("*McGill* is inapplicable to Barnes' FDUTPA claim because under Florida law 'a choice-of-law provision that provides for the application of non-Florida law precludes a claim under the FDUTPA.' " (first quoting *Herssein Law Grp. v. Reed Elsevier, Inc.*, No. 13-23010-CIV, 2014 WL 11370411, at *9 (S.D. Fla. Mar. 5, 2014); then citing *Martin v. Creative Mgmt. Grp., Inc.*, No. 10-CV-23159, 2013 WL 12061809, at *9 (S.D. Fla. July 25, 2013))).

In sum, the arbitration provision prohibiting representative actions for declaratory and injunctive relief on behalf of nonparties is enforceable. The waiver does not undermine FDUTPA's remedial purpose. Mr. Bodie may not seek "public injunctive relief" under FDUTPA.

Opinion subject to revision prior to official publication.