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S.D. Fla.: concealment theory warrants class treatment under FDUTPA but not RICO

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Takeaway: Class actions brought under federal RICO present significant risks for defendants. They present the opportunity for certification of nationwide or multi-state classes under a federal statute, and the remedies provided under federal RICO – similar to federal antitrust remedies – include treble damages and attorneys' fees. State consumer protection statutes likewise provide powerful remedies, such as fee-shifting, but those statutory claims – with their favorable presumptions and burdens of proof – frequently will be more amenable to class treatment than federal RICO claims. In a recent case, *Cardenas v. Toyota Motor Corp*., No. 18-22798-CIV-MORENO, 2021 WL 5811741 (S.D. Fla. Dec. 6, 2021), the differences in proof as between federal RICO and the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) produced diametrically-opposed outcomes on the issue of class certification, with the district court rejecting the certification of a RICO concealment theory but endorsing the certification of a FDUTPA concealment theory.

In *Cardenas*, three representative plaintiffs filed suit in the Southern District of Florida against Toyota Motor Corp. (Toyota), the manufacturer of the Toyota Camry, Southeast Toyota Distributors (Southeast), the distributor of Camrys to authorized dealers in the southeastern United States, as well as other Toyota entities. The plaintiffs alleged that defendants conspired to conceal a defect in non-hybrid 2012-2014 model year Camrys that caused the vehicles' heating, ventilation, and air conditioning (HVAC) systems to produce offensive odors. Their allegations centered on an alleged scheme to defraud to conceal the defect and overcharge for the vehicles. Toyota allegedly recognized the HVAC odor issue as a "chronic issue" in 2012 and produced service bulletins and "Tech Tips" that were distributed by Southeast to authorized Toyota dealers, and which directed the dealers to explain (falsely) to customers that the HVAC odor was "normal" – in other words, a problem that could not be repaired. They allegedly engaged in this scheme to protect the Toyota brand as well as to evade Florida's Lemon Law, which mandates a buyback of a defective vehicle after three unsuccessful attempts to fix it.

The plaintiffs asserted claims under federal RICO and FDUTPA, seeking to represent a five-state southeastern class (Alabama, Florida, Georgia, North Carolina, and South Carolina) for the RICO claims and a Florida class for the FDUTPA claim.

The district court initially described the schemes to defraud supporting the RICO and FDUTPA claims as being similar: "At bottom, this is a fraud case. It is not a products liability case. Plaintiffs allege that Defendants

conspired to and succeeded at concealing a defect in their vehicles in order to defraud purchasers of the class vehicles. Their claims in general, under RICO and FDUTPA, require a showing that Defendants engaged in a scheme to defraud and acted deceptively." 2021 WL 5811741, at *7.

But the court rejected certification of the RICO claims (which included a substantive RICO claim as well as a RICO-conspiracy claim). In its analysis of the predominance requirement under Federal Rule 23(b)(3), the district court concluded that plaintiffs' class-wide RICO fraud theory failed: "Even if Plaintiffs are correct that Toyota and Southeast Toyota Distributors made misrepresentations to authorized Toyota dealers about the source of the odor and the efficacy of the HVAC system, it does not follow that these misrepresentations caused every purchaser from an authorized dealership to overpay for their vehicle. Based on the evidence Plaintiffs offer, it was only those people who already owned a Class Vehicle and brought it to a dealership complaining of odor who were the potential victims of a misrepresentation—i.e., they were the only people told that the odor was normal. But it is too attenuated an inferential chain to conclude that a purchaser from an authorized dealer, that had no meaningful communication with the dealer or Defendants about the HVAC defect, was harmed 'by reason of' Defendants directing dealerships to convey to complaining customers that the odor was normal." *Id*. at *10.

To support this conclusion, the district court observed that, for fraud-based RICO claims, "whether a duty to disclose information exists must be made on a case by case basis, with appropriate attention given to the nature of the transaction and the relationship between the parties." *Id*. at * 11 (quoting *Langford v. Rite Aid of Alabama, Inc.*, 231 F.3d 1308, 1313 (11th Cir. 2000)). A duty to disclose can arise "in a situation where a defendant makes partial or ambiguous statements that require further disclosure in order to avoid being misleading." *Id*. (quoting *Kemp v. Am. Tel. & Tel. Co*., 393 F.3d 1354, 1360 (11th Cir. 2004)). But plaintiffs could not establish a duty to disclose under RICO on a class-wide basis: "The problem for Plaintiffs is that they have not offered any class wide evidence that Defendants, or even dealerships, told half truths [sic] to Class members *before* they purchased their vehicles. Plaintiffs have only submitted evidence that would permit a jury to infer that class members who complained of odor to an authorized dealership were mislead [*sic*]." *Id*. (emphasis in original).

But the district court reached a different conclusion on the FDUTPA concealment theory, given that FDUTPA claims do not require a showing of reliance and that "plaintiffs do not need to present evidence that each potential class member was actually harmed by a defendant's conduct … plaintiffs need only show that a reasonable consumer would have been harmed by defendant's conduct." *Id*. at *12 (quoting *Bowe v. Pub. Storage*, 318 F.R.D. 160, 182 (S.D. Fla. 2015)). Given FDUTPA's looser proof requirements, "a permissible inference of common exposure [to a misrepresentation from an authorized dealer] may be drawn," and "all class members received the same information from defendant regarding the purported defect – which is to say, no information." *Id*. at *12-13 (quoting *Salas v. Toyota Motor Sales, U.S.A., Inc*., 2019 WL 1940619, at *9 (C.D. Cal. Mar. 27, 2019)).

Based on the district court's finding of common evidence of a deceptive act and causation supporting the FDUTPA claim (as well as rulings on other Rule 23 issues, including common evidence of damages), the court certified a FDUTPA class of individuals who purchased non-hybrid 2012-2104 Camrys from authorized Toyota dealers.