

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO. 08-22418-CIV-MORENO/TORRES

CLEAR MARINE VENTURES, LTD.,  
a British Virgin Islands corporation,

Plaintiff,

v.

BRUNSWICK CORP., etc., et al.,

Defendants.

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**MARINEMAX'S MOTION TO DISMISS COUNT X  
OF PLAINTIFFS SECOND AMENDED COMPLAINT**

Defendant MarineMax moves to dismiss Count X of plaintiff's second amended complaint pursuant to Rule 12 (b)(6), Fed.R.Civ.P.

**I. Nature of the Action**

He first saw the model on line and in a promotional brochure (para. 13-15).<sup>1</sup> Her glossy exterior, sculpted body, sophistication, bloodlines, not to mention the accolades of how she could perform, intrigued him, piqued his curiosity (para. 13-15; Exs A. and B. to second amended complaint). Needless to say, he needed to know more, meet her, ride her. He was excited (para. 22).

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<sup>1</sup> The following is not intended or meant to titillate, but illuminate the unique relationship that an individual has with a vessel and the special, discriminating and demanding wants and needs of a wealthy individual, who was disappointed and dismayed with his purchase; who, in the eyes of the law, stands in the same crocs as the common consumer who was disappointed that the new Kenmore front-loader washer didn't eliminate the grass stains on the kids' shorts as was promised and warranted.

Suitable arrangements were made. Not wanting to push her too fast, he rode her easy (para. 36, 37). With her prominent front pushed up, her rear somewhat down, her performance was somewhat hesitant and resistant. But he was told she was a maiden, that he'd be her first owner (para. 40, 47).

He knew that with the right master, the right equipment, and with promises of better things to come, her performance could only get better, would be as promised (para. 45). Michael Krieger was hooked (para. 43).

However, as others before him had learned in dealing with her identical sisters, (para. 60), he would soon come to the realization that in her family, beauty's only skin deep. She had been born with a fatal defect (para.26).

When he realized that despite the glamorous exterior, her performance was as fleet and nimble as a manatee, his interest in her waned. Discontented and having spent a significant amount of money to buy, outfit, maintain and service her (para. 46, 113), he complained. Krieger was instructed to take her in for extensive surgery to correct her imperfections -- not once or twice, but three times (para. 53, 61, 67).

Unfortunately, these procedures, which were designed to decrease her weight and trim, and thereby enhance her performance, failed miserably. She got hot and wet, but too wet. (para. 97, 110, Ex. D to second amended complaint). Just as disturbing, what had at one time been a pleasing, cosmetically acceptable body, had now been transformed into a ghastly and unpleasing specimen.

Alas, once a sea cow, always a sea cow.

Disappointed, dismayed and downhearted (para. 112), Michael Krieger sued to get back the investment he had made in a dream that turned into a nightmare.

**II. The Claim Against MarineMax**

In **Count X**, plaintiff alleges that MarineMax violated the Florida Deceptive and Unfair Trade Practices Act (FDUTPA), Section 501.201, et seq., because on each of the three occasions that Marine Max performed the doomed modifications to correct the fatal defect to the vessel, Phil Vitale of MarineMax represented that “the problems with the hull had been corrected” or, “the problems with the hull’s weight and performance had been corrected”, even though Vitale knew better (para. 55, 62, 71, 205).

The damages plaintiff claims to have suffered are set forth in paragraph 113 (as to all defendants) and paragraphs 205 and 207 (specifically as to MarineMax) of the second amended complaint as follows:

Moreover, Plaintiff has incurred approximately \$964,427 in fees and costs related to the aforementioned repairs and service, as well as Captains’ salaries, equipment, accessories, mortgage interest and legal fees. Krieger has also sustained substantial damages, to be later calculated, resulting from the vessel’s loss of value in the marketplace. Expensive boats of this type develop reputations of their own and their performance, service and repair history greatly impact such vessel’s market value. This amount is over and beyond the \$1,925,000 that Plaintiff purchased Ventura II for. As such, Plaintiff has incurred in excess of \$3,000,000 in costs and expenses arising from the fraudulent conduct of the Defendants. (Para. 113).

.... As such, Marine Max unconscionably and deceptively placed Clear Marine, its representatives and its guests at risk of bodily injury by misrepresenting that the vessel was fit for its intended purpose. (Para. 205).

As a result of Vitale and MarineMax’s violation, Plaintiff has suffered damages in excess of \$3,000,000. (Para. 207).

**III. Basis for Motion to Dismiss**

Plaintiff has (still) not pled with the required degree of sufficiency any “actual” damages that could be recoverable under FDUTPA.

IV. Memorandum of Law

Plaintiff must allege (and ultimately prove) “actual damages” were sustained as a result of a violation of FDUTPA. Section 501.211(2). The correct measure of actual damages is the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the agreement of the parties. *Smith v. 2001 South Dixie Highway, Inc.*, 872 So.2d 992 (Fla.4th DCA 2004). Actual damages includes diminution in value. *Collins v. Daimler Chrysler Corp.*, 894 So.2d 5<sup>th</sup> DCA 2004); *Davis v. Powertel*, 776 So.2d 971, 973 (Fla.1st DCA 2000); *Urling v. Helms Exterminators, Inc.*, 468 So.2d 451, 454 (Fla.1st DCA 1985) (the Act is intended to protect consumers from practices which diminish the value or worth of the goods or service purchased by the consumer).

Here, plaintiff did not “purchase” any product or service from MarineMax as the modifications to the vessel were performed under the direction of Hatteras, at no charge to plaintiff. Nevertheless, in the context of the circumstances in which MarineMax was involved in this matter, it is assumed that plaintiff could possibly set forth, albeit with some ingenuity and/or imagination, “actual damages” caused by Vitale saying that the problems with the hull had been resolved. The problem is that plaintiff has not even attempted to do so.

In paragraph 205 of the second amended complaint, plaintiff states that by reason of Vitale representing that the problems had been corrected even though he knew the “fatal defect and construction” of the vessel had in fact not been corrected, this “deceptively placed [plaintiff] ... at risk of bodily injury.” However, FDUTPA does not permit recovery for personal injuries or any other

“consequential” damages.<sup>2</sup> *Schauer v. Morse Operations, Inc.*, 5 So.2d 2 (Fla.4th DCA 2009). If there can be no recovery for an actual bodily injury, certainly there can be no recovery for the “risk” of suffering a bodily injury.

For that same reason, the alleged damages sustained (as alleged in paragraph 113), for approximately \$964,427.50 in fees and costs for repairs and service, captains’ salaries, equipment, mortgage interest and legal fees -- all consequential -- are also not recoverable. *Id.*

Further, while it is understandable that plaintiff was still disappointed with the vessel after each of the modifications, subjective feelings of disappointment are not sufficient to form a basis for “actual damages” under FDUTPA either. *In re Crown Auto Dealerships, Inc.*, 187 BR 1009, 1018 (Bank. M.D. Fla. 1995); *City First Mortgage Corp. v. Barton*, 988 So.2d 82 (Fla.4th DCA 2008).

Plaintiff has simply failed to allege how these failed series of modifications undertaken by MarineMax has caused in excess of \$3 million in damages.<sup>3</sup> Plaintiff has alleged damages for “loss of value” - - *to be later calculated* -- stemming from the fraudulent conduct of all of the defendants (para. 113), but as to the alleged FDUTPA violation by Marine Max, the actual amount is not stated.

Frankly, it is unknown how plaintiff can or will be able to reasonably allege that Vitale’s “deceit” resulted in a “difference in market value of the [vessel] in the condition in which it was

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<sup>2</sup> In the “Wherefore” clause for Count X, plaintiff claims entitlement to consequential damages. This should be stricken.

<sup>3</sup> In paragraphs 87 and 88 it is alleged that as a result of MarineMax dropping an engine through the deck of the vessel, the vessel was physically damaged and the engines suffered repeated failures which rendered her “unsaleable” causing plaintiff to suffer \$3 million in damages. These damages are being asserted against Marine Max for its alleged negligence in Count XIII.

delivered and its market value in the condition in which it should have been delivered,” or, that it even resulted in some diminution in value.

Under the circumstances, MarineMax should not have to wait any longer to find out. The FDUTPA claim should be dismissed with prejudice.

**V. Conclusion**

Based upon the foregoing, Count X of the second amended complaint should be dismissed.

**V. Certificate of Service**

**I HEREBY CERTIFY** that on May 19, 2009, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following: **Alexander Brito/Melissa L. Bernheim, Esq.**, Zarco Einhorn Salkowski & Brito, P.A., *Attorneys for Plaintiff*, Bank of America Tower, 100 SE Second Street, 27<sup>th</sup> Floor, Miami, FL 33131, **Christina McGinley Paul, Esq./Scott M. Sarason, Esq.**, Rumberger Kirk & Caldwell, *Attorneys for Brunswick*, 80 SW Eighth Street, #3000, Miami, FL 33130, **Matthew Luzadder, Esq./Caroline Plater, Esq.**, Kelley Drye & Warren, LLP, Co-counsel for Brunswick, 333 W. Wacker Drive, #2600, Chicago, IL 60606, **Thomas D. Lardin, Esq.**, Thomas D. Lardin, P.A., *Attorneys for Cazadores and Stevens*, 370 W. Camino Gardens Blvd., Suite 336, Boca Raton, FL 33432, **Kenneth Wayne Waterway, Esq.**, Gordon Hargrove & James, *Attorneys for Caterpillar*, 2400 E. Commercial Boulevard, Suite 1100, Fort Lauderdale, FL 33308, and **John E. Hughes, III, Esq.**, McLuskey & McDonald, *Attorneys for Pantropic Power*, 8821 SW 69<sup>th</sup> Court, Miami, FL 33156.

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