

## DAILY BUSINESS REVIEW

### Ruling Renders Emotional Harm Damages Unavailable

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January 13, 2014, 04:00 PM

A once-fertile avenue for Florida juries to award massive damages has been closed.

Class action representative plaintiffs are no longer able to seek a lump sum award of emotional harm damages for the class of persons they represent, based on a recent decision of Florida's Third District Court of Appeal, sitting in Miami.

In the case of *Alderwoods Group v. Garcia*, 119 So. 3d 497 (3d DCA 2013), the Third DCA reversed in its entirety a class certification order entered by Miami Circuit Court Judge Valerie Manno Schurr.

The court's decision became final in September of last year and is not being appealed. The Alderwoods court agreed with the argument advanced by the appellants that emotional harm claims inherently implicate factual questions specific to each class member. Such subjective questions of fact cannot be answered in a class action setting because the representative plaintiffs are unable to supply evidence demonstrating that the individual class members, who do not directly participate in the case and do not provide any personal evidence, actually suffered emotional harm caused by the defendants. Only the absent class members themselves could provide evidence supporting that they have suffered emotional distress. Because factual questions specific to each absent class member must necessarily be answered in order to find that each suffered emotional harm, the Third DCA in *Alderwoods* held that that class-wide treatment of emotional harm claims is patently improper.

The appellants argued and the Third DCA agreed that the Florida Supreme Court's seminal smoker class action decision in *Engle v. Liggett Group*, 945 So. 2d 1246 (Fla. 2006) signified that claims for emotional harm damages are unsuitable for class action treatment in any context, not just in a smoker's case. The Florida Supreme Court in *Engle* ratified several class-wide determinations made by a jury but expressly reversed the jury's findings regarding the class member's claims for emotional harm. The court reasoned that the class action mechanism was inappropriate to prove, adequately and fairly, that absent class members suffered emotional harm caused by smoking.

In *Engle*, the representative plaintiffs sought class action damages for emotional harm experienced by the absent smoker class members. In the *Alderwoods* case, the plaintiffs claimed that a class consisting of owners of burial rights and family members of decedents interred at a local cemetery had suffered emotional harm due to alleged burial practices at the cemetery. A central claim in the *Alderwoods* case was that the cemetery had years before buried persons in an old section of the cemetery but could no longer locate the burials. Citing to the Florida Supreme Court's 2006 *Engle* decision, the Third DCA ruled that the class member claims for emotional harm could not be the subject of a class action. The representative plaintiffs could not pursue emotional distress claims on behalf of absent class members because such claims are incapable of proof without the direct participation of each injured person. The court held: "Such issues involve highly individualized determinations which cannot be established through common proof and are therefore not amenable to class treatment."

The effect of this opinion is far-reaching. Much like the long-standing rule in Florida that fraud claims are intrinsically inappropriate for class certification, the law in Florida is now that claims for emotional harm may not be certified as part of a class action, as a matter of law. This is unquestionably a positive turn for Florida retailers and employers, in particular. Claims for emotional distress are commonplace in products liability, consumer fraud, and employment lawsuits. Because emotional harm damages are awarded at the discretion of the jury and are virtually impossible to appeal, their unavailability in class actions eliminates the threat of an unpredictable and potentially massive award of damages where there is otherwise minimal material harm to the class members.

The long-term impact of this rule of law likely will be to discourage the filing of putative consumer and employment class actions that are devoid of any actual economic harm yet nevertheless demand millions of dollars for purported emotional harm damages. Going forward, individuals must file their own suits to recover damages of this nature. The likelihood of cases involving scores of participating claimants being filed is slim for the most basic of reasons. Pursuing thousands of personal claims in individual lawsuits is both time-consuming and expensive. The economics of bringing claims of this type are a natural deterrent.

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