

Are my claims preempted? The Bullet Point: Volume 2, Issue 5

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McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.

[Hagy v. Demers & Adams, 6th Cir. No. 17-3696 \(Feb. 16, 2018\).](#)

In this appeal, the Sixth Circuit Court of Appeals reversed the district court's decision finding that the plaintiffs failed to establish a concrete injury and therefore lacked standing to prosecute a Fair Debt Collection Practice Act (FDCPA) claim against the defendant law firm.

The case began when the defendant law firm's client offered plaintiffs a deed-in-lieu of foreclosure. In exchange, the law firm's client agreed to waive any deficiency that may be owed on the loan. This agreement was memorialized in a letter from the law firm to plaintiffs' former counsel. Thereafter, the law firm's client attempted to collect on the debt in violation of the agreement.

Plaintiffs sued claiming that the law firm's letter violated the FDCPA. The district court ultimately granted plaintiffs judgment, finding that the law firm's letter failed to include the debt collector language required by the FDCPA. The district court then awarded plaintiffs \$1,800 in statutory damages and over \$74,000 in attorneys' fees.

On appeal, the Sixth Circuit Court of Appeals reversed. In so ruling, the court found that to have standing (that is, the ability to bring a lawsuit) in federal court that plaintiffs had to suffer an injury-in-fact and that Congress could not simply create such an injury by statute when there has been no harm suffered.

The Bullet Point: In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the United States Supreme Court held that to have standing something more than a "bare procedural violation" must be established. While courts have grappled with what *Spokeo* means for federal statutory lawsuits, this decision makes clear that not all procedural violations, not even all inaccuracies, cause real harm. While a standing challenge can be raised at any time, it is always best to raise it at the earliest outset, and when in doubt, consult with an attorney.

[D&S Remodelers, Inc. v. Wright Natl Flood Ins. Services, Inc., 6th Cir. No. 17-5554 \(Feb. 14, 2018\).](#)

In this appeal, the Sixth Circuit Court of Appeals affirmed the district court's denial of a contractor's claims against a flood insurance adjuster on the grounds of preemption.

Plaintiff claimed that the defendants had promised to pay for its work in repairing flood damage at condominiums that resulted from Superstorm Sandy. Plaintiff claimed that between October 2012 and January 2013 it did more than \$500,000 in unpaid flood remediation and repair work at the condos. The plaintiff claimed that defendants made various oral representations that it would be paid, but it was not. Eventually, plaintiff filed suit for breach of contract and unjust enrichment. The defendants moved to dismiss on the ground of preemption, arguing that the claims were preempted by the National Flood Insurance Act (NFIA). The district court agreed and dismissed the lawsuit. The Sixth Circuit affirmed this decision on appeal on the grounds of preemption.

The Bullet Point: Under the Supremacy Clause of the United States Constitution, “state laws that ‘interfere with, or are contrary to the laws of congress, made in pursuance of the constitution’ are invalid.” This idea, called preemption, applies to both federal regulations and statutes and prohibits a litigant from asserting a state law claim that is contrary to a federal rule or statute. Thus, when determining what types of claims to assert, or in defending against state claims, it is important to consider whether the claims are preempted by a federal rule and statute.

[Goerlitz v. SCCI Hospitals of America, Inc., et. al., 3d Dist. Allen No. 1-17-43, 2018-Ohio-633.](#)

This was an appeal of the trial court’s denial of a motion to stay and compel arbitration. This case started as a wrongful death action. The defendant hospitals filed an answer to the lawsuit and asserted a number of affirmative defenses, including that the claims were subject to arbitration. Thereafter, the defendants sought to transfer the venue and the motion was granted. After the motion was granted, the hospital sought to stay proceedings and compel arbitration.

The trial court denied the motion because, among other reasons, it claimed the defendants had waited too long to arbitrate the claims and had therefore waived the right to arbitration. On appeal, the Third Appellate District affirmed the trial court, noting that it had not abused its discretion in finding that the appellees had waived their right to arbitrate by acting inconsistently with that right.

The Bullet Point: “A party asserting waiver must prove that the waiving party knew of the existing right to arbitrate and, based on the totality of the circumstances, acted inconsistently with that known right.” In determining whether the totality of the circumstances includes actions inconsistent with the right to arbitrate, a court may consider: (1) whether the party seeking arbitration invoked the court’s jurisdiction by filing a complaint or claim without first requesting a stay, (2) the length of the delay, if any, in seeking arbitration, (3) the extent to which the party seeking arbitration has participated in the litigation, and (4) whether prior inconsistent acts by the party seeking arbitration would prejudice the party asserting waiver.

[Cord v. Victory Solutions, LLC, 8th Dist. Cuyahoga No. 106006, 2018-Ohio-590.](#)

In this lawsuit, plaintiff agreed to help her son’s corporation with a loan. After not receiving any form of repayment in 8 years, the plaintiff filed suit against the corporation and her son. She asserted claims for breach

of contract, promissory estoppel, and fraud. Eventually, the court granted the plaintiff's motion for judgment on the fraud claim and plaintiff appealed.

On appeal, the Eighth Appellate District affirmed. In so ruling the court found that while in certain circumstances an officer of a corporation can be liable for fraud, a fraud claim and breach of contract claim cannot be maintained for the same conduct.

The Bullet Point: An officer of a corporation can be liable for fraud. To prove this, a plaintiff must show "(1) the officer knew his [or her] statement to be false, (2) the officer intended the plaintiff to act upon it, and (3) the plaintiff acted on the statement and, as a result, suffered injury."

Moreover, "the existence of a contract action excludes the opportunity to present the same case as a tort claim." Rather, in order to pursue both a contract and fraud claim, "where the causes of action in tort and contract are 'factually intertwined,' a plaintiff must show that the tort claims derive from the breach of duties that are independent of the contract and that would exist notwithstanding the contract."

[Priconics, LLC v. Amperor, Inc., 12th Dist. Warren No. CA2017-07-099, 2018-Ohio-551.](#)

This was an appeal of a trial court's decision to dismiss the lawsuit. The defendant was a Texas corporation, whereas the plaintiff was an Ohio LLC that acts as a sales representative. In 2015, the parties entered into a sales representative agreement where plaintiff would act as a sales rep for defendant and its products in Ohio, Pennsylvania, and Virginia. Eventually a dispute arose between the parties on the amount of commission plaintiff was entitled to and defendant filed a declaratory judgment action in Texas in February 2017. A few weeks later, plaintiff filed a lawsuit in Ohio.

Defendant moved to dismiss on the basis of the jurisdictional priority rule and the trial court agreed and dismissed the lawsuit. On appeal, the Twelfth Appellate District disagreed and reversed the trial court ruling finding that the jurisdictional-priority rule did not apply because the competing lawsuits were filed in different states and the rule only applies to lawsuits filed in the same state.

The Bullet Point: "The jurisdictional-priority rule provides that as between state courts of concurrent jurisdiction, the tribunal whose power is first invoked acquires exclusive jurisdiction to adjudicate the whole issue and settle the rights of the parties." It does not apply to cases from other states. Rather, when faced with such a lawsuit, the litigant has three options: (1) it can grant a stay in the Ohio proceedings pending the resolution of the earlier action outside of Ohio; (2) it can go forward with the action in Ohio; or (3) it can dismiss the case under the doctrine of forum non conveniens. Regardless, this case provides a good example as to why retaining counsel at the outset is key in order to ensure, among other things, that suit has been brought in the proper forum.