Can I Stop Invasive Corporate-Wide Discovery?

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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.

Ohio

Tortious Interference with Business Relations

***Emanuel's LLC v. Restore Marietta*, 4th Dist. Washington No. 2023-Ohio-147.**

In this appeal, the Fourth Appellate District affirmed the trial court's decision to grant judgment to the defendant on the plaintiff's tortious interference with business relations claim.

The Bullet Point: 'The elements of tortious interference with a business relationship are: (1) a business relationship; (2) the tortfeasor's knowledge thereof; (3) an intentional interference causing a breach or termination of the relationship; and (4) damages resulting therefrom.'

"Tortious interference with a business relationship is similar to tortious interference with a contract, but the result of the interference does not require the breach of contract. It is sufficient to prove that a third party does not enter into or continue a business relationship with the plaintiff."

However, a vague assertion that a party interfered with certain unspecified business relationships is insufficient to state a claim for tortious interference with a business relationship.

Applicability of the CSPA to Home Additions

***Estate of Tomlinson v. Mega Pool Warehouse, Inc.*, 5th Dist. Delaware, No. 2023-Ohio-229.**

In this appeal, the Fifth Appellate District affirmed the trial court's decision, finding that the transaction at issue was covered by the Consumer Sales Practices Act (CSPA) and not the Home Construction Services Suppliers Act (HCSSA).

The Bullet Point: The CSPA applies to consumer transactions and prohibits unfair, deceptive, or unconscionable acts or practices by suppliers in consumer transactions, whether they occur before, during, or after the transaction. Notably, the definition of a "consumer transaction" does not include, among other things, transactions involving a home construction service contract. In this case, the issue was whether the construction of a deck and swimming pool is specifically exempt from the definition of a consumer transaction under the CSPA as a transaction "involving a home construction service contract." The Fifth District ultimately found the CSPA applied and not the HCSSA on the basis that the former applies to transactions involving "an already-existing construction," whereas the latter applies to "new constructions."

Specific Performance

***JoMar Group, Ltd. v. Brown*, 5th Dist. Brown No. 2023-Ohio-98.**

In this appeal, the Fifth Appellate District affirmed the trial court's ruling that specific performance of a real estate contract was appropriate.

The Bullet Point: Specific performance is a remedy that courts may sometimes order in breach of contract cases. In order to find specific performance appropriate: "[t]he contract must be concluded, certain, unambiguous, mutual, and based upon a valuable consideration; it must be perfectly fair in all its parts; it must be free from any misrepresentation or misapprehension, fraud or mistake, imposition or surprise; it cannot be an unconscionable or hard bargain; its performance must not be oppressive upon the defendant; and, finally, it must be capable of specific execution through a decree of the court."

Florida

FTC Authority

***Federal Trade Commission v. Simple Health Plans LLC*, No. 21-13116 (11th Cir. Jan. 27, 2023)**

The Eleventh Circuit concluded that the Federal Trade Commission (the FTC) is authorized to obtain a preliminary injunction that includes an asset freeze and the imposition of a receivership over a company that has engaged in unfair or deceptive business practices in violation of § 5(a) of the Federal Trade Commission Act (the FTC Act).

The Bullet Point: The FTC Act broadly prohibits "unfair or deceptive acts or practices in or affecting commerce." Where a violation has occurred, Section 19(b) of the FTC Act authorizes the district court to grant "such relief as the court finds necessary to redress injury to consumers," which "may include, but shall not be limited to, rescission or reformation of contracts, the refund of money or return of the property, the payment of damages, and public notification." This list is non-exhaustive, and the omission of preliminary measures does not mean

they are not authorized. Here, the Eleventh Circuit concluded that preliminary measures such as an asset freeze or the imposition of a receivership are authorized remedies if necessary to preserve funds for a future monetary judgment. Accordingly, because the asset freeze and receivership imposed against the appellant, in this case, were authorized pursuant to the broad scope of relief available under Section 19(b), the order denying the appellant's emergency motion to dissolve the preliminary injunction was affirmed.

Admissibility of a Pooling and Servicing Agreement

***U.S. Bank National Association as Trustee from RAMP 2006EFC2 v. Bell*, No. 5D21-2528 (Fla. 5th DCA Jan. 27, 2023)**

The Fifth District held that a Pooling and Servicing Agreement (a PSA) is not hearsay and is admissible in a mortgage foreclosure action due to its independent legal significance.

The Bullet Point: It is axiomatic in a foreclosure proceeding that the party seeking to foreclose must demonstrate that it has standing. Standing must be established when the complaint was filed and at the time of trial. Under Florida law, a party's standing to foreclose can be shown through a PSA where the note is part of the trust established by the PSA before the suit is filed. In this case, the crux of the dispute was whether the appellant proved it had standing when it first filed its foreclosure complaint, which it attempted to prove by admitting a PSA into evidence. However, the court excluded the PSA from evidence at trial based on the borrower's hearsay objection. On appeal, the Fifth District ruled that the trial court erred in sustaining the borrower's objection, concluding that a PSA can be admitted into evidence as a non-hearsay document, admissible for its independent legal significance. Accordingly, the final judgment was reversed.

Carte Blanche Discovery

***Publix Super Markets, Inc. v. Blanco*, No. 3D22-0852 (Jan. 25, 2023)**

The Third District quashed a discovery order permitting corporate-wide discovery because it amounted to impermissible carte blanche discovery of irrelevant information.

The Bullet Point: Florida's rules of civil procedure broadly allow parties to obtain discovery of any matter, not privileged, that is relevant to the subject matter of the pending action, even where it is reasonably calculated to lead to the discovery of admissible evidence. However, a litigant is not entitled to carte blanche discovery of irrelevant information. A discovery order permitting such discovery results in irreparable harm and departs from the essential requirements of the law. In this case, the petitioner sought certiorari review of a discovery order requiring its corporate representative to address areas of inquiry related to its corporate-wide operations. The petitioner argued that the discovery order causes irreparable harm because it grants impermissible carte blanche to irrelevant discovery. The Third Circuit agreed, concluding that the order broadly grants discovery of information that is not discoverable because it does not support a viable theory of recovery and therefore

departs from the essential requirements of the law. Accordingly, the discovery order was quashed to the extent it grants corporate-wide discovery.

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