Can “No Injury” Class Actions Exist? – The Bullet Point – Volume I, Issue 9

June 20, 2017

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

Henson v. Santander Consumer USA Inc., 582 U.S. __ (2017).

The question in this appeal to the United States Supreme Court was whether a company who collected debts it bought for itself fit the definition of “debt collector” under the Fair Debt Collection Practices Act (FDPCA). A unanimous Supreme Court found that it did not.

In reaching this decision, the Court looked to the plain language of the FDCPA, finding that a debt collector is defined as an entity who “regularly collects or attempts to collect…debts owed or due… another.” The Court found that the defendant in this lawsuit, who purchased defaulted debts and then sought to collect them for itself, did not regularly seek to collect debts “owed…another” and was therefore not a “debt collector” subject to the FDCPA.

The Bullet Point: While *Henson* clarifies who is considered a “debt collector” subject to the FDCPA, the Court made clear that it was only deciding the narrow issue before the court regarding a business who acquires debts to collect on its own. In so doing, and perhaps most notably, the entire Supreme Court declined to consider the spirit of the FDCPA or what Congress would have done if it knew entities would buy defaulted debt.

The Court made clear that it would not rewrite constitutionally valid text and that it would not accept speculative policy arguments as reasonable legislators could differ how defaulted debt purchasers should be treated.

The business community should take note of the Supreme Court’s unanimous decision to limit its analysis to the specific situation and text as it may indicate how the Court will review future legislation of interest to business. This pragmatic rule of construction will undoubtedly have ripple effects for the economy.

Town of Chester v. Laroe Estates, Inc., No. 16-605, 581 U.S. ___ (2017).

This appeal to the United States Supreme Court involved the question of whether a party seeking to intervene in a lawsuit must establish “standing” to do so. The Court held that it did.

The lawsuit involved a land developer who brought suit against the Town of Chester, alleging that the Town's regulations around building a housing subdivision amounted to a regulatory taking. A residential development company moved to intervene in the lawsuit alleging that it had paid the land developer $2.5 million in relation to the project and that the equitable interest it held in the property would be impaired if it could not intervene in the suit. The District Court denied the motion for intervention on the basis that the real estate development company lacked standing to bring a takings claim, and the Second Circuit reversed, holding Article III standing was not required.

The Supreme Court reversed. It found that a litigant seeking to intervene must establish Article III standing and establish that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." Because any plaintiff in a federal lawsuit must establish standing to sue, the Court reasoned, an intervenor seeking relief above and beyond what is originally requested must also establish standing.

The Bullet Point: A **prior issue** of The Bullet Point analyzed how Ohio law viewed intervention, explaining that if you have an interest in property or a transaction subject of a lawsuit mechanisms exist to protect your interests. The Supreme Court's *Laroe Estates* case essentially adds another element to establish a right to intervene in a lawsuit. In addition to establishing that the intervenor "claims an interest related to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest…" as required by Fed. R. Civ. P. 24(a)(2), the party seeking to intervene must also establish an actual and concrete injury giving it standing to intervene.

As we counseled before, though businesses might have a right to intervene, they should carefully consider whether they should. Businesses must establish not only an interest in the property or transaction at issue but must also allege or show that if they are not permitted to intervene, their interests would be impaired.

Estate of Kuzda v. PRF Enterprises, Inc., 8th Dist. Cuyahoga No. 104961, 2017-Ohio-4185.

This case was an appeal of the trial court's decision to grant a default judgment as a discovery sanction. The trial court found that the defendant failed to properly and timely respond to discovery requests and it ordered the opposing party to move for default judgment. The matter was set for a hearing but no hearing took place. Instead, the court indicated a written entry would be issued shortly. That order granted the cross-claim plaintiff $500,000 against the defendant through a default judgment as a discovery sanction.

On appeal, the Eighth Appellate District reversed. It noted that if default judgment is awarded as a discovery sanction then "the notice and hearing requirements of Civ.R. 55 are applicable." The court noted that when a court is considering such a drastic sanctions remedy a party has a right to be heard and explain why discovery sanctions should not be ordered. Here, the court found that the trial court erred in granting default judgment without first holding a hearing and reversed.

The Bullet Point: Ohio law permits various sanctions for failure to comply with discovery rules. One of the most drastic sanctions is to hold the offending party in default and awarding judgment to the other party. However, in order for such a sanction to withstand judicial scrutiny, notice and a hearing are required to give the offending party a chance to explain or correct the sanctionable conduct.

Cruz v. English Nanny & Governess School Inc., 8th Dist. Cuyahoga No. 103714, 2017-Ohio-4176.

This appeal involved, among other things, the question of whether an attorney could be sanctioned for frivolous conduct for sharing publicly available information about the lawsuit with a newspaper reporter. The trial court found that such conduct violated R.C. 2323.52, Ohio’s vexatious litigator statute. The Eighth Appellate District disagreed and reversed that finding on appeal.

In so ruling, the court noted that “[a] review of the case law demonstrates that sanctions are typically imposed under R.C. 2323.51 for frivolous conduct involving pleadings and discovery. We can find no law supporting the award of sanctions under R.C. 2323.51 for the type of conduct here — communicating with the media about a pending case.” The court further noted that Ohio law and the Rules of Professional Conduct do not and cannot impose a blanket prohibition of an attorney communicating with the media. Such a ban would violate the attorney’s First Amendment free speech rights although exceptions apply (such as for defamatory statements). Here, the information shared by the attorney to the newspaper reporter was publicly available information and did not rise to the level of frivolous conduct.

The Bullet Point: Ohio law provides a mechanism to sanction an opposing party or attorney for frivolous conduct in litigation. However, that statute cannot be used to sanction an attorney for undertaking conduct protected by the First Amendment and that do not violate the Rules of Professional Conduct.

Tomaydo-Tomahhdo LLC v. Vozary, 8th Dist. Cuyahoga No. 104446, 2017-Ohio-4292.

This appeal involved a claim for misappropriation of trade secrets. The parties were partners in a restaurant and when the partnership ended, the parties signed a noncompete agreement. The partner who left the partnership eventually joined a catering business. Eventually, the plaintiff filed suit against the departed partner, alleging that his catering business used similar recipes, food preparation methods, marketing strategies, and other trade secrets. The trial court granted the departed partner summary judgment and the plaintiff appealed.

On appeal the Eighth Appellate District affirmed. In so ruling the court noted that certain things alleged to have been taken did not have an “independent economic value” as required to establish a claim for misappropriation of trade secrets. Rather, things like recipes and food lists were common items typical in catering businesses.

The Bullet Point: For many businesses, intellectual property — patents, trade secrets, customer lists — are their most important assets that must be protected at all costs. In order to prevail on a misappropriation-of-trade-secret claim, a party has to show by a preponderance of the evidence: (1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret. If the purported trade secret is not something that derives independent economic value, that is, the device/technique/plan is itself valuable, then a court is unlikely to find that a trade secret has been misappropriated.

While the law provides some common law and statutory protections, the best way to protect intellectual property is by contractual nondisclosure and noncompete agreements. In some instances, especially when, as in this case the “independent economic value” of information may be difficult for a court to establish, it may be best to set a sum certain for alleged breaches. This will set a disincentive for misappropriation and misuse of intellectual property.

Konarzewski v. Ganley, Inc., 8th Dist. Cuyahoga No. 104681, 2017-Ohio-4297.

This was an appeal of the trial court’s decision to certify a class on claims against a car dealership under the Ohio Consumer Sales Practices Act (CSPA) and other claims. The claims were based on supposedly false or misleading statements contained in retail installment contracts used by the dealer in the purchase of vehicles.

The Eighth Appellate District reversed the trial court’s decision to certify a class because the plaintiffs failed to establish actual damages as required to certify a class. As the court noted, relying on a recent Ohio Supreme Court decision, “although the precise amount of damages incurred by each class member need not be shown, the “fact of damage,” which requires that “all class members suffered *some* injury,” must be shown by common evidence.” The court noted that this requires an individualized determination as to whether there exists common proof that each class member was damaged by the defendant’s conduct. When actual damages cannot be established through common evidence, certifying a class is improper “[b]ecause resolution of the issue of actual damages would require a case-by-case analysis of each transaction, we cannot say that common questions of law or fact predominate over individualized inquiries. The need for such individualized inquiries precludes class certification under Civ.R. 23(B)(3).”

The Bullet Point: All businesses should be aware of the risk of class actions. In a typical class action, a plaintiff sues a defendant or a number of defendants on behalf of a group, or class, of others who are not present. This differs from a traditional lawsuit, where one party sues another party for redress of a wrong, and all of the parties are present in court. However, in order to proceed as a class, and get a class certified, the plaintiff must show through common evidence that *each member* of the proposed class suffered actual damages as a result of the defendant’s conduct. The failure to prove this will preclude class certification. Moreover, when actual damages turn on looking at each and every class plaintiff and their transaction with the defendant, class certification is not appropriate because common questions of fact do not exist as required to certify a class.

This case follows an important Ohio Supreme Court case, *Felix v. Ganley Chevrolet, Inc.*, 2015-Ohio-3430 (August 27, 2015), establishing that all members of a plaintiff class alleging violations of the CSPA must have suffered injury as a result of the conduct challenged in a suit under the act, making clear that:

- Ohio’s class action rules and consumer protection statutes do not permit “windfall awards” to parties who were not actually injured by a business’ allegedly improper commercial practices; and
- “No-injury” consumer class actions will not be allowed in Ohio.

These decisions are particularly important to companies (and their management and boards) providing consumer services and holding consumer information, which includes, among other companies and industries, manufacturers, distributors, and/or retailers of consumer goods and/or providers of consumer services (banking, insurance, credit, utilities, etc.). Moreover, at least in Ohio, class actions cannot be based upon allegations that are akin to "we bought a product, other people had a problem with it, and we want our money back, even though it worked fine for us." or, in the data breach context, claims based upon the fact that a data breach occurred even though all affected individuals have not been damaged. While *Felix* and *Konarzewski* certainly apply to CSPA claims — which has been used to assert class action claims related to, among other thing, auto purchase and repair, advertising, collections/credit reporting/financial services, data breaches, and predatory lending/finance scams/mortgage fraud — the Ohio Supreme Court's analysis of Civ. R. 23 class action requirement and its determination that failing to demonstrate that all purported class members have suffered an injury in fact precludes class certification will definitely affect class actions of every flavor.

Click here for a PDF with the full text of each decision.