

# Do I Have Standing to Sue My LLC?

December 20, 2019

## Fair Debt Collection Practices Act Statute of Limitations

### ***Rotkiske v. Klemm*, 6th Circuit Court of Appeals, Slip Op. No. 18-328 (Dec. 10, 2019).**

In this appeal, the United States Supreme Court held that, absent an equitable doctrine, the statute of limitations on a Fair Debt Collection Practices Act (FDCPA) claim begins to run when the alleged violation occurred, not when it was discovered.

**The BulletPoint:** 16 USC 1692k(d) requires an FDCPA claim to be brought “within one year from the date on which the violation occurs.” A split developed among circuit courts as to when the clock started running for statute of limitation purposes under the FDCPA. The Supreme Court ultimately decided the split, finding that the statute was clear and unambiguous: a claim must be brought within one year of the occurrence of the violation. In so ruling, the Court specifically rejected the “discovery rule” and its application to FDCPA claims, finding that permitting such an exclusion would run contrary to the express language of the statute. The court declined to consider whether there were other equitable grounds to toll this rule, as they were not properly asserted by the appellant.

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## Establishing Default in Foreclosure

### ***Deutsche Bank Nat’l Trust Co. v. Omar*, 9th Dist. Summit No. 29300, 2019-Ohio-5224.**

In this appeal, the Ninth Appellate District affirmed the trial court’s decision finding for the lender on a claim for foreclosure, and specifically finding that it provided sufficient evidence of a borrower’s default.

**The BulletPoint:** In order to be entitled to foreclose, a foreclosing party must establish a default. This does not require providing proof of every single payment on the mortgage loan however. Rather, as the Ninth Appellate District noted (and other courts have as well), evidence showing when payments stop, like a partial payment history, IRS forms, debt validation letter, and testimony from an appropriate representative of the lender can establish a default for foreclosure purposes.

## Merchant Exception to the Statute of Frauds

### ***Hornacek v. Madenfort*, 5th Dist. Stark No. 2019CA00058, 2019-Ohio-5180.**

In this appeal, the Fifth Appellate District affirmed the trial court's decision, finding an oral agreement enforceable and not barred by the statute of frauds because the "merchant" exception applied.

**The Bullet Point:** Ohio's statute of frauds requires certain contracts to be in writing. There are certain exceptions to this, one of which is known as the "merchant exception." This exception states: a contract for a sale of goods for five-hundred dollars or more can be enforceable "between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of division (A) of this section against such party unless written notice of objection to its contents is given within ten days after it is received."

## Standing to Sue an Limited Liability Company

### ***North Hill Holdings, LLC v. Concheck*, 8th Dist. Cuyahoga No. 108168, 2019-Ohio-5119.**

In this appeal, the Eighth Appellate District agreed with the trial court, finding that the plaintiff lacked standing to sue a limited liability company (LLC) because it was not considered a member of the corporation and could not sue over a failure to distribute fees.

**The Bullet Point:** Under Ohio law, limited liability companies are governed by R.C. Chapter 1705. Unless the limited liability company has an operating agreement that provides otherwise, R.C. Chapter 1705 sets forth who is a member in a limited liability company and the rights and responsibilities of the members. Under that statute, and when there is no operating agreement, a "member" is one who became a member at the time the company was formed; or, after formation, upon acquiring an interest directly from the LLC under an operating agreement; or, if no agreement exists, upon consent of all members; or, was assigned an interest by a member with the power to assign such interest. If a party is not in fact a member of an LLC, he or she lacks standing to challenge the LLC's actions.

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