

# Do I have the Right of Set-Off?

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Objections to Foreign Subpoena

***Byrd v. Lindsay Corp.*, 7th Dist. Mahoning No. 19 MA 0116, 2020-Ohio-5461**

In this appeal, the Seventh Appellate District affirmed the trial court's decision and agreed that the documents requested in the foreign subpoena *duces tecum* would not reasonably lead to the discovery of admissible evidence and thus were not relevant to the underlying litigation.

- **The Bullet Point:** R.C. 2319.09 codifies the Uniform Interstate Depositions and Discovery Act (UIDDA) and describes the procedures for an Ohio court to issue a subpoena for discovery originating in a foreign jurisdiction. Under the UIDDA, a party seeking discovery in Ohio must submit a foreign subpoena to an Ohio clerk of court, who then issues a subpoena for service upon the person to whom the foreign subpoena is directed. R.C. 2319.09(C)(2). The Ohio Rules of Civil Procedure apply to responding to foreign subpoenas and while discovery is supposed to be liberal, Civ.R. 26 was recently amended to align the Ohio rule with the federal rule in many respects. As explained by the court, Civ.R. 26(B)(1) now includes "language bearing on proportionality, which contemplates greater judicial involvement in the discovery process, and, thus, acknowledges the reality that discovery cannot always operate on a self-regulating basis." As the court further explained, while the standard for relevancy during the discovery process "is much broader than the test for relevancy used at trial," materials that will not reasonably lead to the discovery of admissible evidence are not relevant. In this case, the information sought by the appellant would not reasonably lead to the discovery of admissible evidence in the subject lawsuit. Consequently, the information was not relevant and the appellant's subpoena was properly quashed.

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Bank Set-Off

***Moyer v. Abbey Credit Union, Inc.*, 2d Dist. Montgomery No. 28759, 2020-Ohio-5410**

In this appeal, the Second Appellate District affirmed in part and reversed in part the trial court's decision, agreeing that the bank improperly exercised the right of set-off as there was no mutuality of obligation between the bank and the estate.

- **The Bullet Point:** Under Ohio law, bank set-off is an extrajudicial self-help remedy that allows a bank to "apply general deposits of a depositor against a depositor's matured debt." Stated differently, set-off allows a bank to use funds held in a customer's general bank account to satisfy a matured debt owed by the customer to the bank. For example, a bank may exercise set-off when a customer has defaulted on a promissory note or car loan. This right to set-off arises out of the contractual debtor-creditor relationship that is created between a customer and a bank when an account is opened. Three conditions must be met before a bank obtains the right to set-off: "1) the

existence of mutuality of obligation, 2) the debtor's ownership of the funds used for set-off, and 3) the ripeness of the existing indebtedness for collection at the time of the set-off." A bank proves mutuality of obligation by demonstrating that both the bank and customer are obligated to each other; that is, "the bank must hold funds on behalf of the customer which it is obligated to pay to the customer, and the customer must be obligated in some way to the bank, such as through a promissory note." Where, as in this case, the customer has no obligation to the bank, there is no mutuality of obligation and the bank has no right to exercise set-off.

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## Contract Formation

### ***Vogel v. Albi*, 1st Dist. Hamilton No. C-190746, 2020-Ohio-5242**

In this appeal, the First Appellate District affirmed the trial court's decision, finding that the parties did not intend to be bound by their emails and there was no binding agreement as the contract was never executed.

- ***The Bullet Point:*** A contract requires a meeting of the minds between the parties, which is evidenced by an offer, acceptance, and consideration. Further, the essential terms of the agreement must be definite and certain. In Ohio, a contract for the sale of real property is required to be in writing to satisfy the statute of frauds. A formal written document is not necessary, and an email or exchange of emails may satisfy the written contract requirement. Even when the parties contemplate, but never execute, a formal written document, an agreement may still be enforced "so long as the parties have manifested an intent to be bound and their intentions are sufficiently definite" in the exchanged emails. However, where the emails demonstrate that the parties do not intend to be bound until the execution of a written contract, a written contract must be executed. As the court noted in this case, each email from the seller's agent contained a bolded and boxed statement that acceptance of the offer was contingent upon a fully executed written contract. Consequently, the seller and buyer did not intend to be bound by their emails, and a written contract was required to create a binding agreement.

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