

# Does My Contract Say What I Mean? The Bullet Point: Volume 2, Issue 13

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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.*

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## Voting Restrictions

*Husted v. Randolph Institute, No. 16-980 (June 11, 2018).*

This case addressed whether the State of Ohio's actions in removing voters from the voter rolls due to failure to vote ran afoul of the National Voter Registration Act (NVRA). In this case, the respondents argued that Ohio's method of removing voters violated federal law. The NVRA permits removal of voters from voting rolls "by reason of" a change in residence. The act also includes a "failure-to-vote" provision which indicates that a state cannot remove someone from a voter roll for failing to vote. At the same time, it also indicates that nothing in the act should be construed as prohibiting a state from using any procedures described in the act, including sending a return card and removing individuals from the voter rolls who fail to return the card.

Ohio's process at issue relies on the failure to vote for two years as a rough way of identifying voters who may have moved. It sends these nonvoters a pre-addressed, postage paid return card, asking them to verify that they still reside at the same address. Voters who do not return the card and fail to vote in any election for four more years are presumed to have moved and are removed from the rolls.

The Supreme Court disagreed with the respondents, finding that Ohio's methods of removing voters does not violate the NVRA. In so ruling, the Supreme Court noted that Ohio's process followed language of the NVRA "to the letter."

**The Bullet Point:** In this case, the Supreme Court used classic statutory interpretation requirements to reach what many consider a controversial conclusion. The majority opinion came to its conclusion based upon the plain language of the statutory text. It also considered amendments to the NVRA and what it addressed and, more importantly, did not address, to find that Ohio did not violate the "failure-to-vote" provision.

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## Class Action Statute of Limitations

### *China Agritech, Inc. v. Resh*, No. 17-432 (June 11, 2018).

This case considered whether the filing of a class action tolls the applicable statute of limitations for a successive class action. This case involved the third class action brought by purchasers of plaintiff's stock who alleged various violations of the Securities Exchange Act. The first class action was timely filed under the applicable statute of limitations, and class certification was ultimately denied. A second class action was filed, still timely, and ultimately was settled by the named plaintiffs. The third action was filed by the respondent over a year after the statute of limitations had expired. The district court dismissed the class action as untimely, but the Ninth Circuit Court of Appeals reversed. On appeal the United States Supreme Court reversed, finding that "[u]pon denial of class certification, a putative class member may not, in lieu of promptly joining an existing suit or promptly filing an individual action, commence a class action anew beyond the time allowed by the applicable statute of limitations."

**The Bullet Point:** This decision expands upon and distinguishes the issue from the Supreme Court's holding in *American Pipe & Constr. Co. v. Utah*, 414 U. S. 538. In that case, the Supreme Court addressed putative class members who wish to sue individually after a class-certification denial and found that the "efficiency and economy of litigation" support tolling of individual claims in such a situation. The Court found that the same factors did not weigh in favor of tolling claims for successive class actions, noting: "[w]ith class claims, on the other hand, efficiency favors early assertion of competing class representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with knowledge of the full array of potential class representatives and class counsel. And if the class mechanism is not a viable option, the decision denying certification will be made at the outset of the case, litigated once for all would-be class representatives."

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## Judicial Specificity

### *LabMD, Inc. v. Federal Trade Commission*, 11th Cir. No. 16-16270 (June 6, 2018)

This was an enforcement action brought by the Federal Trade Commission (FTC) against the defendant alleging that its data-security program was inadequate and an "unfair act or practice" under the FTC act. An administrative law judge found for the FTC and ordered the defendant to implement a variety of procedures to protect its data security. The defendant appealed and on appeal the Eleventh Circuit Court of Appeals reversed and vacated the order.

In so ruling, the Eleventh Circuit Court of Appeals found the lower court's order was unenforceable because it was lacking in specificity and, moreover, the order did not enjoin a specific act or practice. Rather, it impermissibly demanded the defendant to overhaul all of its security procedures and was much too broad of a remedy under the FTC Act.

**The Bullet Point:** Section 5(a) of the FTC Act authorizes the FTC to protect consumers by “prevent[ing] persons, partnerships, or corporations . . . from using unfair . . . acts or practices in or affecting commerce.” What constitutes an “unfair” act or practice is determined on a case-by-case basis. A finding of an unfair act or practice typically requires some sort of harm to a consumer. The FTC stated that to warrant a finding of unfairness, an injury “[1] must be substantial, [2] it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces, and [3] it must be an injury that consumers themselves could not reasonably have avoided.” Moreover, the act must be against a well-established public policy to find a violation of the FTC Act.

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## Contract Interpretation

*Lang v. Piersol Outdoor Advertising Co.*, 4th Dist. Washington No. 17CA19, 2018-Ohio-2156.

This case involved a claim for declaratory judgment over clarification of a “right of first refusal” language found in a lease agreement concerning the rental of real estate for the erection of a billboard. The plaintiff claimed the provision was unenforceable, or, alternatively, that it only gave the advertising company the right to acquire any outdoor sign on the property for “off-premises” billboard style advertising. Both parties eventually filed motions for summary judgment and the trial court ultimately agreed with the plaintiff, finding that the right of first refusal provision only applied to “off-premises” style advertising.

The defendant appealed and the Fourth Appellate District affirmed the trial court’s decision. In so ruling, the court found that the only way to interpret the contract provision was in the manner proposed by plaintiff, and to accept defendant’s interpretation would be to ignore the plain meaning of the contract.

**The Bullet Point:** “In construing a written instrument, the primary and paramount objective is to ascertain the intent of the parties so as to give effect to that intent.” “When the terms of a contract are unambiguous, courts will not, in effect, create a new contract by finding an intent not expressed in the clear language employed by the parties.” Thus, courts give words their ordinary meaning in contracts unless some other meaning is clearly evidenced from the contract as a whole.