

# Does My Lawsuit Violate the FDCPA?

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*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.*

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## Magnuson-Moss Warranty Act

### **Powell v. Airstream, Inc., 3rd Dist. Shelby No. 17-18-17, 2019-Ohio-3034.**

This was an appeal of a summary judgment decision in favor of a mobile home manufacturer regarding various alleged breaches of warranties and representations. The plaintiff purchased a mobile home. His son and sister-in-law were the ones who actually used it. The mobile home had various issues and defects and ultimately needed to be worked on at least half a dozen times. Ultimately, the plaintiff filed suit, alleging violations of the Magnuson-Moss Warranty Act and breach of express and implied warranties. The mobile home company ultimately was awarded summary judgment and plaintiff appealed. The Third Appellate District affirmed that decision on appeal, finding that the various state law warranty claims failed and, therefore, the Magnuson-Moss Warranty Act claim also failed.

**The Bullet Point:** The Magnuson-Moss Warranty Act “limits the ability of manufacturers to disclaim or modify implied warranties in cases where they have offered express warranty protection.” It does not create new implied warranties or otherwise modify the implied warranties existing according to state law. Rather, the Act adopts the implied warranty protections previously established under the governing state law. “Claims under the Magnuson–Moss Act stand or fall with [the] express and implied warranty claims under state law.” Accordingly, if an underlying state warranty claim fails, a claim under the Magnuson-Moss Act must likewise fail.

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## Doctrine of the Spoliation of Evidence

### **City of Cincinnati v. Triton Servs., Inc. et. al., 1st Dist. Hamilton No. C-170705, 2019-Ohio-3108.**

This appeal involved various challenges to a trial court’s decision in favor of the city of Cincinnati, regarding various disputes that arose in sewer-related construction contracts. The parties filed claims against each other, some of which were decided by motion. The only claim that went to trial was a claim for “differing-site-conditions.” Prior to trial, the court granted various motions in limine by the city excluding some of the

defendant's evidence. Ultimately judgment was entered in favor of the city and the defendant appealed, arguing, among other things, that the court erred in granting the city's pre-trial motions in limine on the basis of spoliation of evidence. The First Appellate District agreed and remanded the matter to the trial court.

**The Bullet Point:** The effect of the doctrine of spoliation of evidence, when applied in a defensive manner, is to allow the defendant to exculpate itself from liability because the plaintiff has barred it from obtaining evidence necessary to prove the existence or absence of the essential elements of the claim. Expert testimony can be excluded as a sanction for spoliation of evidence if a court finds the evidence was intentionally altered or destroyed before the opposing party had a chance to examine it. Sanctions and causes of action for spoliation of evidence are designed to place responsibility and accountability on parties who were actually in possession of evidence that existed at one time, but who later failed to provide the evidence without adequate explanation.

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## Fair Debt Collection Practices Act (FDCPA)

### **Harper v. Weltman, Weinberg, & Reis, 8th Dist. Cuyahoga No. 107439, 2019-Ohio-3093.**

This was an appeal of the trial court's decision to dismiss a claim under the Fair Debt Collection Practices Act (FDCPA) against the defendant law firm. Plaintiff alleged that the law firm's filing of a lawsuit on behalf of its client against plaintiff violated the FDCPA. The trial court disagreed and plaintiff appealed. On appeal the Eighth Appellate District affirmed, finding that plaintiff had failed to properly allege a violation of the FDCPA.

**The Bullet Point:** The FDCPA was enacted "to eliminate abusive debt collection practices by debt collectors, to ensure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent state action to protect consumers against debt collection abuses." Under the FDCPA, a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." A debt collector is also prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." When analyzing whether conduct giving rise to the claim fits within the broad scope of the FDCPA, "the conduct is viewed through the eyes of the 'least sophisticated consumer.'" That standard, while protecting "the gullible and the shrewd alike," also presumes "a basic level of reasonableness and understanding on the part of the debtor." In order to state a viable FDCPA claim, a plaintiff must establish: (1) that he or she is a "consumer" under the statute, (2) that the "debt" arises out of a transaction entered primarily for personal, family, or household purposes, (3) the defendant is a "debt collector," and (4) the defendant violated a provision of the FDCPA.

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## Conditions Precedent to Foreclosure?

### **Citizens Bank v. Duchene, 11th Dist. Trumbull No. 2018-T-0085, 2019-Ohio-2972.**

This was an appeal of the trial court's decision to grant a lender summary judgment in a foreclosure lawsuit. On appeal, the Eleventh Appellate District reversed, finding an issue of fact regarding whether the lender satisfied conditions precedent prior to foreclosure.

**The Bullet Point:** "To properly support a motion for summary judgment in a foreclosure action, a plaintiff must present evidentiary-quality materials showing: (1) the movant is the holder of the Note and Mortgage, or is a party entitled to enforce it; (2) if the movant is not the original mortgagee, the chain of assignments and transfers; (3) the mortgager is in default; (4) all conditions precedent have been met; and (5) the amount of principal and interest due." "Where prior notice of default and/or acceleration is required by a provision in a Note or Mortgage instrument, the provision of notice is a condition precedent subject to Civ.R. 9(C)." A lender can prove compliance with this by showing that the notice of default was mailed to the property address listed on the loan documents and in a manner specified in the loan documents.

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