Does my website URL constitute a "deceptive trade practice"?

December 21, 2020

Deceptive Trade Practices Act

***Wooster Floral & Gifts, L.L.C. v. Green Thumb Floral & Garden Ctr.*, Inc., Slip Opinion No. 2020-Ohio-5614**

In this appeal, the Supreme Court of Ohio affirmed the lower court's decision, agreeing that the defendant's use of a domain name similar to its competitor's trade name was not a violation of the Deceptive Trade Practices Act (DTPA) as the underlying website was not likely to create customer confusion.

- ***The Bullet Point:*** Under the DTPA, "[a] person engages in a deceptive trade practice when, in the course of the person's business, the person causes likelihood of confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services." R.C. 4165.02(A)(2). Unlike the federal Lanham Act, Ohio's DTPA does not contain a provision that makes a person liable for the bad-faith use of a domain name that is similar to another trademark. Instead, Ohio's law requires courts to look not just at an allegedly infringing domain name, but also at the underlying content of the website. As the Court explained, "whether internet users are initially confused about the origin of a website does not matter; rather, the plaintiff must show a likelihood of confusion that goes to the source of the goods or services." In this instance, the defendant's use of a domain name similar to the plaintiff's trade name was not likely to create customer confusion about the source of the goods. The defendant's underlying website did not mention the plaintiff's trade name and it was clear on its website that customers were ordering the goods from the defendant and not another source. As such, the defendant's use of the domain name was not a deceptive trade practice under the DTPA.

Waiver of Right to Arbitrate

***Fayette Drywall, Inc. v. Oettinger*, 2d Dist. Montgomery No. 28636, 2020-Ohio-6641**

In this appeal, the Second Appellate District affirmed the trial court's decision, agreeing that the totality of the circumstances demonstrated the defendant knowingly and intentionally waived its right to mandatory arbitration.

- ***The Bullet Point:*** Ohio has a strong public policy favoring arbitration. Nevertheless, the right to arbitrate may be waived like any other contractual right, even after a stay has been granted to allow the parties to arbitrate the dispute. A party seeking to prove waiver must demonstrate that "(1) the waiving party knew of the existing right to arbitrate; and (2) the totality of the circumstances demonstrates the waiving party acted

inconsistently with that known right." In conducting a totality of the circumstances analysis, Ohio courts consider four factors. Specifically, courts determine "(1) whether the party seeking arbitration invoked the jurisdiction of the trial court by filing a complaint, counterclaim, or third-party complaint without asking for a stay of the proceedings; (2) the delay, if any, by the party seeking arbitration to request a stay of proceedings or an order compelling arbitration; (3) the extent to which the party seeking arbitration has participated in the litigation, including the status of discovery, dispositive motions, and the trial date; and (4) any prejudice to the nonmoving party due to the moving party's prior inconsistent actions." In this instance, the defendant refused to undertake even the simplest of measures necessary to allow arbitration to move forward as originally scheduled or as rescheduled. As the court noted, the defendant even failed to submit the required arbitration deposit. Moreover, the defendant's delays and failure to participate in arbitration prejudiced the other parties. As such, the totality of the circumstances demonstrated that the defendant waived its right to arbitrate.

Presentment of Claim

Saber Healthcare v. Hudgins, 9th Dist. Summit No. 29698, 2020-Ohio-5603

In this appeal, the Ninth Appellate District affirmed the trial court's decision, finding that the creditor's claim was barred as the creditor failed to satisfy the presentment requirements of R.C. 2117.06.

- ***The Bullet Point:*** Ohio Revised Code 2117.06 governs the presentment of claims against an estate in probate court. Under the statute, creditors must present their claims: (1) in writing, (2) to the executor or administrator of the estate, and (3) within six months after the decedent's death. R.C. 2117.06(A)(1), R.C. 2117.06(C). Under both the statute and Ohio case law, creditors must strictly comply with these presentment requirements or else their claims "shall be forever barred." R.C. 2117.06(C). For instance, a creditor who submits a claim to a person within the six-month period of time who is not then appointed as the administrator but who is eventually appointed as the administrator does not satisfy the presentment requirements. As explained by the court, R.C. 2117.06 does not permit the appointment of an administrator to 'relate back' to when a creditor submits its claim. Likewise, it is irrelevant if someone other than the executor has actual knowledge of the creditor's claim. Ohio Revised Code 2113.06(C) balances this strict statutory compliance requirement with allowing a creditor to be granted administration of an estate in the event one is not timely opened so as to be able to submit its claim within the six-month period. As such, when a creditor fails to properly present its claim under R.C. 2117.06 and also fails to open an estate itself under R.C. 2113.06, "the law should not come to his aid" and the creditor's claim will be barred.

Caveat Emptor

Bayview Loan Servicing, LLC v. Griffen, 12th Dist. Warren No. CA2020-02-013, 2020-Ohio-6666

In this appeal, the Twelfth Appellate District reversed in part the trial court's decision, holding that the doctrine of caveat emptor prevented the purchaser from vacating the judicial sale.

- ***The Bullet Point:*** Known by the maxim "buyer beware," the doctrine of caveat emptor dictates that a purchaser of real property is charged with the knowledge of defects in the property's title where the defects are of public record and easily discoverable. Under this long-standing principle, a purchaser who fails to perform his due diligence by failing to examine public records and the title to the property "must suffer the loss caused by that failure." Stated differently, a purchaser has no recourse or relief against a defect in the property's title which would have been revealed by examining the title. The doctrine of caveat emptor applies to all sales of real property in Ohio, including judicial sales. As explained by the court, judicial sales have a certain degree of finality. This degree of finality makes it even more imperative for the winning bidder to investigate the property's title prior to submitting his winning bid as Ohio courts will not permit the purchaser to vacate a judicial sale on the grounds of a defect in the property's title. To allow otherwise would frustrate the finality of judicial sales. In this case, the purchaser failed to investigate any public records, which clearly showed a defect in the property's title. Consequently, the purchaser was not permitted to vacate the sheriff's sale.

RESPA Claim for Trade Line Deletion

Richissin v. Rushmore Loan Mgt. Servs., LLC, N.D.Ohio No. 20 CV 871, 2020 U.S. Dist. LEXIS 223128 (Nov. 30, 2020)

In this case, the United States District Court for the Northern District of Ohio granted in part the defendant's motion for judgment on the pleadings, holding that the loan servicer's failure to delete a tradeline did not constitute an error in servicing of the loan under RESPA.

- ***The Bullet Point:*** The Real Estate Settlement Procedures Act ("RESPA") details various obligations loan servicers have in responding to borrower inquiries. 12 U.S.C. § 2605(e). A loan servicer's duties are triggered under the statute when the borrower sends the servicer a qualified written request ("QWR") for information relating to the servicing of its loan which must include "a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error." Upon receipt of a QWR, the servicer must then "timely respond to the borrower, make any appropriate corrections, and transmit to the borrower a written notification of such correction." 12 U.S.C. § 2605(e)(2). In addition, the servicer may not report to the consumer reporting agencies information related to the borrower's overdue payment for a period of 60 days upon receiving a QWR. 12 U.S.C. § 2605(e)(3). While Section 2605 sets out the servicer's obligations, it is important to note that "not all issues arising between borrowers and servicers are subject to 12 U.S.C. § 2605(e)(3)". As the court explained, 'servicing' means "receiving any scheduled periodic payments from a borrower pursuant to the terms of any loan…and making the payments of principal and interest and such other payments with respect to the amounts received from the borrower as may be required pursuant to the terms of the loan." 12 U.S.C. § 2605(i)(3). In this case, the borrowers' letter to the servicer alerted the servicer that it was in breach of a settlement agreement in its failure to delete a tradeline. The court determined the servicer's actions of failing to delete a tradeline did not meet the statutory definition of "servicing" and, as such, the servicer's obligations under Section 2605(e) were not triggered by the borrowers' letter.

- The borrowers in this case also argued that the servicer violated Section 2605(k)(1)(C), which prohibits servicers from failing to “take timely action to respond to a borrower’s requests to correct errors relating to allocation of payments, final balance for purposes of paying off the loan, or avoiding foreclosure, or other standard servicer’s duties” upon receipt of a Notice of Error (“NOE”). In arguing that the phrase “other standard servicer’s duties” imposes broader obligations on servicers than the obligations under Section 2605(e), the borrowers relied on the servicer errors outlined in 12 C.F.R. § 1024.35 and the commentary thereto (“Regulation X”). The borrowers pointed to the “catchall” phrase of 12 C.F.R. § 1024.35(b)(11), which states that the term ‘error’ refers to “any other error relating to the servicing of a borrower’s mortgage loan.” Further, the borrowers depended upon the commentary to Regulation X, which provides that “standard servicer duties are not limited to duties that constitute servicing, as defined in this rule…” and lists examples of servicer duties. The court rejected the borrowers’ arguments and concluded that there is nothing on the face of the statute or Regulation X that would include credit reporting errors as within the scope of an NOE under RESPA. The court went on to explain that Congress did not expressly identify “credit reporting” anywhere as an enumerated “servicing” activity or “servicing error.” (Emphasis in original). Consequently, “this demonstrates an intent that credit reporting activities would not trigger obligations under Regulation X.”

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