Is my conduct a violation of the Consumer Sales Practices Act?

October 02, 2020

Unconscionable Arbitration Agreement

Klonowski v. Lynch, 8th Dist. Cuyahoga No. 109086, 2020-Ohio-4567

In this appeal, the Eighth Appellate District reversed and remanded the trial court's decision finding that the arbitration agreement was not unconscionable as it incorporated by reference the arbitration forum's rules and procedures.

The Bullet Point: To successfully prove an arbitration agreement is unconscionable, a consumer must demonstrate that the agreement was both procedurally and substantively unconscionable. In analyzing an arbitration agreement for procedural unconscionability, courts look at the relative bargaining position of the contracting parties, whether the terms were explained to the weaker party, and if the weaker party had the option of obtaining the goods or services from an alternative source. A consumer who had other meaningful choices but who chose to agree to legible, clear arbitration terms in bold print cannot later argue that he was the weak party in the transaction. In addition, courts analyze an arbitration agreement for substantive unconscionability by looking at whether the terms are commercially reasonable. In Ohio, it is the industry standard and commonplace for an arbitration agreement to incorporate by reference the rules and procedures of the arbitration forum. As such, a consumer cannot allege an arbitration agreement is unconscionable simply because it incorporates by reference but does not list out the arbitration forum's rules and procedures.

Notice of Default

LNV Corp. v. Kempffer, 11th Dist. Geauga No. 2019-G-0232, 2020-Ohio-4527

In this appeal, the Eleventh Appellate District affirmed the trial court's decision, holding that the borrowers were already notified their loan had been accelerated when they received their second notice of default and that the deadline to cure the default was not extended.

The Bullet Point: Provided a mortgage requires notice before accelerating a defaulted loan, and a borrower fails to timely bring a loan current after receiving a notice of default, the mortgagee is authorized to accelerate the loan. If the borrower remits a partial payment but fails to fully pay the amount past due, the mortgagee is still within its right to accelerate the loan. Once the borrower is notified its loan has been accelerated, the

mortgagee's right to accelerate is not delayed by subsequent notices of default sent to the borrower. Stated differently, even if a second notice of default is sent because a borrower made a partial payment, the second notice does not give the borrower additional time to cure its default once its loan has already been accelerated.

Lis Pendens

Clinton v. Home Invest. Fund V, Lp, Successor in Interest to Mtge. Electronic Registration Sys., 1st Dist. Hamilton No. C-190646, 2020-Ohio-4555

In this case, the First Appellate District dismissed the appeal as moot as the appellant failed to obtain a stay of execution or post a supersedeas bond in order to reinvoke lis pendens.

The Bullet Point: The doctrine of lis pendens "protects the status quo of the litigants' interest in the subject property while an action is pending." Under R.C. 2703.26, the filing of a lawsuit concerning specific property gives notice to others of the claim alleged in the pending lawsuit and that a purchaser takes the property subject to the outcome of the lawsuit. Simply stated, while litigants are not prevented from conveying away property that is the subject of a lawsuit, the conveyed interest becomes subject-to the outcome of the pending litigation. As the court noted, lis pendens is a procedural doctrine which operates only while the action is pending. Once final judgment has been rendered, lis pendens terminates and no longer protects the litigants' interest. Consequently, an aggrieved party must seek a stay of judgment pending appeal in order to reinvoke lis pendens and protect its interest in the underlying property.

CSPA

Barlow v. Gap, Inc., 8th Dist. Cuyahoga No. 109101, 2020-Ohio-4382

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that the CSPA is not a strict liability statute and that the consumer failed to prove the supplier's signs were false, material, or misleading.

The Bullet Point: Ohio courts have not interpreted the Consumer Sales Practices Act ("CSPA") to be a strict-liability statute and instead consider "reasonableness" when determining whether conduct violates the CSPA. Simply put, the issue of whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it. Under this reasonableness standard, a consumer must prove that the supplier's conduct was deceptive under the CSPA in that it "has the tendency or capacity to mislead consumers" and is material to the decision to purchase the product or service offered for sale. Consequently, a supplier will not be liable under the CSPA unless the consumer can prove its action was false, material to consumers' purchasing decisions, and likely to mislead a reasonable consumer.

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