

Is My Electronic Signature Valid?

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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. We're pleased to expand our Commercial Law Bulletin from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

Ohio

Uniform Trade Secrets Act

***Sal's Heating & Cooling, Inc. v. Bers Acquisition Co.*, 8th Dist. Cuyahoga No. 110685, 2022-Ohio-1756**

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that Ohio's Uniform Trade Secret Act broadly preempts not only causes of action for misappropriation of trade secrets but also causes of action that are based in some way on misappropriation of trade secrets.

The Bullet Point: In this dispute between competing companies, former plaintiff's employees went to work for the defendants, allegedly violating their non-competition and employee confidentiality/security agreements. The plaintiff filed suit against the competing companies and its former employees who had left to work for the competitors. Their alleged claims included breach of a non-competition agreement, breach of non-solicitation agreement, breach of contractual duty not to disclose confidential and proprietary information, violation of Ohio's Uniform Trade Secret Act (OUTSA), tortious interference, and civil conspiracy. The trial court granted in part the defendants' motion to dismiss, finding the plaintiff's civil conspiracy claim to be preempted by OUTSA. Plaintiff filed the instant appeal. OUTSA, as stated in R.C. 1333.61 through 1333.69, "provides for civil remedies, i.e., injunctive relief and damages for the misappropriation of trade secrets." Under R.C. 1333.67(A), OUTSA displaces "conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret." In this case, the plaintiff alleged defendants conspired to misappropriate its trade secrets and induce former employees to breach their contractual obligation to the plaintiff. In dismissing this claim, the trial court found the civil conspiracy claim to be specifically linked to the alleged theft of trade secrets, which was asserted in other counts in the complaint and thus preempted by OUTSA. Plaintiff contended its civil conspiracy claim was not preempted, arguing that only claims based entirely on factual allegations of misappropriation of trade secrets are preempted. The appellate court disagreed, explaining that the Sixth Circuit has adopted a broader interpretation of OUTSA preemption, finding that it "should be understood to preempt not only causes of action for misappropriation of trade secrets but also causes of action that are based in some way on misappropriation of trade secrets." The test to determine whether OUTSA displaces a state law claim is to determine whether "the claims are no more than a restatement of the same operative facts that formed the basis of the plaintiff's statutory claim for trade secret misappropriation." "Where the state-law claim has a

factual basis independent from the facts establishing the OUTSA claim, the portion of the claim supported by an independent factual basis survives preemption.” Embracing this broader approach, the appellate court found the central theme of several of the plaintiff’s claims to be the misappropriation of trade secrets. Further, the plaintiff redeployed the same operative facts that formed the basis for its statutory claim for trade secret misappropriation throughout the complaint. Consequently, the plaintiff’s civil conspiracy claim was preempted by OUTSA.

E-signed Contract

***AC Asset, L.L.C. v. Mitchell*, 8th Dist. Cuyahoga No. 110818, 2022-Ohio-1763**

The Eighth Appellate District affirmed the trial court’s decision in this appeal. The court agreed that a contract may not be denied legal effect or enforceability because an electronic signature was used and that a signature on a contract, including an electronic signature, creates a rebuttable presumption it was validly executed.

The Bullet Point: A lease is a contract between a landlord and the tenant. As the appellate court explained, a signature on a contract creates a rebuttable presumption that it was validly executed. In Ohio, using an electronic signature does not change this rebuttable presumption. Further, a contract may not be denied legal effect or enforceability because an electronic signature was used. To rebut the presumption the signature was validly executed, the party denying the signature must introduce evidence to support her denial, which, if believed, would be sufficient to permit the trier of fact to make a finding in her favor. When a defendant presents such evidence to rebut the presumption, the burden remains with the plaintiff to establish that the signature was genuine. Here, the trial court found that the landlord withstood its burden of proving by a preponderance of the evidence that the defendant executed the lease agreement. At trial, the landlord admitted into evidence the lease agreement containing the electronic signature of both defendant and her cousin, as well as an audit report printed from Adobe Sign showing a timeline of the lease agreement’s preparation, submission, and execution. Landlord’s property manager testified that the defendant and her cousin each electronically submitted the rental application and uploaded a copy of their driver’s license and paystubs, with the defendant “cosigning for” her cousin. The property manager also explained the landlord’s business practices and procedures involving electronically executing lease agreements, including testifying audit reports from Adobe Sign, which serve as a “trail system” that tracks the signing process of the lease. He also testified that both defendant and her cousin electronically executed the lease in the same manner as all leases that the landlord issues. Although the defendant testified that she did not execute the lease, she provided no corroborative, credible evidence that her cousin assumed her identity and executed the lease agreement on her behalf. Defendant admitted that other than a police report, which she failed to provide during the trial, she had no other proof to substantiate her claim. Moreover, the documents the defendant provided did not establish that she lived elsewhere or paid rent to another landlord. Accordingly, the defendant failed to rebut with sufficient evidence the presumption that the lease was validly executed or failed to demonstrate that she was the victim of identity theft.

Fiduciary Duty

Hawes v. Downing Health Technologies L.L.C., 8th Dist. Cuyahoga No. 110920, 2022-Ohio-1677

In this appeal, the Eighth Appellate District reversed the trial court's In this appeal, the Eighth Appellate District reversed the trial court's decision that the defendant owed a fiduciary duty to the plaintiff, as there was no evidence he knew the plaintiff was relying upon him as a fiduciary in deciding to invest in the company and plaintiff did not completely depend upon the defendant in deciding to invest.

The Bullet Point: At issue in this matter was the relationship between an employee/investor and his employer/companies in which he invested. Here, the plaintiff entered into an employment contract with one of the defendant companies, some of which were portfolio entities and some of which were investment entities. The entities were entwined, controlled, and operated by parent corporate entities. As a condition of hiring, the plaintiff was required to invest \$250,000 into a pooled investment fund of affiliated companies through the defendants. A few days after making the investment and beginning employment, the plaintiff realized the defendant's companies were a "sham." Paychecks were either late or never received, and employees were owed back pay for years and were often not paid until a new employee was hired and made the requisite \$250,000 investment. The plaintiff filed suit against the entities and several high-level individuals, alleging in part breach of fiduciary duty. During litigation, all corporate defendants went out of business, and all but one of the individuals filed for personal bankruptcy. The matter proceeded to trial against the remaining individual defendant, after which the trial court found the defendant breached his fiduciary duty to the plaintiff. Defendant appealed, arguing the determination he breached a fiduciary duty to the plaintiff was against the manifest weight of the evidence. Specifically, the trial court found defendant and plaintiff created a de facto fiduciary relationship because both parties understood that a special trust or confidence had been reposed in the other. Upon review, the appellate court disagreed. A fiduciary relationship is one in which special confidence and trust is reposed in the integrity and fidelity of another, and there is a resulting position of superiority or influence acquired by virtue of this special trust. A de facto fiduciary relationship may arise from an informal confidential relationship, which exists whenever trust and confidence is placed in the integrity and fidelity of another. As the appellate court explained, "the determination concerning what constitutes a confidential (fiduciary) relationship is a question of fact dependent upon the circumstances in each case." The Supreme Court of Ohio has explained that a fiduciary duty may arise from an informal relationship only if both parties understand that a special trust or confidence has been reposed. In this case, the parties negotiated an arms-length commercial transaction. No evidence indicated the parties stood in a position of special confidence in each other or that defendant exerted a position of superiority influence over the plaintiff.

Moreover, courts have required complete dependence by the inferior party to recognize the de facto status. There was no evidence that the defendant had any knowledge plaintiff was relying upon him as a fiduciary in deciding to invest in the company. More importantly, the plaintiff did not present evidence demonstrating that he depended entirely on the defendant. On the contrary, the plaintiff testified he was uncertain about the investment and joining the company, and it was recommended to him that he speak with the defendant regarding his concerns. While the defendant was at the meeting to answer the plaintiff's questions, "his ultimate purpose was to sell plaintiff on the company." But the plaintiff testified that he also consulted his wife and venture capital friends, who advised him not to invest in the company. Therefore, the plaintiff did not wholly

depend upon the defendant in deciding to invest in the company, and there was no de facto fiduciary relationship between the parties.

Breach of Contract

***Szewczyk v. Century Fed. Credit Union*, 8th Dist. Cuyahoga No. 110822, 2022-Ohio-1683**

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing there was no breach of the parties' contract as the agreement's language and its incorporated documents unambiguously permitted the credit union to charge the overdraft fees.

The Bullet Point: In this dispute, the plaintiff filed a class action against the defendant credit union on behalf of himself and all others similarly situated, asserting a claim for breach of contract and alleging the credit union charged account holders overdraft fees on accounts that were never actually overdrawn. Specifically, the plaintiff claimed he was assessed a \$25 overdraft fee on a \$65 withdrawal when his account was not negative after the withdrawal. Thus, according to the plaintiff, the credit union improperly assessed an overdraft fee for that transaction in breach of the contract documents. The credit union filed a motion to dismiss, which the trial court granted upon finding the contract unambiguously authorized the overdraft fees. Plaintiff appealed, arguing no contract language unambiguously allowed the credit union to assess overdraft fees when the monthly account statements show the account was never overdrawn. Therefore the credit union breached the contract. To state a claim for breach-of-contract, a plaintiff must allege "(1) the existence of a binding contract, (2) the nonbreaching party performed his or her contractual obligations, (3) the other party failed to fulfill its contractual obligations without legal excuse, and (4) the nonbreaching party suffered damages as a result of the breach." When the terms in a contract are unambiguous, courts will not create a new contract by finding an intent not expressed in the precise language employed by the parties. Terms in a contract are ambiguous if their meanings cannot be determined from reading the entire contract or if they are reasonably susceptible to multiple interpretations. Here, the plaintiff asserted his Membership and Account Agreement with the credit union is ambiguous because it does not define "available funds" or "available account balance." Plaintiff contended these terms mean "actual balance."

The credit union argued the Agreement unambiguously provides it will charge overdraft fees for overdrafts of the "available balance," which the credit union contended means "the money in an account minus holds placed on funds for transactions" pursuant to the well-established industry definition. Reviewing the Agreement, including the attached documents, the appellate court agreed the language was unambiguous. Where one instrument incorporates another by reference, both must be read together. Construing the Agreement and its incorporated documents as a whole, the language was clear and unambiguous that "available funds" and "available account funds" are not synonymous with "actual balance." Instead, an account's available funds balance can be less than the actual balance. One of the incorporated documents explained that there might be a delay between when a deposit is made at an ATM and when it will be available for withdrawal. Another of the documents explained that there is a distinction between available account balance and actual account balance as the credit union reserved the right to hold funds deposited by check and that longer delays may apply, which

would delay the ability to withdraw funds. Thus, upon review of the documents as a whole, they unambiguously provide that a credit union member will not have access to his or her funds immediately; that is, the available balance can be less than the actual balance in a member's account. Because the contract is unambiguous, the overdraft fee that the credit union charged was not in breach of its terms.

Florida

Requests for Declaratory Relief

***Cintron v. Edison Ins. Co.*, No. 2D21-1334 (Fla. 2d DCA May 18, 2022)**

The Second District determined whether a complaint satisfied the pleading requirements necessary to seek declaratory relief.

The Bullet Point: This appeal stemmed from the trial court's dismissal with prejudice of the appellants' second amended complaint for declaratory relief concerning the interpretation and construction of contractual rights, obligations, and exclusions contained in an insurance policy. The trial court determined that (1) the second amended complaint failed to state a cause of action, (2) there was no ambiguous policy language requiring construction, and (3) there was an adequate remedy at law. In disagreeing with each trial court's determinations, the Second District identified the pleading requirements necessary to seek declaratory relief and found the second amended complaint met each one. The Second District further held that declaratory relief is available to resolve questions concerning the application of unambiguous policy provisions to a disputed set of facts, and its application is not precluded by the existence of another adequate remedy at law. Therefore, the Second District reversed and remanded to allow the appellants to proceed with their claim for declaratory relief.

Recovery of Fees for Litigating Fees

***Nazarova v. Nayfield*, No. 3D21-1940 (Fla. 3d DCA May 18, 2022)**

The Third District reviewed the language of a contract to determine whether it was sufficiently broad enough to encompass recovery of fees for litigating the number of fees to be awarded.

The Bullet Point: As a general rule, litigants cannot recover fees incurred in litigating the amount of attorney's fees to be awarded (also known as "fees for fees"). However, an award of "fees for fees" is permissible in cases where the underlying contract is broad enough to encompass recovery of fees incurred in litigating the amount of fees.

This appeal stemmed from a final judgment including an award for attorney's fees incurred in litigating the amount of attorney's fees. The Third District held the trial court erred by awarding "fees for fees," reasoning that the recovery of fees incurred in litigating attorney's fees is generally prohibited unless the underlying contract contains language sufficiently broad enough to encompass such an award. In reviewing the underlying contract, in this case, the Third District determined its language was not broad enough to warrant this exception

to the general rule prohibiting recovery of “fees for fees.” Specifically, the attorney’s fees provision in the underlying contract awarded prevailing party fees in any lawsuit brought to enforce the contract, which was “simply not broad enough to encompass recovery of fees for litigating the amount of fees to be awarded.” Therefore, the Third District remanded with directions to amend the final judgment by removing any attorney’s fees awarded for litigating the amount of attorney’s fees to be awarded.

Res Judicata

Claims Hldg Grp., LLC v. AT&T Mobility, LLC, No. 3D21-615 (Fla. 3d DCA May 18, 2022)

The Third District reviewed whether the res judicata doctrine precluded a claim.

The Bullet Point: At issue in this appeal was whether the doctrine of res judicata, which prevents the litigation of a claim that was brought or could have been brought in prior litigation, precluded the appellant from filing the instant action, which was premised on claims identical to those raised in a prior action but sought damages incurred at a different time. Both actions alleged that AT&T violated Florida’s Deceptive and Unfair Trade Practices Act by charging improper monthly administrative fees to the same account. Still, the instant action sought to recover only the damages incurred after the prior action was dismissed with prejudice. The appellant maintained res judicata; therefore, it did not apply to the instant action because it sought damages separate from the prior lawsuit. Conversely, AT&T argued res judicata applied to the instant action regardless of when the damages were incurred because the claims derived from the same alleged misconduct. The trial court agreed with AT&T and granted its motion for summary judgment based on res judicata.

In affirming the trial court’s decision, the Third District noted that, for res judicata purposes, in determining whether both litigations involve “the thing being sued for” (which is one of the elements necessary to invoke the doctrine of res judicata) the proper inquiry focuses on the defendant’s conduct, rather than the plaintiff’s damages. The Third District determined that the substantive issue underpinning both actions was identical and thus, notwithstanding the different periods in which damages allegedly were incurred in the two cases, the “thing being sued for” in both cases was identical. Therefore, the Third District concluded that the trial court correctly applied the res judicata doctrine to preclude the appellant’s claims.

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