

# Is my oral agreement worth the paper it is printed on? The Bullet Point: Volume 2, Issue 15

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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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## The Bullet Point

### Enforcement of Oral Agreements

***Cooper v. City of West Carrollton, 2d Dist. Montgomery No. 27789, 2018-Ohio-2547.***

This was an appeal of a trial court's decision to dismiss a breach of contract action. The plaintiff was employed by the City of West Carrollton (the "City") in the parks and recreation department. He worked in that department for more than 30 years, during which time he belonged to a union. In 2008, the City approached the plaintiff about a promotion to supervisor of the parks department. He met with the City and provided them a letter seeking guaranteed employment in exchange for the position, knowing that supervisory positions were not unionized. The City advised plaintiff at the meeting that it did not enter into employment contracts. Thereafter, the plaintiff orally advised the City that he would accept the position without a contract. While acting in his new role as supervisor, the plaintiff continued to perform his prior position duties. He noticed that he never received a pay raise and would ask about it from time to time. Eventually plaintiff sued the city.

The city moved to dismiss the contractual claims, arguing that they were barred by the statute of limitations. The trial court agreed, finding that the promissory estoppel and implied contract claims were barred by the statute of limitations and that there was no meeting of the minds necessary to find a contract existed. Plaintiff subsequently appealed. On appeal the Second Appellate District affirmed, finding that the oral agreement lacked the essential elements of a contract in order to enforce it.

**The Bullet Point:** Courts may enforce oral agreements if the terms "can be established by clear and convincing evidence." 'A contract is generally defined as a promise, or a set of promises, actionable upon breach. Essential elements of a contract include an offer, acceptance, contractual capacity, consideration (the bargained-for legal benefit and/or detriment), a manifestation of mutual assent and legality of object and of consideration.' " "A meeting of the minds as to the essential terms of the contract is a requirement to enforcing the contract." " "In order for a meeting of the minds to occur, both parties to an agreement must mutually assent to the substance

of the exchange.’ ” To that end, a contract which is not binding on one party because it is too indefinite and uncertain is not binding on the other as well.

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## Class Certification

### *Unifund CCR Partners v. Rosenberg, et. al., 11th Dist. Ashtabula No. 2017-A-0003, 2018-Ohio-2575.*

This was an appeal of a trial court’s decision to grant, in part, the defendant’s motion for class certification on claims for violations of the Fair Debt Collection Practices Act (FDCPA). In 2009, Unifund filed a complaint against the defendant to collect on a credit card debt. It had been assigned the account from the original creditor. The defendant responded by asserting various individual and class claims, including a claim under the FDCPA for Unifund purportedly making false and misleading representations in lawsuits in Ohio. Eventually the defendant sought class certification on two classes of individuals: (1) an “incompetence class,” consisting of individuals who had been sued by Unifund after December 23, 2008 and at the time of suit, someone else other than Unifund had the right to the money, and (2) a “time-bar class.” The trial court ultimately granted the motion to certify in part, certifying a class that met the following definition: “At the time of filing of the lawsuit, an entity other than [Unifund] held the right, in whole or part, to receive the money that was sought to be collected through the lawsuit, and [Unifund] did not meet the FDCPA requirements to lawfully file suit to collect the debt in its own name.” Unifund appealed this decision. The Eleventh Appellate District affirmed in part and reversed in part. It found that the trial court did not abuse its discretion in certifying the class action but found that the class needed to be narrowed and remanded for that purpose.

**The Bullet Point:** A trial court has discretion to certify a class action, bound by Civil Rule 23. The following seven requirements must be satisfied before an action may be maintained as a class action under Civ.R. 23: (1) an identifiable class must exist and the definition of the class must be unambiguous, (2) the named representatives must be members of the class, (3) the class must be so numerous that joinder of all members is impracticable, (4) there must be questions of law or fact common to the class, (5) the claims or defenses of the representative parties must be typical of the claims or defenses of the class, (6) the representative parties must fairly and adequately protect the interests of the class, and (7) one of the three Civ.R. 23(B) requirements must be met. “The requirement that there be a class will not be deemed satisfied unless the description of it is sufficiently definite so that it is administratively feasible for the court to determine whether a particular individual is a member.” Where a class is overbroad and could include a substantial number of people who have no claim under the theory advanced by the named plaintiff, the class is not sufficiently definite. A class can be overbroad if it is also considered a “fail-safe” class. “A fail-safe class definition is one in which the putative class is defined by reference to the merits of the claim.” “Such a class definition is improper because a class member either wins or, by virtue of losing, is defined out of the class and is therefore not bound by the judgment.” When the class as defined is a fail-safe class, an appellate court can remand to redefine the class, such as what happened in this case.

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## Frivolous Conduct

### ***Hamlin v. Bosse*, 2d Dist. Miami No. 2017-CA-26, 2018-Ohio-2657.**

This was an appeal of a trial court's order denying sanctions, costs, and attorneys' fees for allegedly frivolous conduct under R.C. 2323.51 and a violation of Civil Rule 11. The case began as a divorce. As part of the divorce, the court appointed the defendant as an expert with respect to distributing the husband's retirement benefits to the plaintiff. Pursuant to court order, the defendant prepared certain qualified domestic relations orders regarding the equitable division of retirement benefits. Plaintiff eventually found out that the orders were improperly calculated by the defendant and eventually moved to amend them. Thereafter, the plaintiff sued defendant for breach of contract and malpractice, claiming damages in excess of \$11,000 in the drafting of the orders. The defendant moved to dismiss the lawsuit and while plaintiff opposed, she also dismissed the lawsuit. In response, defendant sought sanctions under Civ.R. 11 and R.C. 2323.51 for frivolous conduct. The trial court denied the motion and defendant appealed.

The Second Appellate District affirmed on appeal. In so ruling it found that the trial court's finding that plaintiff had a good faith basis to file the complaint was not an abuse of discretion since there was some legal basis for her assertions.

**The Bullet Point:** R.C. 2323.51 allows a court to award "court costs, reasonable attorney's fees, and other reasonable expenses." Before making an award, the court must hold a hearing "to determine whether particular conduct was frivolous; to determine, if the conduct was frivolous, whether any party was adversely affected by it; and to determine, if an award is to be made, the amount of that award" to any party "who was adversely affected by frivolous conduct." Frivolous conduct is not proved merely by winning a legal battle or by proving that a party's factual assertions were incorrect. Rather, to be considered frivolous, it must be "absolutely clear under the existing law that no reasonable lawyer could argue the claim."

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## Unjust Enrichment

### ***Spalsbury v. Gill Construction Co.*, 9th Dist. Medina No. 17CA0030-M, 2018-Ohio-2616.**

This is an appeal of a trial court's decision to grant summary judgment on breach of contract and unjust enrichment claims. The appellants used to work as sale agents for the construction company. They claimed they were owed commissions for works on several projects from 2008. The construction company argued that the claims were time-barred, and the trial court agreed.

The Ninth Appellate District affirmed on appeal. In so ruling, the court noted that the appellants could not prevail on a claim for unjust enrichment because such an equitable claim does not exist when the parties' relationship is governed by a written contract, as was the case here.

**The Bullet Point:** To recover for unjust enrichment, a plaintiff must demonstrate: (1) that it conferred a benefit upon the defendant; (2) that the defendant knew of the benefit; and (3) that, under the circumstances, it would be unjust to allow the defendant to retain the benefit without payment. An unjust enrichment claim is a "quasi-

contractual” claim that applies only in the absence of a written contract. “The reason for this rule is that if the parties have fixed their contractual relationship in an express contract, there is no reason or necessity for the law to supply an implied contractual relationship between them.” Thus, if the parties’ relationship is governed by a written contract, a plaintiff will not be able to succeed on a quasi-contractual claim like unjust enrichment.

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## The Preview Point

What constitutes “debt collection” under the FDCPA?

***Obduskey v. McCarthy & Holthus LLP*, No. 17-1307.**

The United States Supreme Court accepted this case to resolve a circuit split on what constitutes “debt collection” under the FDCPA.

In this case, a borrower obtained a mortgage loan from Wells Fargo. The borrower defaulted and Wells Fargo retained a law firm to pursue a non-judicial foreclosure. The law firm sent the borrower a letter advising that it was pursuing a non-judicial foreclosure, was a debt collector, and was attempting to collect a debt. The borrower ultimately filed suit against the law firm, claiming that it never verified the debt as required under the FDCPA. Eventually, the district court granted the law firm’s motion to dismiss, finding that a non-judicial foreclosure is not debt collection activity subject to the mandates of the FDCPA. The borrower appealed and the Tenth Circuit Court of Appeals affirmed.

The United States Supreme Court granted certiorari based on a circuit split in the following cases on the issue of whether a foreclosure constitutes debt collection activity: *Glazer v. Chase Home Fin. LLC*, 704 F.3d 453 (6th Cir. 2013); *McCray v. Fed. Home Loan Mortg. Corp.*, 839 F.3d 354 (4th Cir. 2016); *Wilson v. Draper & Goldberg, P.L.L.C.*, 443 F.3d 373 (4th Cir. 2006); *Kaymark v. Bank of Am., N.A.*, 783 F.3d 168 (3d Cir. 2015).