

The Bullet Point – Volume I, Issue 2

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The Bullet Point 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 the Bullet Point from its previous coverage of Ohio case law to include additional areas in McGlinchey's footprint.

[Bank of New York Mellon v. Walker, 8th Dist. Cuyahoga No. 104430, 2017-Ohio-535.](#)

This residential foreclosure appeal involved the issue of whether a lender could still foreclose on a mortgage if a claim on a promissory note was barred by the statute of limitations. The Eighth Appellate District, based upon the recent Ohio Supreme Court decision *Deutsche Bank Natl. Trust Co. v. Holden*, 147 Ohio St.3d 85, 2016-Ohio-4603, 60 N.E.2d 1243, ¶ 23, found that even if an action on a promissory note was barred by the six-year statute of limitations to bring such a claim, the lender could still foreclose on the mortgage because it is a separate and distinct contract and claim. The court noted that in a foreclosure a lender had three options: it could sue to obtain a monetary judgment for breach of the note, it could seek to foreclose on the mortgage, or it could file an ejectment claim. Recently, the homeowner filed a motion for reconsideration, motion for en banc consideration, and motion to certify a conflict to the Ohio Supreme Court on this issue.

The Bullet Point: Be mindful of the time you have to bring your lawsuit! While a foreclosure claim can be brought independent of a claim for a monetary judgment on a promissory note, the best course of action is to ensure that any foreclosure action is brought within the six-year statute of limitations for obtaining a judgment on a promissory note.

[Fabrizi Trucking & Paving Co., Inc. v. City of Cleveland, 8th Dist. Cuyahoga No. 104124, 2017-Ohio-531.](#)

This was an appeal of a jury verdict in favor of the plaintiff on a breach of contract claim and a cross-appeal of the trial court's decision to deny a motion for pre-judgment interest after the jury found for the appellant on its breach of contract claim. The Eighth Appellate District found that the trial court was wrong to outright deny the motion for pre-judgment interest. The Eighth Appellate District noted that once a party is able to recover for a breach of contract, they are automatically entitled to pre-judgment interest. Determining the amount owed, on the other hand, was a factual inquiry that should be done by the trial court to compensate the prevailing party for the lapse in time between when the claim accrued and when it obtained judgment.

The Bullet Point: When a party to a lawsuit is due money from a judgment arising out of a contract, the prevailing party is entitled to interest at a rate set by Ohio law to make the prevailing party whole. The amount

of pre-judgment interest should compensate the prevailing party for the lapse of time between when the contract was breached and when judgment was entered. If you are forced to sue for breach of contract and prevail, as a matter of law you are entitled to pre-judgment interest, the amount of which you will have to prove to the trial court.

[Painter v. Testa, 5th Dist. Delaware No. 16 CAH 03 0016, 2017-Ohio-267.](#)

This was an appeal from a decision from the Ohio Board of Tax Appeals finding that the plaintiff was a “responsible party” for unpaid sales taxes owed by his company, Central City Beverage, Inc. The tax commissioner had found that the business had underreported taxes in excess of \$96,000 and found that the plaintiff was responsible for the payment of those taxes. The plaintiff contested that finding and claimed that he had various written agreements with entities to file/pay the taxes during the time frame when they were underreported. The Fifth Appellate District affirmed the Ohio Board of Tax Appeals findings. It noted that a responsible party includes “officers who have control or supervision of or are charged with the responsibility of filing returns and making payments.” The court also stated that this individual cannot escape liability by delegating this duty to others. In this case, the court found that the plaintiff was a responsible party and that his side agreements with various vendors to pay the taxes for the business were not binding on the Ohio Board of Tax Appeals and could not absolve him of his responsibility to pay the taxes for his business.

The Bullet Point: If you are an officer in control of your business, you are responsible for the payment of taxes for the business even if you contracted with someone else to pay and file the taxes on behalf of your business.

[In Re Lubrizol Shareholders Litigation, 11th Dist. Lake No. 2016-L-026, 2017-Ohio-622.](#)

This was an appeal of the trial court’s decision to dismiss a class action based on a lack of standing. The issue before the court was whether a “plaintiff bringing a shareholder derivative action loses standing to maintain the action if he ceases to hold corporate stock during the pendency of the litigation.” The Eleventh Appellate District disagreed with the trial court and found that under Ohio law, a named plaintiff in a derivative lawsuit did not have to have current stock to have standing to sue on behalf of the corporation. In so ruling, the court distinguished Ohio law with Delaware law which makes clear that “[to have standing to maintain a shareholder derivative suit, a plaintiff must be a shareholder at the time of the filing of the suit and must remain a shareholder throughout the litigation.” The court declined to accept this “continuous ownership” theory for Ohio law, noting that the purpose and intent of a derivative lawsuit under Ohio law differs from Delaware law.

The Bullet Point: Under Ohio law, a shareholder can maintain a derivative action on behalf of a corporation, which is a lawsuit brought by a shareholder on behalf of a corporation to assert an interest that belongs to the corporation, even if he does not maintain shares in the corporation during the entire lawsuit. This is because the purpose of such a lawsuit is to benefit the corporation itself, not the individual shareholder.

[Connors v. Target Automotive Group, Inc., 8th Dist. Cuyahoga No. 104230, 2017-Ohio-652.](#)

This appeal involved the trial court's denial of a motion for attorneys' fees after the appellant prevailed on a claim under Ohio's Consumer Sales Practices Act. The Consumer Sales Practices Act is Ohio's consumer law statute which protects consumers from unfair and deceptive acts or practices in connection with various business transactions. Appellant had filed a lawsuit based on various Ohio consumer protection statutes related to the sale and quality of a used vehicle she had purchased. The case went to a jury trial and the jury found in favor of the appellant awarding her actual damages, economic damages, and treble damages under the Consumer Sales Practices Act. The appellant also sought payment of her attorney's fees but the trial court, without explanation, denied her request. The Eighth Appellate District disagreed with the trial court's decision, finding that based on the clear language of the Consumer Sales Practices Act, it was unreasonable to simply deny a request for attorneys' fees.

The Bullet Point: The Consumer Sales Practices Act is a powerful consumer law that could subject one to substantial damages, including a large amount of attorneys' fees if the consumer prevails and establishes that the opposing party's actions were knowingly committed in violation of the statute.

[FDT Group, LLC v. Guaraci, 10th Dist. Franklin No. 16AP-679, 2017-Ohio-663.](#)

This was an appeal of a trial court's decision to grant summary judgment on claims for negligence and breach of fiduciary duty that arose out of an insurance agent-client relationship. The appellant was a company who acquired, remodeled and managed real property. The appellant's operations manager would find insurance to protect all of the appellant's properties and contracted for insurance coverage with the appellee for a property in Reynoldsburg, Ohio. The coverage did not include back-up water coverage. That property eventually flooded and appellant filed an insurance claim which was denied. Appellant then filed suit asserting claims for negligence and fiduciary duty against the insurance agent. The trial court eventually granted the agent summary judgment and appellant appealed.

The Tenth Appellate District agreed with the trial court. Regarding the negligence claim, the Tenth Appellate District noted that in the context of an insurance agent procuring insurance for a client, the client "has a duty to duty to examine the policy, know the extent of its coverage, and notify the agent if said coverage is inadequate." Regarding the breach of fiduciary duty claim, the court found that this type of relationship did not typically rise to a "fiduciary relationship" absent some evidence of a "bilateral understanding" that each party was aware of and agreed that the client relied on the insurance agent for advice. The Tenth Appellate District found that in this case, the appellant was a sophisticated businessman, knew he was responsible for ultimately selecting the insurance company and reviewing the policies, and was aware of backup water coverage. Because of this, the facts of the case did not establish a special relationship as required to have a fiduciary duty.

The Bullet Point: A fiduciary relationship is a relationship in which a special confidence is placed in one of the parties due to that parties superiority, knowledge, or influence who is supposed to act in the best interest of the other party. Courts will look at a variety of factors between parties to see whether a fiduciary relationship exists.

However, just because an individual relied on your advice doesn't create a fiduciary duty unless and until you acknowledge and accept that duty.

[Clerk of Courts v. Ibanez, 10th Dist. Franklin No. 16AP-639, 2017-Ohio-662.](#)

This was an appeal of a trial court ruling declaring that the appellant was a vexatious litigator. The appellant was accused of routinely filing civil stalking protection orders against court employees who never touched her and who never had any contact with her outside of the court system. The Tenth Appellate District found that appellant's conduct clearly violated Ohio's vexatious litigator statute and agreed with the trial court's ruling. Notably, the Tenth Appellate District stated that while a "person need not engage in repetitive actions in order to be deemed a vexatious litigator, and such a finding can be based upon the actions in a single case," the court found that the appellant had filed 58 separate lawsuits since 1994, including 17 cases in 2016 alone against various court personnel. The court also found that since January 2016, the appellant filed 76 separate charges of discrimination with the Ohio Civil Rights Commission and that none of the filings were warranted.

The Bullet Point: Ohio law permits recourse for litigants who face continued, harassing lawsuits and legal actions that are not justified under Ohio law, even if the harassment occurs in only a single lawsuit. Examples of this include individuals who continually file lawsuits, even though they did not succeed in prior lawsuits based on the same facts, or individuals who utilize the courts to harass or injure another party.