

The Bullet Point – Volume I, Issue 5

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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.

[Deutsche Bank Nat'l Trust Co. v. Baxter, 8th Dist. Cuyahoga No. 104585, 2017-Ohio-1364.](#)

This was an appeal of a trial court decision to grant a mortgage lender summary judgment on its claim for foreclosure. The borrower argued that summary judgment was inappropriate because there was a question whether the lender had “standing” (or the right) to foreclose based on differing evidence it presented in a prior, dismissed lawsuit and the pending case. The trial court disagreed and the Eighth Appellate District affirmed.

In its decision the Eighth Appellate District noted that a finding in a prior lawsuit that the lender lacked standing would not preclude it from having standing and foreclosing in a subsequent lawsuit. The court noted that dismissal for lack of standing is without prejudice and therefore res judicata would not apply. Moreover, filings in a prior lawsuit would be immaterial to determining standing in a present lawsuit because standing is determined at the commencement of an action.

The Bullet Point: Standing is determined at the commencement of an action. This means, for example, that actions taken in a prior, dismissed lawsuit should not affect a lender’s standing to foreclose in a current lawsuit.

[Global Pacific, LLC v. Kirkpatrick, 12th Dist. Butler No. CA2016-08-163, 2017-Ohio-1332.](#)

This was an appeal of a trial court’s decision ordering a non-party to an arbitration agreement to arbitrate its claims and defenses. On appeal, the Twelfth Appellate District found the trial court erred in ordering the non-signatory to arbitrate its claims and defenses.

The court noted that Ohio law typically does not require a non-party to an arbitration agreement to arbitrate claims and a presumption against arbitration arises in these circumstances. The court further noted that while exceptions to this general rule apply, no such exception existed in this case. Under Ohio law a third party beneficiary to an agreement can be compelled to arbitrate claims. For this to apply, however, the contract must have been entered with the “intent to benefit” the non-signatory. This typically requires performance of some promise owed to the non-signatory. The court found no evidence of an intent to benefit the non-signatory in this case and reversed the trial court.

The Bullet Point: In Volume I, Issue I of The Bullet Point: An Ohio Commercial Law Bulletin, we highlighted the case of *Javorsky v. Javorsky*, 8th Dist. Cuyahoga No. 103896, 2017-Ohio-285, where the Eighth Appellate District found that a non-signatory was bound by the terms of an arbitration agreement. The difference between the two cases was that in *Javorsky*, evidence was presented that the non-signatory accepted monies payable directly under the contract (i.e. a benefit) whereas in this case, no evidence of a benefit to the non-signatory was presented. In order for a non-signatory to an arbitration agreement to be compelled to arbitrate his or her claims, some benefit under the contract must be conferred on him or her.

[*Saumer v. Cliffs Natural Resources*, 6th Cir. No. 16-3449 \(Apr. 17, 2017\).](#)

This appeal asked the Sixth Circuit to reconcile the competing interests under the Employee Retirement Income Security Act (ERISA) between acting as fiduciaries for employees and offering employee stock as part of a retirement plan.

In this case, a group of employees sued their employer claiming that after the employee's stock crashed, the retirement plan's fiduciaries continued to invest their money in the company's stock. The company moved to dismiss and the trial court agreed. The Sixth Circuit affirmed on appeal.

The plaintiffs argued that the market value of the stock should not absolve the plan fiduciary from his duties because the plan fiduciary knew the company's stock was overvalued and risky. However, the Sixth Circuit disagreed noting that under Supreme Court precedent, relying on a stock's market value is reasonable for a plan fiduciary absent special circumstances. The court also affirmed the district court's decision finding that no special circumstances existed because this exception does not require a plan fiduciary to independently verify the accuracy of the stock market's valuation of the company stock.

The Bullet Point: It is very difficult to bring a claim against a plan fiduciary for imprudently investing employee's retirement funds in company stock absent special circumstances. The Sixth Circuit has now held that the failure to investigate whether the market's valuation of the company stock is accurate is not a special circumstance that would give rise to liability.

[*Schramm v. Appvion, Inc.*, 2d Dist. Montgomery No. 27116, 2017-Ohio-1390.](#)

This was an appeal of a trial court decision to grant an employer summary judgment in a worker's compensation case. The plaintiff had previously filed suit and then subsequently dismissed it without prejudice. The trial court found that the plaintiff's next lawsuit was time-barred because the statute of limitations had run on the claim during the first lawsuit and the subsequent lawsuit had not been re-filed within one year of the prior lawsuit and therefore did not comply with Ohio's Savings Statute. On appeal the Second Appellate District affirmed.

The court noted that Ohio's Savings Statute permits a litigant to re-file a lawsuit within one year of a previous dismissal even if the statute of limitations on the claim had run in the interim. In other words, the Savings Statute "saves" a claim that would otherwise be too late to assert. Here, the court found that the plaintiff's

complaint was filed over a year after the prior case was dismissed and as a result, she could not use the savings statute to save an otherwise time-barred claim.

The Bullet Point: Ohio's Savings Statute can save an otherwise time-barred claim if it is strictly complied with. That rule requires a lawsuit to be filed within one year of a dismissed lawsuit to avoid the application of a statute of limitation that had run during the interim period between lawsuits.

[State ex. rel. Miller v. Pinkey, 2017-Ohio-1335.](#)

This was an action in mandamus filed in the Ohio Supreme Court against the sheriff of Cuyahoga County seeking to compel the production of documents related to police reports and investigations involving a former candidate for governor, Ed FitzGerald. Upon reviewing the records, the court differentiated between incident reports, which were subject to public records requests, and security records, which were not.

The court reasoned that incident reports “initiate criminal investigations” and are typically subject to immediate release. By contrast, security record is a record that contains information used to protect or maintain security of a public office against “attack, interference, or sabotage.”

The Bullet Point: Ohio's Public Records Act is broad and applies to many documents and records of a public office. However, the act recognizes an exception for security records which contain sensitive information designed to protect a public office from attack, interference, or sabotage. The court will typically review the records in camera (meaning off the record) to determine whether the requested record falls within the Ohio Public Records Act or is an exempt security record.

[Waddell v. Grant/Riverside Medical Care Found., 10th Dist. Franklin No. 15AP-982, 2017-Ohio-1349.](#)

This was an appeal of a trial court decision to enter judgment notwithstanding a jury verdict in a race discrimination lawsuit. At trial, the jury returned a verdict for the plaintiff finding that she had been discriminated against because of her race despite the defendant presenting evidence that it had fired people of all races for the exact, same conduct and that it had a legitimate basis for firing her. Thereafter, the defendant moved for a judgment notwithstanding the verdict or a new trial arguing that it presented legitimate, non-discriminatory reasons for firing the plaintiff. The trial court agreed and granted the judgment notwithstanding the verdict.

The Tenth Appellate District affirmed. It noted that in deciding a judgment notwithstanding the verdict, the evidence should be weighed strongly in the non-moving parties' favor. Despite this, the court found that the evidence presented established a clear, non-discriminatory basis for the plaintiff's finding and found that a judgment notwithstanding the jury's verdict was appropriate.

The Bullet Point: While there is a high burden to succeed on a motion for judgment notwithstanding the verdict, Ohio provides this mechanism for a trial court to correct a jury decision that was legally incorrect.