The Bullet Point – Volume I, Issue 6

May 09, 2017

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.

Bank of America Corp. v. City of Miami, 581 U.S. ___ (2017).

In this seminal decision, the United States Supreme Court decided that cities are considered "aggrieved persons" under the Fair Housing Act (FHA) who have standing to sue banks for racial discrimination in various city neighborhoods provided they allege a causal connection between the bank's conduct and the city's injury.

In this case, the City of Miami sued a number of banks under the FHA alleging that they engaged in racial discrimination by lending to minorities at worse terms than equally creditworthy non-minorities. The city alleged that this discriminatory practice increased the number of foreclosures and vacancies in minority neighborhoods. The district court dismissed the lawsuit, finding that Miami could not sue under the FHA and, regardless, the city failed to show a sufficient causal connection between the city's injuries and the banks' actions. The Eleventh Appellate District reversed, and on appeal, the United States Supreme Court affirmed.

In so ruling, the court noted that the city fell within the definition of "aggrieved persons" who could sue under the FHA, noting that the statute defines an "aggrieved person" as "any person who" either "claims to have been injured by a discriminatory housing practice" or believes that such an injury "is about to occur."

The Court stopped short of deciding that the city had alleged a sufficient causal connection between the harm caused by the banks and Miami's purported injury. The Court noted that to have damages under the FHA, the loss must be attributable to the proximate cause, "and not to any remote cause." The Court further noted that "foreseeability alone" does not establish the required causal connection. Rather, "proximate cause under the FHA requires 'some direct relation between the injury asserted and the injurious conduct alleged.'" The Court refused to determine what constitutes proximate cause under the FHA in these situations and remanded it to the lower court in order to outline the boundaries of proximate cause and how that standard applied to the City of Miami's claims.

The Bullet Point: Numerous Ohio cities have sued banks and mortgage lending companies making similar allegations to the City of Miami, with limited success. This recent decision gives cities a new blueprint to follow to try and hold banks liable for damages purportedly causes by lending practices.

That said, businesses should take comfort in the Court's reinforcement of its definition of proximate cause, which determines who can be liable for alleged injuries. Per the Court, a party cannot be liable simply because it could have predicted some damage could result from its actions. Rather, it must be established that the party was the direct cause of any damage. If multiple factors contribute to any injury, it will be difficult to determine what was the direct cause, making causation difficult to prove. So, when determining if you can sue, or how to defend a suit, special attention should be paid to whether proximate causation exists.

Lyshe v. Levy, No. 16-4026, 2017 WL 1404182 (6th Cir. Apr. 20, 2017).
This lawsuit arose out of a collection lawsuit filed in state court against the plaintiff. As part of that lawsuit, the defendant served written discovery on the plaintiff without also providing an electronic copy, as required by Ohio rules. In addition, the discovery requests included a verification form related to requests for admission, even though Ohio law did not require such verification.

The plaintiff then brought suit in federal court, alleging that defendant violated the Fair Debt Collection Practices Act (FDCPA) by violating Ohio's Rules of Civil Procedure. The district court dismissed for lack of subject-matter jurisdiction, finding that the plaintiff failed to allege he suffered any concrete and specific injury, as required to have standing. The Sixth Circuit Court of Appeals affirmed on appeal.

Plaintiff argued that the failure to comply with Ohio's procedural rules was an automatic violation of the FDCPA regardless of whether he suffered an injury. The Sixth Circuit disagreed. Based on the United States Supreme Court decision in *Spokeo, Inc. v. Robins*, __ U.S. __, 136 Ohio S.Ct. 1540, the court noted that even if a statute granted a statutory right to sue, a litigant must still meet Article III's standing requirements of showing an actual and concrete injury. The court noted that under *Spokeo*, "bare procedural violation[s]," like the violation alleged by the plaintiff, could not satisfy the injury-in-fact requirement if it is 'divorced from any concrete harm.'" Here, the court found that the plaintiff failed to allege any concrete injury as a result of the procedural violations, and thus he lacked standing to sue under the FDCPA.

The Bullet Point: Standing in federal court requires evidence of an actual, concrete injury, even if a statute gives a right to sue. That means that even if a procedural violation of a statute has occurred, some evidence of an actual injury must be established to have standing to sue. For businesses, this is an important distinction when considering whether to bring suit or how to defend a suit. If you cannot point to a concrete or tangible injury, or expected or eventual damages, it will be difficult for anyone to maintain suit.

Three-C Body Shops, Inc. v. Nationwide Mut. Fire Ins. Co., 10th Dist. Franklin No. 16AP-742, 2017-Ohio-1461.
This was an appeal of a trial court decision to grant judgment on the pleadings to an insurance company on a breach-of-contract claim. The plaintiff alleged that it had entered into a contract with a customer that authorized it to repair a vehicle to its pre-accident condition and that a copy of the agreement was sent to the insurance company. The plaintiff alleged that the insurance company was a third-party beneficiary of the contract. The plaintiff claimed that it made the repairs to the vehicle but that the insurance company did not pay

it for all the work under the contract. The insurance company moved for judgment on the pleadings, arguing that it was not a party or third-party beneficiary under the contract because the repairs of the vehicle were for the sole benefit of the customer. The trial court agreed and dismissed the case.

The Tenth Appellate District Court affirmed on appeal. The court found that based on the plain language of the contract, the insurance company was not a party to it and could not be liable for breaching it as a result. The court further found that while a third-party beneficiary to a contract can sue under the contract, it cannot be sued, based on language from a treatise adopted by the Supreme Court finding that the idea of a third-party beneficiary is concerned with "right to performance" under a contract. The court further found that there was no mention of a third-party beneficiary "having liability to either the promisor or promisee, only a 'duty to him' owed by the contracting parties." In so ruling, the Tenth Appellate District disagreed with various other Ohio courts that have found that a third-party beneficiary could be sued under a contract for failure to perform.

The Bullet Point: The concept of third-party beneficiaries is very important, especially for businesses. Third-party beneficiaries are entities that benefit from a contract made between two other parties. Even though a third-party beneficiary was not a party to the contract itself, if the contract is fulfilled, the third party stands to realize a benefit. Under the law, if the underlying contract is not fulfilled, the third-party beneficiary may be able to recover for any resulting damage. While certainly not universal in Ohio, one court has now expressly held that while a third-party beneficiary to a contract can sue for a breach of the contract, it cannot also be sued for breaching the same.

Sorrell v. Micomonaco, 12th Dist. Warren No. CA2015-07-060, 2017-Ohio-1498.
This was an appeal of a trial court decision finding that *lis pendens* applied to the purchase of real property and rescinding the sale to the purchaser as a result.

The owner of a piece of real property agreed to sell it to a neighbor. However, the owner backed out of the deal and the prospective purchaser sued for specific performance. During that lawsuit, the owner then sold the property to another party. The trial court ordered that the sale be rescinded because it was subject to *lis pendens* and ordered the property to be sold to the prospective purchaser. The owner appealed.

The Twelfth Appellate District affirmed. The court noted that *lis pendens* applied and warranted the sale to the other party to be rescinded. The third party claimed that lis pendens only applied with the plaintiff had actual title to the property at the outset of the litigation, not merely a claim of title, but the Twelfth Appellate District disagreed. The court found that such an argument would significantly abridge contract rights. Moreover, "title" within the meaning of *lis pendens* means title to property ultimately decided by a trial court, not necessarily title at the time suit is filed.

The Bullet Point: *Lis pendens* means that when a lawsuit is filed, third parties are put on notice of its existence. And, anyone that buys property while on such notice must assume any litigation that exists pertaining to the property. For example, if a bank is suing the owner of a lot and a buyer purchases the lot, then the new owner must face the lawsuit; sale of the property does not prevent the plaintiff getting recovery.

Pike Delta York Local School Dist. v. Pike Delta York Ed. Ass'n., 6th Dist. Fulton No. F-16-006, 2017-Ohio-1476.

This was an appeal of a trial court's decision to reverse an arbitrator's award. The appellant, a union organization, filed a grievance in 2014–2015 against a school board for not properly considering an employee for a softball coach position. The arbitrator granted the grievance in part, finding that the school board erred by not hiring the employee for the softball coaching position and ordering the school board to give the employee the position for the 2015–2016 school year. The board appealed to the trial court, which reversed the arbitrator's award, and the union appealed.

On appeal the Sixth Appellate District affirmed. It noted that an arbitrator's award can only be reversed in very limited circumstances. Furthermore, the power an arbitrator has is governed by the agreement from which he gets his authority. Here, the court found that the arbitrator awarded the softball position for the 2015–2016 school year, but the grievance was related to the 2014–2015 school year and was outside the scope of the arbitration before the court. In so ruling, the court found that the arbitrator had exceeded his powers because he decided an issue not before him when he awarded the employee the softball coach position for the 2015–2016 school year.

The Bullet Point: The power of an arbitrator is derived from the contract from which he or she gets his or her authority. That means that an arbitrator can only decide things that were specifically decided or presented to him or her. When an arbitrator decides an issue that was not presented, or beyond the scope of the agreement, the arbitrator exceeds his or her authority. Commercial entities seeking to avoid the impact of an arbitrator's decision should focus primarily on whether the arbitrator exceeded his or her authority. As prior *Bullet Points* have shown, it is difficult to establish that an arbitrator's decision was otherwise improper.

Wilson v. Lawrence, Slip. Op. No. 2017-Ohio-1410

This was an appeal to the Ohio Supreme Court on how to present a creditor's claim to an estate in order to be accepted by a probate court under Ohio law. Ohio law requires someone with a claim against a decedent's estate to "present" it in writing to the executor or administrator of the estate. In this case, the claim was presented by a creditor to the decedent's personal secretary and accountant. The letter was then forwarded to the executor of the estate. The trial court found that the claim was not properly presented and denied it because it was not submitted directly to the executor or administrator. The Eighth Appellate District reversed on appeal finding that a claim is presented "when other individuals connected with the estate receive the claim."

On appeal, the Ohio Supreme Court reversed the Eighth Appellate District's decision. In so ruling, the Ohio Supreme Court looked at the language of the presentment statute. The court found that "the statute is not ambiguous. The General Assembly's mandate in R.C. 2117.06(A) is a clear and unequivocal command that "all creditors * * * shall present their claims * * * to the executor or administrator in a writing." The court found that the word "shall" meant "must" and that to comply with the statute the claim had to be presented directly to the executor or administrator of the estate.

The Bullet Point: When presenting a claim against a decedent's estate, make sure it is in writing and sent directly to the executor or administrator. Otherwise, the claim will not be accepted!