The Bullet Point – Volume I, Issue 8

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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.

Water Splash, Inc. v. Menon, 581 U.S. ___ (2017)

An employer sued a former employee alleging that she had begun to work for a competitor in Canada while she was still employed. Because the employee lived in Canada, the employer got permission to serve her the lawsuit via mail. After she failed to appear, the employer obtained default judgment against her and subsequently denied her motion to vacate due to improper service. An appellate court reversed finding that under the Hague Service Convention, service via mail was not proper. On appeal, the United States Supreme Court reversed, finding that under the plain language of the Hague Service Convention, service of process by mail is not prohibited. In so ruling, the court noted that the statute used the term "send," a broad term with no statutorily defined meaning, and that the language of the statute as a whole does not prohibit service by mail.

The Bullet Point: The Hague Service Convention was created to simplify, standardize, and improve the process of servicing documents abroad by specifying certain approved methods of service. Service by mail, while not specifically permitted, is not only a cost-effective manner of service but also comports with the text and purpose of the Hague Service Convention to simply the process of servicing lawsuits and legal documents outside the country.

As business becomes more global, the ability to get service upon international entities can become critical. This ruling realigns decades of law and will allow businesses to more easily enforce agreements and legal rights, potentially saving significant costs and time. This should reduce risks for all businesses with respect to international transactions.

TC Heartland LLC v. Kraft Foods Group Brands LLC, 581 U.S. ____ (2017).

This appeal to the United States Supreme Court involved the question of the proper court in which to file a patent lawsuit (called "venue"). The defendant filed a patent infringement lawsuit against the plaintiff in Delaware, a competitor organized and headquartered in Indiana who allegedly shipped the infringing products to Delaware. The plaintiff moved to transfer venue to Indiana, arguing that venue was improper in Delaware. The district court and appellate court denied the motion, finding that under the relevant patent statute, a corporation is deemed a resident "in any judicial district in which such defendant is subject to the court's

personal jurisdiction." In other words, almost anywhere in the country where a corporation does business or sales.

The Supreme Court disagreed and reversed the lower court judgments. In so ruling, the court found that "residence" for venue purposes in the applicable patent statutes only refers to the state of incorporation.

The Bullet Point: TC Heartland has dramatically altered where patent lawsuits can be brought. Prior to the court's decision, litigants could shop around for "patent-owner-friendly" courts throughout the country as the lax venue rules permitted suit in most courts throughout the country provided the defendant did business in that state. In light of TC Heartland, such forum shopping is likely no longer possible and businesses can more predictably assess where patent suits may be filed.

Moreover, the threats posed by "patent trolls" — entities that get rights to one or more patents in order to profit by means of licensing or litigation, rather than by producing its own goods or services — have been curtailed as their litigation costs will likely increase, since in most cases, they can no longer file in more plaintiff-friendly jurisdictions.

Little v. Wyndham Worldwide Ops., Inc., M.D. Tenn. No. 16-cv-02758, 2017 WL 1788427 (May 5, 2017).

This lawsuit involved a question of first impression on whether removal before a defendant located in the forum state is served, called "snap removal," is appropriate. The case involved common law claims under Tennessee law by citizens from the state of Illinois. One of the defendants was a sales agent of Wyndham Worldwide who was a Tennessee resident. Four days after the suit was filed, Wyndham Worldwide removed the lawsuit to federal court, prior to its sales agent being served with the lawsuit.

The plaintiffs moved to remand, arguing that it was improper to remove the lawsuit before all defendants had been served and that by doing so, Wyndham Worldwide had engaged in "forum shopping." The district court ultimately agreed with the plaintiffs. In so ruling, the court noted that there was a split in case law on the issue in the Sixth Circuit Court of Appeals. Despite the conflict, the district court found that snap removal was improper. The court found the removal statute ambiguous and, applying rules of statutory construction, found that snap removal defeats the purpose of the removal statute in part because it smacks of forum shopping and would result in the death of the "forum defendant rule."

The Bullet Point: Snap removal is often used when a larger company believes an individual or smaller party has been added simply to keep a case in state court, as opposed to federal court, which some consider to be more sophisticated and fair to larger companies. For a defendant business who wishes to remove a lawsuit immediately upon service despite a forum defendant not yet being served, a finding that snap removal is inappropriate would thwart such goals and require the lawsuit to proceed in state court.

Courts in the Sixth Circuit Court of Appeals have split on whether snap removal is proper and the issue has not

yet been decided by the Sixth Circuit. This case is almost certain to be appealed. We are considering assembling an amicus group to argue in favor of reversal. If you are interested, please contact us.

Washburn v. Gvozdanovic, 1st Dist. Hamilton No. C-160590, 2017-Ohio-2954.

This was an appeal of a trial court's decision to grant summary judgment on claims for fraud and breach of contract. The dispute centered around the purchase of real property for $92,000. As part of the sale, the defendant signed a disclosure form noting some structural issues in the property. Prior to purchasing the property, the plaintiff had a number of inspections done that found mold and determined that water had been entering the home through the walls in the basement. The plaintiff still went ahead and purchased the property. Some time later, plaintiff started noticing large cracks in the home and driveway and hired a structural engineer. The engineer advised that the home sat on an active landslide and that he had told the defendant this as well. Almost four years later, plaintiff filed suit and asserted claims for breach of contract and fraud.

Regarding the fraud, plaintiff claimed defendant misrepresented the condition of the property on the disclosure form. Eventually, the trial court dismissed the fraud claim, finding it was barred by the four-year statute of limitations for asserting such a claim. Defendant appealed and the First Appellate District affirmed. In so ruling, the court noted that a fraud claim must be brought within four years after it had been discovered, "or should have been discovered in the exercise of reasonable diligence." The court noted that this discovery rule did not require actual knowledge; rather, constructive knowledge was sufficient. Here, the court found that the plaintiff had constructive knowledge of the structural issues when he purchased the property and the fraud claim, filed some six years after the loan closing, was not timely.

The Bullet Point: A party has four years to assert a claim for fraud. The clock starts running on such a claim not from when the litigant has "actual" knowledge of the fraud but, rather, when constructive knowledge exists. In determining whether constructive knowledge exists, the question is whether the fact "would lead a fair and prudent man, using ordinary care and thoughtfulness, to make further inquiry." In other words, constructive knowledge exists if a reasonable person would be aware of the possibility of fraud.

U.S. Bank, N.A. v. Hull, 9th Dist. Lorain No. 16CA010979, 2017-Ohio-2914.

This was an appeal of a trial court's decision to deny a motion to vacate a final judgment in a foreclosure action. After the plaintiff had obtained judgment on its claim for foreclosure, the defendant filed a motion for relief from judgment contesting the judgment. The Ninth Appellate District agreed with the trial court's ruling.

It noted that the motion for relief from judgment was barred by the concept of res judicata. This concept precludes a party from relitigating any issue that was, or could have been litigated in a prior lawsuit between the parties. Here, the court found that the issues raised in the defendant's motion were issues previously litigated in the foreclosure that she could have, and should have, timely appealed and that res judicata prohibited the court from considering her belated claims.

The Bullet Point: Res judicata exists when there was a prior lawsuit between the same parties involving the same or similar claims that were or could have been litigated and a final judgment was entered. The purpose of res judicata is to ensure litigation is brought to an end at some point and to stop the endless relitigation of issues previously decided. Its purpose also is to avoid the unnecessary waste of judicial resources in the court system.

Eighmey v. City of Cleveland, 8th Dist. Cuyahoga No. 104779, 2017-Ohio-2857.

This was an appeal by the city of Cleveland appealing the trial court's decision to certify a class of plaintiffs who claimed the city issued unlawful traffic tickets from unmarked traffic cameras. Here, the named plaintiff received a speeding ticket on October 3, 2013. She paid the ticket roughly a month later. Thereafter, she filed a class action complaint against the city. The city of Cleveland opposed class certification arguing, among other things, that the named plaintiff lacked standing. The trial court disagreed and certified the class. The city appealed.

On appeal, the Eighth Appellate District reversed the trial court's ruling on the grounds that the named class plaintiff lacked standing to sue. In so ruling, the court found that while a defense against the named plaintiff's claims may not ultimately preclude class certification, standing is a jurisdictional prerequisite that must be met before considering the merits of a lawsuit. Here, the court found that by paying the speeding ticket, the named plaintiff could not receive any redress from the litigation and therefore lacked standing and could not represent the class.

The Bullet Point: Above and beyond meeting the requirements of a class action, a class representative must also have standing to sue. This requires evidence that the class representative suffered an injury, that is traceable to the defendant's conduct and will be redressed by the requested relief.

When considering bringing and defending suits businesses should consider whether they have standing to sue or the other party has standing to sue. This requires analysis of whether a party has sustained or will sustain direct injury or harm and that the harm can be set right.