

What is the “adoptive business records” exception? The Bullet Point: Volume 1, Issue 19

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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. We’re pleased to expand our Commercial Law Bulletin from its previous coverage of Ohio case law to include additional areas in McGlinchey’s footprint.

[Hay v. Summit Funding, Inc., 4th Dist. Ross No. 16CA357, 2017-Ohio-8261.](#)

This was an appeal of a trial court’s decision to deny a motion to compel arbitration. The plaintiff had filed a sexual harassment lawsuit against her former employer and boss. The employer moved to compel arbitration based upon an arbitration clause contained in the plaintiff’s employment agreement. The trial court denied the motion, finding that the sexual harassment claim was outside the scope of the arbitration agreement.

The Fourth Appellate District disagreed and reversed the trial court’s decision. In so ruling, the court noted that the arbitration agreement specifically applied to claims on the discrimination of sex and that while sexual harassment is somewhat different, it is a form of sex discrimination covered by the arbitration agreement.

The Bullet Point: There is a strong presumption in favor of arbitration, and any ambiguities or doubts regarding the scope of the arbitration clause are resolved in favor of arbitration.

[Griffith v. Aultman Hospital, 5th Dist. Stark No. 2017CA0004, 2017-Ohio-8293.](#)

This was an appeal, in part, of the trial court’s denial of a motion to compel discovery responses. The plaintiff had sought information related to her husband’s death in a wrongful death action. The hospital refused to provide all of the requested information claiming that some of the information was protected by the attorney-client and work product privilege. The trial court agreed and plaintiff appealed.

On appeal, the Fifth Appellate District reversed, finding that the hospital failed to prove the existence of the attorney-client privilege, noting: “The attorney-client privilege cannot shield these documents and information from production merely because such was gathered and turned over to the risk management department.”

The Bullet Point: While a trial court has discretion over discovery matters, that discretion is not unlimited.

Moreover, while attorney-client or attorney-work product privileges can exclude the production of discovery, the party asserting the privilege bears the burden to prove its existence and the privileges will be strictly construed.

[The Bank of New York v. Roulston, 8th Dist. Cuyahoga No. 104908, 2017-Ohio-8400.](#)

This was an appeal of a foreclosure judgment. On appeal, the defendant argued, among other things, that the bank failed to present admissible evidence to support its claims because its affiant failed to establish could testify on behalf of another company she did not work for. While the trial court disagreed, the Eighth Appellate District found that the bank failed to properly present admissible evidence because its affiant lacked the requisite personal knowledge to testify on behalf of a company she did not work for.

The Bullet Point: Ohio courts will permit one business to attest to the documents of another business under the “adoptive business records” exception. Under the adoptive business records exception, “[r]ecords need not be actually prepared by the business offering them if they are received, maintained, and relied upon in the ordinary course of business and incorporated into the business records of the testifying entity.” However, in order for the exception to apply, there must be some evidence that the offering business used, relied upon, or incorporated the prior businesses records into its own in order to have the required personal knowledge to testify to the records.

[Bragdon v. Carter, 4th Dist. Scioto No. 17CA3791, 2017-Ohio-8257.](#)

This was an appeal of a denial of a declaratory judgment claim. The action involves the interpretation of will executed by the plaintiff’s father and the restriction on the alienability of real property deeded under the will. The will provided for the property to be given to the decedent’s children provided it was not sold until 21 years after the death of his granddaughter. After various transfers of the property, one of the decedent’s children filed suit seeking to hold that the restriction on the sale of the real estate was null and void. The trial court disagreed, and the decedent’s children appealed.

On appeal, the Fourth Appellate District reversed, finding that a restraint on the grant of fee simple transfer of real property is void.

The Bullet Point: The case law of Ohio holds that any attempt by a testator to restrain alienation on a grant of fee simple must be declared void. While an owner of an absolute estate may transfer an estate less than whole. i.e., life estate, etc., he cannot take away its inherent quality of alienability and still transfer it as a fee simple absolute. In other words, when a decedent transfers title in fee, he or she cannot also include provisions restraining the use of the property in the future.

[Stewart v. Woods Cove II, LLC, 8th Dist. Cuyahoga No. 105160, 2017-Ohio-8314.](#)

This was an appeal of a trial court’s decision to dismiss a class action challenging the sale of tax certificates to a private entity. The plaintiff, on behalf of the class, claimed that Cuyahoga County only sold delinquent tax certificates to the defendant who would charge in excess of 18% to tax payers to bring the delinquent taxes current. The class asserted claims for declaratory judgment, among other things. The trial court dismissed the class action and on appeal, the Eighth Appellate District reversed, finding that the class had stated a viable claim for declaratory judgment because the increased interest rate for paying off the delinquent taxes constituted an actual, concrete harm.

The Bullet Point: In order to state a claim for declaratory judgment, there must be an actual, “justiciable” controversy between the parties. The Ohio Supreme Court has interpreted a “justiciable matter” to mean the existence of an actual controversy, a genuine dispute between adverse parties. In order for a justiciable question to exist, the “threat” to a party’s position “must be actual and genuine and not merely possible or remote.”