

# What type of damages are recoverable under the Consumer Sales Practices Act? The Bullet Point: Volume 3, Issue 4

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## Constitutionality of Health and Safety Building Codes

*Benjamin v. Stemple*, No. 18-1736 (6th Cir. 2019).

This appeal was based on a now-standard practice of American cities requiring vacant properties to be registered and compliant with city health and safety ordinances. In this case, the city of Saginaw, Michigan required owners of vacant properties to register their property with the city. The registration required owners to permit the city access to the property if it became “dangerous.” Various defendants refused to register, finding this language constituted an unconstitutional search of their property, and they filed suit. The District Court granted the city judgment and the various defendants appealed.

On appeal the Sixth Circuit Court of Appeals affirmed, finding the registration forms ask for nothing more than what was permitted by the Fourth and Fourteenth Amendments, which permitted warrantless searches of buildings found to be dangerous.

**The Bullet Point:** As the Sixth Circuit noted, the question in this case is “whether the property owners have a cognizable Fourth Amendment right to resist warrantless searches premised on a finding that their properties have become dangerous. They do not.” The Fourth Amendment protects the people’s right “to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.”

A warrantless search of a home or business is presumptively unreasonable. But that rule comes with exceptions. One exception applies when the warrant requirement is impracticable and the “primary purpose” of the search is “[d]istinguishable from the general interest in crime control.” Also included in this exception are administrative searches designed to assure compliance with building codes, including codes designed to prevent

buildings from becoming dangerous to tenants or neighbors.

Although the administrative-search exception to the warrant requirement exempts law enforcement officers from some procedural hurdles, it does not exempt them from all of them. Before conducting a warrantless search of a building or property on the ground that it has become dangerous, the government must give the owner “an opportunity to obtain pre-compliance review before a neutral decision-maker.” The administrative scheme must give the property owner the chance to challenge a warrantless search request before being sanctioned for refusing entry.

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## When is an out-of-state business subject to personal jurisdiction in Ohio?

*MJM Holdings Inc. v. Sims*, 9th Dist. Summit No. 28952, 2019-Ohio-514.

This was an appeal of the trial court’s decision to dismiss the lawsuit for lack of personal jurisdiction. The plaintiff, an Ohio corporation, had entered into a written loan agreement with the defendant, a citizen of Nevada with business interests in Texas. The other defendant was a Texas law firm that assisted the defendant in drafting and negotiating the loan agreement. The defendant ultimately defaulted on the loan and the plaintiff filed suit in Ohio. The defendant law firm moved to dismiss, arguing that the trial court lacked personal jurisdiction over it. The trial court agreed and dismissed the lawsuit. The plaintiff appealed and on appeal the Ninth Appellate District reversed, finding that the trial court did in fact have personal jurisdiction over the defendant law firm.

**The Bullet Point:** Ohio courts apply a two-part test to determine whether an out-of-state defendant is subject to personal jurisdiction in Ohio. First, the court must determine whether the defendant’s conduct falls within Ohio’s long-arm statute or the applicable civil rule. Second, the court must consider whether the assertion of jurisdiction over the nonresident defendant would deprive the defendant of due process of law under the Fourteenth Amendment to the United States Constitution. Ohio’s long-arm statute sets forth nine specific acts by a defendant which give rise to personal jurisdiction. R.C. 2307.382(A). This includes transacting any business in the state. The Ohio Supreme Court has interpreted this act as “being a broad statement of jurisdiction.” Thus, “transact” as defined by Ohio’s long-arm statute, means “to prosecute negotiations; to carry on business; to have dealings” and it “is a broader term than the word ‘contract.’” A business does not have to have a physical presence in Ohio to “transact” business under Ohio’s long-arm statute.

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## What constitutes a Novation of a contract?

*Johnson v. Stone*, 3d Dist. Allen No. 1-18-40, 2019-Ohio-318.

This was an appeal of the trial court’s decision denying defendant’s counterclaims seeking to prove they had an enforceable settlement agreement, or that novation existed with the plaintiff. The parties were involved in a financing relationship for the development of real property. The defendants ultimately executed a promissory

note in favor of the plaintiff for \$423,000. Defendants then sought a bank loan to develop the property. The only way the bank would fund such a loan was to have a superior interest to the loan the parties had worked out, and obtain a guarantee from the plaintiff. The plaintiff agreed to the guarantee and defendants ultimately defaulted on the bank loan. Plaintiff then brought suit seeking almost \$300,000; the amount he had guaranteed on the loan. Prior to this time, the parties had been in settlement negotiations to resolve the default but apparently were unable to do so.

While the plaintiff was ultimately awarded summary judgment, the trial court found that a genuine issue of material fact existed regarding whether the parties had reached a settlement agreement. After a bench trial, judgment was awarded to plaintiff on the defendants' counterclaims and defendants appealed.

On appeal the Third Appellate District affirmed, finding that there was no novation.

**The Bullet Point:** "A contract of novation is created where a previous valid obligation is extinguished by a new valid contract, accomplished by substitution of parties or of the undertaking, with the consent of all the parties, and based on valid consideration." A novation can never be presumed but must be evinced by a clear and definite intent on the part of all the parties to the original contract to completely negate the original contract and enter into the second. Because a novation is a new contract, it too must meet all the elements of a contract.

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## Consumer Sales Practices Act Damages

### *Averback v. Montrose Ford, Inc., 9th Dist. Summit No. 28875, 2019-Ohio-373.*

This was an appeal of the trial court's decision to grant the plaintiff judgment on his Consumer Sales Practices Act (CSPA) claim and award attorney's fees. In 2013, the defendant car dealership purchased a new truck from a dealership in Maryland. Upon receipt, the dealership determined the long block engine was defective and needed replaced. The price was approximately \$5,800. Plaintiff then sought to purchase a truck and paid \$73,000 for the truck in which the dealership had replaced the long block engine. Six month later the truck began to overheat. There was no evidence that this was related to the prior repairs. The plaintiff eventually traded in the truck for \$50,000 to another dealership. Plaintiff then became aware of the prior engine replacement, which he was not made aware of prior to purchasing the vehicle, and he filed suit under the CSPA for fraud, and breach of contract/warranty.

Eventually, the plaintiff was awarded summary judgment on his CSPA claim and awarded over \$23,000 in attorney's fees, \$7,978 in damages (which was trebled) and \$500 in noneconomic damages. The dealership appealed and on appeal, the Ninth Appellate District affirmed in part and reversed in part, finding that failure to disclose the engine replacement was a CSPA violation. However, the amount of damages and fees awarded was reversed, finding that plaintiff failed to produce sufficient evidence of economic damages and failed to establish that the dealership knowingly violated the CSPA (thus plaintiff was not entitled to attorney's fees).

**The Bullet Point:** As a remedy for a violation of the CSPA, the consumer may rescind the transaction or seek actual economic damages and noneconomic damages. R.C. 1345.09(A). "[A]ctual economic damages" are

defined as “damages for direct, incidental, or consequential pecuniary losses” arising from a violation of the CSPA. R.C. 1345.09(G). Actual economic damages, however, do not include damages for noneconomic loss.

If the CSPA violation has been declared a deceptive or unconscionable act or practice by a rule promulgated by the Attorney General pursuant to R.C. 1345.05(B)(2), or if a court order, made available for public inspection, had determined that a specific act or practice violated R.C. 1345.02, R.C. 1345.03, or R.C. 1345.031, then the consumer may either:

1. rescind the transaction, or
2. recover treble damages of the amount of the actual economic damages or \$200, whichever is greater, plus noneconomic damages up to five thousand dollars. R.C. 1345.09(B).

“Under the Act, treble damages are punitive in nature, intended to deter a seller’s wrongful conduct.” Under R.C. 1345.09(B), the CSPA provides an alternative \$200.00 statutory award for a CSPA violation in the event the consumer is unable to prove actual damages or the treble damages are less than \$200.00. CSPA claims essentially arise from contractual relationships, breach of a warranty regarding a sale of goods, or the fraudulent inducement to enter a contract. Accordingly, the measure of damages for a CSPA claim involving deception is the expectancy interest. This is “the difference between the value of property as it was represented to be and its actual value at the time it was received or purchased.”

In addition to economic damages, attorney’s fees are available under the CSPA, but only if there is a finding “that the supplier acted ‘knowingly’ in committing the deceptive/unconscionable act or practice.” The CSPA defines “[k]nowledge” as “actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.” R.C. 1345.01(E). The Ohio Supreme Court has found “the supplier need only intentionally do the act that violates the Consumers Sales Practices Act” to have been found to “knowingly” violate its provisions and permit the recovery of attorney’s fees.