When Can a Class be Certified?

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Statute of Limitations of Note Enforcement After Acceleration

M&T Bank v. Wood, 2nd Dist. Clark No. 2019-CA-46, 2020-Ohio-10.

In this appeal, the SecondAppellate District found that a claim on a promissory note was not barred bythe six-year statute of limitations for such claims, because the lawsuit wasfiled within six years of the note being accelerated.

The BulletPoint: R.C. 1303.16(A) provides: "Except as provided in division (E) ofthis section, an action to enforce the obligation of a party to pay a notepayable at a definite time shall be brought within six years after the due dateor dates stated in the note or, if a due date is accelerated, within six yearsafter the accelerated due date." What constitutes "acceleration" for statute oflimitations has been the subject of significant litigation in Ohio. In Wood,the Second Appellate District found that the act of filing the foreclosurelawsuit was the event of acceleration that triggered the statute of limitationpurposes. The Second Appellate District also found that the date a notice ofdefault was mailed was not the trigger date for statute of limitations purposesbecause the lender sent multiple notices of default, which evidenced that ithad not actually accelerated the mortgage loan.

Standing to Foreclose

U.S. Bank Nat'l Ass'n v. O'Malley, 8th Dist. Cuyahoga No. 108191, 2019-Ohio-5340.

In this appeal, the EighthAppellate District affirmed the trial court's decision finding that a lenderhad standing to foreclose.

The BulletPoint: To have standing in a foreclosure lawsuit, a lender must establishan interest in the promissory note or the mortgage at the time the lawsuit wascommenced. With respect to a promissory note, a party has standing when it is a"party entitled to enforce" the note, which includes a "holder" of the note. Aholder, in turn, is one in physical possession of a note that is endorsed inblank or endorsed specifically to it. While endorsements are typically on thenote itself, sometimes they are on an Allonge that is attached to the note.Allonges do not have to be dated to be enforceable. Moreover, a lender is "notrequired to state, verbatim, that the allonges were physically attached to thenote" in order to be considered a holder of the instrument.

Car Dealership Duty of Care

Burns v. Zurich, 4th Dist. Ross No. 19CA3676, 2019-Ohio-5255.

In this appeal, the FourthAppellate District refused to overturn the trial court's decision finding thata car dealership did not owe a heightened duty of care when allowingprospective purchasers to test drive a vehicle.

The BulletPoint: Relying on case law from outside of Ohio, the Fourth AppellateDistrict noted: Courts across the country have established that "at common law,a dealer who holds a motor vehicle for purposes of sale is not liable forinjuries or damages from negligence in the operation of the dealer's vehicle bya prospective purchaser, or one acting for a prospective purchaser, who isseeking to determine whether to purchase such vehicle." The situation also doesnot give rise to "imputed negligence." "The doctrine of imputed negligence doesnot ordinarily apply in Ohio, an exception being when parties are engaged in ajoint enterprise." "A 'joint enterprise' within the law of imputed negligenceis the joint prosecution of a common purpose under such circumstances that eachmember of such enterprise has the authority to act for all in respect to thecontrol of the agencies employed to execute such common purpose." "'Partiescannot be said to be engaged in a joint enterprise, within the meaning of thelaw of negligence, unless there be a community of interests in the objects orpurposes of the undertaking, and an equal right to direct and govern themovements and conduct of each other with respect thereto. Each must have somevoice and right to be heard in its control or management.'"

Mitigation of Damages

PHH Mortgage Corp. v. Barker, 3rd Dist. Van Wert No. 15-19-01, 2019-Ohio-5301.

In this appeal of aforeclosure decision, the Third Appellate District affirmed the trial court'sdecision to grant a lender summary judgment, finding, among other things, thatthe borrowers had no absolute right to reinstate the loan, that the lendermitigated its damages, and that Ohio law did not recognize a claim for"wrongful foreclosure."

The BulletPoint: The burden of proof for the affirmative defense of failure tomitigate damages lies with the breaching party. "Under Ohio law, the injuredparty in a breach-of-contract action has a duty to mitigate damages, meaningthat the injured party cannot recover damages 'that it could have prevented by"reasonable affirmative action.'" "An injured party need only use 'reasonable,practical care and diligence, not extraordinary measures to avoid excessivedamages.'

FDCPA Class Certification

Midland Funding LLC v. Colvin, 3rd Dist. Hancock No. 5-18-15, 2019-Ohio-5382.

In this appeal, the ThirdAppellate District reversed a trial court's decision to deny classcertification to the defendant consumer under the Fair Debt CollectionPractices Act for purportedly filing lawsuits against consumers in countieswhere they did not reside.***The Bullet Point:*** Class actions are governedby Rule 23 of the

Ohio Rules of Civil Procedure. To maintain a class action, alitigant must satisfy seven things: "(1) an identifiable class must exist andthe definition of the class must be unambiguous; (2) the named representativesmust be members of the class; (3) the class must be so numerous that joinder ofall members is impracticable; (4) there must be questions of law or fact commonto the class; (5) the claims or defenses of the representative parties must betypical of the claims or defenses of the class; (6) the representative partiesmust fairly and adequately protect the interests of the class; and (7) one ofthe three Civ.R. 23(B) requirements must be met." The failure to meet any oneof these elements will defeat a request for class certification. "The FDCPA wasdesigned to eliminate abusive debt collection practices, to ensure that debtcollectors who abstain from such practices are not competitively disadvantaged,and to promote consistent state action to protect consumers." One issue thatconcerned Congress when enacting the FDCPA was "forum abuse," or the practiceof seeking to "obtain default judgments by filing suit in courts so distant orinconvenient that consumers cannot make an appearance." To that end, the FDCPAprohibited such conduct and requires a debt collector (absent certainexceptions) to file suit either where the contract was signed or where theconsumer resides when the lawsuit is commenced.

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Jim Sandy