

# When can I get specific performance? The Bullet Point: Volume 2, Issue 10

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## ***The Preview Point***

### **Frank v. Gaos, No. 17-961:**

This appeal to the United States Supreme Court involves the question of whether, or in what circumstances, a cy pres award of class action proceeds that provides no direct relief to class members supports class certification and comports with the requirement that a settlement binding class members must be “fair, reasonable, and adequate.” In this case, an \$8.5 million settlement was reached in a class action that called for no compensation, monetary or otherwise, to absent members of the class. Despite this, the class settlement was approved by both the District Court and Ninth Circuit Court of Appeals. The petitioners were class members who objected to the proposed class settlement. The settlement itself was confirmed under the cy pres doctrine, which refers to a court’s power to reform a trust or charitable gift that has become impossible to administer according to its terms. The use of this doctrine in class action settlements is a recent phenomenon and this particular case presents a split among the circuit courts on whether a cy pres award that provides no direct award to members of a class is permissible.

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### **Lamps Plus, Inc. v. Varela, No. 17-988:**

The United States Supreme Court accepted this appeal to determine whether the Federal Arbitration Act forecloses a state-law interpretation of an arbitration agreement that would authorize class arbitration based solely on general language commonly used in arbitration agreements.

In this case, the Ninth Circuit Court of Appeals found that an arbitration provision required class action claims to be arbitrated, notwithstanding no specific mention of arbitrating class-wide claims. Despite this, the Ninth Circuit Court of Appeals nonetheless inferred mutual assent to class arbitration from such standard language as

the parties' agreement that "arbitration shall be in lieu of any and all lawsuits or other civil legal proceedings" and a description of the substantive claims subject to arbitration.

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### ***The Bullet Point***

## **GMAC Mortgage, LLC v. Giuliano, 11th Dist. Trumbull No. 2018-T-0086, 2018-Ohio-1669.**

In this foreclosure action, a borrower attempted to create a genuine issue of material fact regarding a lender's standing to foreclose by attempting to introduce into evidence copies of the loan documents filed in a prior, dismissed lawsuit. The trial court found that such documents failed to create any genuine issues of material fact for trial and awarded summary judgment to the lender. The borrower appealed, and on appeal, the Eleventh Appellate District affirmed.

In so ruling, the court found that a borrower could not create an issue of fact for trial regarding a lender's standing by introducing different or inconsistent copies of the loan documents filed in a prior lawsuit because standing is determined at the commencement of the action.

**The Bullet Point:** In foreclosure actions, standing is determined at the commencement of the action. What this means is that courts are concerned with a lender's ability to enforce a promissory note and mortgage at the time it filed the lawsuit, not whether it could enforce the instruments in a prior, dismissed lawsuit. Thus, as long as the lender can establish its ability to enforce the note and mortgage at the commencement of the action, and as long as it did not confuse the record by offering multiple, inconsistent copies of the loan documents into evidence to support its standing, copies of loan documents filed in prior dismissed lawsuits should have no impact or relevance to the lender's standing to foreclose in the instant action.

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## **Klossner v. Burr, 9th Dist. Wayne No. 16AP0069, 2018-Ohio-1663.**

This was an appeal of the trial court's decision ordering specific performance of a real estate purchase agreement. The parties had entered into a real estate agreement for plaintiff to purchase six acres of land. Plaintiff wanted to use the land to build a manufacturing facility. Because the land was next to a road, the agreement called for a permanent easement onto defendant's land to enter the facility. The agreement was contingent on receiving zoning variances. During the process of obtaining the variances, plaintiff learned the driveway needed to be a certain size and that it would have to be built over a leach field. In order to begin building the facility, the parties agreed to a temporary easement while the driveway and leach field issues were resolved. Despite this, defendant stopped communicating with plaintiff and the loan closing could not occur, which ultimately resulted in the present lawsuit.

Eventually, the trial court granted plaintiff's request for specific performance conveying title to the property to plaintiff and granting him a permanent and temporary easement. On appeal, the Ninth Appellate District

affirmed, finding that specific performance was proper given the uniqueness of the contract between the parties.

**The Bullet Point:** Specific performance of contracts is an equitable remedy, and an action for specific performance is an equitable action. The remedy of specific performance is available when the promisor's failure to perform constitutes a breach of the \* \* \* contract, and a remedy for the breach which is ordinarily available at law, such as money damages, will not afford the promisee adequate relief for a loss arising from the breach. There must typically be no other adequate remedy (like monetary damages) for specific performance to apply. However, there is an exception to this general rule: "[c]ontracts involving interests in land \* \* \* generally are specifically enforced because of the clear inadequacy of damages at law for breach of contract."

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### **Wentling v. David Motor Coach Ltd., 5th Dist. Stark No. 2017CA00190, 2018-Ohio-1618.**

This appeal involved various tort claims brought by the estate of a deceased employee of the defendant. The decedent had been ordered to obtain some parts from an old scrap bus. The decedent crawled under the bus but the jack holding it to collapse and crushed the decedent. The estate eventually sued the decedent's employer for various tort claims. During the course of the case, the estate filed for sanctions against defendants for spoliation of evidence for disposing the bus and sought a negative inference as a sanction. The trial court eventually granted the defendant's summary judgment motion and the defendant appealed on various grounds.

Regarding the estate's motion for sanctions as a result of spoliation of evidence, the Fifth Appellate District agreed with the trial court that sanctions were not proper because even though the bus had been destroyed, the defendants were not put on notice of the impending litigation as required for sanctions pursuant to a spoliation claim.

**The Bullet Point:** A motion for sanctions for spoliation of the evidence is properly filed under Civ.R. 37. The proponent must first establish that (1) the evidence is relevant, (2) the offending party's expert had an opportunity to examine the unaltered evidence, and (3) even though the offending party was put on notice of impending litigation, this evidence was intentionally or negligently destroyed or altered without providing an opportunity for inspection by the proponent. "[d]estruction of evidence in accordance with a standard practice of destroying certain items after a fixed period, before a suit is filed, has been found not to support an inference of willful destruction."