

When is a Class Action Superior?

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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.

Ohio

Substantial Compliance with Contract

American Bus. Investments, LLC v. Shaeena & Allos, LLC, 6th Dist. Lucas, 2023-Ohio-739.

In this appeal, the Sixth Appellate District affirmed the trial court's decision to grant summary judgment to the defendant, finding, among other things, that no contract had been formed under a theory of substantial compliance.

The Bullet Point: "Substantial compliance is a concept that allows a party to enforce a contract where the party seeking enforcement has substantially complied with its terms. A nominal or trifling breach is excused. However, where the performance of a term is essential to the purpose of the contract, a default of that term is not excusable no matter how trifling."

Standing to Sue Under the FDCPA

Ward v. NPAS, Inc., 6th Cir., No. 21-6189 (Mar. 24, 2023).

In this appeal, the Sixth Circuit affirmed the district court's decision to grant the defendant judgment on the plaintiff's FDCPA claim, finding that the plaintiff had standing to sue based upon a single unwarranted phone call but ultimately finding for the defendant on the basis that it is not a debt collector subject to the FDCPA.

The Bullet Point: As the Sixth Circuit noted, intrusion upon seclusion can suffice to establish the concrete harm needed to have Article III standing to sue. "Unwanted phone calls are the 'type of intrusive invasion of privacy' that a claim for intrusion upon seclusion seeks to prevent." As the court noted, "[i]t is true that tort liability typically lies only when 'telephone calls are repeated with such persistence and frequency as to amount to a course of hounding the plaintiff.'" "Because the intrusion caused by unwanted phone calls bears a 'close relationship' to the *kind* of harm that the common law sought to protect, it does not matter that the volume of such calls 'may be too minor an annoyance to be actionable at common law.'"

Florida

Class Action Certification

***Florida Power & Light Company v. Velez*, No. 3D22-181 (Fla. 3d DCA March 22, 2023)**

The Third District concluded a trial court did not abuse its discretion in certifying a class under Florida Rule of Civil Procedure 1.220(b)(3).

The Bullet Point: Under Florida law, parties seeking class certification have the burden of pleading and proving each element of Florida Rule of Civil Procedure 1.220(a): (1) numerosity; (2) commonality; (3) typicality; and (4) adequate representation. In addition, plaintiffs must demonstrate that the action meets the criteria under at least one basis for class certification under Rule 1.220(b). The plaintiffs, in this case, sought class certification under Rule 1.220(b)(3), which requires a showing of predominance and superiority. The trial court decided to certify the class, finding that common questions of law and fact predominate over individual questions. That class representation is superior to other methods of adjudication.

On appeal, the Third District found no abuse of discretion in the trial court's decision. First, the Third District concluded that predominance exists in this case because the issues will be resolved by common proof that does not vary from customer to customer. The Court then determined the superiority requirement was met based upon its examination of three factors for determining whether a class action is a superior method of adjudicating a controversy: (1) whether a class action would provide the class members with the only economically viable remedy; (2) whether there is a likelihood that the individual claims are large enough to justify the expense of separate litigation; and (3) whether a class action cause of action is manageable. Therefore, the trial court's order granting the plaintiff's motion for class certification was affirmed.

Mutuality of Remedies

***DiMauro v. Martin*, No. 4D22-524 (Fla. 4th DCA March 15, 2023)**

The Fourth District ruled that if a contract provides for each party to have an enforceable remedy against the other, even if not the same remedy, mutuality of remedy is not absent.

The Bullet Point: Florida law is clear that there must be mutuality of obligation and remedy in lawsuits for the specific performance of a contract. Mutuality of obligation pertains to the consideration, while mutuality of remedy pertains to the means of enforcement. It is well settled that parties to a contract may agree to limit their respective remedies and that those remedies need not be the same. Therefore, mutuality of remedy exists so long as the contract provides for each party to have an enforceable remedy against the other, even if not the same remedy.

Here, the trial court found the contract at issue was unenforceable due to a lack of mutuality of remedy. The contract did not allow the appellees to assert specific performance if the appellant breached the agreement. The Fourth District ruled this was an error, holding that as long as the appellees had an enforceable remedy if the

appellant breached, mutuality of remedy was not lacking. This is true even if the remedy was not the same remedy that the appellant could obtain against the appellees.

Change of Ownership

***S and A Prop. Invest. Servs., LLC v. Garcia, et al.*, No. 3D22-835 (Fla. 3d DCA March 15, 2023)**

The Third District concluded that a real property transfer from individuals to a Florida limited liability company wholly owned by such individuals constituted a “change of ownership” of the property.

The Bullet Point: Pursuant to Florida Statute § 193.1554, any change resulting from the annual assessment of a non-homestead residential property is capped at 10% of the property’s assessed value for the prior year. The property retains this 10% limitation so long as the property does not undergo “a change of ownership or control,” which is defined as “any sale, foreclosure, transfer of legal title or beneficial title in equity to any person, or the cumulative transfer of control or of more than 50% of the ownership of the legal entity that owned the property when it was most recently assessed at just value.”

At issue in this appeal is whether the conveyance of the subject non-homestead residential property from individuals to a Florida limited liability company wholly owned by such individuals constituted a “change of ownership or control” of the property. The Third District ruled that because an LLC is an entity separate and distinct from its owners, the transfer of the property to the LLC constituted a change in ownership. This is supported both by Florida real property law, which provides that any interest of the grantor vests in the grantee upon delivery of a quitclaim deed, and by Florida LLC law, which specifies that an LLC member has no interest in any specific limited liability company property. Accordingly, the LLC lost its annual assessment cap upon the transfer of the property.

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