

Can I be sued for deceptive practices? The Bullet Point: Volume 2, Issue 8

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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.

Michelson v. Volkswagen Aktiengesellschaft, 8th Dist. Cuyahoga No. 105960, 2018-Ohio-1303.

This appeal involved the dismissal of a lawsuit against Volkswagen for issues with a used vehicle. The plaintiff claimed that the vehicle had various design defects that caused engine failure when it had fewer than 90,000 miles on the vehicle and sued Volkswagen for, among other things, violation of Ohio's Deceptive Trade Practices Act. Plaintiff claimed that Volkswagen knew, or should have known, of serious design and manufacturing defects. Volkswagen moved to dismiss the complaint and the trial court granted the motion.

Plaintiff appealed, and on appeal, the Eighth Appellate District affirmed. Regarding Plaintiff's Deceptive Trade Practices Act claim, the court found that individuals, like Plaintiff, lack standing to sue under the act.

The Bullet Point: There is a split in authority on whether an individual may sue under the Deceptive Trade Practices Act. "The Ohio Deceptive Trade Practices Act is substantially similar to the federal Lanham Act, and it generally regulates trademarks, unfair competition, and false advertising." Some courts, including the Eighth Appellate District and the United States District Court for the Northern District of Ohio, have held that individuals lack the ability to sue under the Deceptive Trade Practices Act, noting that "The act's purpose * * * is exclusively to protect the interests of a purely commercial class against unscrupulous commercial conduct." Conversely, some Ohio courts, including the United States District Court for the Southern District of Ohio, have found that an individual can in fact sue under the Ohio Deceptive Trade Practices Act. Unless and until the Ohio Supreme Court decides the issue, a business faced with such a claim should be aware of the jurisdiction's position on this issue.

Jori, Inc. v. B2B International, LLC, 11th Dist. Lake No. 2016-L-23, 2018-Ohio-1216.

This lawsuit stemmed from a dispute over a license agreement to run a restaurant. Plaintiff claimed it executed a license for Defendant to run a burger restaurant, but Defendant failed to comply with various statutory requirements to provide certain written disclosures and a right to cancel. Eventually, each party filed summary judgment motions and the court ultimately granted judgment in favor of defendant. Plaintiff appealed.

The Eleventh Appellate District reversed, finding that the Business Opportunity Purchasers Protection Act (BOPPA) was not complied with in this case and that defendant could not avoid its obligation to make certain required disclosures by relying on the parole evidence rule.

The Bullet Point: BOPPA defines a “business opportunity plan” as “an agreement in which a purchaser obtains the right to offer, sell, or distribute goods or services under all of the following conditions: (1) The goods or services are supplied by the seller, a third person with whom the purchaser is required or advised to do business by the seller, or an affiliated person. (2) The purchaser is required to make an initial payment greater than \$500, but less than \$100,000, to the seller or an affiliated person to begin or maintain the business opportunity plan. BOPPA requires certain written disclosure statements to be provided, including a five-day cancellation right. Conversely, “The parole-evidence rule is a principle of common law providing that ‘a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence of earlier or contemporaneous agreements that might add to, vary, or contradict the writing.’” Notwithstanding this, the parole evidence rule does not require all disclosures be included in the business opportunity plan under BOPPA. As the Eleventh Appellate District noted, “applying such logic, however, would permit a franchisor to easily avoid the Ohio Act’s disclosure requirements by leaving essential elements of a transaction out of the underlying document and instead incorporating these elements in the transaction outside the document. The language used by the Ohio Act to define a business opportunity plan does not support the conclusion that the definitional elements must be found within the document itself.”

New Asian Super Market v. Weng, 10th Dist. Franklin No. 17AP-207, 2018-Ohio-1248.

This matter commenced as an eviction action filed by the landlord against a tenant under a commercial lease. The tenant filed counterclaims in excess of the municipal court’s jurisdictional limit and the court bifurcated the claims, ultimately finding for the landlord. Tenant appealed, and on appeal, the Tenth Appellate District reversed, finding the trial court erred in bifurcating the claims.

In so ruling, the court found that the municipal court lacked jurisdiction to hear the entire case once its monetary jurisdiction was exceeded and it should have transferred the matter to common pleas court in its entirety, rather than just the counterclaim.

The Bullet Point: Jurisdiction refers to a court’s authority and ability to preside over a certain type of case. In Ohio, municipal courts have subject-matter jurisdiction over disputes not exceeding \$15,000. If the amounts in dispute or the amounts sought seek more than this, and the claims and counterclaims are interwoven, the municipal court must transfer the entire matter to the common pleas court.

Johnson v. Aultman Hospital, 5th Dist. Stark No. 2017 CA 00145, 2018-Ohio-1268.

Plaintiff was a nurse at defendant hospital. In June 2015, the hospital did an audit on its nurses' narcotics withdrawal. It found that Plaintiff's withdrawals were higher than her peers, along with 21 discrepancies in the narcotics withdrawals. Plaintiff was eventually suspended, and then notified that she was being terminated. Plaintiff eventually applied for unemployment compensation, but was denied after the Ohio Unemployment Compensation Review Commission found that Plaintiff was terminated with just cause.

Plaintiff eventually sued defendant hospital for, among other things, libel and slander. Eventually the trial court granted the hospital's motion for summary judgment and Plaintiff appealed. The Fifth Appellate District affirmed on appeal. Regarding the defamation claims, the court found that the hospital and its employees had immunity because they were required to report its findings regarding the narcotic withdrawal discrepancies.

The Bullet Point: To establish a claim for defamation, a plaintiff must show: (1) a false statement of fact was made about the plaintiff; (2) the statement was defamatory; (3) the statement was published; (4) the plaintiff suffered injury as a proximate result of the publication; and, (5) the defendant acted with the requisite degree of fault in publishing the statement. Even then, certain defendants may have a qualified privilege to a defamation claim. Such a privilege can exist pursuant to statute (such as when there is a mandatory requirement to disclose something) or in the performance of a duty. As the Fifth Appellate District noted, "a publication is protected by a qualified privilege when the defendant making the communication is doing so under the performance of a public or private duty, or where the publisher and the recipient have a common interest."

Yoo v. Ahn, 8th Dist. Cuyahoga No. 105406, 2018-Ohio-1291.

This was an appeal of a trial court's decision to deny a motion for new trial, and an award of punitive damages and attorneys' fees. The case started when plaintiff obtained a \$39,000 judgment against defendant for passing a bad check to plaintiff in a prior lawsuit. Plaintiff then recorded a judgment lien, which it renewed twice. Thereafter, Plaintiff initiated the present lawsuit based on a claim for fraudulent conveyance. Plaintiff claimed that Defendant purchased real property that was then fraudulently transferred to avoid Plaintiff's lien and interest as a judgment creditor.

Eventually, a bench trial was held and the court found that the sale of the real property constituted a fraudulent conveyance and awarded \$50,000 in punitive damages. Defendant appealed, and the Eighth Appellate District affirmed the trial court's decision finding that sufficient evidence was presented to establish a fraudulent conveyance.

The Bullet Point: Ohio's Uniform Fraudulent Transfer Act, as set forth in R.C. Chapter 1336, was enacted to create a right of action for a creditor to set aside an allegedly fraudulent transfer of assets. One such fraudulent transfer includes: "A transfer made or an obligation incurred by a debtor is fraudulent as to a creditor, whether the claim of the creditor arose before, or within a reasonable time not to exceed four years after, the transfer

was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation * * * with actual intent to hinder, delay, or defraud any creditor of the debtor[.]” The Fraudulent Transfer Act provides a way for a judgment creditor to go after transfers or conveyances made by a judgment debtor solely to avoid a judgment.