

Quarterly Review

Volume 15

Issue No. 3

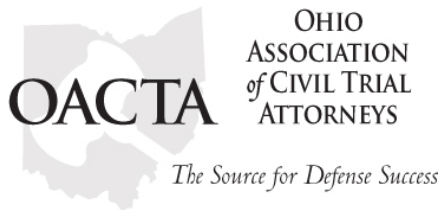
Autumn 2020

OHIO ASSOCIATION *of* CIVIL TRIAL ATTORNEYS

**A Quarterly Review of
Emerging Trends
in Ohio Case Law
and Legislative
Activity...**

Contents

President's Note	1
<i>Jamey T. Pregon, Esq.</i>	
Introduction:	2
<i>Gregory R. Farkas, Esq.</i> <i>Business & Commercial Litigation Committee Chair</i>	
Strategies for Defending Illinois Biometric Privacy Class Action Lawsuits	3
<i>David J. Oberly, Esq.</i>	
E-Discovery and Cellphones – A Practical Guide to Making the Most of Request for Smartphone Data.....	7
<i>Zachary Pyers, Esq. and Kenton H. Steele, Esq.</i>	
Ohio Premises Liability and Criminal Acts	11
<i>Stu Harris, Esq.</i>	
Retailers Score a Victory on Multiple-Unit Pricing Sales Ads	15
<i>Eric J. Weiss, Esq.</i>	
Is Grandma's Secret Recipe a Trade Secret?	17
<i>Gregory R. Farkas, Esq.</i>	



2020 Officers

President

Jamey T. Pregon

American Family
1900 Polaris Parkway, Suite 200B
Columbus, OH 43240
(513) 292-2717
jpregon@amfam.com

Vice President

Natalie M. E. Wais

Young & Alexander Co., L.P.A.
One Sheakley Way, Suite 125
Cincinnati, OH 45246
(513) 326-5555
nwais@yandalaw.com

Treasurer

Benjamin C. Sassé

Tucker Ellis LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
(216) 696-3213
bsasse@tuckerellis.com

Secretary

David W. Orlandini

Collins, Roche, Utley & Garner, LLC
655 Metro Place S., Suite 200
Dublin, Ohio, 43017
(614) 901-9600
dorlandini@cruglaw.com

Immediate Past President

James N. Kline

Bonezzi Switzer Polito & Hupp Co., L.P.A.
1300 East 9th Street, Suite 1950
Cleveland, OH 44114-1501
(216) 875-2767
jkline@bsphlaw.com

2020 Board of Trustees

Alexander M. Andrews

Ulmer & Berne LLP
65 East State Street, Suite 1100
Columbus, OH 43215-4213
(614) 229-0002
aandrews@ulmer.com

Susan Audey

Tucker Ellis LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
(216) 696-3715
saudey@tuckerellis.com

Patrick S. Corrigan

Managing Attorney, Cleveland Office
Staff Counsel of the
Cincinnati Insurance Companies
55 Public Square, Suite 930
Cleveland, Ohio 44113
(216) 479-7695 (direct)
Patrick_corrigan@staffdefense.com

Thomas F. Glassman

Bonezzi Switzer Polito & Hupp Co. LPA
312 Walnut Street, Suite 2530
Cincinnati, OH 45202
(513) 345-5502
tglassman@bsphlaw.com

Melanie Irvin

Branch
875 N. High St.
Columbus, OH 43215
(440) 590-0536
melanie@ourbranch.com

Mark F. McCarthy

Tucker Ellis LLP
950 Main Ave., Suite 1100
Cleveland, OH 44113
(216) 592-5000
mark.mccarthy@tuckerellis.com

Paul W. McCartney

Bonezzi Switzer Polito & Hupp Co. L.P.A.
201 E. Fifth St., 19th Floor
Cincinnati, OH 45202
(513) 766-9444
pmccartney@bsphlaw.com

Jill K. Mercer - DRI State Representative

Nationwide Insurance
One Nationwide Plaza, 1-30-302
Columbus, OH 43215
(614) 677-7924
mercerj3@nationwide.com

Michael M. Neltner

Staff Counsel for the
Cincinnati Insurance Company
6200 South Gilmore Rd.
Cincinnati, OH 45014
(513) 603-5082
michael_neltner@staffdefense.com

David Oberly

Blank Rome, LLP
1700 PNC Center; 201 East Fifth Street
Cincinnati, OH 45202
(513) 362-8711
DOberly@BlankRome.com

Daniel A. Richards

Weston Hurd LLP
The Tower At Erieview
1301 East 9th Street, Suite 1900
Cleveland, OH 44114-1862
(216) 687-3256
drichards@westonhurd.com

Elizabeth T. Smith

Vorys Sater Seymour & Pease
52 E. Gay Street
Columbus, OH 43215
(614) 464-5443
etsmith@vorys.com

EXECUTIVE DIRECTOR

Debbie Nunner, CAE

OACTA
400 W. Wilson Bridge Road
Worthington, OH 43085
(614) 228-4710- Direct
(614) 221-5720
debbie@assnoffices.com

MEMBER SERVICES COORDINATOR

Laney Mollenkopf

OACTA
400 W. Wilson Bridge Road
Worthington, OH 43085
(614) 228-4727
laney@assnoffices.com

President's Note

Jamey T. Pregon, Esq.

American Family



By the time you are reading this, our country's national election will (hopefully) be over, and OACTA's election will be drawing near. As this unprecedented year comes to a close, OACTA's annual meeting is going virtual for the first time. I encourage you all to register for the annual meeting, and to attend the business meeting and awards ceremony to kick the meeting off. We have a very timely, practical, and informative agenda that will be well worth your time.

I am both happy and sad that my term is ending. I am very happy at what OACTA has accomplished this year, given the unique challenges we faced as an organization. I am thankful for all who stepped up during this year to not only help OACTA survive 2020, but to even thrive in it. We were able to provide a variety of valuable services to our membership, and to the Ohio legal system in general, as we provided input and leadership in the efforts to deal with COVID-19. I would borrow a phrase from the national political scene, and say that we Made OACTA Great Again, but I believe OACTA has always been great, and will continue to be great long after I am gone.

I am, of course, sad and disappointed that I was unable to see any of you during my presidency. It does make me look forward to a day when we are able to get back to in person seminars and meetings. I know that day will come again, and when it does, I think we will all appreciate those opportunities even more, having gone without them for this period of time.

I will be soon recognizing and thanking people during the business meeting and awards ceremony, but I do want to take a moment here to acknowledge and thank this year's officers and board for all their efforts during this year. We all also need to thank Debbie Nunner and Laney Mollenkopf for being the glue that holds us all together. I want to give a special recognition to our sponsors, who have worked with us during this year despite the lack of in person events. And I want to thank all of our members for staying with us or joining us during this challenging year, and for their continued support of OACTA. It has been a true honor and privilege to serve as president of this organization, and it is an experience I will never forget, thanks to all of you.

Please enjoy this issue of the *Quarterly Review*, and thanks to the Business and Commercial Litigation Committee for putting it together for us. As we enter the holiday season, I wish you and your families a safe, healthy, and joyous holiday season.

Introduction

Business & Commercial Litigation Committee

Gregory R. Farkas, Esq., Committee Chair

Frantz Ward, LLP



It certainly has been an interesting year to start as the Chairperson of the Business & Commercial Litigation Committee, in the sense of the apocryphal and now debunked ancient curse.¹ 2020 has found no shortage of ways to surprise us, with virtually all of those surprises being of the unpleasant variety. In early April a colleague of mine sent me a link to a 2020 apocalypse bingo card and joked that we would not be able to use our Indians tickets until June. As 2020 continued neither the card, nor the cancellation of sports and school graduations, or any of the other losses we suffered was funny. I think it is safe to say that there has been no year in recent memory where more people are looking forward to the New Year.

Needless to say, 2020 impacted the OACTA and Business & Commercial Litigation Committee. We lost the opportunity to meet in person and get to know each other as attorneys and Committee members. We certainly hope for better times to come. Yet despite all the challenges, I am pleased to present the Committee's issue of the OACTA *Quarterly Review*. I also want to sincerely thank everyone whose hard work has made this issue possible.

David Oberly has contributed an article on defending class actions under the Illinois Biometric Information Act. The Act has generated a tidal wave of class action litigation that has impacted commercial defendants across the county, including in Ohio. David's article will help us all counsel our clients about these important issues.

Zach Pyers and Kenton Steele have provided an extensive look at discovery of cellphone data. Their piece is a great starting point for anyone researching this important discovery issue.

Stuart Harris has authored an article on a split of authority in premises liability cases. The split involves the standard used to evaluate whether a risk of harm from a third person's criminal act is foreseeable. Some courts have adopted a totality of the circumstances test to determine foreseeability, while others have applied a "prior-similar-acts-test." The difference can have significant impact on litigating such cases, and Stuart's article highlights an issue that ultimately is likely to be resolved by the Ohio Supreme Court.

Eric Weiss has added a piece on an important decision on deceptive advertising claims under the Ohio Consumer Sales Practices Act. He provides valuable guidance to help retail clients to avoid such claims.

Last, and most certainly least, I have written a short article on the treatment of recipes as trade secrets. Fans of the turkey sandwiches and chili soup recipes might find something of interest.

I hope that you find these articles useful in your practice, and more importantly, that you and your families stay safe and healthy into the New Year.

In closing, I want to thank and congratulate Candi Taggart, who is stepping down as the Vice Chairperson of the Business & Commercial Litigation Committee. Candi has been a fixture at OACTA and a mentor for those new to the organization or stepping into leadership roles. Everything the Committee was able to accomplish this year would not have been possible without her guidance. I am also extremely pleased to announce that Zack Pyers has accepted the position of Vice Chairperson of the Committee. I am sure that with his support that 2021 will be a far better year than 2020.

¹<https://quoteinvestigator.com/2015/12/18/live/#:~:text=Kennedy%20delivered%20a%20speech%20that%20included%20an%20instance%3A&text=There%20is%20a%20Chinese%20curse,in%20the%20history%20of%20mankind>

Strategies for Defending Illinois Biometric Privacy Class Action Lawsuits

David J. Oberly, Esq.
Blank Rome LLP



Over the last two years, companies utilizing biometric data in their operations have faced a relentless wave of class action lawsuits for purported violations of the Illinois Biometric Information Privacy Act (“BIPA”). 2019 was an especially rough year for BIPA defendants, as courts issued

a string of plaintiff-favorable decisions that greatly expanded the scope of potential BIPA liability, while limiting many of the major defenses.

As just one example, after several significant setbacks, Facebook agreed to pay \$650 *million* to settle a longstanding BIPA dispute over the use of facial recognition technology to support its photo “tagging” feature.

However, 2020 has been a different story for defendants in BIPA class actions, who have seen a sizable shift in momentum with courts issuing a number of favorable decisions on key issues and defenses. Several recent BIPA opinions demonstrate how some of these defenses—namely preemption, arbitration, and personal jurisdiction—can be utilized by corporate defendants to halt such claims in their tracks or, at a minimum, significantly limit the amount of damages involved in this type of litigation.

Why Ohio Businesses Should Take Note of Recent BIPA Developments

While the name of the law suggest that BIPA applies only to companies located in Illinois, the reach of the law extends well beyond the borders of the Prairie State. Specifically, any Ohio business that collects or uses the

biometric data of residents of Illinois must comply with the mandates of BIPA. As such, those Ohio companies that fall under the scope of BIPA should take note of the defenses that have recently emerged as powerful methods to successfully defend or limit BIPA lawsuits and work with experienced biometric privacy counsel to leverage these powerful defenses whenever possible.

Overview of the Illinois Biometric Information Privacy Act

Under BIPA, private entities cannot collect, possess, use, share, or store biometric data without first implementing a publicly-available privacy policy, providing notice, obtaining a written release, making certain disclosures, and maintaining reasonable security measures.

BIPA has quickly become the next class action battleground—primarily due to the statute’s private right of action permitting the recovery of statutory damages ranging between \$1,000 and \$5,000 by any “aggrieved” person under the law. These uncapped statutory damages, combined with a low bar for establishing harm, led to an explosion of bet-the-company BIPA class litigation in 2019, which continued apace into 2020—until very recently.

Leveraging the Preemption Defense to Dispose of BIPA Class Litigation

One of the strongest defenses that has emerged on the scene in BIPA litigation is preemption.

The BIPA preemption defense finds its roots in the Seventh Circuit Court of Appeals’ opinion in *Miller*

CONTINUED

v. Southwest Airlines Co., 926 F.3d 898, 901 (7th Cir. 2019). In that case, the Seventh Circuit directly addressed the preemptive impact of federal labor law, and the Railway Labor Act (“RLA”) in particular, on claims asserted by union employees subject to a collective bargaining agreement (CBA) alleging state-law violations of BIPA. In *Miller*, union employees of United Airlines and Southwest Airlines brought suit against their airline employers alleging violations of BIPA stemming from their use of biometric timekeeping systems.

On appeal, the Seventh Circuit held that the union workers’ BIPA claims were completely preempted by the RLA. In doing so, the court first noted that BIPA allowed worker or *their authorized agent* to receive necessary notices and consent to the collection and use of biometric data under the statute. Applied to the airline workers’ claims, whether the unions *did* consent to such collection and use of their biometric data, or perhaps granted authority through a management-rights clause, was a question that was required to be answered by an adjustment board under the RLA.

The court reasoned that because the plaintiffs had asserted a right in common with all other employees, dealing with a mandatory subject of collective bargaining, it was not possible, even in principle, to litigate a dispute about how the airlines acquired and used fingerprint data for its whole workforce without asking whether the union had consented on its employees’ collective behalf. As such, the BIPA claims were preempted by federal labor law, and were required to be resolved by an adjustment board, and not before a judge pursuant to the RLA.

Following *Miller*, several decisions have been issued in 2020 dismissing BIPA lawsuits in their entirety due to preemption under the RLA, including *Crooms v. Southwest Airlines Co.*, 2020 WL 2404878 (N.D. Ill. May 12, 2020), and *Frisby v. Sky Chefs, Inc.*, 2020 WL 4437805 (N.D. Ill. Aug. 3, 2020).

Importantly, courts have also followed *Miller* in extending the scope of the preemption defense to claims

implicating § 301 of the Labor Management Relations Act (“LMRA”)—which preempts claims founded directly on rights created by CBAs, as well as those that are substantially dependent upon an analysis of a CBA.

In *Peatry v. Bimbo Bakeries USA, Inc.*, 2020 WL 919202 (N.D. Ill. Feb. 26, 2020), a former employee of Bimbo Bakeries, USA filed suit for purported violations of BIPA stemming from the bakery’s biometric timekeeping practices. Peatry worked for the company from September 2016 to February 2019, and was covered by a CBA from May 2018 through her employment end date. The bakery moved to dismiss Peatry’s lawsuit, arguing that the LMRA preempted Peatry’s claims.

The *Peatry* court agreed, holding that LMRA § 301 preempted the plaintiff’s claims during the period over which Peatry was working under a CBA. The court found that *Miller* governed the court’s resolution of the preemption question because the RLA preemption standard is “virtually identical to the preemption standard the Court employs in cases involving § 301 of the LMRA.” Consequently, under *Miller*, Peatry’s claims required interpretation of the CBA governing the bakery workers’ employment, such that § 301 preempted Peatry’s claims during the period the CBA was in effect.

Following *Peatry*, several other BIPA actions have been dismissed based on successful LMRA preemption challenges, including *Gray v. Univ. of Chicago Medical Center, Inc.*, 2020 WL 1445608 (N.D. Ill. March 25, 2020), and *Williams v. Jackson Park SLF, LLC*, 2020 WL 5702294 (N.D. Ill. Sept. 24, 2020).

Utilizing Arbitration Agreements & Class Action Waivers to Kick BIPA Lawsuits Out of Court

Second, defendants have also found success in utilizing arbitration agreements and class action waivers to kick BIPA class action lawsuits out of court and into binding individual arbitration.

CONTINUED

Such was the case in *Miracle-Pond v. Shutterfly, Inc.*, 2020 WL 2513099 (N.D. Ill. May 15, 2020), where a federal court held a plaintiff was required to pursue her BIPA claims in individual arbitration, despite the fact the arbitration provision was not added to the company's Terms of Use until a year *after* the plaintiff originally agreed to them.

In *Shutterfly*, Vernita Miracle-Pond sued Shutterfly claiming the company's use of its facial recognition technology in connection with the Shutterfly account she maintained violated BIPA. To complete her account registration process, Miracle-Pond had to agree to Shutterfly's Terms of Use, which included both a revision clause and a class action waiver. Significantly, the revision clause stated Shutterfly "may revise these Terms from time to time by posting a revised version" and explained a user's continued use of the app subsequent to any such revisions constituted the user's acceptance of the changes. The revision clause did not require notice of revisions to Shutterfly users beyond posting the new terms.

The 2014 Terms did not, however, include an arbitration provision; this provision was added to Shutterfly's Terms of Use in 2015 and was thereafter included in every later version of the Terms.

After the filing, Shutterfly moved to compel arbitration and stay the federal litigation pending the outcome. In so doing, Shutterfly argued that, as a user of the app, Miracle-Pond had agreed to Shutterfly's Terms of Use—including the provision mandating individual arbitration. The District Court agreed with Shutterfly, granting its motion to compel arbitration for Miracle-Pond and staying the federal court proceedings.

In its opinion, the court first found that Shutterfly's Terms of Use constituted a valid and enforceable clickwrap agreement. The court highlighted that Shutterfly's page presented the Terms of Use for viewing, stated that clicking "Accept" would be considered acceptance of the Terms of Use, and offered both "Accept" and "Decline" buttons. Thus,

Miracle-Pond agreed to be bound by Shutterfly's Terms of Use when she created her account.

The court also found that it was proper to require Miracle-Pond to arbitrate her claim, even where the 2014 Terms of Use did not include an explicit arbitration provision. Pursuant to the change-in-terms provision in the 2014 Terms of Use, Miracle-Pond agreed her continued use of Shutterfly's services would communicate her assent to the most recent version of the Terms posed online at the time of her use. Because Miracle-Pond continued to use her account after Shutterfly posted its amended Terms in 2015, she accepted those modifications, including the inclusion of the 2015 arbitration clause.

Lastly, the court held that it was also proper to require Miracle-Pond to arbitrate her claim, even where Shutterfly failed to provide notice of the 2015 modification and she was never informed of the change. Here—because the parties' agreement expressly reserved the right of Shutterfly to modify its terms—Miracle-Pond was bound to the 2015 modifications, as Shutterfly had posted the modified terms on its website in 2015 and Miracle-Pond indicated her acceptance thereof by continuing to use Shutterfly's services.

As such, the court held Miracle-Pond had entered into a valid arbitration agreement, thus compelling the court to grant Shutterfly's motion to compel arbitration.

Personal Jurisdiction as a Basis to Dismiss BIPA Claims

Lastly, defendants have also found success in challenging personal jurisdiction to extricate themselves from BIPA class action lawsuits at an early juncture in the litigation.

Such was the case in *McGoveran v. Amazon Web Services, Inc.*, 2020 WL 5602819 (S.D. Ill. Sept. 18, 2020), where Amazon Web Services ("AWS") and Pindrop Security, Inc. ("Pindrop") defeated a biometric privacy lawsuit claiming they captured voice data through phone calls placed through AWS' Amazon Connect service in violation of BIPA.

CONTINUED

Pindrop offers voiceprint biometric services for call centers to confirm the identity of callers. AWS provided cloud storage services under the brand Amazon Connect for Pindrop to store its collected voiceprint data.

In *McGoveran*, three plaintiffs sued AWS and Pindrop for alleged BIPA violations stemming from the collection and retention of their voiceprint data from multiple calls made to a John Hancock call center located in Massachusetts, which used Amazon Connect with Pindrop biometric voiceprint authentication.

After the filing, AWS and Pindrop moved to dismiss for lack of personal jurisdiction. The Southern District of Illinois agreed with AWS and Pindrop, granting their respective motions and dismissing both defendants.

In its opinion, the court focused its attention to whether plaintiffs had made a *prima facie* showing of personal jurisdiction over AWS/Pindrop sufficient to avoid dismissal. Because the plaintiffs conceded general jurisdiction was lacking, the court focused its analysis on whether the defendants were subject to specific personal jurisdiction in Southern District of Illinois.

On this issue, the court rejected the plaintiffs' principal argument that defendants were subject to specific jurisdiction because they collected/possessed the voiceprint data of Illinois citizens who placed phone calls while in the state. The court reasoned the plaintiffs' initial dialing of the phone while in Illinois—the only activity at issue that took place in the Prairie State—was insufficient by itself to confer specific jurisdiction.

In addition, the court also found neither the defendants' relationship with a third party located out of state (John Hancock) nor that third party's contacts with Illinois could be used to establish personal jurisdiction.

Thus, in the absence of any evidence AWS or Pindrop specifically targeted Illinois citizens when providing their voice printing services, and because the litigation did not arise from contacts AWS or Pindrop themselves created with Illinois, the court concluded it lacked personal jurisdiction over both defendants, resulting in dismissal of the entire action.

Takeaways

Following Facebook's \$650 million BIPA settlement, companies that collect and use biometric data can expect to continue to see a flurry of BIPA class action lawsuits to continue for the foreseeable future. With that said, while the Facebook settlement will further incentivize plaintiff's attorneys to pursue BIPA lawsuits for mere technical violations of the law, as the above decisions show, several potential avenues exist to attack and defeat, or at least limit, a broad assortment of BIPA actions. As such, BIPA defendants and their legal counsel are well advised to add the above defenses to their litigation toolbelts and should contact experienced counsel about utilizing these potentially game-changing defenses whenever possible.

David J. Oberly, Esq., is an attorney in the Cincinnati office of Blank Rome LLP and is a member of the firm's Biometric Privacy, Privacy Class Action Defense, and Cybersecurity & Data Privacy groups. David's practice encompasses both defending clients in high-stakes, high-exposure biometric privacy, privacy, and data breach class action litigation, as well as counseling and advising clients on a wide range of biometric privacy, privacy, and data protection/cybersecurity matters. He can be reached at doberly@blankrome.com.

E-Discovery and Cellphones – A Practical Guide to Making the Most of Request for Smartphone Data

Zach B. Pyers, Esq. and Kenton H. Steele, Esq.
Reminger Co., L.P.A.



Zach B. Pyers, Esq.



Kenton H. Steele, Esq.

I. Introduction

Cellphones are not only changing the way Americans live their lives, but also the way discovery is conducted. “[I]t is no exaggeration to say that many of the more than 90% of American adults who own a cellphone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.” *Riley v. California*, 134 S. Ct. 2473, 2490 (2014). Today, the extensive amount of information created and stored on cellphones is sought after by litigants hoping to uncover useful information to help them

prevail at trial or on a dispositive motion. Litigators must incorporate procedures tailored towards discovery and preservation of cellphone and application data into their practice. That being said, courts will ultimately make the decisions on the appropriate balance of privacy concerns and the free flow of relevant information. Litigators able to strike a balance between these concerns and speak authoritatively on the mechanics of discovery of cellphone data will likely be at a significant advantage.

II. What is E-Discovery?

Electronic discovery or “e-discovery” is any process where electronically stored information (“ESI”) is sought, located, collected, searched, processed, produced, reviewed, or analyzed in a civil or criminal case. This electronic information is created every day by businesses and people at incredible rates. The

amount of available information raises privacy concerns and can greatly increase the cost of discovery in all litigation. Cellphones are creating, storing, sending, and receiving ESI in numerous ways. This is especially true when that phone is a smartphone. A smartphone is “[a] mobile phone that performs many of the functions of a computer, typically having a touchscreen interface, Internet access, and an operating system capable of running downloaded apps.” *Smartphone, Oxford Living Dictionary* (2019). For example, if GPS is enabled on a smartphone, location information is created simply by the device being carried around in someone’s pocket. Many people are totally unaware of the information created by their use of a cellphone. Similarly, most people fail to understand how the information on their phone may be unintentionally destroyed through the regular operation of their phone’s operating system or the apps they use. Destruction or spoliation may occur through the overwriting of data by the cellphone carrier settings, making preservation in high-stakes litigation that much more important.

III. What Is The Appropriate Scope of E-Discovery Involving Cellphone Data?

Both the Ohio and Federal Rules of Civil Procedure permit the discovery of ESI. Fed. R. Civ. P. 26(b); Ohio R. Civ. P. 26(B)(5). However, these rules also place limitations on the scope of ESI discovery – “A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of *undue burden or cost.*” Fed. R. Civ. P. 26(b)(2)(B) (emphasis added). Electronic information can be costly to retrieve, review, and produce. The limitations in the Civil Rules are particularly important when the ESI may be only

CONTINUED

potentially or possibly relevant to a given case. Although the Civil Rules set out specific limitations on discovery of ESI, litigators should also remain cognizant of the general principles that govern the discovery process as these may be crucial to a court's determination between granting a motion to compel or a request for a protective order.

While cellphones record and store an enormous amount of information, it is unlikely that the entirety of the information on a device will be relevant to a given case. Because not all information on a cellphone will be important, requests should be tailored to obtain the specific information most likely to be relevant. A broad request for all information on a cellphone is almost certain to be a categorically unreasonable request. Making a broad, all-encompassing request for anything and everything will often result in an unwinnable discovery dispute. This is particularly true if the case is in federal court, where the Civil Rules now explicitly prioritize specific and well-articulated requests.

Two cases from Florida demonstrate different approaches to how information is requested and how those varying approaches can lead to significantly different outcomes when it comes to the discovery of cellphone data. First, in *Holland v. Barfield*, a wrongful death case arising from a balcony fall, the plaintiff requested production of "any and all computer hard drives" and "all cellphones" from "24 hours preceding [the date of the incident] to present." 35 So.3d 953, 954 (Fla.App.2010). The plaintiff claimed that the request was necessary to uncover conversations between the co-defendants, including text and Facebook messages. *Id.* Predictably, the defendant requested a protective order in response to the broad request, both in the scope of the timeframe and subject matter, arguing it amounted to a "fishing expedition" and would be an invasion of privacy. *Id.* The court agreed and found that there were less intrusive ways to obtain the requested information. *Id.* at 956. This Court was particularly troubled by the fact that the request asked for the hardware rather than "the specific information contained therein." *Id.*

In *Antico v. Sindt Trucking*, a wrongful death arising from an automobile accident, plaintiff requested inspection of defendant's cellphone for the nine-hour period surrounding the accident. 148 So.3d 163 (Fla. App., 2014). Additionally, this request contained strict parameters for how to obtain the information, including allowing defendant's counsel to be present and to video record the inspection. *Id.* at 165. Further, the plaintiff proposed that the summary of findings could be reviewed by defendant's counsel prior to distribution. *Id.* Here, plaintiff requested the information contained in the phone during the time of the alleged accident as result of a specific allegation, supported by testimony of two witnesses, that the petitioner driver was distracted by her phone immediately before the collision. *Id.* at 167. Based on that fact-supported allegation, the time-scope limitations, and the specific plan to protect against privacy invasions, the court allowed the plaintiff's expert to inspect the defendant's phone and review all use of the phone in the time leading up to the collision. *Id.* at 168.

A Pennsylvania case offers additional insight into the appropriate scope of cellphone discovery. In *Dietrich v. Buy-Rite Liquidators, Inc.*, a slip and fall case, defendant (after restructuring his original request) requested all of plaintiff's cellphone records during the one-hour period in which the injury supposedly occurred. 25 Pa.D.&C.5th *1 (C.P.2012). Defendant requested this information upon the premise that plaintiff *may* have been on her phone while in the store, and the distraction of the cellphone use was the actual cause of her fall. *Id.* Here, unlike *Antico*, there were no witnesses or other evidence to support the allegation that plaintiff was distracted by her phone. *Id.* at *9. Ultimately, the court found granting access to, "Plaintiff's cellphone records for the date of the accident, without any factual evidence or other indicia of possible relevance, is an improper intrusion upon Plaintiff's privacy." *Id.* at *5. Thus, even when discovery requests for cellphone data are limited temporally, there must also be factual support for the likely relevance of the requested data.

CONTINUED

These cases demonstrate that while it is easy to see a cellphone as a treasure trove of discoverable information, courts are likely to weigh the party's e-discovery requests based upon the following factors:

- **Time:** When the discovery request is sufficiently limited to the period of time relevant to the event at issue, and not simply between the incident and the time the request is sent, or for all information on the phone at issue, the discovery request is more likely to be a reasonable request.
- **Factual Basis:** Being able to fully articulate why an inspection of an opposing party's smartphone is likely to lead to the discovery of relevant information and provide evidence to support that basis should serve as winning support for a motion to compel.
- **Type of Information Requested:** Courts have shown they are more willing to grant requests that ask for specific information, rather than requests based on sources or locations of information. For instance, a request for all text conversations that mention a specific subject is a better alternative than a broad request for any and all texts exchanged in a given time frame.
- **Manner of Obtaining the Requested Information:** When the discovery request is limited to the electronic records and not the hardware itself, and when the requester offers ways of including opposing counsel in their discovery plan, the cellphone discovery request is more likely to be permissible.

Considering these factors when drafting requests will likely lead to more fruitful responses from opposing parties and/or favorable outcomes in the event a motion to compel becomes necessary. That being said, these factors should also guide objections to requests from opposing parties and the content of briefing submitted when a discovery dispute arises.

IV. Differing Preservation Obligations For Individuals And Companies

While there is a common sense duty to preserve evidence, cellphones can create challenges related

to preserving potentially relevant data. This reality is reflected in the Federal Rules of Civil Procedure through the creation of a good-faith operation exception to sanctions for spoliation of evidence. "Absent exceptional circumstances, a court *may not* impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic system." Fed. R. Civ. P. 37(e) (emphasis added).

To determine whether a loss of ESI was the result of routine and good-faith operations, courts have looked at the settings in electronic systems and cellphones, which can include the deletion or overwriting of information. *Federico v. Lincoln Military Hous., LLC*, E.D.Va. No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943, at *23 (Dec. 31, 2014). For example, a person may set their cellphone to keep text messages for only thirty-days or up to one-year. Additionally, cellphone carriers have independent retention periods for backing up the content of devices. *Id.* As with all discovery concerns, proportionality and reasonableness should be considered. "For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative." Fed. R. Civ. P. 37(e) (Notes of Advisory Committee on 2015 amendments).

Courts have applied differing standards for the obligation to preserve electronically stored information based upon the type of party being subpoenaed. "Moreover, the fact that Plaintiffs are individuals whose devices are solely for personal use informs what constitutes a 'routine, good-faith operation.'" *Federico v. Lincoln Military Hous., LLC*, E.D.Va. No. 2:12-cv-80, 2014 U.S. Dist. LEXIS 178943, at *28 (Dec. 31, 2014). In short, individual plaintiffs are held to a more forgiving standard than corporate parties. *Id.* This difference in accountability can frustrate attempts to obtain information from an individual plaintiff's cellphone. Courts have overlooked the deletion of relevant information by individuals even when that individual anticipates of litigation. The reason behind this forgiving attitude is that parties are only put on notice to preserve information that the party knows to

CONTINUED

be relevant to the litigation. *Id.*

In an illustrative example, the United States District Court for the District of Nevada found that an individual plaintiff had not been put on notice to preserve all text messages, and that the deletion of likely relevant text messages prior to receiving discovery requests was not spoliation of evidence. *Painter v. Atwood*, D.Nev. No. 2:12-cv-01215-JCM-RJJ, 2014 U.S. Dist. LEXIS 35060, at *18-19 (Mar. 18, 2014). Conversely, United States District Court for the District of South Carolina held a corporate party liable for spoliation through continued use of a work laptop after litigation was anticipated. *Nucor Corp. v. Bell*, 251 F.R.D. 191, 197 (D.S.C., 2008). Corporate parties are expected to have a higher level of sophistication and understanding of the litigation process than individuals, and this presumption impacts how courts view disputes over e-discovery and preservation of data.

V. Conclusion

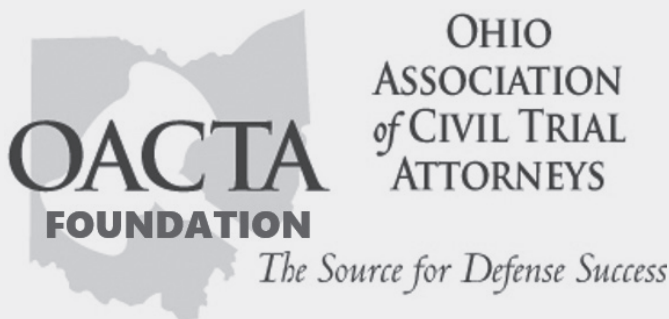
The amount of electronically stored information people and businesses are creating continues to grow. Correspondingly, the ability to obtain and make use of ESI will continue to be a primary concern in nearly all litigation. In order to balance the desire to discover electronically stored information against privacy concerns and the cost of production, parties and courts must take the scope and reasonableness of requests into account. This includes limiting the scope of

requests for cellphone data temporally and by subject, the identifying a factual basis supporting the need for the information, the format of information being sought, and the manner and specifics of obtaining information requested. The burden on parties created by electronic information begins with the duty to preserve, continues in discussions of electronic discovery issues at Rule 26(f) or similar provisions, and permeates throughout the written discovery process. Understanding the importance of this category of information, while also considering how courts are likely to perceive the privacy concerns attendant to a given request for digital information, are key to obtaining favorable outcomes and avoiding sanctions for the destruction of relevant information.

Zachary Pyers, Esq., is a Partner in the Columbus, Ohio office of Reminger Co., LPA and practices in the areas of commercial litigation and professional liability. He is also an Adjunct Professor at Capital University Law School where he teaches a number of litigation focused courses, including a course in E-Discovery.

Kenton H. Steele, Esq., is an attorney in the Columbus, Ohio office of Reminger Co., LPA. He frequently encounters issues relating to discovery of cellphone data when litigating personal injury and professional liability cases.

THE OACTA FOUNDATION

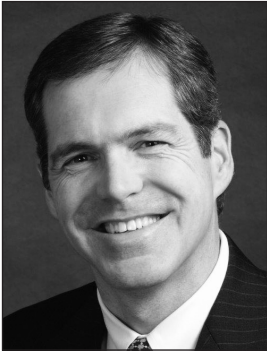


The OACTA Foundation funds projects consistent with the mission of OACTA, such as the OACTA Hilary S. Taylor Law Student Inclusion & Equity Scholarship program and the National Foundation for Judicial Excellence (NFJE). Please consider contributing to The OACTA Foundation. Your support is appreciated!

**LEARN MORE AND
MAKE A CONTRIBUTION**

Ohio Premises Liability and Criminal Acts

Stu Harris, Esq.
Nationwide Insurance



Introduction

Courts in Ohio continue to evaluate a premises owner's duty to safeguard an invitee from the criminal acts of a third party in commercial settings like shopping malls and residential settings like apartments. On this issue,

courts often refer to the American Law Institute position outlined in Comment f to Section 344 of the Restatement of the Law, Torts 2d: "Since the [premises owner or] possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur." This article traces the development of this issue from the Ohio Supreme Court to the appellate court decisions. Some Ohio appellate courts apply a more exacting foreseeability standard requiring the existence of prior similar acts of criminal activity. Many Ohio appellate courts opt to apply a flexible standard of foreseeability based on the totality of the circumstances allowing for evidence of prior similar acts supplemented with additional presentable evidence including the propensity for criminal activities on or near the location of the business, and the character of the business.

For a view from courts around the country, see generally, Annotation, *Parking Facility Proprietor's Liability for Criminal Attack on Patron*, 49 A.L.R.4th 1257 (1986); Annotation, *Liability of Owner or Operator of Shopping Center, or Business Housed Therein, for Injury to Patron on Premises from Criminal Attack by Third Party*, 31 A.L.R.5th 550 (1991).

Ohio Supreme Court: the "Sock" Hop Dance and Prior Similar Acts Test

Like many courts, the Ohio Supreme Court's evaluation of a premises owner's duty to safeguard an invitee from

the criminal acts of a third party was influenced by the American Law Institute position in the Section 344 of the Restatement of the Law, Torts 2d.

In the last year of the 1960's, in *Howard v. Rogers*, 19 Ohio St.2d 42, 249 N.E.2d 804 (1969), the Ohio Supreme Court considered this issue following a fight at a local dance. The plaintiff's allegations included: "[The] defendants provided no police, chaperon or other security protection for paying guests, [for]... the dance sponsored by them, although, defendants knew, in the exercise of ordinary care, of the danger of the outbreak of a fight at said dance...." *Id.* Prior to her injury, the plaintiff testified that she was "dancing with a bunch of friends" and then she observed "people fighting and kicking everywhere." *Id.*

In determining that the dance promoters were not liable, the Supreme Court, speaking for a unanimous Court through Chief Justice Taft, explained: "Thus, where an occupier of premises for business purposes does not, and could not in the exercise of ordinary care, know of a danger which causes injury to his business invitee, he is not liable...." *Id.* In this evaluation, the Court relied on Comment f to Section 344 of the Restatement of the Law, Torts 2d: "Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring or are about to occur...." In reaching a resolution, the Court explained there was no evidence that the defendants either knew or should have known of the likelihood of a fight at the dance. "There is no evidence either of any such conduct at any teen-age dance in or near where this dance was conducted, or of anything which might have put defendants on notice as to the possibility of such a fight." *Id.* See also *Simpson v. Big Bear Stores Co.*, 73 Ohio St.3d 130, 135, 652 N.E.2d 702 (1995).

CONTINUED

Appellate Courts and the Split: prior similar acts of criminal activity and totality of the circumstances

Following the Ohio Supreme Court's lead in *Howard, supra*,—initially Ohio courts applied a more exacting foreseeability standard requiring the existence of prior similar acts of criminal activity. Subsequently, other Ohio courts began applying a flexible standard of foreseeability based on the totality of the circumstances allowing for evidence of prior similar acts supplemented with additional presentable evidence including the propensity for criminal activities on or near the location of the business, and the character of the business. Appellate courts noted a “split as to the appropriate test to determine whether a particular criminal act by a third party against an invitee was foreseeable.” *Heys v. Blevins*, 2d Dist. Montgomery No. 16291 1997, Ohio App. LEXIS 2536 (June 3, 1997). *See also Hickman v. Warehouse Beer Systems, Inc.*, 86 Ohio App.3d 271, 620 N.E.2d 949 (2d Dist. 1993); *McKee v. GILG*, 96 Ohio App.3d 764, 645 N.E.2d 1320 (10th Dist. 1994).

Prior Similar Acts and the Globetrotters

An early appellate court decision applying the prior similar acts test is *Townsley v. Cincinnati Gardens, Inc.*, 39 Ohio App.2d 5, 314 N.E.2d 409 (1st Dist. 1974). Townsley and his high school friend attended a Harlem Globetrotters event at the Cincinnati Gardens. On the way to the concession stand, while Townsley was “in [the] washroom he was approached by a young man who demanded money from him.” *Id.* Townsley declined and the assailant was “joined by other friends” ... “[who] proceeded to assault him ... resulting in the laceration of [his] face and ... loss of two of his front teeth.” *Id.*

In reviewing these facts and applying the prior acts test, the court revisited the holding in *Howard v. Rogers, supra*, and explained: “It ... must appear from the facts and the circumstances of the case presented that the defendant had some prior knowledge or experience of the type of occurrence which occasioned the plaintiff's injuries, as alleged, or that the defendant should reasonably have known of or anticipated the type of danger or acts of third persons which resulted in the injuries sustained by the plaintiff.” *Id.* Accordingly, the court concluded that the facility was not liable to the plaintiff.

Totality of the Circumstances and Parking Lot Violence

The totality of the circumstances test was considered in the courts in the late 1980's and was captured in full by the court in the *Reitz v. May Co. Dep't Stores*, 66 Ohio App.3d 188, 583 N.E.2s 1071 (8th Dist. 1990). In this case, the plaintiff was assaulted and stabbed in the department store parking lot. The plaintiff planned on producing evidence including “a history of criminal activity in May Company's parking area, including thirty-seven car thefts, episodes of disturbances, fights, vandalism, drug transactions, and juvenile disturbances, since 1982, [and] evidence of a nearly identical incident occurring April 12, 1982...” *Id.* The trial court barred this evidence during pretrial hearings. On appeal, the plaintiff asserted that “the totality of the circumstances should be considered when determining a defendant's knowledge include [and should] include evidence of prior nonviolent crimes.” *Id.*

On this issue, the court revisited a key line from the Ohio Supreme Court's decision in *Howard v. Rogers, supra*, on whether there were similar incidents of concern. As noted in *Rogers*, there was “no evidence either of any such conduct at any teen-age dance in or near where this dance was conducted, or of anything which might have put defendants on notice as to the possibility of such a fight.” *Id.* (Emphasis provided by court). In interpreting this key line, the *Reitz* court noted:

Although this language would appear to permit the broad admission of evidence to establish a defendant's knowledge, various interpretations have flowed from this language, including courts' focusing solely on prior similar acts when discussing foreseeability. ... Other courts, however, have referenced more of the total picture or criminal activity in general. *See, e.g., Meyers v. Ramada Inn*, 14 Ohio App.3d 311, 471 N.E.2d 176 (10th Dist. 1984) (special circumstances, such as previous assaults, high crime area); *Daily v. K-Mart Corp.*, 9 Ohio Misc.2d 1, 458 N.E.2d 471 (C.P. 1981 (occurrence of prior criminal incidents)). We are now squarely faced with the issue of what evidence is relevant to establishing foreseeability for the purpose of determining whether a business owes a duty toward its patrons for the criminal acts of third parties. *Id.*

CONTINUED

In considering this pivot, the court indicated that the “totality of the circumstances” is a “better indicator to establish knowledge of a defendant than focusing in on any particular criminal occurrences.” *Accord Morgan v. Bucks Assoc.*, 428 F.Supp. 546 (E.D.Pa. 1977); *Isaacs v. Huntington Memorial Hosp.*, 38 Cal.3d 112, 211 Cal. Rptr. 356, 695 P.2d 653 (1985); *Garner v. McGinty*, 771 S.W.2d 242 (Tex.Ct.App. 1989).

Finally, the court bolstered this determination by referencing Comment f to Section 344 of the Restatement of the Law 2d, Torts (1965), and concluded: “By adopting the totality of the circumstances standard, the first victim is not necessarily precluded from establishing foreseeability and the finite distinctions between how similar prior incidents must be is avoided.” *Id.*

Recently, in *Davis v. Hollins*, 10th Dist. Franklin No. 17AP-716, 2019-Ohio-1789, the court considered a wrongful death action in a grocery store parking lot. Grocery store customers, Barry and Petree, were assaulted and Barry was killed while loading their groceries into their car in the parking lot. Two defendants, Hollins and Hill, arrived at the same shopping plaza to “purchase cocaine.” *Id.* After a verbal altercation with Hill over her driving and rate of speed in the parking lot, Hollins, who was in another vehicle in another part of the same parking lot at the time, drove his vehicle over and “began circling the parking lot at a high rate of speed and struck both Barry and Petree, killing Barry and injuring Petree.” *Id.*

In this 2 to 1 decision with a strong dissent, the court considered whether a business owner has a duty to warn or protect its business invitees from criminal acts of third parties. In evaluating this issue, the court applied the totality of the circumstances test and considered “prior similar incidents, the propensity for criminal activity to occur on or near the location of the business, and the character of the business.” *Id.* The court, speaking through Judge Nelson, indicated that “[t]hree main factors contribute to a court’s finding the evidence insufficient to demonstrate the foreseeability of a crime as a matter of law: (1) spatial separation between previous crimes and the crime at issue; (2) difference in degree and form between previous crimes

and the crime at issue; and (3) lack of evidence revealing defendant’s actual knowledge of violence.” *Id.* Finally, the court noted that “[b]ecause criminal acts are largely unpredictable, the totality of the circumstances must be “somewhat overwhelming” in order to create a duty.” *Id.*, quoting *Reitz v. May Co. Dep’t Stores*, *supra*.

In the dissent, Judge Klatt explained: “The central issue in this case is whether ... the owners/managers of a large shopping center, should have foreseen that a third party would commit vehicular homicide and seriously injure another shopper by purposefully running them down with a car in the parking lot of a Kroger store. I would conclude that such a crime is not foreseeable, and therefore, [owners/managers] owed no duty to protect [plaintiffs] from this type of criminal attack.” *Id.* Judge Klatt focused on the “significant difference in degree and form between the previous crimes reported at the shopping center and the heinous crime at issue here.” *Id.* Noting “no evidence that any of the previous crimes involved homicide or the use of an automobile as a weapon,” Judge Klatt concluded: “A significant difference in degree and form between the previous crimes reported and the crime at issue is one of the significant factors this court has considered in determining that a particular criminal act was not foreseeable, and therefore, no duty was owed.” *Id.*

Conclusion

Ultimately, the Ohio Supreme Court granted an appeal for review in September of 2019 and dismissed it in May of 2020 on “appellants’ application for dismissal.” *Davis v. Hollins*, 158 Ohio St.3d 1502, 2020-Ohio-2832, 144 N.E.3d 440. One can only speculate on the basis for the Ohio Supreme Court’s decision to take the appeal, although it could be the “panel’s original decision [and other appellate decisions] may tend to muddy the initial requirement that to establish liability by a business owner for failure to warn or protect its business invitees against criminal acts by third parties, one must demonstrate that the specific harm at issue was foreseeable....” See *Davis v. Hollins*, *supra* (lead opinion by Judge Nelson)(emphasis supplied by author). The other perspective on the Supreme Court’s interest may have been expressed by Judge Klatt:

CONTINUED

When a retail establishment is located in a high crime area and there is a history of criminal activity involving business invitees on the premises, further criminal activity against business invitees consistent with that history is foreseeable, and therefore, may give rise to some duty to warn or protect business invitees from such activity. Nevertheless, not all forms of violent criminal activity automatically become foreseeable. Otherwise, a business owner essentially would become the insurer of a business invitees' safety, an obligation the law does not impose. Moreover, such liability exposure would create a further disincentive for businesses to locate in high crime neighborhoods.

See *Davis v. Hollins*, *supra* (dissenting opinion).

Finally, the Ohio Supreme Court could have been considering one of the many options for evaluating these cases including the following "tests ... divided into five basic categories: (1) the "specific harm" test; (2) the "prior similar incidents" test; (3) the "totality of the circumstances" test; (4) the "balancing" test;

and (5) the "hindsight" test. Although each of these tests articulates its own distinctive set of criteria for determining foreseeability in criminal attack cases, all five tests may be characterized, at least initially, by their application of either a specific or a general approach to the concept of foreseeability." See 2 *Premises Liability-Law and Practice* § 8B.02. Clairvoyantly speaking, a future decision by the Ohio Supreme Court on this issue is an option.

Stu Harris enjoys working at Nationwide Insurance in Columbus, Ohio and practices in the following areas: Insurance Coverage, Risk Transfer: Additional Insureds and Contractual Indemnity, and Insurance Regulatory Matters. His professional involvement includes: Ohio Association of Civil Trial Attorneys, Ohio State Bar Association-Chair, Insurance Committee, Franklin University-Adjunct Professor, and 15 years of service on the Dublin School Board.

OACTA 2020 Virtual Annual Meeting November 12-13, 2020

Join us for the first-ever OACTA Virtual Annual Meeting, November 12th and 13th! Two, half-day programs are planned, providing outstanding educational opportunities and engagement through live question and answer with our speakers.

You can register for one or both days of the Virtual Annual Meeting! Up to 7.0 CLE credits will be available, including Attorney Professional Conduct Instruction (APC) credit. Register today and plan to join us in November for the OACTA Virtual Annual Meeting!



LEARN MORE • REGISTER TODAY

Retailers Score a Victory on Multiple-Unit Pricing Sales Ads

Eric J. Weiss, Esq.
Reminger Co., LPA



Ohio's Consumer Sales Practices Act ("CSPA") is codified in Chapter 1345 of the Revised Code. R.C. 1345.02(A) prohibits unfair or deceptive acts or practices in connection with a consumer transaction.

Pertinent to this article are sales ads run by local retailers that involve "multiple-unit pricing" – i.e., sales ads that reflect that a specific price advantage exists if consumers purchase a specified number of units of a particular product during a specified period of time. For example, a sales ad offers ten cans of pizza sauce for \$10. The regular price for one can of pizza sauce is \$1.69, so the sale represents a total saving of \$6.90 if the consumer purchases ten cans. The sales ad does not, however, expressly state that the discounted sales price remains applicable if the consumer purchases less than the stated multiple of ten cans.

A recent Eighth Appellate District case addressed whether this type of price promotion violates the CSPA. In *Grgat v. Giant Eagle, Inc.*, 2019-Ohio-4582, 135 N.E.3d 846 (8th Dist.), a consumer commenced a declaratory judgment action against a local retailer in Cuyahoga County challenging the legality of multiple-unit pricing ads under the CSPA. The consumer contended that price promotions (like the pizza sauce ad discussed above) was deceptive because it suggests that the discounted price is only available if the consumer purchases the specified quantity in the sales ad – when in reality the discounted sales price is available irrespective of the quantities purchased.

The consumer did not, however, seek damages for the alleged CSPA violations.

In support of his position, the consumer cited R.C. 1345.02(B)(8), which states that it is deceptive for a supplier to represent "that a specific price advantage exists, if it does not." In addition, the consumer relied on OAC 109:4-3-02(A)(2)(g), which requires that "If there is a minimum amount (or maximum amount) that must be purchased for the advertised price to apply, that fact must be stated."

After the completion of discovery, the retailer moved for summary judgment arguing that the sales ad was neither unfair nor deceptive. The trial court granted the retailer's motion for summary judgment. The consumer timely appealed.

On appeal, the Eighth Appellate District overruled the consumers' assignments of error and affirmed the trial court's decision holding that the sales ads did not violate the CSPA. In doing so, the appellate court held, among other things:

- The trial court correctly found, in order to be deceptive under the CSPA, the act or practice in question must be both false and material to the consumer transaction."
- The CSPA is not a strict liability statute: "Rather than applying strict liability, courts have held that whether a supplier's act or omission is a violation of the CSPA depends on how a reasonable consumer would view it."

CONTINUED

- The consumer presented no evidence that any of the retailer’s multi-unit pricing promotions represented that a specific price advantage existed when it did not. To the contrary, the advertised item was, in fact, being sold at a discounted sales price.
- The trial court did not err in determining that OAC 109:4-3-02(A)(2)(g) did not require the retailer to expressly disclose the fact that the purchase of lesser quantities than the total number indicated in multi-unit pricing promotions would be charged the pro rata price per individual item.¹

The *Grgat* decision is important because it provides clarity as to the legality of these commonly used multiple-unit price promotions.

The *Grgat* decision also is important for perhaps a more subtle reason. As outlined above, the consumer in *Grgat* did not seek damages, but sought only declaratory and injunctive relief. In fact, the consumer in *Grgat* did not even allege that he was deceived by the sales ads, or that he purchased more quantities than he initially wanted to just so he could take advantage of the discounted sales price. This begs the question: why incur the time, cost, and energy associated with bringing this action in the first place?

These facts suggest that the declaratory judgment action may have been only the first step in a more complex, far-reaching legal battle under the CSPA. If the consumer in *Grgat* prevailed in obtaining a declaration that these commonly used price promotions violated the CSPA, such decision would inevitably form the basis for subsequent consumer class action suits against numerous retailers (both national, regional, and family-owned companies). Simply put: the retailer’s victory in *Grgat* may have prevented a subsequent wave of CSPA class action lawsuits against retailers throughout Ohio.

So do not expect local sales ads to change in any significant manner in the near future.

Endnotes

- ¹ On March 3, 2020, the Supreme Court of Ohio declined review of the appellate court’s decision. See *Grgat v. Giant Eagle, Inc.*, 158 Ohio St.3d 1422, 2020-Ohio-647, 140 N.E.3d 741.

Eric J. Weiss is a shareholder at Reminger Co., LPA, wherein his practice emphasizes commercial and professional liability litigation.

Is Grandma's Secret Recipe a Trade Secret?

Gregory R. Farkas, Esq.
Frantz Ward LLC



The formula for Coca-Cola. The herbs and spices in Kentucky Fried Chicken. The ingredients for the secret sauce on a Big Mac (spoiler alert, it is mostly mayo and French dressing). Some of the most iconic trade secrets involve recipes for food and

beverages. But when exactly a recipe is distinctive enough to warrant protection as a trade secret can be a difficult question.

Lawyers practicing in downtown Cleveland may remember the late Tomaydo-Tomahhdo restaurant, which once was a popular spot to grab a quick lunch to bring back to the office. Unfortunately, it was not popular enough and closed. The circumstances surrounding that closing gave an Ohio court the opportunity to explore when a recipe is sufficiently distinctive to constitute a trade secret.

In *Tomaydo-Tomahhdo L.L.C. v. Vozary*, 2017-Ohio-4292, 82 N.E.3d 1180 (8th Dist.) the court considered a claim by the owner of Tomaydo-Tomahhdo that a former partner and employee misappropriated trade secrets by using recipes for certain menu items. *Id.* at ¶ 21. The court started with the basics. It explained that R.C. 1336.61(D) defines a trade secret as:

[I]nformation, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Id. at ¶ 10. The court then noted that in analyzing a trade secret claim it must consider;

The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Id. at ¶ 11 (citations and quotations omitted).

The court then turned to the recipe issue. It held that “[t]he law is clear that lists of needed ingredients and directions for combining them generally require no expressive elaboration or minimal level of creativity.” *Id.* at ¶ 21 (citation and quotation omitted). The court rejected the argument that serving similar items on both restaurants’ menus could constitute a theft of trade secrets because the items on both menus were “typical catering fare.” *Id.* at ¶ 22 (although if a competitor copies

CONTINUED

a restaurant's atmosphere, theme and décor, that could be the basis for a trade dress claim. *Cf. Two Pesos Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 765 (1992)). Finally, it noted that even minor differences in ingredients for the menu items were enough to defeat any trade secret claim because at some level, every "turkey sandwich" is a turkey sandwich. *Id.* at ¶ 25. It is the ingredients or preparation that make a recipe unique that matter.

An Ohio bankruptcy court, while not directly ruling on whether a recipe was a trade secret, illustrated some of the elements that go into such an analysis. Readers of a certain age might remember the television show *M.A.S.H.* and Klinger's frequent reference to Tony Packo's Café in Toledo, Ohio. The descendants of the original owners of Tony Packo's unfortunately ended up in multiple proceedings in common pleas, probate and ultimately bankruptcy court fighting over the ownership of recipes from the family business. The recipes, including recipes for chili soup and hot dog sauce, were passed down through the family and apparently written in a spiral notebook in the 1960's.

In *Parker v. Horvath (In re Horvath)*, 2016 Bankr. LEXIS 3658 (Bankr. N.D. Ohio Oct. 7, 2016), the court entered an injunction prohibiting one of the family members from disclosing the chili soup and hot dog sauce recipes to other parties. The court found that it was undisputed that the recipes were not known to the public and had significant economic value to the company. *Id.* at *57. It therefore recognized them as trade secrets and held that disclosure of the recipes to third parties would work irreparable harm on the bankruptcy estate. *Id.* at *58.

So when will grandma's secret recipe be a trade secret? The answer depends on whether the recipe is unique enough to meet the definition of a trade secret and whether the recipe is in fact treated like one. Evidence that the recipe is truly distinct, rather than merely a version of a "turkey sandwich" will be

critical to the argument. *Cf. Buffets Inc. v. Klinke*, 73 F.3d 965, 968 (9th Cir. 1996) (denying trade secret claim where recipes were "basic American dishes that are served in buffets across the United States" and it was not "a case where material from the public domain ha[d] been refashioned or recreated in such a way to be an original product, but is rather an instance where the end-product is itself unoriginal."); *Hui Kun Li v. Schuman*, No. 5:14-cv-00300, 2016 U.S. Dist. LEXIS 171009, *55 (W.D. Va. Dec. 9, 2016) (rejecting trade secret claim for dishes that were common in Asian cuisine where there was no evidence recipes were different from those generally known in the industry); *Vrainment Hospitality, LLC v. Binkowskii*, No. 8-11-CV-1240-T-33TGW, 2012 U.S. Dist. LEXIS 59331, *39-40 (M.D. Fla. Mar. 19, 2012) (denying preliminary injunction for use of a salted caramel brownie recipe where the alleged secret ingredient was included in salted caramel brownie recipes widely available on internet); *H.E. Butt Grocery Co. v. Moody's Quality Meats*, 951 S.W.2d 33, 38 (Tex. App. 1997) (reversing jury verdict that fajita marinade recipe was trade secret where essential elements of recipe had been published in Annual Meat Institute Seminar paper); *but see Mason v. Jack Daniel Distillery*, 518 So.2d 130, 133 (Ala. Civ. App. 1987) (affirming jury verdict that recipe for Lynchburg Lemonade was trade secret despite evidence bartenders could easily identify ingredients, which were included in many other alcoholic drinks, because jury could have found that method of combining these common ingredients into successful beverage was a trade secret).

Thus, evidence that a menu item would be difficult to recreate without access to the original recipe will support the trade secret claim. *Cf. 205 Corp. v. Brandow*, 517 N.W.2d 548, 550 (Iowa 1994) (affirming permanent injunction and citing testimony from a department chairman of the Culinary Institute of America that it could not determine ingredients in pizza sauce, pizza crust, and grinder recipes without

CONTINUED

access to prohibitively expensive chemical analysis machine, and even then could not determine how ingredients were combined).

Finally, evidence that the recipe was treated as confidential and efforts were taken to protect it from disclosure will be important in proving the recipe is a trade secret. *205 Corp.*, 517 N.W.2d at 550-51 (discussing evidence that recipes were purchased for value, sauce recipes were kept confidential and while crust recipe had to be disclosed to employees making crust, there was evidence they were told to keep it confidential); *Sysco Corp. v. FW Chocolatier*, Pa. Super. No. 1492 WDA 2012, 2013 Pa. Super. LEXIS 1801 *17-19 (Aug. 27, 2013) (affirming grant of preliminary injunction based on testimony that fudge recipe was not written down, apprenticeship program was used to teach recipe only to those with a “need to know,” and that anyone with expertise in confectionery industry was not allowed around the recipe); *Vrainment Hospitality*, 2012 U.S. Dist. LEXIS 59331 at *40-41 (rejecting trade secret claim, despite fact plaintiff had employees sign confidentiality agreements concerning recipe,

because the recipe had been published in local magazines except for single secret ingredient the court found was not actually secret); *Peggy Lawton Kitchens, Inc. v. Hogan*, 466 N.E.2d 138, 139 (Mass App. 1984) (affirming finding chocolate chip cookie recipe was trade secret in part based on evidence only copies of recipe were locked in safe and desk and ingredients were prepared in such way to keep overall recipe secret).

Gregory Farkas, Esq., is a partner with the law firm of Frantz Ward LLP. Greg’s practice encompasses a variety of litigation matters, including commercial disputes, consumer fraud claims, and defense of bad faith and insurance coverage litigation. Greg has represented defendants in numerous class actions in state and federal courts and has authored several articles concerning class action practice. Greg the Chairperson of OACTA’s Business and Commercial Litigation Committee.

**Visit the OACTA website for information
on OACTA seminars and activities...**

WWW.OACTA.org



OHIO
ASSOCIATION
of CIVIL TRIAL
ATTORNEYS

The Source for Defense Success

400 W. Wilson Bridge Rd.
Worthington, Ohio 43085

