

## When can parol evidence contradict my contract? The Bullet Point: Volume 3, Issue 5

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By: [Richik Sarkar](#) , [James W. Sandy](#)

The Bullet Point is a biweekly update of recent, unique, and impactful cases in Ohio state and federal courts in the area of commercial litigation.

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### FDCPA Statute of Limitations

*Preview Point: Case currently before the Supreme Court*

*Rotkiske v. Klemm*, 890 F.3d 422 (3d Cir. 2018) (en banc), cert. granted, No. 18-328, 2019 U.S. LEXIS 1391 (Feb. 25, 2019).

The appeal involves the application the Fair Debt Collection Practices Act (FDCPA)'s one year statute of limitations and whether the "discovery rule" should apply to toll the statute of limitations for FDCPA claims. In this case, plaintiff Kevin Rotkiske had outstanding credit card debt, which the credit card issuer referred to a debt collector. The debt collector filed two lawsuits against Mr. Rotkiske to collect the debt. The first lawsuit, filed in 2008, was withdrawn after it appeared that the complaint was served at an address where Mr. Rotkiske did not reside. The debt collector filed another lawsuit in 2009 and served the complaint at the same address. After Mr. Rotkiske did not appear to defend the lawsuit, the municipal court entered default judgment against him. Mr. Rotkiske claims he was not aware of the outstanding judgment against him until 2014, when he applied for a mortgage. Mr. Rotkiske filed a lawsuit against the debt collector, alleging the defendant violated the FDCPA in obtaining the default judgment.

The defendant debt collector moved to dismiss the claim, arguing the plaintiff filed his lawsuit outside the FDCPA's one-year statute of limitations. The FDCPA provides that "[a]n action to enforce any liability created by this subchapter may be brought . . . within one year from the date on which the violation occurs." 15 U.S.C. § 1692k(d). Therefore, the defendant argued that the plain language of the statute requires the claim to be brought within one year of the alleged violation, which occurred in 2009. In response, the plaintiff argued that because he did not discover the violation until 2014, the application of the "discovery rule" should mean the statute of limitations began running in 2014.

The district court agreed with the defendant debt collector that the statutory text provides that the statute of limitations begins to run from the date of the violation, not the date of discovery. The en banc Third Circuit unanimously affirmed the district court. The United States Supreme Court granted certiorari on February 25, 2019. While the Third Circuit ruled that the discovery rule does not apply to toll the FDCPA statute of limitations, there is currently a federal circuit split over the application of the FDCPA statute of limitations. While the Third Circuit ruled against the consumer plaintiff on this issue, the Fourth and Ninth Circuits have held that statute of limitations begins to run at the time of the plaintiff's discovery, not at the time of the alleged violation. The Supreme Court will provide a definite resolution to this question and will ultimately bring clarity to this issue.

**The Bullet Point:** The Third Circuit used statutory interpretation to conclude that the text of the FDCPA shows the statute of limitations begins as of the date of the alleged FDCPA violation, not when a plaintiff discovers the violation. Consequently, the Third Circuit declined to employ the "discovery rule" for purposes of the FDCPA's statute of limitations. If the Supreme Court agrees with the Third Circuit, some potential consumer plaintiffs may learn of FDCPA violations only after the statute of limitations has run, limiting the remedy for consumers. However, creditor advocates would argue that affirming the Third Circuit's decision will advance the "security and stability" statute of limitations provide and would protect debt collectors from unanticipated FDCPA claims brought years after an alleged violation.

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### Merger By Deed

*V.T. Larney, Ltd. v. Locust Street Invest. Co.*, 7th Dist. Mahoning No. 17 MA 0101, 2019-Ohio-496.

This was an appeal of the trial court's decision to grant summary judgment to the defendant on breach of contract and unjust enrichment claims. The defendant owned an apartment complex. In 2004, it entered into a five year lease of the premises with the plaintiff, which contained an option to purchase. The plaintiff was entitled to a credit towards the purchase price for rental payments made. Thereafter, the parties re-negotiated the terms (and a prior breach) and ultimately entered into a new lease in 2010. It contained similar language as the old lease. However, a dispute arose about credits to the purchase price for rental paid prior to 2010. Eventually, the plaintiff purchased the property at the price demanded by the defendant and then filed a lawsuit for breach of contract and unjust enrichment. Defendant moved for summary judgment and the trial court granted the motion.

On appeal, the Seventh Appellate District reversed, finding an issue of fact existed on the defendant's merger by deed and laches defenses.

**The Bullet Point:** When a deed is delivered and accepted without qualification pursuant to an agreement in Ohio, no cause of action upon the prior agreement generally exists thereafter. In this situation, the purchase contract merges into the deed. However, where the deed is accepted "under protest" and with a reservation of rights, it is typically excepted from the merger doctrine.

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### Contract Ambiguity

*Campbell v. 1 Spring, LLC*, 10th Dist. Franklin No. 18AP-94, 2019-Ohio-623.

This was an appeal of the trial court's decision to grant plaintiff judgment on claims for breach of contract and unjust enrichment. The defendant had entered into a lease with an advertisement company to have an outdoor advertisement placed on a building it owned. The lease required a payment of \$80,000 per year for ten years. After the lease had been signed, the defendants were advised that due to the building's proximity to a highway, they would also need to get the Ohio Department of Transportation's (ODOT) approval to place the advertisement. ODOT refused and advised that defendants would need to acquire all other existing advertising in the area. Defendants were then put in touch with the plaintiff, former chief of staff of ODOT, as it was suggested that he could assist with the signage issue. The parties memorialized the agreement. Thereafter, plaintiff worked with ODOT to eventually change the rules regarding the placement of the signage, and the defendant ultimately was able to get its advertisement placed in 2013. Thereafter, plaintiff filed suit for breach of contract.

Eventually, the matter proceeded to trial and the court found in favor of the plaintiff.

Defendants appealed and on appeal, the Tenth Appellate District reversed, finding that the trial court applied the wrong standard in determining whether the contract was

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ambiguous.

**The Bullet Point:** If a contract is not ambiguous, it must be enforced as written. "Contractual language is 'ambiguous' only where its meaning cannot be determined from the four corners of the agreement or where the language is susceptible of two or more reasonable interpretations." If the terms of the contract are clear and precise, it is not ambiguous and the court may not refer to evidence outside of the contract to determine the meaning of those terms. However, "[w]hen the language of a contract is unclear or ambiguous, or when the circumstances surrounding the agreement give the plain language special meaning, extrinsic evidence can be used to ascertain the intent of the parties."

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#### The Parol Evidence Rule

*PJ Lindy & Co, Inc. v. Savage*, 6th Dist. Erie No. E-18-028, 2019-Ohio-736.

This was an appeal of the trial court's decision to dismiss a lawsuit. Plaintiff had entered into a real estate purchase with the defendant to buy 4.3 acres of real estate. Prior to the sale, the defendants had been using the property as a banquet facility and plaintiff intended to use the property in a similar manner. Plaintiff claimed that prior to the sale, the defendants fraudulently misrepresented that it could serve alcohol at the property, host outdoor functions, and have late night events at the site. After purchasing the property, plaintiff found out that the property was subject to various zoning restrictions and defendant's representations were untrue. Plaintiff sued defendant for breach of contract, fraud, misrepresentation, and promissory estoppel. Defendants answered the complaint and moved for judgment on the pleadings, arguing that the claims were barred by the parol evidence rule and statute of frauds. The trial court agreed and dismissed the lawsuit.

On appeal the Sixth Appellate District reversed, finding that an issue of fact existed as to whether the claims were barred by the parol evidence rules.

**The Bullet Point:** The parol evidence rule provides that "absent fraud, mistake or other invalidating cause, the parties' final written integration of their agreement may not be varied, contradicted or supplemented by evidence of prior or contemporaneous oral agreements, or prior written agreements." The parol evidence rule protects the integrity, predictability, and enforceability of written contracts by prohibiting evidence of any purported agreements that are extrinsic to the contract. "Extrinsic evidence is excluded because it cannot serve to prove what the agreement was, this being determined as a matter of law to be the writing itself." *Id.*

"Nevertheless, the parol evidence rule does not prohibit a party from introducing parol or extrinsic evidence for the purpose of proving fraudulent inducement." Indeed, "it was never intended that the parol evidence rule could be used as a shield to prevent the proof of fraud, or that a person could arrange to have an agreement which was obtained by him through fraud exercised upon the other contracting party reduced to writing and formally executed, and thereby deprive the courts of the power to prevent him from reaping the benefits of his deception or chicanery."