ORIGINAL

IN THE SUPREME COURT OF OHIO

SANDRA J. TAYLOR JARVIS,	:	Case Number 2013-0118
Plaintiff-Appellee	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
vs.	:	
FIRST RESOLUTION INVESTMENT CORP., et al.,	:	Court of Appeals Case No. CA26042
Defendants-Appellants	:	

MERIT BRIEF OF APPELLANTS, FIRST RESOLUTION INVESTMENT CORP. AND FIRST RESOLUTION MANAGEMENT CORP.

Jeffrey C. Turner (0063154)
John Langenderfer (0079094)
Kevin A. Lantz (0063822) (Counsel of Record)
Surdyk, Dowd & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
Tel. (937) 222-2333
Fax (937) 222-1970
jturner@sdtlawyers.com
jlangenderfer@sdtlawyer.com
klantz@sdtlawyers.com
Attorneys for Appellants First Resolution Investment Corp. & First Resolution Management Corp.

Boyd W. Gentry, Esq.
Law Office of Boyd W. Gentry, LLC
9 East Dayton Street
West Alexandria, Ohio 45381
937.839.2881
Fax 800.839.5843
Bgentry@boydgentrylaw.com
Attorney for Appellants Cheek Law Offices, LLC and Attorney Parri Hockenberry

James F. Burke, Jr., Esq.
John J. Horrigan, Esq.
Burke & Horrigan
1660 West Second Street
900 Skylight Office Tower
Cleveland, Ohio 44113
216-685-1700
216-664-6901 (fax)
Attorneys for Appellee Sandra J. Taylor Jarvis

FILED
JUN 24 2013
CLERK OF COURT
SUPREME COURT OF OHIO

RECEIVED
JUN 24 2013
CLERK OF COURT
SUPREME COURT OF OHIO

Michael D. Slodov
Counsel of Record
Sessions, Fishman, Nathan & Israel, LLC
15 E. Summit St.
Chagrin Falls, Ohio 44022
(440) 318-1073
(fax) (216) 359-0049
mslodov@sessions-law.biz
Attorneys for Amici Curiae
Ohio Creditor's Attorney's Association
and DBA International

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. STATEMENT OF FACTS AND THE CASE 1

II. ARGUMENTS IN SUPPORT OF APPELLANTS' PROPOSITIONS OF LAW 3

Proposition of Law No. I:...Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio. 3

A. Choice-of-Law principles do not determine procedure 4

B. The absence of a cardholder agreement renders Ohio's borrowing statute inapplicable. 6

C. In the alternative, the Court's interpretation of "accrual" shows Appellants' action accrued in Ohio. 8

D. The Court of Appeals erred when it applied Section 188 to determine where the action accrued. 12

E. If Section 188 applies, it nevertheless dictates that Appellants' action accrued in Ohio 13

Proposition of Law No. II: ..... Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment and subsequent insufficient payments do not cure the breach. 14

Proposition of Law No. III:.... A complaint for breach of a credit card contract may pray for a post-judgment interest rate that exceeds the statutory rate when there is evidence suggesting that the parties agreed to the higher rate. 18

Proposition of Law No. IV: .. The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no "consumer transaction" or "supplier." 22

A. The Appellants did not participate in a "consumer transaction." 22

B. The Appellants are not "suppliers." 25

IV. CONCLUSION 26

V. CERTIFICATE OF SERVICE 27

APPENDIX

TABLE OF AUTHORITIES

Cases

Almand v. Reynolds & Robin, P.C., 485 F.Supp.2d 1361 (M.D.Ga.2007) 4
Am. Express Centurian Bank v. Banaie, 7th Dist. No. 10 MA 9, 2010-Ohio-6503 15
Anderson v. Barclay's Capital Real Estate, Inc., Slip Opinion No. 2013-Ohio-1933 ..... 23, 24, 25
Bank One, Columbus, N.A. v. Palmer, 63 Ohio App.3d 491, 579 N.E.2d 284 (10th Dist.1989) 5, 19
Beattie v. D.M. Collections, Inc., 754 F.Supp. 383 (D.Del.1991) 4
Broadnax v. Greene Credit Service, 118 Ohio App.3d 881, 694 N.E.2d 167 (2nd Dist.1997) 25
Calvary S.P.V. I, L.L.C. v. Krantz, 8th Dist. No. 97422, 2012-Ohio-2202 10
Canterbury v. Columbia Gas of Ohio, S.D.Ohio No. C2-99-1212, 2001 WL 1681132 (Sept. 25, 2001) 3
Capital One Bank (USA) v. Rhoades, 8th Dist. No. 93968, 2010-Ohio-5127 16
Capital One Bank (USA), N.A. v. Heidebrink, 6th Dist. No. OT-08-049, 2009-Ohio-2931 10
Capital One Bank v. Rodgers, 5th Dist. No. CT2009-0049, 2010-Ohio-4421 ..... *passim*
Casserlie v. Shell Oil Co., 8th Dist. No. 88361, 2007-Ohio-2633 15
Celebrezze v. United Research, Inc., 19 Ohio App.3d 49, 482 N.E.2d 1260 (9th Dist.1984) 13, 25
Children's Hospital v. Ohio Dept. of Public Welfare, 69 Ohio St.2d 523, 433 N.E.2d 187 (1982) 9, 13, 16
Combs v. International Ins. Co., 163 F.Supp.2d 686 (E.D.Ky.2001), *aff'd*, 354 F.3d 568 (6th Cir.2004) 10, 11
Curl v. Greenlee Textron, Inc., 404 F.Supp.2d 1001 (S.D.Ohio 2005) 11
D.A.N. Joint Venture III, L.P. v. Armstrong, 11th Dist. No. 2006-L-089, 2007-Ohio-898 15
Deere v. Javitch, Block and Rathbone LLP, 413 F.Supp.2d 886 (S.D.Ohio 2006) 19
Discover Bank C/O DFS Servs. L.L.C. v. Lammers, 2nd Dist. No. 08-CA-85, 2009-Ohio-3516 19
Discover Bank v. Cummings, 9th Dist. No. 08CA009453, 2009-Ohio-1711 16
Discover Bank v. Heinz, 10th Dist. No. 08AP-1001, 2009-Ohio-2850 16
Discover Bank v. Poling, 10th Dist. No. 04AP–1117, 2005-Ohio-1543 16
Doner v. Snapp, 98 Ohio App.3d 597, 649 N.E.2d 42 (2nd Dist.1994) 15
Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC, 702 F.Supp.2d 826 (N.D.Ohio 2010) 11, 14, 15, 16
Executone of Columbus, Inc. v. Inter-Tel, Inc., 665 F.Supp.2d 899 (S.D.Ohio 2009) 11, 14
Gatto v. Frank Nero Auto Lease, Inc., 8th Dist. No. 74894. 1999 WL 195664 (Apr. 8, 1999) 25
Gionis v. Javitch, Block & Rathbone, 405 F.Supp.2d 856 (S.D.Ohio 2005) 23
Gregory v. Flowers, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972) 15
Gries Sports Enterprises, Inc. v. Modell, 15 Ohio St.3d 284, 473 N.E.2d 807 (1984) 5, 12

Hartman v. Asset Acceptance Corp., 467 F.Supp.2d 769 (S.D.Ohio 2004) 24
Harvey v. Great Seneca Financial Corp., 453 F.3d 324 (6th Cir.2006) 18
Heiges v. JP Morgan Chase Bank, N.A., 521 F.Supp.2d 641 (N.D.Ohio 2007) 11
Howard v. Allen, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972) 5
Inter Ins. Exchange of the Chicago Motor Club v. Wagstaff, 144 Ohio St. 457, 59 N.E.2d 373 (1945) 9, 23
Kincaid v. Erie Ins. Co., 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207 (2010) 9, 13, 16
Lamb v. Javitch, Block & Rathbone, L.L.P., S.D.Ohio No. 1:04-CV-520, 2005 WL 4137786 (Jan. 24, 2005) 23
Lawson v. Valve-Trol Co., 81 Ohio App.3d 1, 610 N.E.2d 425 (9th Dist.1991) 5
Lewis v. Steinreich, 73 Ohio St.3d 299, 1994-Ohio-133, 652 N.E.2d 981 (1995) 5
Lindbergh v. Transworld Systems. Inc., 846 F.Supp. 175 (D.Conn.1994) 4
Matrix Acquisitions, L.L.C. v. Swope, 8th Dist. No. 94943, 2011-Ohio-111 21
Matrix Acquisitions, LLC v. Hooks, 5th Dist. No. 10CA1112, 2011-Ohio-3033 ..... 7, 11
Meekison v. Groschner, 153 Ohio St. 301, 91 N.E.2d 680 (1950) 10
Midland Funding. L.L.C. v. Paras, 8th Dist. No. 93442, 2010-Ohio-264 ..... 4, 6
Minster Farmers Coop. Exchange Co., Inc. v. Meyer, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056 ..... 19, 20
Morgan v. Biro Mfg. Co., Inc., 15 Ohio St.3d 339, 474 N.E.2d 286 (1989) 5
Nationwide Mut. Ins. Co. v. Ferrin, 21 Ohio St.3d 43, 487 N.E.2d 568 (1986) 12
Norgard v. Brush Wellman, Inc., 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977 12
Ohayon v. Safeco Ins. Co. of Illinois, 91 Ohio St.3d 474, 2001-Ohio-100, 747 N.E.2d 206 12
Resner v. Owners Ins. Co., 3rd Dist. No. CA 2001 0091, 2002 WL 236970 (Feb. 14, 2002) 13
Schroyer v. Frankel, 197 F.3d 1170 (6th Cir.1999) 25
Siemientkowski v. Bank One Columbus, N.A., 8th Dist. No. 66531, 1994 WL 663483 (Nov. 23, 1994) 16
Simmons v. Miller, 970 F.Supp. 661 (S.D.Ind.1997) 4
Smith v. Palasades Collection, LLC., N.D.Ohio No. 1:07 CV 176, 2007 WL 1039198 (Apr. 3, 2007) 10, 14
Smither v. Asset Acceptance, LLC, 919 N.E.2d 1153 (Ind.App.2010) 10, 16, 17
State ex rel. Hawley v. Industrial Commission, 137 Ohio St. 332, 30 N.E.2d 332 (1940) ..... *passim*
State v. LaSalle, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172 14
The Limited Stores, Inc. v. Pan American World Airways, Inc., 65 Ohio St.3d 66, 600 N.E.2d 1027 (1992) 12
Torrance v. Cincinnati Mortg. Co. Inc., S.D.Ohio No. 1:08–CV–403, 2009 WL 961533 (Mar. 25, 2009) 23
Turner v. Retirement Plan of Marathon Oil Co., 659 F.Supp. 534 (N.D.Ohio 1987) 15
Unifund CCR Partners Assignee of Palisades Collection, LLC v. Childs, 2nd Dist. No. 23161, 2010-Ohio-746 6
Williams v. Am. Suzuki Motor Corp., 5th Dist. No. 20076-CA-00172, 2008-Ohio-3123 . 22

Willits v. Peabody Coal Co., 6th Cir. Nos. 98-5458, 98-5527, 1999 WL 701916 (Sept. 1, 1999) 10
Wright v. Asset Acceptance Corp., S.D.Ohio No. C–3–97–375, 2000 WL 33216031 (Jan. 3, 2000) 4
York v. Ohio State Highway Patrol, 60 Ohio St.3d 143, 573 N.E.2d 1063 (1991) 18

Statutes

10 Del.C. § 8106(a) 3
15 U.S.C. § 1692 *et seq.* 1
15 U.S.C. § 1692i(a)(2) 9, 13
R.C. § 1345.01 *et seq.* 1
R.C. § 1345.01(A) 22
R.C. § 1345.01(C) 25
R.C. § 1345.02(A) 22
R.C. § 1345.03(A) 22
R.C. § 2305.03 ..... 7, 14
R.C. § 2305.03(B) 3, 7, 8
R.C. § 2305.06 ..... 3, 6
R.C. § 2305.07 ..... 3, 6
R.C. § 5725.01 22

Other Authorities

Am. Sub. S.B. No. 80 7
Ohio Const. art. II, § 28 14
Restatement (Second) Conflict of Laws § 142(2) (1971) 6
Restatement (Second) of Conflicts of Laws § 188 (1971) 5
Sub. S.B. No. 224 3

Rules

Civ.R. 8(A) 18

I. STATEMENT OF FACTS AND THE CASE

This case concerns an effort by a credit card holder – admittedly in default of payment – to avoid the Appellants' attempt to collect on her debt. In response to the attempt, the Appellee, Sandra J. Taylor Jarvis ("Jarvis"), accuses the Appellants, First Resolution Investment Corporation ("FRIC"), First Resolution Management Corporation ("FRMC") (collectively, "Appellants"), Cheek Law Offices, LLC, and Attorney Parri Hockenberry, of multiple violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.* ("FDCPA" or "the Act"). This Court should reverse the Ninth District and hold the Appellants did not violate the Act because they properly brought their claims or, alternatively, because they did not knowingly assert a time-barred action and because their requested relief was a matter for the trial court to determine. In addition, the Court should determine Appellants are not subject to the Ohio Consumer Sales Practices Act, R.C. § 1345.01 *et seq.* ("OCSPA") because neither a "consumer transaction" nor a "supplier" is involved. Finally, the Court should find Appellee's abuse of process claim is without merit.

Jarvis opened, used and defaulted upon a Chase Bank credit card account. (Appellee's Mem. in Resp. to Appellants' Mem. in Supp of Jurisdiction at 2; Supp. at 2-3 (Jarvis Resp. to Req. for Admis. Nos. 7-15)). Charges were incurred on the account. (*Id.*) After Jarvis satisfied a previous past-due amount by payment received on October 17, 2004, (*see id.* at 2, 12, 13 (Jarvis Resp. to Req. for Admis. No. 7 and statements attached as "C 3 of 21" and "C 4 of 21")), she failed to make a minimum monthly payment on January 1, 2005, (*id.* at 2, 15, 17 (Jarvis Resp. to Req. for Admis. No. 8 and statements attached as "C 6 of 21" and "C 8 of 21")). Jarvis thereafter failed to make *any* minimum monthly payments. (*Id.* at 2-3 (Jarvis Resp. to Req. for Admis. Nos. 10-15)).

Jarvis's monthly statements for the periods, December 8, 2004 to January 7, 2005 and January 8, 2005 to February 7, 2005 state, "Your credit card account is past due!" (*Id.* at 2, 17, 19 (Jarvis Resp. to Req. for Admis. No. 7 and statements attached as "C 8 of 21" and "C 10 of 21")). Jarvis's monthly statement for the period, February 8, 2005 to March 7, 2005, states, "You risk losing the charge privileges on your credit card account." (*Id.* at 2, 21 (Jarvis Resp. to Req. for Admis. No. 7 and statement attached as "C 12 of 21")). Jarvis's monthly statement for the period, March 8, 2005 to April 7, 2005, states, "Your charge privileges are now revoked." (*Id.* at 2, 23 (Jarvis Resp. to Req. for Admis. No. 7 and statement attached as "C 14 of 21")). Jarvis's account was marked delinquent on February 7, 2005. (Supp. at 32 (FRMC Resp. to Interrog. No. 23)). Jarvis's made her final payment on June 28, 2006 in the amount of $50.00, less than the minimum payment due. (*See* Supp. at 53 (Am.Countercl., ¶ 70)).

FRIC purchased Jarvis's account. (Supp. at 100 (Reply to Am. Countercl., ¶ 11)). FRIC retained FRMC to communicate with Jarvis. (*Id.* at 101 (Reply to Am.Countercl., ¶ 24)). In September 2009, FRMC forwarded correspondence to Jarvis in an attempt to collect on the account. (*See id.*, ¶ 34). After the correspondence proved fruitless, FRIC retained Appellants, Cheek Law Offices, LLC and Attorney Parri Hockenberry (collectively, "Cheek"), to sue on Jarvis's account. On March 9, 2010, Cheek filed a Complaint seeking $8,765.37 on the Chase Bank account, accrued interest of $7,738.99 and future interest at twenty-four percent, (Supp. at 37, 38 (Compl.)), the approximate interest rate identified in Chase Bank's billing statements, (*Id.* at 2, 10-30 (Jarvis Resp. to Req. for Admis. No. 7 and attached statements)). Jarvis answered and counterclaimed. Subsequently, FRIC dismissed the suit.

Jarvis filed an Amended Class Action Counterclaim to allege Appellants violated the FDCPA, OCSPA and abused process. (*See generally*, Supp. at 42 (Am.Countercl.)) Appellee's

allegations distill to two theories: 1) Appellants filed a time-barred lawsuit, according to Delaware law, 10 Del.C. § 8106(a) (three-year statute of limitations) (Appx. at 45), applying R.C. § 2305.03(B) (borrowing statute) (Appx. at 44), rather than Ohio's 15-year statute for written contracts, former R.C. § 2305.06 (Appx. at 47),[1] or the state's six-year statute for non-written contracts, R.C. § 2305.07 (Appx. at 48); and 2) Appellants prayed for post-judgment interest at 24 percent, in excess of the statutory rate, without evidence of a written contract confirming the rate.

The trial court granted the Appellants' motions for summary judgment. (Appx. at 27). Jarvis filed a timely appeal with the Ninth District Court of Appeals. The appellate court remanded the case, holding Appellants' case was time-barred because the action accrued in Delaware on or about June 28, 2006, which was after R.C. § 2305.03(B)'s effective date, April 5, 2005. (Appx at 4). The Appellants appealed from the Ninth District's judgment, (Appx. at 1), and this Court accepted jurisdiction.

II. ARGUMENTS IN SUPPORT OF APPELLANTS' PROPOSITIONS OF LAW

Proposition of Law No. I: Absent an agreement otherwise, a cause of action against an Ohio consumer for breach of a credit card contract accrues in Ohio.

Jarvis claims that Appellants violated the FDCPA by threatening to file and by filing a time-barred action to collect a debt. (Supp. at 42, 68-73 (Am.Countercl., Counts I and II)). To succeed, Appellee must prove that the Appellants knew their action was time-barred. "A threat to sue a consumer on a debt that is *known to be time barred* is a deceptive collection practice under the FDCPA." *Canterbury v. Columbia Gas of Ohio*, S.D.Ohio No. C2-99-1212, 2001 WL 1681132, * 6 (Sept. 25, 2001) (emphasis added); *Wright v. Asset Acceptance Corp.*, S.D.Ohio

[1] The General Assembly modified R.C. § 2305.06 to an eight-year statute of limitation following commencement of this action. Sub. S.B. No. 224 (eff. June 28, 2012).

No. C–3–97–375, 2000 WL 33216031, * 3 (Jan. 3, 2000) (same); *see Almand v. Reynolds & Robin, P.C.*, 485 F.Supp.2d 1361, 1364 (M.D.Ga.2007) (without controlling authority from the state's highest court, the "defendants did not knowingly file a time-barred suit" and "could not have violated the FDCPA"); *Simmons v. Miller,* 970 F.Supp. 661, 664 (S.D.Ind.1997) (uncertain limitations law precluded FDCPA liability); *Lindbergh v. Transworld Systems, Inc.*, 846 F.Supp. 175, 179 (D.Conn.1994) (summary judgment granted where plaintiff debtor produced no specific evidence "suggesting that the defendant actually knew or should have known that the collection of the plaintiff's debt was time-barred."); *see also Beattie v. D.M. Collections, Inc.*, 754 F.Supp. 383, 393 (D.Del.1991) (knowingly threatening lawsuit "debt collector knows or should know is unavailable or unwinnable by reason of a legal bar such as the statute of limitations is the kind of abusive practice the FDCPA was intended to eliminate.")

Because Appellants' suit was not time-barred, the Court should reverse the Ninth District. Alternatively, because the Ninth District's decision runs counter to prevailing authority, the Court should hold Appellants' did not act knowingly when they sued Appellee.

A. Choice-of-Law principles do not determine procedure.

Ohio law instructs that when parties to a credit card agreement disagree whether Ohio's or another state's law governs the contact, the "argument raises a choice of law issue." *Capital One Bank v. Rodgers*, 5th Dist. No. CT2009-0049, 2010-Ohio-4421, ¶ 16 ("*Rodgers*"). Choice-of-law principles apply when the cardholder agreement is in the record, *Midland Funding, L.L.C. v. Paras*, 8th Dist. No. 93442, 2010-Ohio-264, ¶ 11-12 ("*Paras*") or as here,[2] when it is not,

[2] Jarvis could neither admit nor deny whether she "entered into a credit card agreement/contract with Chase USA" or that the Cardmember Agreement attached to FRIC's requests for admission governed her account with Chase. (Supp. at 1, 2 (Jarvis Resp. to Req. for Admis. Nos. 1, 5)).

Rodgers, 2010-Ohio-4421, ¶ 15.[3] To determine the applicable *substantive* law, this Court adopted the multi-factor, "most significant relationship," test set forth in the Restatement (Second) of Conflicts of Laws § 188 (1971), "[i]n the absence of an effective choice of law by the parties," *Gries Sports Enterprises, Inc. v. Modell*, 15 Ohio St.3d 284, 473 N.E.2d 807 (1984), syllabus ("*Gries*"). Later, the Court broadened its adoption. "We hereby adopt the theory stated in the Restatement of the Law of Conflicts, as it is more reflective of our past decisions and also provides sufficient guidelines for future litigation." *Morgan v. Biro Mfg. Co., Inc.*, 15 Ohio St.3d 339, 342, 474 N.E.2d 286 (1989). Since the record is devoid of the contract's guidance, the Court must apply the Restatement.

The Restatement dictates the proper result here; an outcome contrary to the Ninth District's holding. The answer is found not in Section 188, relied on by the court of appeals, (Appx. at 13-15), because Section 188 determines which forum's *substantive* law to apply. "In choice-of-law situations, the *procedural laws of the forum state*, including applicable statutes of limitations, are generally applied." *Lawson v. Valve-Trol Co.*, 81 Ohio App.3d 1, 3-4, 610 N.E.2d 425 (9th Dist.1991) (citing, *inter alia, Howard v. Allen*, 30 Ohio St.2d 130, 283 N.E.2d 167 (1972) (emphasis added)). This Court recognized the distinction when determining which state's law to apply to an estate administrator's declaratory judgment action. "*As Ohio procedural law does not bar the present action*, we now consider whether Ohio or Florida law controls * * *" *Lewis v. Steinreich*, 73 Ohio St.3d 299, 303, 1994-Ohio-133, 652 N.E.2d 981 (1995) (emphasis added).

---

[3] Notwithstanding the cardholder agreement's absence, Appellee entered into a legally-binding agreement when she used the credit card Chase issued. *Bank One, Columbus, N.A. v. Palmer*, 63 Ohio App.3d 491, 493, 579 N.E.2d 284 (10th Dist.1989) ("*Palmer*") (citing *Manufacturers & Traders Trust Co. v. Lindauer*, 135 Misc.2d 132, 513 N.Y.S.2d 629 (1987)).

The Restatement is explicit. "An action will be maintained if it is not barred by the statute of limitations of the forum, *even though it would be barred by the statute of limitations of another state* * * *" Restatement (Second) Conflict of Laws § 142(2) (1971) (emphasis added). "Section 142(2) thus requires Ohio courts to apply Ohio's statute of limitations to breach of contract actions brought in Ohio, even if the action would be time-barred in another state." *Unifund CCR Partners Assignee of Palisades Collection, LLC v. Childs*, 2nd Dist. No. 23161, 2010-Ohio-746, ¶ 15 ("*Childs*"). Since "an express statement that the parties intended another state's limitations statute to apply [is absent from the record], the procedural law of the forum [state] governs time restrictions on an action for breach, while the law chosen by the parties governs the terms of their contract." *Paras*, 2010-Ohio-264, ¶ 11 (quoting *Cole v. Milletti*, 133 F.3d 433, 437 (6th Cir.1998)); *accord Rodgers*, 2010-Ohio-4421, ¶ 15-19. Applying Section 142(2) of the Restatement, if Appellants brought the action within the applicable Ohio statute of limitations, the case is properly maintained in this state.

The record shows that whether the Court applies the 15 year statute applicable to written contracts, former R.C. § 2305.06, or the six year statute for contracts not in writing, R.C. § 2305.07, FRIC and FRMC filed this case during operation of the statute. Applying the six year statute, Jarvis' breach must have occurred on or after March 9, 2004, considering Appellants filed suit on March 9, 2010. (Supp. at 37 (Compl.)) The Appellants assert Jarvis' breach occurred on January 1, 2005. Jarvis claims it happened some 18-19 months later. In either case, Appellants timely filed suit.

B. The absence of a cardholder agreement renders Ohio's borrowing statute inapplicable.

Jarvis wants to interpose Ohio's borrowing statute on the Restatement. The statute provides:

> No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

R.C. § 2305.03(B) (eff. April 7, 2005).[4] The Court should reject Appellee's effort to eliminate the Restatement's clarity.

First, the agreement's absence from the record renders Jarvis' reliance on Delaware law baseless:

> Appellant argues because Bank One and Chase were Delaware corporations *and the billing statements originated in Delaware*, it is presumed Delaware law controls under the cardholder agreement. * * *
>
> Appellant asserts pursuant to Ohio's borrowing statute, found in R.C. 2305.03, the cause of action herein accrued in Delaware, therefore the Delaware statute of limitations governs the action. Further, Appellant suggests the choice of law provision in the cardholder agreement most likely specifies Delaware law should govern the action.
>
> Matrix did not offer the cardholder agreement into evidence. * * *
>
> * * *
>
> Appellant has conclusively and summarily alleged the cause of action accrued in Delaware and the cardholder agreement is likely to elect Delaware Law as the choice of law. However, upon our review, we find Appellant has not affirmatively demonstrated via the pleadings, written admissions and affidavits submitted in support thereof, how the laws of the State of Delaware govern the subject account. As neither party has filed the cardholder agreement with their pleadings or in support of the motion or in opposition to summary judgment, we find the trial court properly applied the law of the State of Ohio.

Matrix Acquisitions, LLC v. Hooks, 5th Dist. No. 10CA1112, 2011-Ohio-3033, ¶ 10-12, 15 ("*Hooks*") (emphasis added).

Similarly, in *Rodgers*, Capital One sued on a credit card account more than three years after the last payment on the account was made on April 11, 2006. *Rodgers*, 2010-Ohio-4421, ¶

[4] The General Assembly enacted R.C. § 2305.03(B) when it amended the Revised Code to enact tort reform provisions. *See* Am. Sub. S.B. No. 80 (eff. Apr. 7, 2005).

2, 3, 15. The appellant argued the cause of action was barred by Virginia's three year statute of limitations because the account was allegedly governed by Virginia law. *Id.*, ¶ 15. The court of appeals pointed out there was no evidence of the agreement governing the account. *Id.* The Court, relying on *Childs* and *Paras*, held that Ohio's statute of limitations applied since there was no evidence that the parties agreed to a different state's statute of limitations. *Id.*, ¶ 15, 19.

As in *Hooks* and *Rodgers*, Jarvis has no evidence of an agreement to apply the statute of limitations from another state. Appellee alleged she applied to a Delaware corporation (later merged into Bank One) for a credit card, (Appellee's Mem. in Resp. to Mem. in Supp. of Jurisdiction at 2-3), and that the monthly billing statements "indicated that [she] was to send her payment to * * * Delaware," (*id.* at 3). Like *Hooks* and *Rodgers*, Appellee merely presumes Delaware law controls under the cardholder agreement. Therefore, Jarvis has nothing but speculation and conjecture to support her theory that Delaware procedure applies. The Court should reject Appellee's meritless assertion, apply the Restatement and hold Ohio procedure controls.

C. In the alternative, the Court's interpretation of "accrual" shows Appellants' action accrued in Ohio.

Next, the express terms of the borrowing statute focus on where a cause of action "accrued." R.C. § 2305.03(B). If Jarvis' invocation of Delaware procedure is legitimate, her argument that Appellants' cause of action accrued there lacks substance. This Court settled the question over 70 years ago. "A cause of action 'arises' at the place where the facts creating the necessity for bringing the action occur." *State ex rel. Hawley v. Industrial Commission*, 137 Ohio St. 332, 335, 30 N.E.2d 332 (1940). Hawley was injured on the job in Summit County and his workers' compensation claim was allowed for temporary total disability until he returned to work. *Id.* at 332. Once back on the job, Hawley claimed the same injury impaired his earning

capacity and applied for permanent partial disability payments. *Id.* at 332-33. The Industrial Commission denied Hawley's claim and his request for rehearing. *Id.* at 333. Hawley then sought mandamus in Summit County to order the Commission to reverse its decision. *Id.* The Supreme Court held Hawley's action arose in Franklin County because "[h]is alleged right, his claimed wrong, and the relief which he demands-the elements of his alleged cause of action which makes necessary the action itself-are all centered in the commission and its failure or refusal to act in its official capacity." *Id.*

The scenario is no different here. To be sure, Appellants' case concerned breach of contract and not a workplace injury. Nevertheless, just as Hawley's right, asserted wrong and relief accrued in Franklin County because it was the locus of the Commission's failure and refusal, Appellants' right to have Jarvis pay her debt;[5] the wrong incurred by her breach; and the consequential relief sought, all have their locus where Appellee resides: Ohio. Jarvis' failure and refusal to pay her credit card bill occurred to the same extent in this state as the Industrial Commission's failure and refusal to act occurred in Franklin County. Therefore, all of "the facts creating the necessity for bringing the action occur[red]" in Ohio. *Id.* at 335. In addition, Appellants had to deal with one more, inescapable "fact." The FDCPA required them to sue in Ohio. 15 U.S.C. § 1692i(a)(2) (Appx. at 50).

In accord with *Hawley*, this Court's emphasis has been on the conduct of the breaching party for commencing the operation of a statute of limitations. *Kincaid v. Erie Ins. Co.*, 128 Ohio St.3d 322, 2010-Ohio-6036, 944 N.E.2d 207 (2010), ¶ 13 ("Until Erie refuses to pay a claim for a loss, Kincaid has suffered no actual damages for breach of contract ***"); *Children's Hospital v. Ohio Dept. of Public Welfare*, 69 Ohio St.2d 523, 526, 433 N.E.2d 187 (1982) (cause

[5] As assignee, FRIC stands in the place of Chase Bank. *Inter Ins. Exchange of the Chicago Motor Club v. Wagstaff*, 144 Ohio St. 457, 460, 59 N.E.2d 373 (1945) ("*Wagstaff*").

accrued when money actually withheld from payment). It is no surprise, therefore, that the Sixth Circuit Court of Appeals holds a similar view. *Willits v. Peabody Coal Co.*, 6th Cir. Nos. 98-5458, 98-5527, 1999 WL 701916, *13 (Sept. 1, 1999) (under Kentucky law, breach occurred where improperly-calculated payments issued); *Combs v. International Ins. Co.*, 163 F.Supp.2d 686, 691 (E.D.Ky.2001), *aff'd*, 354 F.3d 568 (6th Cir.2004) (interpreting similar Kentucky borrowing statute, breach occurred where insurer decided to deny payment).

Jarvis has relied on a case from the *Hawley* era to posit this Court may take a different view in her case. In *Meekison v. Groschner*, the Court considered an action on a promissory note "executed and delivered in a state other than Ohio but * * * by its terms, made payable at a later date to a resident of Ohio at his place of residence * * *" 153 Ohio St. 301, 91 N.E.2d 680 (1950), at paragraph one of the syllabus. In that instance, the Court held, "upon default in payment, the cause of action upon such note arises in Ohio." *Id.* *Meekison* is distinguishable because a cardholder agreement is not a promissory note. *Smith v. Palasades Collection, LLC.*, N.D.Ohio No. 1:07 CV 176, 2007 WL 1039198, *6 (Apr. 3, 2007); *Calvary S.P.V. I, L.L.C. v. Krantz*, 8th Dist. No. 97422, 2012-Ohio-2202, ¶ 13; *Capital One Bank (USA), N.A. v. Heidebrink*, 6th Dist. No. OT-08-049, 2009-Ohio-2931, ¶ 44 ("*Heidebrink*"); *see Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1159 (Ind.App.2010) ("credit card accounts would appear to closely resemble the common law definition of an 'open account.'")

Furthermore, no specific terms made Jarvis's credit card contract enforceable only in Delaware. Even Jarvis' claim that the cause of action accrued in Delaware because she sent her payments to Delaware is belied by the record. Jarvis did not send all of her payments to Delaware. At one point, Jarvis was instructed to send payments to Illinois. (Supp. at 114-16 (Jarvis monthly statement for December 10, 2003 to January 8, 2004 supplied by Chase pursuant

to subpoena)). More important, it is not a mailing address but where the facts necessitating the action occur that determine accrual. *Hawley*, 137 Ohio St. at 335. The cause of action for breach of a credit card contract by an Ohio consumer, without evidence of a contrary agreement, naturally arises from activities in Ohio. *Hooks*, 2011-Ohio-3033, ¶ 15 (court rejected Ohio consumer's argument that § 2305.03(B) governed an action on a credit card account and applied Ohio's statute of limitations); *Rodgers*, 2010-Ohio-4421, ¶ 15-19 (applying Ohio's statute where breach occurred after effective date of § 2305.03(B) even though debtor claimed Virginia law applied); *see Heiges v. JP Morgan Chase Bank, N.A.*, 521 F.Supp.2d 641, 646 (N.D.Ohio 2007) ("Absent the choice of law clause, Ohio is the appropriate forum. The Agreement was applied for and signed in Ohio and, as the card was used by an Ohio corporation, its primary effect was in Ohio.")

Jarvis' argument below – that Delaware procedure controls under § 2305.03(B) because that is where she sent some of her payments – invites manipulation. Furthermore, Appellee's position emasculates the intent of the borrowing statute. The statute was designed to halt forum shopping. "Borrowing statutes address the situation where a plaintiff fails to sue within the time period allotted by the state where the action accrued, and then files suit in another state's court to avoid the time bar." *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC*, 702 F.Supp.2d 826, 835 (N.D.Ohio 2010); *accord Executone of Columbus, Inc. v. Inter-Tel, Inc.*, 665 F.Supp.2d 899, 916 (S.D.Ohio 2009); *Curl v. Greenlee Textron, Inc.*, 404 F.Supp.2d 1001 (S.D.Ohio 2005); *Combs*, 354 F.3d at 596. If a cause of action arises where a consumer sends payments, a bank could flag accounts on the verge of default and suddenly require payments be sent to an address in the consumer's home state or to some other state with more favorable procedure. On the other hand, if a cause of action arises where a consumer resides, a bank,

absent a contract with a consumer specifying otherwise, would consistently be subject to the laws the state where the consumer resides.

D. The Court of Appeals erred when it applied Section 188 to determine where the action accrued.

Third, the Ninth District employed this Court's "most significant relationship" test in a method never intended: to determine procedure rather than substance. When the Court adopted Section 188 of the Restatement, it did so to "enumerate[] factors that courts should consider in the absence of" the contracting parties' selection of state law to govern their agreement. *Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 477, 2001-Ohio-100, 747 N.E.2d 206 (citing *Gries*, 15 Ohio St.3d 284, syllabus). The factors include: "(a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Gries*, 15 Ohio St.3d 284, syllabus.

Although the Court consistently followed and applied these factors, *e.g.*, *The Limited Stores, Inc. v. Pan American World Airways, Inc.*, 65 Ohio St.3d 66, 70, 600 N.E.2d 1027 (1992); *Nationwide Mut. Ins. Co. v. Ferrin*, 21 Ohio St.3d 43, 45, 487 N.E.2d 568 (1986), it has not done so to determine "accrual" – a procedural rather than substantive concern, *see Norgard v. Brush Wellman, Inc.*, 95 Ohio St.3d 165, 2002-Ohio-2007, 766 N.E.2d 977, ¶ 18-19 ("we hold that a cause of action based upon an employer intentional tort accrues when the employee discovers, or by the exercise of reasonable diligence should have discovered, the workplace injury and the wrongful conduct of the employer. This holding is consistent with the rationale underlying a statute of limitations * * *").

The Third District noted the difference when it reversed a trial court for applying Section 188 in the same manner employed by the Court of Appeals below:

> The trial court began its analysis by determining that the insurance policy was a contract and that contract choice-of-law issues are addressed by the Supreme Court law in *Gries* and Section 188 of the Restatement 2d of Conflict of Laws. We have no quarrel with that analysis. However, since this is a question of which state's statute of limitations to apply, *Gries* and Section 188 do not apply. Section 188 applies to determine which substantive law to apply.

Resner v. Owners Ins. Co., 3rd Dist. No. CA 2001 0091, 2002 WL 236970, *1 (Feb. 14, 2002). The lower court's reliance upon Section 188 to determine accrual is at odds with this Court's emphasis upon a party's alleged wrongdoing to determine accrual location. As discussed, *supra*, *Hawley*; *Kincaid*; and *Children's Hospital* counsel it is the location where the facts occurred that created the necessity for the action that controls – not the "most significant relationship" test.

The Act required Appellants to sue in Ohio. 15 U.S.C. § 1692i(a)(2). If Appellants had sued in Delaware, they risked being accused of unfair and deceptive acts and being held in violation of federal law barring unfair methods of competition. *Celebrezze v. United Research, Inc.*, 19 Ohio App.3d 49, 50, 482 N.E.2d 1260 (9th Dist.1984) (and federal statute and cases cited therein). From a legal and practical standpoint, therefore, the Ninth District's application of Section 188 was erroneous.

E. If Section 188 applies, it nevertheless dictates that Appellants' action accrued in Ohio.

Finally, should this Court agree with the lower court's approach, the Ninth District's conclusion was incorrect. Section 188's factors dictate Ohio is the proper forum. No written contract appears; however, Jarvis claimed she executed the first page of a "form of a blank credit card application," and formed a contract. (Supp. at 128 (Jarvis Ninth Dist. Br. at 6)). Since the form was blank, any negotiations were in the terms on first page of the form she received and signed in Ohio. (*See id.*; Supp. at 224-25, 231 (Jarvis Aff. in Support of Mot. For Summary J., ¶¶ 1, 8, 34)). Moreover, Jarvis admittedly used the credit card, the subject matter of the contract,

in Ohio. (Appellee's Mem. in Resp. to Appellants' Mem. in Supp of Jurisdiction at 2; Supp. at 2-3 (Jarvis Resp. to Req. for Admis. Nos. 7-15)). *See Smith*, 2007 WL 1039198, *6 (credit card is "a series of unilateral contracts which are actually formed when *the holder uses the credit card* to buy goods or services or to obtain cash.") The only factor to implicate Chase Bank is the final one – its out-of-state domicile – but this factor also identifies Ohio because it is Appellee's residence. Therefore, all five factors militate toward Ohio, with only the last factor indicating a split result.

This Court should reverse the Ninth District and hold that Jarvis' breach occurred in Ohio and that the Appellants' action was brought against her properly in this state.

Proposition of Law No. II: Absent an agreement otherwise, a claim for breach of a credit card contract accrues when a consumer fails to make a required payment and subsequent insufficient payments do not cure the breach.

This issue's prominence turns on whether the Court believes Appellants' action accrued outside of Ohio. If Ohio is the proper location, Appellants filed a timely action, even applying the six-year statute for unwritten contracts. However, if the borrowing statute potentially applies because of *where* Appellants' cause accrued, *when* Appellants' cause accrued becomes determinative.

The General Assembly amended Section 2305.03 effective April 7, 2005. R.C. § 2305.03. The statute may not apply retroactively. "The General Assembly shall have no power to pass retroactive laws." Ohio Const. art. II, § 28. (Appx. at 49). Unless there is a "clear pronouncement by the General Assembly that a statute is to be applied retrospectively, a statute may be applied prospectively only." *State v. LaSalle*, 96 Ohio St.3d 178, 2002-Ohio-4009, 772 N.E.2d 1172, paragraph 1 of the syllabus; *see Dudek*, 702 F.Supp.2d at 836-37 (refusing to apply R.C. § 2305.03(B) retroactively); *Executone of Columbus*, 665 F.Supp.2d at 916 (same); *D.A.N.*

Joint Venture III, L.P. v. Armstrong, 11th Dist. No. 2006-L-089, 2007-Ohio-898, ¶ 29 (same). Moreover, "[w]hen the retroactive application of a statute of limitation operates to destroy an accrued substantive right, such application conflicts with Section 28, Article II of the Ohio Constitution." *Gregory v. Flowers*, 32 Ohio St.2d 48, 290 N.E.2d 181 (1972), paragraph 3 of the syllabus. The legislature included no retroactive language when it amended Section 2305.03; therefore, the borrowing statute may not apply before April 7, 2005. The question of when Jarvis breached controls the result. If she breached prior to April 7, 2005, the borrowing statute cannot apply. If her breach occurred after that date, the statute applies if the Court holds the breach occurred out-of-state.

When it agreed with Jarvis that her breach occurred and the statute of limitations began "to run after the last activity of the account," (Appx. at 18), the Ninth District ignored contrary case authority and misapplied *Smither*. A "suit regarding a credit card balance is 'founded upon contract and thus a plaintiff must prove the necessary elements of a contract action.'" *Am. Express Centurian Bank v. Banaie*, 7th Dist. No. 10 MA 9, 2010-Ohio-6503, ¶ 11 (quoting *Heidebrink*, 2009-Ohio-2931, ¶ 29). The fundamental elements of a breach of contract claim are: 1) the existence of a contract, 2) performance by the plaintiff, 3) breach by the defendant, and 4) damage or loss to the plaintiff. *Doner v. Snapp*, 98 Ohio App.3d 597, 601, 649 N.E.2d 42 (2nd Dist.1994). "It is well-established that a cause of action for breach of contract accrues when the breach occurs." *Dudek*, 702 F.Supp.2d at 839; *accord Turner v. Retirement Plan of Marathon Oil Co.*, 659 F.Supp. 534, 538 (N.D.Ohio 1987) ("A statute of limitations runs from the time a claim accrues and causes of action accrue when a wrong or breach occurs"); *Casserlie v. Shell Oil Co.*, 8th Dist. No. 88361, 2007-Ohio-2633, ¶ 93 ("A cause of action, however,

accrues when the breach occurred"); *see Smither*, 919 N.E.2d at 1162 (statute of limitations commenced when the credit card debtor failed to make required minimum monthly payment).

The Appellants previously discussed this Court's focus on the allegedly-offending party's conduct to determine *where* a claim accrued. *Hawley*; *Kincaid*; *Children's Hospital*. Similarly, *Children's Hospital* also stands for the proposition that *when* the conduct occurs, the claim accrues. "Appellee's cause of action * * * accrued on * * * the date appellant made a payment to appellee from which it withheld part of the alleged overpayment." 69 Ohio St.2d at 526. Meanwhile, the Northern District's *Dudek* decision dovetails with this Court's analysis. "[T]he relevant date for purposes of accrual of the state court action is July 22, 2002 – the date upon which Dudek's obligation to pay under the credit card agreement became due and owing." 702 F.Supp.2d at 840.

Other Ohio courts agree that a breach occurs when the consumer fails to make the minimum monthly payment. *Discover Bank v. Heinz*, 10th Dist. No. 08AP-1001, 2009-Ohio-2850, ¶ 17; *Discover Bank v. Poling*, 10th Dist. No. 04AP–1117, 2005-Ohio-1543, ¶ 18; *Siemientkowski v. Bank One Columbus, N.A.*, 8th Dist. No. 66531, 1994 WL 663483, *3 (Nov. 23, 1994) (Supp. at 232). Furthermore, Jarvis' payments of less than the minimum following breach did not cure the default. *Capital One Bank (USA) v. Rhoades*, 8th Dist. No. 93968, 2010-Ohio-5127, ¶ 23; *Discover Bank v. Cummings*, 9th Dist. No. 08CA009453, 2009-Ohio-1711, ¶ 36; *Siemientkowski*, 1994 WL 663483, *1, 3. Jarvis' breach, therefore, commenced on January 1, 2005 and because she never paid the minimum payment thereafter – including the "last activity" payment of $50.00 on June 28, 2006 – she remained in default.

The Court of Appeals' error is illustrated by its treatment of *Smither*. Although the panel noted the "thoughtful consider[ation]" of the Indiana Court of Appeals, (Appx. at 17), the Ninth

District wrongly interpreted the Indiana court's holding. As discussed, *supra*, in *Smither*, the court held credit card accounts are akin to "open accounts." 919 N.E.2d at 1159. The court then discussed the operation of a statute of limitations for open accounts:

> The general rule is that the statute of limitations for an action on an open account "*commences from the date the account is due.*" 1 Am.Jur.2d *Accounts & Accounting* § 22 (2005). *It is also clear that when the last activity on an open account, such as the charging of an item or the making of a payment on the account, has occurred beyond the statutory limitations period, any action as to the entire balance of the account or any part of the balance is time-barred. See Hawkins v. Barnes,* 661 So.2d 1271, 1272–73 (Fla.Ct.App.1995). There is no indication in case law or other authorities that a creditor can indefinitely postpone the commencement of the statute of limitations by continuing to send additional statements demanding payment after the first demand has gone unpaid.

Id. at 1160 (emphasis added). The court held the account was due, *i.e.*, that statute of limitation commenced, when Smither: "last made a payment on the account on February 9, 2000 * * * or [on] next payment due date thereafter * * *" *Id.* Because Smither never made a minimum payment after the due date, Indiana's six-year statute continued to run and the creditor's action, filed more than six years following the customer's failure, was time-barred. *See id.* at 1161-62.

The lower court misread *Smither* to hold the statute of limitations begins on the "last activity date" and encompasses any activity on the account. (Appx. at 18-19). This interpretation ignores the Indiana court's holding that the statute of limitations "commences from the date the account is due." 919 N.E.2d at 1160. Furthermore, the interpretation renders the next portion of *Smither* nonsensical. If the "last activity" commences the statute, there is no basis to include, "when the last activity on an open account, such as the charging of an item or the making of a payment on the account, *has occurred beyond the statutory limitations period*, any action as to the entire balance of the account or any part of the balance is time-barred." *Id.* (emphasis added). Under the Ninth District's view, the "last activity" could never occur beyond

the limitations period because it would *commence* the limitations period. The Court should not permit this erroneous construction to stand.

This Court should hold the statute of limitations commenced on January 1, 2005. Jarvis breached the account on that date. Her account became due on that date. She never made a minimum payment on or after that date. Ohio's borrowing statute was not effective for four months after that date and does not apply. The Appellants' filed their Complaint within six years of that date. The Court should reverse the Ninth District's judgment.

<u>Proposition of Law No. III</u>: A complaint for breach of a credit card contract may pray for a post-judgment interest rate that exceeds the statutory rate when there is evidence suggesting that the parties agreed to the higher rate.

The Ninth District erred when it accepted Jarvis' argument that the Appellants' prayer for 24 percent interest established a "prima facie claim against the [Appellants] under the FDCPA, and consequently the OCSPA * * *" (Appx. at 21). Essentially, the appellant panel held a plaintiff must prove its case in its pleadings because the court, in part, based its decision on the Appellants' "fail[ure]" to attach the cardholder agreement to their Complaint. (*Id.* at 20). The panel's requirement is contrary to established Ohio law. "[A] plaintiff is not required to prove his or her case at the pleading stage." *York v. Ohio State Highway Patrol*, 60 Ohio St.3d 143, 145, 573 N.E.2d 1063 (1991); *see* Civ.R. 8(A) ("A pleading * * * shall contain (1) a short and plain statement of the claim showing that the party is entitled to relief, and (2) a demand for judgment for the relief to which the party *claims* to be entitled.") Moreover, the requirement is not supported by the FDCPA. "[A] debt may be properly pursued in court, even if the debt collector does not yet possess adequate proof of its claim." *Harvey v. Great Seneca Financial Corp.*, 453 F.3d 324, 333 (6th Cir.2006); *see Deere v. Javitch, Block and Rathbone LLP*, 413

F.Supp.2d 886, 890-891 (S.D.Ohio 2006) (FDCPA does not require "that more of a paper trail should have been in the lawyers' hands or attached to the complaint.")

Jarvis's credit card statements stated her credit card account was subject to an interest rate of 24.99 percent. (Supp. at 2, 10-30 (Jarvis Resp. to Req. for Admis. No. 7 and attached statements)). As a result, FRIC sued on Jarvis's account seeking a post-judgment interest rate of 24 percent. Not only did Appellee's use of the credit card create a legally-binding agreement, *Palmer*, 63 Ohio App.3d at 493, properly authenticated account statements, such as those introduced here, (Supp. at 2, 10-30 (Jarvis Resp. to Req. for Admis. No. 7 and attached statements)), establish a prima facie case for the amount owed on an account, *Discover Bank C/O DFS Servs. L.L.C. v. Lammers*, 2nd Dist. No. 08-CA-85, 2009-Ohio-3516, ¶ 22. Therefore, FRIC's reliance on the credit card statements was proper.

The Ninth District erred when it held to the contrary based upon *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, 884 N.E.2d 1056 ("*Minster*"). The court below employed *Minster* to hold "monthly credit card statements are insufficient to constitute a written contract entitling one party to interest in excess of the statutory rate" established in R.C. § 1343.03(A). (Appx. at 20). The appellate panel's view overstates this Court's decision. In *Minster*, this Court held "an invoice or account statement unilaterally stating interest terms does not meet R.C. 1343.03's requirement of a written contract." 2008-Ohio-1259, ¶ 28. The *Minster* Court did not conclude that an account statement was not evidence of a written contract and that, with additional evidence, could not prove the parties agreed to a percentage in excess of the statutory rate.

In fact, the Court held open that possibility when it merely distinguished – and did not overrule – a Third District decision holding evidence other than a written contract could establish its existence:

> In *Champaign Landmark*, the court's decision was based largely on the fact that the defendant had established that he was aware of the credit policy in place; the trial court had found "most enlightening" a letter written by the defendant to the plaintiff's credit manager, which the court said "in effect admitted the existence and validity of the credit policy and did not dispute either the validity of the claim or the amount claimed." The trial court found that in the letter in question, the "defendant arbitrarily reduced the amount of interest to 14% due to 'drought and resulting low yields' and the fact that he could not afford to pay." *There is no such letter in evidence "admitt[ing] the existence and validity of the credit policy" in either of the cases before us today.*

Id., ¶ 26 (quoting *Champaign Landmark v. McCullough* (Nov. 27, 1990), 3d Dist. No. 6–89–17, 1990 WL 188002). The issue is not whether FRIC ultimately could have proved its entitlement to interest in excess of the statutory rate. The issue is that the Ninth District erred when it held FRIC must have possessed sufficient evidentiary proof at the pleading stage.

In addition, the court of appeals ignored this Court's restriction on the scope of *Minster's* holding. The Court limited *Minster* to "these cases and to *transactions arising in the future*. * * * We do not intend for this decision to create shock waves throughout the many sectors of Ohio's economy that rely on book accounts to do business, nor do we wish to encourage a propagation of pleadings regarding past practices." *Id.*, ¶ 30 (emphasis added). This Court rendered its *Minster* opinion on March 26, 2008. As discussed, *supra*, the transaction giving rise to the instant action occurred January 1, 2005. Even accepting, *arguendo*, Appellee's "last activity" date of June 28, 2006, that transaction occurred well before the *Minster* decision. The Ninth District ignored this Court's instruction and applied *Minster* in error.

In a post-*Minster* decision that concerned a pre-*Minster* transaction, the Eighth District Court of Appeals rejected a debtor's assertion that the creditor violated the FDCPA and OCSPA

by "'impermissibly demand[ing] future interest at 25%'" and, thereby "'falsely stat[ing] the amounts due.'" *Matrix Acquisitions, L.L.C. v. Swope*, 8th Dist. No. 94943, 2011-Ohio-111, ¶ 3. Swope defaulted on his credit card account shortly after receiving his credit card in November 2005. *Id.*, ¶ 2. Matrix sued Swope for the balance plus 25 percent future interest. In a pair of summary judgment decisions, the trial court found Swope liable on the account but held a triable issue existed on the appropriate interest amount. *Id.*, ¶ 4. Subsequently, Matrix sought only the statutory rate. *Id.*, ¶ 5. On appeal, the Eighth District held Matrix's original interest claim violated neither the FDCPA nor the OCSPA:

> Swope's interest rate-based counterclaim was based on Swope's allegation that Matrix "impermissibly demanded 'future interest at 25%.' " The court did not find that Matrix was entitled to 25% interest, but rather determined there was a genuine issue of material fact as to the interest rate. The court's ruling suggests the interest rate could be less than 25%, or that 25% might be a permissible interest rate. Even if a 25% interest rate is "impermissible," as Swope claims, the court's ruling does not conflict with its finding that Matrix did not violate the FDCPA or the OCSPA *because the court was to determine the proper interest rate at trial.*

Id., ¶ 18 (emphasis added). *Swope* does not state the credit card agreement was entered into evidence; only that "business records pertaining to Swope's credit card agreement with Chase" were reviewed by Matrix's affiants. *Id.*, ¶ 13.

FRIC properly sought an interest rate of 24 percent in the action on Jarvis' account. Jarvis' credit card statements indicated her credit card account was subject to an interest rate of 24.99 percent. FRIC was entitled to conduct discovery to determine if Jarvis' credit card agreement provided an interest rate of 24 percent. This Court should reverse the Ninth District's decision that: (1) requires Appellants to have in hand all evidence prior to filing a complaint; (2) discounts all other evidence of an agreement; and (3) misinterprets and misapplies *Minster*. The Court should clarify that in Ohio, a notice pleading state, Appellants are required to plead just that – notice – and that they do not violate the Act or the OCSPA by following the Civil Rules.

<u>Proposition of Law No. IV</u>: The Ohio Consumer Sales Practices Act does not apply to bank assignees and their collection attorneys because there is no "consumer transaction" or "supplier."

Jarvis claims FRIC is a "supplier" under the OCSPA and that FRIC and its "agents" engaged in unfair, deceptive or unconscionable acts in connection with a "consumer transaction," (Supp. at 45, 77 (Am.Countercl., ¶¶ 18, 176, 178)), and, therefore, violated the OCSPA, R.C. §§ 1345.01(A), 1345.02(A), 1345.03(A). To prove a violation, Jarvis must show: "(1) [she] is a consumer; (2) [FRIC] is a supplier; (3) [FRIC] committed an unfair and/or deceptive and/or unconscionable act or practice; and the act or practice occurred before, during, or after the consumer transaction." *Williams v. Am. Suzuki Motor Corp.*, 5th Dist. No. 20076-CA-00172, 2008-Ohio-3123, ¶ 32. Because Jarvis cannot establish the final two elements, she cannot prevail on her OCSPA claim. The Ninth District failed to address Appellants' arguments on this issue although they properly raised them in the trial court and upon appeal.

A. The Appellants did not participate in a "consumer transaction."

A "consumer transaction," as contemplated by the OCSPA, did not occur because the law specifically excludes FRIC from the class of "persons" who may participate in a transaction:

> "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers * * *

R.C. § 1345.01(A). Section 5725.01 defines "financial institutions" and "dealers in intangibles"; therefore, transactions between financial institutions and their customers are exempt from the OCSPA.

As a "financial institution," Chase Bank is not subject to the OCSPA and neither is its assignee, FRIC. "[A]n assignee or subrogee of a claim stands in the shoes of the assignor or

subrogor, and *succeeds to all the rights and remedies of the latter*." *Wagstaff*, 144 Ohio St. at 460 (emphasis added). "[U]nless the collection action is associated with an underlying 'consumer transaction,' there can be no violation of the OCSPA." *Gionis v. Javitch, Block & Rathbone*, 405 F.Supp.2d 856, 869 (S.D.Ohio 2005); *accord Lamb v. Javitch, Block & Rathbone, L.L.P.*, S.D.Ohio No. 1:04-CV-520, 2005 WL 4137786, *4 (Jan. 24, 2005). Credit card accounts are not "consumer transactions" and the OCSPA does not apply. *Gionis*, 405 F.Supp.2d at 869 ("the underlying [credit card] * * * falls outside the scope of a 'consumer transaction'"); *accord Torrance v. Cincinnati Mortg. Co. Inc.*, S.D.Ohio No. 1:08–CV–403, 2009 WL 961533, *3 (Mar. 25, 2009) ("all transactions involving the issuance of credit were excluded from the scope of the CSPA.") Appellants could not and did not accede to an underlying "consumer transaction" because no such transaction occurred between Chase Bank and Jarvis.

This Court recently construed various provisions of the OCSPA, including what constitutes a "consumer transaction." In *Anderson v. Barclay's Capital Real Estate, Inc.*, the Court considered, *inter alia*, whether "Barclays Capital Real Estate, Inc., doing business as HomEq Servicing ('HomEq') * * * a 'mortgage servicer' that engages in the business of servicing residential mortgages of individuals," Slip Opinion No. 2013-Ohio-1933, ¶ 3, participated in a "consumer transaction." The Court described HomEq's business as including "'direct[ing] customers who are in default or danger of default to contact it for options concerning loss mitigation or loan modification and further hold[ing] itself out as having authority to make substantive decisions regarding which customers, if any, will receive loan modification agreements or loss mitigation assistance.'" *Id.*, ¶ 5. These practices encompassed mortgage payment processing, including determination and collection of fees, penalties and

assessments. *Id.*, ¶ 4. The Court noted HomEq was not "a bank, financial institution, or any other entity defined in R.C. 5725.01." *Id.*, ¶ 3.

The Court compared HomEq's mortgage-servicing business to the OCSPA's definition of "consumer transaction" and held the business did not come within the description because "there is no sale, lease, assignment, award by chance, or other transfer of a service to a consumer." *Id.*, ¶ 12. The Court explained its holding:

> Mortgage servicing is a contractual agreement between the mortgage servicer and the financial institution that owns both the note and mortgage. Mortgage servicing is carried out in the absence of a contract between the borrower and the mortgage servicer. We recognize that the mortgage servicer's duties may involve direct and indirect interactions with borrowers on behalf of the financial institution. Sometimes the mortgage servicer may even assist the borrower in modifying the terms of the note, but the mortgage servicer undertakes the negotiation not for itself but on behalf of the financial institution.
>
> These interactions do not satisfy the language found in R.C. 1345.01(A).
> * * *

Id., ¶ 13, 14. As discussed, *supra*, there is no underlying "consumer transaction" between Chase Bank and Jarvis. As the *Anderson* Court held, the fact that a mortgage servicer subsequently participates after a default and may even have direct contact with the borrower does not create a "consumer transaction" where none previously existed. The Court should follow *Anderson* and hold Appellants did not "[sell], lease, assign[], award by chance, or * * * transfer * * * a service to" Jarvis by attempting to collect on her debt.

Anderson lends support to the distinction between this case and a decision the Ninth District relied upon: *Hartman v. Asset Acceptance Corp.*, 467 F.Supp.2d 769 (S.D.Ohio 2004). The court below cited *Hartman* to support its blanket statement, "The Ohio Consumer Sales Practices Act has been held to apply to debt collectors and to litigation activities." (Appx. at 8 (citing *Hartman*, 467 F.Supp.2d at 780)). Although that was *Hartman's* conclusion, the cases

the Southern District relied upon involved "consumer transactions." *Schroyer v. Frankel*, 197 F.3d 1170 (6th Cir.1999) (home repairs); *Gatto v. Frank Nero Auto Lease, Inc.*, 8th Dist. No. 74894. 1999 WL 195664 (Apr. 8, 1999) (auto lease); *Broadnax v. Greene Credit Service*, 118 Ohio App.3d 881, 694 N.E.2d 167 (2nd Dist.1997) (check for home repairs returned for insufficient funds after being cashed at supermarket); *Celebrezze*, *supra* (retail installment sales agreement for purchase of educational materials). None of the cited cases concerned collection upon a credit card account – an underlying agreement that is not a "consumer transaction." The Court should hold a "consumer transaction" did not occur here.

B. The Appellants are not "suppliers."

FRIC is not a "supplier" under the OCSPA. "'Supplier' means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. § 1345.01(C). The *Anderson* Court construed this section to mean "'suppliers' are those that cause a consumer transaction to happen or that seek to enter into a consumer transaction." 2013-Ohio-1933, ¶ 30. Notwithstanding HomEq's mortgage-servicing activities, *supra*, and the lack of an R.C. § 5725.01 exemption, the Court held HomEq was not a "supplier":

> HomEq does not engage in the business of effecting or soliciting consumer transactions. The residential mortgage transaction is a transaction that occurs between the financial institution and the borrower. Mortgage servicers are not part of this transaction. And simply servicing the mortgage is not causing a consumer transaction to happen. Similarly, mortgage servicers do not seek to enter into consumer transactions with borrowers.

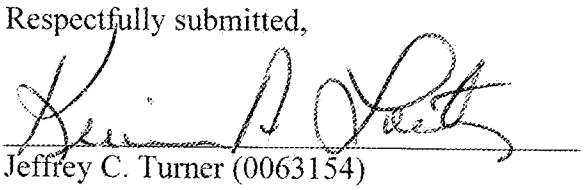
Id., ¶ 31. The instant analysis is similar. Although there is no underlying "consumer transaction," the original credit card transaction occurred between Chase Bank and Jarvis – not the Appellants. FRIC's efforts to collect on Appellee's debt are akin to HomEq's mortgage-

servicing practices and cannot manufacture a "consumer transaction." Hence, the Court should hold the Appellants are not "suppliers" under the OCSPA.

III. CONCLUSION

For the reasons set forth herein, the Appellants, First Resolution Investment Corporation and First Resolution Management Corporation, request that the Court reverse the judgment of the Ninth District Court of Appeals and render judgment in favor of the Appellants.

Respectfully submitted,



Jeffrey C. Turner (0063154)
John Langenderfer (0079094)
Kevin A. Lantz (0063822)
Surdyk, Dowd & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
Tel. (937) 222-2333
Fax (937) 222-1970
jturner@sdtlawyers.com
jlangenderfer@sdtlawyer.com
klantz@sdtlawyers.com
Attorneys for Appellants First Resolution Investment Corp. & First Resolution Management Corp.

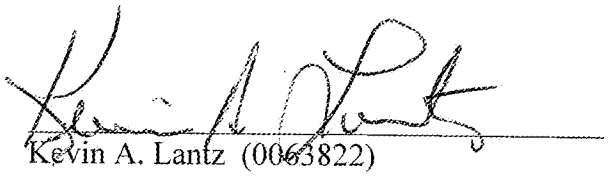
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on this 21st day of June 2013, via U.S. regular mail to the following:

James F. Burke, Jr., Esq.
John J. Horrigan, Esq.
Burke & Horrigan
1660 West Second Street
900 Skylight Office Tower
Cleveland, Ohio 44113
216-685-1700
216-664-6901 (fax)
Attorneys for Plaintiff-Appellant
Sandra J. Taylor Jarvis

Boyd W. Gentry, Esq.
Law Office of Boyd W. Gentry, LLC
9 East Dayton Street
West Alexandria, Ohio 45381
937.839.2881
Fax 800.839.5843
Bgentry@boydgentrylaw.com
Attorney for Cheek Law Offices, LLC
and Attorney Parri Hockenberry

Michael D. Slodov
Counsel of Record
Sessions, Fishman, Nathan & Israel, LLC
15 E. Summit St.
Chagrin Falls, Ohio 44022
(440) 318-1073
(fax) (216) 359-0049
mslodov@sessions-law.biz
Attorneys for Amici Curiae
Ohio Creditor's Attorney's Association
and DBA International



Kevin A. Lantz (0063822)

APPENDIX

Item	Page
Notice of Appeal	APPX. 1
Ninth District Court of Appeals Case No. CA 26042 Opinion/Judgment Entry	APPX. 4
Summit County Court of Common Pleas Case No. CV 2010 03 1627 Judgment Entry	APPX. 27
Ohio Revised Code § 2305.03	APPX. 44
10 Delaware Code § 8106	APPX. 45
Former Ohio Revised Code § 2305.06	APPX. 47
Ohio Revised Code § 2305.07	APPX. 48
Ohio Constitution, Article II, § 28	APPX. 49
15 United States Code § 1692i	APPX. 50
Ohio Revised Code § 1345.01	APPX. 51
Ohio Revised Code § 1345.02	APPX. 55
Ohio Revised Code § 1345.03	APPX. 58
Ohio Revised Code § 5725.01	APPX. 60

ORIGINAL

IN THE SUPREME COURT OF OHIO

13-0118

SANDRA J. TAYLOR JARVIS,	:	
Plaintiff-Appellee	:	On Appeal from the Summit County Court of Appeals, Ninth Appellate District
vs.	:	
FIRST RESOLUTION INVESTMENT CORP., et al.,	:	Court of Appeals Case No. CA26042
Defendants-Appellants	:	

NOTICE OF APPEAL OF DEFENDANT-APPELLANTS FIRST RESOLUTION INVESTMENT CORP., FIRST RESOLUTION MANAGEMENT CORP., CHEEK LAW OFFICES, LLC, AND ATTORNEY PARRI HOCKENBERRY

Jeffrey C. Turner (0063154)
John Langenderfer (0079094) (COUNSEL OF RECORD)
Surdyk, Dowd & Turner Co., L.P.A.
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
Tel. (937) 222-2333
Fax (937) 222-1970
jturner@sdtlawyers.com
jlangenderfer@sdtlawyer.com
Attorneys for Appellants First Resolution Investment Corp. & First Resolution Management Corp.

Boyd W. Gentry, Esq. (COUNSEL OF RECORD)
Law Office of Boyd W. Gentry, LLC
9 East Dayton Street
West Alexandria, Ohio 45381
937.839.2881
Fax 800.839.5843
Bgentry@boydgentrylaw.com
Attorney for Appellants Cheek Law Offices, LLC and Attorney Parri Hockenberry

James F. Burke, Jr., Esq.
John J. Horrigan, Esq.
Burke & Horrigan
1660 West Second Street
900 Skylight Office Tower
Cleveland, Ohio 44113
216-685-1700
216-664-6901 (fax)
Attorneys for Appellee Sandra J. Taylor Jarvis

FILED
JAN 22 2013
CLERK OF COURT
SUPREME COURT OF OHIO

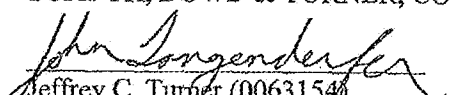
Notice of Appeal of Defendant-Appellants First Resolution Investment Corp. First Resolution Management Corp., Cheek Law Offices, LLC and Attorney Parri Hockenberry

Defendant-Appellants First Resolution Investment Corp., First Resolution Management Corp., Cheek Law Offices, LLC, and Attorney Parri Hockenberry hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Summit County Court of Appeals, Ninth Appellate District, entered in Court of Appeals Case No. CA26042 on December 5, 2012.

This case raises a substantial question of public and great general interest.

Respectfully submitted,

SURDYK, DOWD & TURNER, CO., L.P.A.



Jeffrey C. Turner (0063154)
John Langenderfer (0079094)
One Prestige Place, Suite 700
Miamisburg, Ohio 45342
Tel. (937) 222-2333
Fax (937) 222-1970
jturner@sdtlawyers.com
jlangenderfer@sdtlawyer.com
Attorneys for Appellants First Resolution Investment Corp. & First Resolution Management Corp.

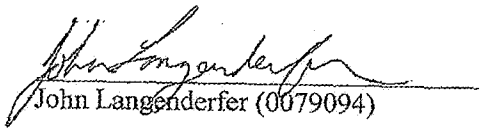
Boyd W. Gentry, Esq. Law Office of Boyd W. Gentry, LLC
9 East Dayton Street
West Alexandria, Ohio 45381
937.839.2881
Fax 800.839.5843
Bgentry@boydgentrylaw.com
Attorney for Appellants Cheek Law Offices, LLC and Attorney Parri Hockenberry

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a copy of the Notice of Appeal has been served upon the following by regular U.S. Mail this 22nd day of January, 2013:

Boyd W. Gentry, Esq. (COUNSEL OF RECORD)
Law Office of Boyd W. Gentry, LLC
9 East Dayton Street
West Alexandria, Ohio 45381
937.839.2881
Fax 800.839.5843
Bgentry@boydgentrylaw.com
Attorney for Cheek Law Offices, LLC and Attorney Parri Hockenberry

James F. Burke, Jr., Esq.
John J. Horrigan, Esq.
Burke & Horrigan
1660 West Second Street
900 Skylight Office Tower
Cleveland, Ohio 44113
216-685-1700
216-664-6901 (fax)
Attorneys for Appellee Sandra J. Taylor Jarvis



John Langenderfer (0079094)

COURT OF APPEALS
DANIEL M. HORRIGAN
2012 DEC -5 AM 8: 22
SUMMIT COUNTY
CLERK OF COURTS

STATE OF OHIO)
)ss:
COUNTY OF SUMMIT)

IN THE COURT OF APPEALS
NINTH JUDICIAL DISTRICT

SANDRA J. TAYLOR JARVIS

Appellant

v.

FIRST RESOLUTION INVESTMENT CORP., et al.

Appellees

C.A. No. 26042

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO CASE No. CV 2010 03 1627

DECISION AND JOURNAL ENTRY

Dated: December 5, 2012

CARR, Judge.

{¶1} Appellant Sandra Jarvis appeals the judgment of the Summit County Court of Common Pleas. This Court reverses and remands.

I.

{¶2} First Resolution Investment Corporation filed a complaint against Ms. Jarvis in an attempt to collect the charged off sum plus interest accrued to date on credit card debt, the interest in which it purchased from Chase Bank. Investment Corp. also sought future interest at a rate of 24 percent. After Ms. Jarvis failed to file a timely answer, Investment Corp. moved for default judgment. The trial court granted default judgment to Investment Corp. in the amount of $16,832.88, plus 24 percent future interest. Six weeks later, Ms. Jarvis moved to vacate the default judgment. The parties and judge signed a stipulated entry granting the motion to vacate.

{¶3} Ms. Jarvis filed an answer in which she raised several affirmative defenses, including the defense that Investment Corp.'s claim for money due was barred by the applicable

statute of limitations. She also filed counterclaims premised on the Fair Debt Collection Practices Act, the Ohio Consumer Sales Practices Act, and common law abuse of process. She alleged these claims on her own behalf and as class action claims. Ms. Jarvis later filed a "first amended class action counterclaim," in which she alleged claims against Investment Corp., First Resolution Management Corporation, Attorney Parri Hockenberry, and Cheek Law Offices, LLC. She alleged three class action claims under the Fair Debt Collection Practices Act, to wit: a claim against Investment Corp., Management Corp., and Cheek Law arising out of letters threatening legal action to collect a debt when such legal action was barred by the applicable statute of limitations; a claim against Investment Corp., Attorney Hockenberry, and Cheek Law arising out of the filing of a complaint to collect money due when such legal action was barred by the applicable statute of limitations; and a claim against Investment Corp., Attorney Hockenberry, and Cheek Law arising out of the filing of a complaint seeking post-judgment interest in excess of the statutory rate in the unjustified absence of a written contract supporting such a claim. Ms. Jarvis alleged a class action claim against all four parties under the Ohio Consumer Sales Practices Act arising out of the same circumstances alleged above. Finally, she alleged a class action common law abuse of process claim against Investment Corp., Attorney Hockenberry, and Cheek Law. Ms. Jarvis further moved for class certification.

{¶4} Investment Corp. dismissed without prejudice its complaint against Ms. Jarvis pursuant to Civ.R. 41(A)(1)(a). The four counterclaim defendants subsequently moved to realign the parties to designate Ms. Jarvis as the plaintiff, as hers were the only claims pending. The trial court granted the motion over Ms. Jarvis' objection.

{¶5} All parties filed motions for summary judgment. The trial court held the motion for class certification in abeyance pending its resolution of the motions for summary judgment.

The trial court ultimately granted summary judgment in favor of Investment Corp., Management Corp., Ms. Hockenberry, and Cheek Law on all of Ms. Jarvis' claims. Ms. Jarvis appealed and raises two interrelated assignments of error, which we consolidate to facilitate review.

II.

ASSIGNMENTS OF ERROR

THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO APPELLEES. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO APPELLANT.

{¶6} Ms. Jarvis argues that the trial court erred by granting summary judgment in favor of Investment Corp., Management Corp., Ms. Hockenberry, and Cheek Law on her claims and by denying summary judgment in her favor. This Court agrees in part.

{¶7} This Court reviews an award of summary judgment de novo. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105 (1996). This Court applies the same standard as the trial court, viewing the facts in the case in the light most favorable to the non-moving party and resolving any doubt in favor of the non-moving party. *Viock v. Stowe-Woodward Co.*, 13 Ohio App.3d 7, 12 (6th Dist.1983).

{¶8} Pursuant to Civ.R. 56(C), summary judgment is proper if:

> No genuine issue as to any material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and viewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party.

Temple v. Wean United, Inc., 50 Ohio St.2d 317, 327 (1977).

{¶9} To prevail on a motion for summary judgment, the party moving for summary judgment must be able to point to evidentiary materials that show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt*, 75 Ohio St.3d 280, 293 (1996). Once a moving party satisfies its burden of

supporting its motion for summary judgment with sufficient and acceptable evidence pursuant to Civ.R. 56(C), Civ.R. 56(E) provides that the non-moving party may not rest upon the mere allegations or denials of the moving party's pleadings. Rather, the non-moving party has a reciprocal burden of responding by setting forth specific facts, demonstrating that a "genuine triable issue" exists to be litigated for trial. *State ex rel. Zimmerman v. Tompkins*, 75 Ohio St.3d 447, 449 (1996).

{¶10} The non-moving party's reciprocal burden does not arise until after the moving party has met its initial evidentiary burden. To do so, the moving party must set forth evidence of the limited types enumerated in Civ.R. 56(C), specifically, "the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact[.]" Civ.R. 56(C) further provides that "[n]o evidence or stipulation may be considered except as stated in this rule."

{¶11} Under the Fair Debt Collection Practices Act ("FDCPA"), a debt collector is prohibited from using "any false, deceptive, or misleading representation or means in connection with the collection of any debt." 15 U.S.C. 1692e. This includes any false representation of the character, amount, or legal status of a debt; any threat to take action that cannot be taken legally; and the use of any false representation or deceptive means to collect or attempt to collect a debt. 15 U.S.C. 1692e(2)(A), (5), and (10). Moreover, a debt collector is prohibited from using "unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. This includes the "collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f(1). A "debt collector" includes "any person who uses any instrumentality of interstate commerce or the mails in any

business the principal purpose of which is the collection of any debts, or who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another." 15 U.S.C. 1692a(6). Within this context, a "consumer" is "any natural person obligated or allegedly obligated to pay any debt." 15 U.S.C. 1692a(3).

{¶12} Under the Ohio Consumer Sales Practices Act ("OCSPA"), "[n]o supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction." R.C. 1345.02(A). Moreover, "[n]o supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction." R.C. 1345.03(A). A "consumer transaction" is any "sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things." R.C. 1345.01(A). A "supplier" is "a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer." R.C. 1345.01(C). In this context, a "consumer" is a "person who engages in a consumer transaction with a supplier." R.C. 1345.01(D). The Ohio Consumer Sales Practices Act has been held to apply to debt collectors and to litigation activities. *Hartman v. Asset Acceptance Corp.*, 467 F.Supp.2d 769, 780 (S.D.Ohio 2004).

{¶13} The interrelationship between the FDCPA and OCSPA is well established. "'[V]arious violations of the FDCPA constitute a violation of the CSPA...[T]he purpose of both acts is to prohibit both unfair and deceptive acts and this court holds that any violation of any one of the enumerated sections of the FDCPA is necessarily an unfair and deceptive act or practice in violation of R.C. 1345.02 and/or 1345.03.'" *Kelly v. Montgomery Lynch & Associates, Inc.*,

N.D.Ohio No. 1:07-CV-919, 2008 WL 1775251, *11 (Apr. 15, 2008), quoting *Becker v. Montgomery, Lynch*, N.D.Ohio No. 1:02CV874, 2003 WL 23335929, *2 (Feb. 26, 2003).

{¶14} To prevail on a claim for abuse of process, Ms. Jarvis must establish "(1) that a legal proceeding was properly initiated and supported by probable cause, (2) that same legal proceeding was perverted by the nonmoving party in order to achieve 'an ulterior motive for which it was not designed,' and (3) that the moving party has incurred damages as a result of the nonmoving party's wrongful use of process." *Gugliotta v. Morano*, 161 Ohio App.3d 152, 2005-Ohio-2570, ¶ 47 (9th Dist.), quoting *Levey & Co. v. Oravecz*, 9th Dist. No. 21768, 2004-Ohio-3418, ¶ 8, citing *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.*, 68 Ohio St.3d 294, 298 (1994).

{¶15} The trial court granted summary judgment in favor of all four defendants on Ms. Jarvis' FDCPA and OCSPA claims arising out of their representation of the legal status of the credit card debt during their attempts to collect it. The trial court did so based on its finding that R.C. 2305.03(B), Ohio's borrowing statute, was not applicable in this case, so the applicable statute of limitations was either the 15-year or 6-year period under Ohio law. The borrowing statute provides in relevant part: "No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired." R.C. 2305.03(B). Specifically, the trial court found that the cause of action (to collect on the credit card debt) accrued in Ohio, precluding application of the borrowing statute. Moreover, it found that the cause accrued prior

to the April 7, 2005 effective date of the borrowing statute, thereby precluding retroactive application of the statute.

{¶16} The trial court also granted summary judgment in favor of Investment Corp., Ms. Hockenberry, and Cheek Law on Ms. Jarvis' abuse of process claim. It did so in part after concluding that Investment Corp.'s claim against Ms. Jarvis to collect credit card debt was initiated with probable cause which could only have existed if the claim was not time-barred.

Applicability of Ohio's borrowing statute

{¶17} The determination as to whether R.C. 2305.03(B) applied to this matter was of paramount importance because the statute of limitations (at the time relevant to this matter) to bring an action to collect such a debt was (1) in Ohio, 15 years where the contract was in writing, former R.C. 2305.05; (2) in Ohio, 6 years where the contract was not in writing, R.C. 2305.07; and (3) in Delaware, 3 years, 10 Del.C. 8106(a). There is no dispute that Investment Corp. filed its complaint against Ms. Jarvis on March 9, 2010. Accordingly, if the Delaware statute of limitations was applicable, the cause of action to collect on the debt must have accrued no earlier than March 9, 2007, lest Investment Corp.'s claim be time-barred. Most of Ms. Jarvis' claims under the FDCPA and OCSPA, as well as her abuse of process claim, were premised on the allegation that Investment Corp.'s claim was time-barred when Management Corp. and Cheek Law sent a letter in an attempt to collect on the debt and when Investment Corp. through Ms. Hockenberry and Cheek Law filed the complaint.

Where the claim accrued

{¶18} Ohio's borrowing statute does not clarify how to determine where a cause of action accrues, and case law has not offered a definitive answer. While we disagree with the Sixth Circuit's ultimate determination regarding the place where certain breaches of contract

have accrued for purposes of Kentucky's borrowing statute, we agree with the circuit court's sentiment that "[t]he elements of time and place of accrual are inextricably intertwined: The time when a cause of action arises and the place where it arises are necessarily connected, since the same act is the critical event in each instance." (Internal quotations omitted.) *Swanson v. Wilson*, 423 Fed.Appx. 587, 593 (2011). We may disagree regarding the interpretation of the "act" that implicates the breach, but we agree that the time and place of the breach are interdependent.

{¶19} The trial court found that the claim accrued in Ohio because that was where Ms. Jarvis resided, primarily used her credit card, and decided to stop making the minimum required payments. While admitting that it could not find any controlling authority directly on point, the trial court was persuaded by the reasoning of the United States District Court for the Eastern District of Kentucky, which held that for a breach of a contract for money due, "the cause of action accrues where the decision to deny payment was made." *Combs v. Internatl. Ins. Co.*, 163 F.Supp.2d 686, 692 (2001).

{¶20} *Combs* involved an insurance company's refusal to indemnify its insured and implicated Kentucky's borrowing statute. After consideration of the law in several other jurisdictions, the federal district court adopted the "final significant event" test after predicting that the Kentucky Supreme Court would find the reasoning of Wisconsin state and federal courts persuasive. *Id.* at 694. The *Combs* court reasoned that the insured's cause of action against the insurance company accrued where the insurance company "rejected the demands for payment," as evidenced by the mailing of a letter to the insured to that effect. *Id.*

{¶21} The Sixth Circuit Court of Appeals affirmed the district court's decision in a lengthy decision that considered the reasoning and law enunciated by the states of Wyoming,

New York, Missouri, Illinois, and Florida. *Combs v. Internatl. Ins. Co.*, 354 F.3d 568 (6th Cir.2004). After rejecting the "most significant relationship" test adopted by other states and enunciated in Section 188 of the Restatement of Law 2d, Conflict of Laws, and narrowing its focus to situations involving anticipatory repudiation, the circuit court held that "an anticipatory breach occurs where the breaching party posts its letter of renunciation[,]" rather than where the other party received the letter. *Id.* at 602. This Court rejects the reasoning of the *Combs* courts and their adoption and application of the "final significant event" test to determine where the cause of action accrued. Accordingly, the trial court's reliance on such reasoning was misplaced.

{¶22} The Ohio Supreme Court has thoughtfully considered the issue of the choice of law in regard to actions sounding in contract. This Court finds the reasoning and test adopted by the high court relevant to determining where a cause of action for breach occurred. The parties here agree that Ms. Jarvis' alleged failure to pay money due arose out of her alleged breach of a credit card agreement.

{¶23} Unlike the Sixth Circuit, which rejected the "most significant relationship" test enunciated in the Restatement of Law 2d, Conflict of Laws, the Ohio Supreme Court has long embraced that test. In *Schulke Radio Productions, Ltd. v. Midwestern Broadcasting Co.*, 6 Ohio St.3d 436 (1983), the high court reiterated the general rule that the law of the state where the contract is to be performed governs on the theory that the place of performance bears the most significant relationship to the contract. *Id.* at 438. In considering whether to apply the law of the state chosen by the parties in their contract, the *Schulke* court held that the contractual choice of law provision would govern "*unless* either the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or application of the law of the chosen state would be contrary to the fundamental policy of a state

having a greater material interest in the issue than the chosen state and such state would be the state of the applicable law in the absence of a choice by the parties." (Emphasis added.) *Id.* at syllabus.

{¶24} A year later, the Ohio Supreme Court considered the question of the choice of law applicable to contract disputes where the parties had not provided for such in the contract. *Gries Sports Ents., Inc. v. Modell*, 15 Ohio St.3d 284 (1984). The high court formally adopted Section 188 of the Restatement of the Law 2d, Conflict of Laws, and held: "In the absence of an effective choice of law by the parties, the contacts to be taken into account to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties." *Gries Sports* at syllabus.

{¶25} Since that time, the Ohio Supreme Court has applied the "most significant relationship" test in various types of contractual disputes to resolve choice of law issues. *See, e.g., Ohayon v. Safeco Ins. Co. of Illinois*, 91 Ohio St.3d 474, 481 (2001) (referring to the Restatement's test as a needed "predictable methodology * * * to choose the applicable law if neither the parties nor the statutory scheme make that choice for them."). Moreover, the Sixth Circuit Court of Appeals has recognized Ohio's adoption and application of the "most significant relationship" test in these circumstances. *Natl. Union Fire Ins. Co. v. Watts*, 963 F.2d 148, 150 (6th Cir.1992) ("Ohio choice of law rules mandate that the law of the state with the more significant relationship to the contract should govern disputes arising from it. To determine which state has the more significant relationship to the contract, Ohio law has adopted the test set forth in the Restatement (Second) of Conflict of Laws Section 188.") The test embraced by the

Ohio courts in determining choice of law issues in contract disputes guides our decision in determining where any breach of the contract occurred and, consequently, where the cause of action accrued.

{¶26} The trial court found that the cause of action accrued in Ohio because that is where Ms. Jarvis "resides, primarily used the credit card, and decided to stop making the minimum required payments[.]" The trial court further found that Ms. Jarvis "could have also chosen to make her payments on the Internet, by telephone, or to a Chase bank branch" rather than to the remittance address in Delaware. Ms. Jarvis did not dispute that she resided in Ohio at all times relevant to this matter. However, the defendants did not present any evidence to demonstrate where Ms. Jarvis primarily used her card, that she was in Ohio at the moment she decided not to pay amounts owed on her account, or that she could have made her payments in any way but by check to the payment address in Wilmington, Delaware.

{¶27} On the other hand, the evidence demonstrates that Ms. Jarvis sent her credit card invitation to Delaware and that her offer was accepted in Delaware, thereby creating a contract in Delaware. Ms. Jarvis' obligation was to be performed by making payments on her account. Her performance was not completed merely by depositing her check in the mail, but rather upon timely receipt of a valid check in Delaware.

{¶28} Moreover, the defendants did not present any affidavits or deposition testimony to show that they attempted to collect the credit card debt from Ms. Jarvis in the belief that their claim accrued in Ohio and was, therefore, not time-barred. Ms. Jarvis, on the other hand, attached a copy of Management Corp.'s procedures provided during discovery, which indicated that the company recognized that Chase Manhattan accounts are subject to Delaware's 36-month (3-year) statute of limitations in Ohio.

{¶29} Viewing each party's evidence in a light most favorable to the non-moving party, this Court concludes as a matter of law that Investment Corp.'s cause of action for breach of the credit card agreement accrued in Delaware where the most significant relationship regarding the contract existed.

When the claim accrued

{¶30} Even though Investment Corp.'s claim accrued in Delaware, R.C. 2305.03(B) would not be effective to require the application of the three-year Delaware statute of limitations if Investment Corp.'s claim accrued prior to the statute's April 7, 2005 effective date. In the absence of express intent by the legislature that a statute that is not merely remedial be applied retroactively, the statute will only be applied prospectively. *Smith v. Smith*, 109 Ohio St.3d 285, 2006-Ohio-2419, ¶ 6; *see also* Ohio Constitution, Article II, Section 28.

{¶31} The trial court found that the claim accrued prior to April 7, 2005, thereby precluding the application of R.C. 2305.03(B). Significantly, because the defendants failed to produce a copy of the credit card agreement governing Ms. Jarvis' account, there was no evidence of the parties' agreement to describe under which circumstances a default or breach would occur, whether Chase possessed remedies for default in the absence of legal action, and whether it must pursue such remedies prior to pursuing legal action.

{¶32} The trial court appears to have premised its finding regarding when Investment Corp.'s claim accrued on events that occurred on three dates prior to the effective date of the statute. First, the court twice noted that Ms. Jarvis last used her credit card in 2004. This Court is at a loss as to why the last date of use of the card was relevant to determining when any claim accrued. Second, the trial court found that Ms. Jarvis "first failed to make the minimum required monthly payment on January 1, 2005." Although the trial court cited Ms. Jarvis' response to

request for admission number 8, Ms. Jarvis only admitted that she did not make the minimum payment due on January 1, 2005, not that that was the first time she failed to pay the minimum due. On the other hand, Ms. Jarvis presented copies of credit card statements that indicated that she carried a past due amount and was assessed a late fee on a statement covering the period of December 10, 2003, to January 9, 2004, almost a full year earlier. Ms. Jarvis remained delinquent on her account for another six months, made a payment that cured her deficiency, failed to make required minimum payments in September and October 2004, made appropriate payments in November and December 2004, and again failed to make her minimum payment in January 2005. If this Court accepted, which we do not, the legal proposition that the claim accrued when Ms. Jarvis "first" failed to pay the monthly minimum due, it is unclear how her "first" failure occurred on January 1, 2005. Finally, the trial court found that Ms. Jarvis' account "was marked delinquent on February 7, 2005." Certainly, Chase was the entity that would have marked the account delinquent at that time, as Chase did not sell its interest in the account until February 13, 2008. Investment Corp. did not purchase its interest in the debt until June 19, 2008. The trial court did not cite any authority for finding that a claim for the payment of credit card debt accrues when the account is marked delinquent, and this Court does not adopt any such proposition of law. Significantly, Ms. Jarvis attached Management Corp.'s admissions that Ms. Jarvis made her last payment on the account on June 28, 2006, and that Chase wrote off the debt on January 31, 2006. The trial court did not note either event, implicitly finding neither event relevant to the inquiry.

{¶33} The issue of when a claim accrues regarding credit card debt is unsettled, in part because courts have not consistently categorized credit card accounts. We reject Ms. Jarvis' argument that they are analogous to installment contracts. *See* R.C. 1317.01(A). This Court

concludes that credit card accounts are more properly categorized as open accounts. The legislature has broadly defined "account" to include "a right to payment of a monetary obligation, whether or not earned by performance, * * * (vii) arising out of the use of a credit or charge card or information contained on or for use with the card * * *." R.C. 1309.102(A)(2)(a).

{¶34} The Court of Appeals of Indiana has thoughtfully considered the nature of credit card accounts, distinguishing them from promissory notes and installment loans in which the total amount of indebtedness and a repayment schedule are fixed. *Smither v. Asset Acceptance, LLC*, 919 N.E.2d 1153, 1159 (Ind.App.2010), citing *Portfolio Acquisitions, LLC v. Feltman*, 909 N.E.2d 876 (Ill.App.2009). The *Smither* court concluded that credit card accounts closely resemble "open accounts" in that "the precise amount of indebtedness that a customer may incur is unknown and fluctuating and the account is kept open in anticipation of future transactions, unless one of the parties decides to close it." *Id.* at 1160. The common law definition of "open account" is instructive:

> An "open account" is an account with a balance which has not been ascertained and is kept open in anticipation of future transactions. An open account results where the parties intend that the individual transactions in the account be considered as a connected series, rather than as independent of each other, subject to a shifting balance as additional debits and credits are made, until one of the parties wishes to settle and close the account, and where there is but one single and indivisible liability arising from such series of related and reciprocal debits and credits. This single liability is fixed at the time of settlement, or following the last entry in the account, and such liability must be mutually agreed upon between the parties, or impliedly imposed upon them by law. *Thus, an open account is similar to a line of credit.*
>
> Observation: Openness of an account, for purposes of an action on an open account, is indicated when further dealings between the parties are contemplated and when some term or terms of the contract are left open and undetermined.
>
> The continuity of an account is broken where there has been a change in the relationship between the parties, or where the account has been allowed to become dormant.

Id. at 1159-1160, quoting 1 American Jurisprudence 2d, Accounts and Accounting, Section 4 (2005). The *Smither* court, therefore, applied the statute of limitations applicable to open accounts to the claim against Smither for credit card debt. *Smither*, 919 N.E.2d at 1160, quoting 1 American Jurisprudence 2d, Accounts and Accounting, Section 22 (2005) ("The general rule is that the statute of limitations for an action on an open account 'commences from the date the account is due.'"). Accordingly, the Indiana appellate court concluded that the cause of action on the open account accrued either as of the date of Smither's last payment on the account or, because Asset sent another statement the following month, on the next payment due date. *Id.* at 1160.

{¶35} This Court is persuaded by the reasoning of *Smither* and its reliance on the common law definition of an "open account" in determining that the statute of limitations begins to run after the last activity on the account. *See also Barnets, Inc. v. Johnson*, 12th Dist. No. CA2004-02-005, 2005-Ohio-682, ¶ 18 (concluding that the cause of action on an open account secured by a mortgage accrued for statute of limitations purposes when the last item was posted on the account, in that case, a returned check). In this case, Jarvis' "single liability" for the balance of her credit card account arose "following the last entry in the account" which would have been her $50 payment on June 28, 2006. Chase accepted that payment and there is no evidence that Jarvis attempted to make a subsequent payment that was rejected. Moreover, because the defendants did not attach any evidence to demonstrate the next due date after the June 28, 2006 payment, this Court concludes that a question of fact exists as to whether the statute of limitations began to run on June 29, 2006, or on some date in July 2006. However, that does not create a genuine issue of material fact because both time periods are after the effective date of the borrowing statute. Accordingly, the trial court erred by finding that the

defendants met their burden to show that Investment Corp.'s cause of action accrued prior to the effective date of Ohio's borrowing statute. On the other hand, Ms. Jarvis met her burden by demonstrating that, given the parties' agreement that the last payment was posted to the account on June 28, 2006, Investment Corp.'s cause of action accrued after R.C. 2305.03(B) became effective.

{¶36} For the above reasons, the trial court erred by granting summary judgment to the defendants upon finding that Ohio's borrowing statute was not applicable and that Investment Corp.'s cause of action was not time-barred. Accordingly, this matter is remanded to the trial court for resolution of Ms. Jarvis' claims pursuant to the FDCPA and OCSPA and her claim for abuse of process, as this Court will not determine those issues in the first instance. *See Harris-Coker v. Abraham*, 9th Dist. No. 26053, 2012-Ohio-4135, ¶ 4.

{¶37} Ms. Jarvis also asserted claims against Investment Corp., Ms. Hockenberry, and Cheek Law pursuant to the FDCPA and OCSPA based on their claims that Investment Corp. was entitled to post-judgment interest in excess of the statutory rate and efforts to obtain such interest. The statutory rate of interest was 4 percent at the time the various defendants sought to obtain it. *See* R.C. 1343.03. The defendants sought to obtain future interest at a rate of 24 percent. The trial court, relying on a federal district court case out of Massachusetts, found that Ms. Jarvis failed to show that the defendants violated the FDCPA or OCSPA by merely requesting interest in excess of the statutory rate because the request was merely a prayer for relief directed to the court, not Ms. Jarvis. *See Argentieri v. Fisher Landscapes, Inc.*, 15 F.Supp.2d 55, 61-62 (D.Mass.1998). Moreover, the trial court found that, because Investment Corp. dismissed its complaint against Ms. Jarvis, the issue of future interest was no longer before it.

{¶38} A party is not entitled to interest in excess of the statutory rate in the absence of a written contract providing for such. *Minster Farmers Coop. Exchange Co., Inc. v. Meyer*, 117 Ohio St.3d 459, 2008-Ohio-1259, ¶ 26; *Capital One Bank (USA), N.A. v. Heidebrink*, 6th Dist. No. OT-08-049, 2009-Ohio-2931, ¶ 37; *see also* R.C. 1343.03(A). The defendants failed to attach the credit card agreement relevant to Ms. Jarvis' account to either the complaint on the account pursuant to Civ.R. 10(D) or as an exhibit relevant to their motions for summary judgment or responses in opposition to Ms. Jarvis' motion for summary judgment. Moreover, monthly credit card statements are insufficient to constitute a written contract entitling one party to interest in excess of the statutory rate. *Meyer*, 2008-Ohio-1259, at ¶ 27. Accordingly, the defendants did not meet their initial burden of showing that Investment Corp. was entitled to 24 percent interest or any other rate in excess of the statutory rate (4 percent) in effect at the time it filed its complaint.

{¶39} The *Argentieri* court opined: "A prayer for relief in a complaint, even where it specifies the quantity of attorney's fees, is just that: a request to a third party – the court – for consideration, not a demand to the debtor himself. A request for attorney's fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation. The whole purpose of regulating debt collection was to 'supervise' a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel. The two situations are drastically different." *Argentieri*, 15 F.Supp.2d at 61-62. This Court is not persuaded by the Massachusetts district court's opinion and reasoning.

{¶40} The issue of the viability of FDCPA claims based on prayers for relief in complaints is predominantly raised in regard to requests for attorney fees. This Court finds the

instant matter involving a request for interest analogous. The Federal District Court for Montana rejected the reasoning of *Argentieri*, noting that, in its case, the complaint clearly demanded judgment against the defendant for attorney fees. *McCollough v. Johnson, Rodenberg & Lauinger*, 587 F.Supp.2d 1170, 1178 (D.Mont.2008). In Ohio, the Federal District Court for the Southern District of Ohio also found a violation of the FDCPA where a creditor prayed for attorney fees when it was not entitled to such fees pursuant to law. *Foster v. D.B.S. Collection Agency*, 463 F.Supp.2d 783, 802 (S.D.Ohio 2006). The *Foster* court reasoned that the prayer for such relief "constitute[d] an absolute entitlement to attorney fees, even though such fees are not recoverable under Ohio law." *Id.* We are persuaded by this line of cases.

{¶41} In this case, Investment Corp. concluded in its complaint against Ms. Jarvis: "WHEREFORE, Plaintiff *demands* judgment *against [Ms. Jarvis]* for the charged off sum of $8,765.37 plus accrued interest of $7,738.99, *plus future interest at 24.00%* after March 02, 2010 plus costs of this action." (Emphasis added.) It was clear under these circumstances that Investment Corp. was enunciating its absolute entitlement to interest at a rate of 24 percent and that it was demanding such from Ms. Jarvis, not from the trial court. Accordingly, Ms. Jarvis established a prima facie claim against the defendants under the FDCPA, and consequently the OCSPA, as those claims related to the request for interest in excess of the statutory rate. This, however, does not end our inquiry.

{¶42} "Courts have characterized the FDCPA as a strict liability statute, meaning that a consumer may recover statutory damages if a debt collector violates the FDCPA even if the consumer suffered no actual damages." *Fed. Home Loan Mtg. Corp. v. Lamar*, 503 F.3d 504, 513 (6th Cir.2007). A very limited exception to the strict liability imposed by the FDCPA is the bona fide error defense which provides: "A debt collector may not be held liable in any action

brought under this subchapter if the debt collector shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error." *Hartman v. Great Seneca Fin. Corp.*, 569 F.3d 606, 614 (6th Cir.2009). Because the trial court found that a prayer in a complaint for interest was not a demand to the debtor, it did not consider whether genuine issues of material fact existed regarding the existence of a bona fide error defense. This Court declines to address that issue in the first instance. *See Harris-Coker*, 2012-Ohio-4135, at ¶ 4. Accordingly, we remand the matter to the trial court for further consideration.

{¶43} For the reasons enunciated above, Ms. Jarvis' consolidated assignment of error is sustained as it assigns error to the trial court's granting summary judgment in favor of the defendants. Because we are remanding the matter to the trial court for further consideration of issues it did not previously address, Ms. Jarvis' assignment of error is overruled as it assigns error to the trial court's denial of her motion for summary judgment.

III.

{¶44} Ms. Jarvis' consolidated assignment of error is sustained in part. The judgment of the Summit County Court of Common Pleas is reversed and the cause remanded for further proceedings consistent with this opinion.

Judgment reversed,
And cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(C). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellees.

DONNA J. CARR
FOR THE COURT

WHITMORE, P. J.
CONCURS.

DICKINSON, J.
CONCURRING IN PART AND DISSENTING IN PART.

{¶45} I agree that First Resolution Investment Corporation's claim against Sandra Jarvis accrued in Delaware after Section 2305.03(B) of the Ohio Revised Code became effective. I also agree that Ms. Jarvis's claim that First Resolution Management Corporation and Cheek Law Offices violated the Fair Debt Collection Practices Act by threatening to file suit on a time-barred claim and her claim that First Resolution Investment Corporation, Cheek, and Parri Hockenberry violated the Act by filing suit on a time-barred claim must be remanded so that the trial court can determine the unresolved issues related to those claims in the first instance.

Although I am not convinced that the mere filing of a time-barred claim violates the Act, none of the parties have made that argument to this Court. Instead, First Resolution Investment Corporation, Cheek, and Parri Hockenberry have limited their argument to asserting that Ms. Jarvis cannot demonstrate that they knowingly filed a time-barred claim. Upon review of the record, I believe there is a genuine issue of material fact regarding whether they acted knowingly, so a remand to the trial court is an appropriate disposition of that claim.

{¶46} On the other hand, I do not believe that a demand in a complaint for interest in excess of the statutory rate violates the Fair Debt Collection Practices Act. Under United States Code Title 15 Section 1692e, "[a] debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt." That includes "[t]he use of any false representation or deceptive means to collect or attempt to collect any debt or to obtain information concerning a consumer." 15 U.S.C. 1692e(10). A debt collector may also "not use unfair or unconscionable means to collect or attempt to collect any debt." 15 U.S.C. 1692f. That includes "[t]he collection of any amount (including any interest, fee, charge, or expense incidental to the principal obligation) unless such amount is expressly authorized by the agreement creating the debt or permitted by law." 15 U.S.C. 1692f(1).

{¶47} The Fair Debt Collection Practices Act was enacted in light of "abundant evidence of the use of abusive, deceptive, and unfair debt collection practices by many debt collectors." 15 U.S.C. 1692(a). Congress found that "[a]busive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy." *Id.* The purpose of the act is "to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using

abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses." 15 U.S.C. 1692(e).

{¶48} Because the Fair Debt Collection Practices Act is remedial legislation, I agree that it should be liberally construed in favor of the individuals it is designed to protect. *See Dennie v. Hurst Constr. Inc.*, 9th Dist. No. 06CA009055, 2008-Ohio-6350, ¶ 8 (explaining that the Consumer Sales Practices Act should be liberally construed). Nevertheless, I do not believe that a demand for interest in a complaint is the type of practice that the act prohibits. As the Honorable Nancy Gernter of the United States District Court of Massachusetts explained, "[a] prayer for relief in a complaint . . . is just that: a request to a third party—the court—for consideration, not a demand to the debtor himself." *Argentieri v. Fisher Landscapes Inc.*, 15 F. Supp. 2d 55, 61 (D. Mass. 1998). The "whole purpose of regulating debt collection was to 'supervise' a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel." *Id.* at 61-62. "The courts have their own system of protections against abusive tactics that occur during litigation. A grossly exaggerated debt or unfounded claim in a pleading could represent an abuse of process, and subject the attorney or client to sanctions or other disciplinary mechanisms. Given these protections, when a claim is made to the court, there is no need to invoke the protections of a statute designed to protect consumers from unscrupulous, unsupervised debt collection tactics such as threats of violence and harassing telephone calls." *Id.* at 62; *see also B-Real LLC v. Rogers*, 405 B.R. 428, 432 (M.D. La. 2009) ("While the FDCPA's purpose is to protect unsophisticated consumers from unscrupulous debt collectors, that purpose is not implicated when a debtor is instead protected by the court system and its

officers."); *Gisneros v. Neuheisel Law Firm P.C.*, No. CV06-1467-PHX-DGC, 2008 WL 65608, *3 (D. Ariz. Jan. 3, 2008).

{¶49} Not only does an interest demand in a complaint not resemble the type of activity intended to be protected by the Fair Debt Collection Practices Act, it does not fall within the Act's language. Under Ohio law, a court will award interest at a higher-than-statutory rate only if it is explicitly provided in a written contract. R.C. 1343.03(A). Accordingly, a mere demand for a higher rate of interest cannot be deemed a "false, deceptive, or misleading representation" under Section 1692e of Title 15 of the United States Code. *Harvey v. Great Seneca Fin. Corp.*, 453 F.3d 324, 333 (6th Cir. 2006) (concluding that it is not a deceptive practice for a debt collector to file a lawsuit "without the immediate means of proving the existence, amount, or true owner of the debt[.]"). Similarly, asking for a non-statutory rate of interest cannot be considered an "unfair or unconscionable" practice under Section 1692f because a debt collector will only be able to recover interest at the requested rate if it establishes that it is contractually entitled to that rate. I, therefore, believe that the trial court correctly granted summary judgment to First Resolution Investment Corporation on Ms. Jarvis's post-judgment-interest-rate claim.

APPEARANCES:

JAMES F. BURKE, JR. and JOHN J. HORRIGAN, Attorneys at Law, for Appellant.

JEFFREY TURNER, BOYD W. GENTRY, and JOHN P. LANGENDERFER, Attorneys at Law, for Appellee.

COPY

DANIEL M. HORRIGAN

2011 JUN 22 AM 11:31

SUMMIT COUNTY
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

68

SANDRA J. TAYLOR JARVIS,	)	CASE NO. CV 2010 03 1627
	)	
Plaintiff,	)	JUDGE TAMMY O'BRIEN
	)	
vs.	)	
	)	
FIRST RESOLUTION INVESTMENT CORP., *et al.*,	)	**JUDGMENT ENTRY**
	)	
	)	**Final and Appealable**
Defendants.	)	
	)	

This matter comes before the Court on the following pleadings:

1) Plaintiff, Sandra J. Taylor Jarvis's, ("Plaintiff") Motion for Summary Judgment and Memorandum in Support filed on February 25, 2011;

2) Defendant, First Resolution Investment's, ("FRIC") Motion for Summary Judgment filed on February 25, 2011;

3) Defendant, First Resolution Management Corp.'s, ("FRMC") Motion for Summary Judgment filed on February 25, 2011.

4) Defendants, Cheek Law Office and Attorney Parri Hockenberry's, Motion for Summary Judgment filed on February 25, 2011;

5) Plaintiff's Reply to the Motions for Summary Judgment filed by all Defendants filed on March 25, 2011;

6) Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment filed on March 25, 2011;

COPY

For the reasons stated below, the Court GRANTS the Motions for Summary Judgment filed by Defendants, FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry. The Court DENIES the Motion for Summary Judgment filed by Plaintiff, Sandra Taylor Jarvis.

I. STATEMENT OF CASE AND LAW

Defendant, FRIC, filed a Complaint for Money Due against the Plaintiff on March 9, 2010.[1] FRIC's claim was based on a Chase credit card account used by the Plaintiff. FRIC purchased the Plaintiff's debt from Chase and employed FRMC, Cheek Law Office and Attorney Parri Hockenberry to attempt to collect the debt from Plaintiff. In its Complaint, FRIC claimed that Plaintiff owed the charged off sum of $8,763.37, plus accrued interest of $7,738.99 for a total amount owed of $16,504.36.

Plaintiff was served with a copy of the Complaint on March 24, 2010. On May 12, 2010, the Court awarded default judgment against the Plaintiff in favor of Defendant, FRIC. On June 28, 2010, the Plaintiff filed a Motion to Vacate and Set Aside Default Judgment and Motion to File Answer *Instanter*. The Court signed a Stipulated Entry granting this Motion to Vacate and Set Aside Default Judgment on July 26, 2010. Plaintiff filed her Answer to Complaint on August 6, 2010.

On August 26, 2010, Plaintiff filed a First Amended Class Action Counterclaim. In her Counterclaim, Plaintiff named Defendants, FRMC, Cheek Law Office and Attorney Parri Hockenberry, as third-party Defendants to this action. Plaintiff's proposed class action is based on alleged violations under the Fair Debt Collection Practices Act ("FDCPA") and the Ohio Consumer Sales Practices Act ("OCSPA").[2]

---

[1] On February 4, 2011, the Court granted the Defendant's Motion to Realign the parties. For this reason, Sandra Taylor Jarvis has now been designated as the Plaintiff, and the original Plaintiffs have been designated as the Defendants.

[2] This Court has been holding class certification in abeyance while it considers the Motion for Summary Judgment.

COPY

On September 10, 2010, FRIC, the original Plaintiff to this lawsuit, dismissed its claims against Sandra Taylor Jarvis. Thus, the only claims that remain pending in this lawsuit are the claims asserted by Plaintiff, Taylor Jarvis, in her Counterclaim against FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry.

A. Plaintiff's Motion for Summary Judgment

All of the parties filed Motions for Summary Judgment on February 25, 2011. In Plaintiff's Motion for Summary Judgment, she argues that under Ohio's borrowing statute, R.C. § 2305.03(B), this Court is required to apply Delaware's three-year statute of limitation to the claim asserted by FRIC in its Complaint. Ohio's borrowing statute became effective on April 7, 2005. Plaintiff claims that FRIC's claim is subject to Ohio's borrowing statute because it arose *after* the effective date. This argument is based on the fact that Plaintiff made several payments to FRIC's predecessor, Chase, after the statute's effective date of April 7, 2005.

Plaintiff claims that Ohio's borrowing statute dictates that Delaware's statute of limitations applies to the present case. Under the borrowing statute, claims that accrued in different states are subject to those states' statutes of limitation. Plaintiff argues that FRIC's claim against her arose in Delaware. Plaintiff executed her credit card application in Ohio, but she sent it to Delaware. She also sent payments on the credit card to Delaware. She argues that her contract was to be performed in Delaware and "accrued" there as well.

If the Court agrees with the arguments presented by the Plaintiff and applies Delaware's three-year statute of limitations, the claim that FRIC filed on March 9, 2010 against Plaintiff would have been time barred. Accordingly, Plaintiff argues that the Defendants violated the FDCPA and OCSPA by filing this time-barred claims against the Plaintiff. Plaintiff also argues that the Defendants violated the FDCPA by threatening to sue on the time-barred claims. Plaintiff argues

COPY

that the Defendants also violated the FDCPA by requesting post-judgment interest in excess of the statutory amount.

B. Defendants' Motions for Summary Judgment

Defendant, FRMC, filed a Motion for Summary Judgment on February 25, 2011.[3] FRMC argues that the Court should apply *Ohio's* statute of limitations. FRMC argues that Ohio courts typically apply a fifteen-year statute of limitation on credit card cases or a six-year statute of limitation if the credit card agreement has not been produced.

FRMC argues that there is no evidence that the parties chose Delaware's statute of limitations. The parties have not produced the Credit Card Agreement that applies to the Defendant's account. FRMC argues that, in the absence of an Agreement stating otherwise, Ohio's statute of limitations should apply to the present credit card case. FRMC further argues that, even if the Credit Card Agreement *did* provide that Delaware's law governed the parties' agreement, it would not follow that Delaware's statute of limitations applied to the present case. FRMC argues that Ohio's Supreme Court has adopted the Restatement (Second) of Conflict of Laws as the governing law for Ohio conflicts issues. When a conflict arises between two states' statutes of limitations, the Restatement provides that, "an action will be maintained if it is not barred by the statute of limitations of the forum, even though it would be barred by the statute of limitations of another state." Restatement (Second) of Conflict of Laws § 142(2).

FRMC also argues that Ohio's borrowing statute, O.R.C. § 2305.03(B), does not apply to this case. FRMC contends that Plaintiff defaulted on her account on January 1, 2005, when she first failed to make the minimum monthly payment on her account. FRMC cites case law stating that a default occurs when a debtor fails to make a minimum monthly payment on a credit card. See, *e.g.*,

[3] As noted below, many of the arguments presented by the Defendants are identical, even though they were separately filed in different Motions for Summary Judgment.

COPY

Discover Bank v. Heinz, Franklin App. No. 08AP-1001, 2009 Ohio 2850; *Siemientkowski v. Bank One Columbus, N.A.*, (November 23, 1994), 8th Dist. No. 66531, unreported; *Discover Bank v. Cummings*, 9th Dist. No. 08CA009453, 2009 Ohio 1711. Accordingly, FRMC argues that Plaintiff defaulted on her account, and FRIC's claim arose, *before* Ohio's borrowing statute became effective, on April 7, 2005.

FRMC argues that the Court cannot retroactively apply Ohio's borrowing statute. FRMC cites *Dudek v. Thomas & Thomas Attorneys & Counselors at Law, LLC* (N.D. Ohio 2010), 702 F.Supp.2d 826, wherein the federal court held that Ohio's borrowing statute did not apply retroactively.

FRMC also argues that Defendants' cause of action accrued in Ohio, not Delaware. Thus, even if the Court found that Ohio's borrowing statute *was* already in effect when the claims against Plaintiff accrued, the statute still would not apply in the present case. Ohio's borrowing statute, R.C. § 2305.03(B) provides as follows:

> No civil action that is based upon a cause of action *that accrued* in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory or district or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired. (Emphasis added.)

FRMC argues that the present case did not *accrue* in Delaware because Plaintiff's decision to stop making payments was made in Ohio. FRMC cites a federal case from the Eastern District of Kentucky, *Combs v. International Insurance Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, 692, wherein the court held that a breach of contract claim accrued "where the decision to deny payment was made." The *Combs* case is persuasive in the present case because it also involved a borrowing statute and the question of where a claim accrues.

COPY

Next, FRMC argues that, even if this Court determines that the borrowing statute applies and that the Defendants' claims were barred by Delaware's three-year statute of limitations, FRMC is not liable under the FDCPA because it did not *knowingly* threaten to file an action on an account that was barred by the applicable statute of limitations. FRMC argues that no court has recognized Jarvis's position regarding the statute of limitations in Delaware barring the present credit card case in Ohio. Thus, FRMC argues that it cannot be held liable under the FDCPA because it did not *knowingly* do anything to violate that statute.

FRMC also argues that the Plaintiff's OCSPA claim must be dismissed because this action does not involve a "consumer transaction." The definition of a "consumer transaction" specifically excludes transactions between financial institutions, as defined in Ohio Revised Code §5725.01, and their customers. Thus, state and federal courts in Ohio have held that a credit card account is not a "consumer transaction." *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998), 135 F.3d 389, 412. FRMC argues that it cannot be held liable under the OCSPA because no "consumer transaction" was involved.

Defendant, FRIC, also filed its Motion for Summary Judgment on February 25, 2011. FRIC has asserted all of the same arguments asserted by FRMC, which will not be repeated herein. In addition to the arguments raised by FRMC, FRIC has also argued that it did not violate the FDCPA or the OCSPA by seeking post-judgment interest of 24%. FRIC argues that it was permitted to seek an interest rate of 24% under the credit card agreement between the parties. FRIC further argues that, even if it is not entitled to post-judgment interest of 24%, it did not violate any law in requesting this interest rate in its Complaint. FRIC cites several cases holding that a request for costs and interest directed to the court in its pleadings is not actionable under the FDCPA. *Lewis v. ACB Business Services, Inc.* (6th Cir. 1998), 135 F.3d 389, 411; *Deere v. Javitch, Block and*

COPY

Rathbone, LLP (S.D. Ohio 2006), 413 F.Supp.2d 886, 890-891; *Harvey v. Great Seneca Financial Corp.* (6th Cir. 2006), 453 F.3d 324, 333; *Reyes v. Kenosian & Miele, LLP* (N.D. Cal. 2008), 619 F.Supp.2d 796, 808.

Finally, FRIC argues that Plaintiff cannot state a claim for abuse of process, even if Delaware's statute of limitation applies, and FRIC was not entitled to 24% interest. The elements for an abuse of process claim are: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. *Yaklevich v. Kemp, Schaeffer & Rowe Co.* (1994), 68 Ohio St.3d 294, 298. FRIC argues that it filed this suit with the purpose of collecting on an account. It has not perverted or attempted to accomplish an ulterior purpose through these court proceedings. Thus, FRIC argues that it is entitled to summary judgment on Plaintiff's abuse of process claim.

Defendants, Cheek Law Offices ("Cheek") and Attorney Parri Hockenberry ("Hockenberry"), also filed a Motion for Summary Judgment on February 25, 2011. Much of the Motion for Summary Judgment filed by Cheek and Hockenberry is identical to the Motions filed by FRMC and FRIC. The Court will not repeat the arguments it has already summarized herein. Cheek and Hockenberry also argue that they had a duty to zealously represent their client and were fulfilling this duty when they filed the lawsuit against the Plaintiff. They argue, as such, that they did not violate the FDCPA or the OCSPA.

C. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment

Defendants filed a joint Memorandum in Opposition to Plaintiff's Motion for Summary Judgment on March 25, 2011. In addition to restating the arguments in their Motions for Summary Judgment, Defendants argue that the small and sporadic payments that the Plaintiff made on her

COPY

account after January of 2005 did not cure her breach. As already noted, Plaintiff argues that the Defendants' claims did not arise until after her last payment was accepted. However, Defendants argue that their claims arose when Plaintiff first failed to make the minimum monthly payment, pursuant to their agreement. This distinction is critical because Ohio's borrowing statute did not become effective until April 7, 2005. If Defendants' claims did not arise until *after* Plaintiff's last payment was credited to her account on June 28, 2006, Ohio's borrowing statute may apply to the present case. For this reason, Defendants emphasize that their claims arose on January 1, 2005, when the Plaintiff first failed to make the minimum monthly payment on her account. As further support for their argument, Defendants represent that Chase marked Plaintiff's account "delinquent" on February 7, 2005.

Defendants also attack the case law cited by the Plaintiff and argue that it does not apply to the facts of the present case. Defendants claim that many of the cases cited by the Plaintiff relate to promissory notes rather than credit card accounts. They argue that these cases do not apply to the facts of the present case.

D. Plaintiff's Reply to the Motions for Summary Judgment Filed by All Defendants

Plaintiff filed a Reply to Defendants' Motion for Summary Judgment on March 25, 2011. In her Reply, Plaintiff continues to argue that Ohio's borrowing statute *was* in effect when the Defendants' claims arose. Plaintiff lists seven payments of $50 or $100 that she made after April 7, 2005 (the effective date of Ohio's borrowing statute). Plaintiff claims that the minimum monthly amount due on May 2, 2005 was $632.00. Plaintiff claims that she made payments of $1,150 between April 7, 2005 and June 28, 2006. Plaintiff argues that, if the Defendants would have applied this amount to the minimum monthly amount due in May of 2005, then technically, Plaintiff

COPY

would not have been in default on her account until after May of 2005 and after Ohio's borrowing statute was in effect.

Plaintiff continues to argue that the Court should apply Delaware's statute of limitations to this case pursuant to Ohio's borrowing statute. Plaintiff also argues that the FDCPA is a strict liability statute and it does not matter whether the Defendants "knowingly" violated the statute. Plaintiff contends that the Defendants waived the bona fide error defense because they have not produced any evidence showing that they had a procedure in place to avoid unintentional violations of the FDCPA. Plaintiff also continues to argue that the Defendants violated the FDCPA by requesting 24% interest. Because there is no Cardholder Agreement in this case, Plaintiff states that Defendants can only seek statutory interest. Plaintiff argues that Defendants' request for a greater percentage of interest is another violation of the FDCPA.

The Court will consider the parties' arguments below.

II. Summary Judgment

A. Standard of Review

In reviewing a motion for summary judgment, the Court must consider the following: (1) whether there is no genuine issue of material fact to be litigated; (2) whether in viewing the evidence in a light most favorable to the non-moving party it appears that reasonable minds could come to but one conclusion; and, (3) whether the moving party is entitled to judgment as a matter of law. *Dresher v. Burt* (1996), 75 Ohio St.3d 280; *Wing v. Anchor Media, L.T.D.* (1991), 59 Ohio St.3d 108. If the Court finds that the non-moving party fails to make a sufficient showing on an essential element of the case with respect to which it has the burden of proof, summary judgment is appropriate. *Celotex Corp. v. Catrett* (1986), 477 U.S. 317; *Schremp v. Haugh's Products* (Nov. 19 1997), Lorain App. No. CA 006655, unreported.

COPY

Rule 56(C) of the Ohio Rules of Civil Procedure states the following, in part, in regards to summary judgment motions:

> Summary judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of the evidence in the pending case, and written stipulations of fact, if any timely filed in the action, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

The Plaintiff's case turns, in large part, on whether Ohio's borrowing statute applies to the facts of this case. If the Court determines that Ohio's borrowing statutes applies to this case, the next question is whether the Defendants' claims accrued in Ohio or Delaware. If the Court determines that the claims accrued in Delaware, then they may be barred by Delaware's three-year statute of limitations. The Court will address these issues below.

B. Ohio's Borrowing Statute

Ohio's Borrowing Statute became effective on April 7, 2005. The statute provides:

> No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

O.R.C. § 2305.03(B). Plaintiff argues that Ohio's Borrowing Statute governs the present case. She claims that the Defendants' claims against her arose after the statute's effective date of April 7, 2005, because she continued to make payments on her credit card account after the statute became effective. Defendants argue that their claim arose when the Plaintiff first failed to make the minimum payment required by her credit card statement. The Court has reviewed the parties' arguments and the case law cited in their briefs. The Court finds that the Defendants' claims against the Plaintiff arose before the effective date of Ohio's Borrowing Statute.

COPY

Plaintiff last used her Chase credit card account on May 5, 2004. (See Plaintiff's Motion for Summary Judgment, p. 15) She first failed to make the minimum required monthly payment on January 1, 2005. (See Plaintiff's response to Request for Admission, No. 8). Defendants claim that Plaintiff defaulted on her credit card account on January 1, 2005. Plaintiff's account was marked delinquent on February 7, 2005. (See FRMC's response to Interrogatory No. 8). All of these dates occurred *before* Ohio's borrowing statute became effective.

Defendants cite several cases supporting their argument that the Plaintiff breached the credit card agreement before April 7, 2005. See, e.g., *Discover Bank v. Heinz,* Franklin App. No. 08 AP-1001, 2009 Ohio 2850, ("defendant failed to make any required minimum monthly payments due on her Discover card account and therefore was in "default" under the express terms of the Card member Agreement. In defaulting on her Discovery card account, defendant breached the card member Agreement."); *Siemientkowski v. Bank One Columbus, N.A.* (November 23, 1994), 8th Dist. No. 66531, unreported ("It is . . . undisputed that plaintiff-appellant became delinquent on the account by failing to pay the required minimum monthly payment when due."); *Discover Bank v. Poling*, Franklin App. No. 04 AP-1117, 2005 Ohio 1543 ("defendant repeatedly failed to make the minimum monthly payment due on the account, and, therefore, was in default. By defaulting on the account, defendant breached the card member Agreement.")

Conversely, Plaintiff does not cite any case law supporting her argument that the payments she made, which were less than the minimum monthly payments demanded by Chase, somehow prevented Chase, or Defendants, from filing a claim against her. It is undisputed that the Plaintiff stopped using the credit card in 2004. She first failed to make the minimum monthly payment in January of 2005 and her account was marked delinquent in February of 2005. Considering these facts, the Court finds that the Defendants' claim arose before Ohio's borrowing statute became effective.

COPY

Defendants also argue that the Court cannot apply Ohio's borrowing statute retroactively. The Court agrees. Nothing in the language of O.R.C. § 2305.03(B) demonstrates that the Ohio General Assembly intended the statute to apply retroactively. In *Dudek v. Thomas & Thomas Attys. & Counselors at Law, LLC* (N.D. Ohio 2010), 702 F. Supp. 2d 826, the United States District Court for the Northern District of Ohio held that the statute could not be applied retroactively. The *Dudek* Court stated, "[t]he Court has not located any case law suggesting that the legislature intended O.R.C. § 2305.03(B) to apply retroactively, and the parties have cited none. And, the few courts that have considered this issue have held that the borrowing statute cannot be applied retrospectively." *Dudek* at 836-837. Accordingly, the Court will not apply Ohio's borrowing statute to the present case.

C. Where did FRIC's claim accrue?

Even if this Court *were* to find that Ohio's borrowing statute was in effect when the claims against Plaintiff arose, Defendants argue that Delaware's statute of limitations would not apply to this case. Ohio's borrowing statute applies to actions "that accrued in any other state." Defendants argue that the present case, based on a credit card account, "accrued" in Ohio. Plaintiff argues that Defendants' actions accrued in Delaware because that is where she sent her credit card payments.

The Court has reviewed the case law cited by the parties and has conducted its own research on this issue. It does not appear that there is any controlling case that is directly on point. The Court finds that *Combs v. International Insurance Co.* (E.D. Ky. 2001), 163 F.Supp.2d 686, aff'd (6th Cir. 2004), 354 F.3d 568, cited by the Defendants, is most persuasive in assisting this Court in its determination of where the present case "accrued." The *Combs* case involved a breach of a written contract for payment of money. The *Combs* Court held that "the cause of action accrues where the decision to deny payment was made." *Combs,* 163 F.Supp.2d at 692.

COPY

As in the present case, the alleged breach of the contract in *Combs* was where the decision to deny payment was made. The Court finds that Ohio, where Plaintiff resides, primarily used the credit card, and decided to stop making the minimum required payments on her credit card, was where the breach of the agreement occurred. The fact that the Plaintiff was required to mail payments to Delaware does not determine *where* the breach occurred – or where the action accrued. There is evidence that, for some period of time, the Plaintiff was mailing her payments to Illinois, rather than Delaware. She could have also chosen to make her payments on the Internet, by telephone, or to a Chase bank branch. The location where she sent her payments seems less significant to this case than the place where Plaintiff decided to stop making payments. In summary, the Court finds that the Defendants' action accrued in Ohio. For this reason, the Court finds that Ohio's statute of limitations applies to the present case.

There are also public policy reasons for deciding that this case accrued in Ohio. For example, if this Court were to determine that the present case accrued in Delaware, credit card companies would be able to choose favorable statutes of limitation or other differing state law by simply requiring their customers to make payments to the preferred state. The Court finds that such a determination could adversely affect Ohio residents who use credit cards. Thus, there are policy reasons to overrule the Plaintiff's argument regarding the place where FRIC's claim accrued.

D. Ohio's Statute of Limitations

Because the Court has determined that Ohio's Borrowing Statute does not apply and that, even if it did, the present case accrued in Ohio, the Court will turn to Ohio's statute of limitations to determine whether FRIC filed a time-barred claim. Normally, an action to recover on a credit card agreement is governed by Ohio's fifteen-year statute of limitations O.R.C. § 2305.06. However, some Ohio courts have applied Ohio's six-year statute of limitations, O.R.C. § 2305.07, to cases for breach

COPY

of a credit card agreement when the written credit card agreement has not been introduced into evidence. See, *e.g.*, *Unifund CCR Partners Assignee of Palisades Collectio , L.L.C. v. Hemm*, 2nd Dist. App. No. 08-CA-36, 2009 Ohio 3522. In the present case, the parties have not introduced the actual credit card agreement, but, regardless of whether the Court applies the fifteen-year or six-year statute of limitations, Defendant, FRIC's claim against the Plaintiff was timely. Plaintiff first failed to make the minimum payment required on her credit card statement in January of 2005. Defendant's predecessor, Chase, marked Plaintiff's account delinquent in February of 2005. FRIC filed its Complaint on March 9, 2010. Thus, FRIC filed its claim within Ohio's statute of limitations.

E. Plaintiff's claims against Defendants

Plaintiff's claims against Defendants are based on two categories of alleged violations under the FDCPA and OCSPA. Plaintiff has asserted FDCPA and OCSPA violations based on Delaware's statute of limitations applied by way of Ohio's Borrowing Statute. As stated above, the Court finds that FDIC's claim against Plaintiff on her credit card account was not subject to Ohio's Borrowing Statute or Delaware's statute of limitations. For this reason, Defendants are entitled to summary judgment on Plaintiff's claims, which rely on Ohio's Borrowing Statute and/or Delaware's statute of limitations.

Plaintiff also alleges that Defendants violated the FDCPA by seeking post-judgment interest in excess of the statutory rate. Plaintiff claims that Defendant, FDIC, violated the FDCPA by seeking an interest rate in excess of the statutory interest rate. Plaintiff alleges that the post-judgment interest is limited to 4% as a matter of law.

FDIC argues that the monthly credit card statements that the Plaintiff received clearly establish that her credit card account was subject to an interest rate of 24.99%. The credit card agreement at issue also provided for an interest rate of 2% per month on the unpaid balance, when the account is six

COPY

or more billing cycles past due. FDIC acknowledges that the credit card agreement has not been produced. Nonetheless, it argues that it was entitled to interest on the credit card account.

FDIC also argues that, even if it is not entitled to the requested amount of post-judgment interest, it did not violate the FDCPA by simply requesting this interest in its Complaint. FDIC cites federal case law holding that requests for attorneys' fees in a prayer for relief in a Complaint do not violate the FDCPA. *Argentieri v. Fisher Landscapes, Inc.* (D. Mass. 1998), 15 F.Supp.2d 55, 61-62.

The Court notes that neither party has cited case law that is directly on point. The Court has also been unable to find any case law holding that is a violation of the FDCPA for a debt collector to seek post-judgment interest above the statutory interest rate in its Complaint. In the absence of controlling case law, the Court finds the *Argentieri* Court's reasoning is helpful in the present case. The *Argentieri* court stated:

> A prayer for relief in a complaint, even where it specifies the quantity of attorney's fees, is just that: a request to a third party -- the court -- for consideration, not a demand to the debtor himself. A request for attorney's fees ultimately rests upon the discretion of the court and a determination of applicability at a later stage of the litigation. The whole purpose of regulating debt collection was to "supervise" a range of unsupervised contacts, such as demand letters and late-night telephone calls. In contrast, a statement in a pleading is supervised by the court and monitored by counsel. The two situations are drastically different.

Argentieri at 61-62. Similarly, this Court finds that the Plaintiff has failed to show that the Defendants violated the FDCPA or OCSPA by requesting post-judgment interest in excess of the statutory rate in its Complaint. Defendant, FDIC, ultimately dismissed the Complaint and the question of post-judgment interest is no longer before this Court. For these reasons, the Court finds that there are no genuine issues of material fact, and Defendants are entitled to summary judgment on Plaintiff's claims related to FRIC's demand for post-judgment interest.

Plaintiff also filed an abuse of process claim against the Defendants. In *Yaklevich v. Kemp, Schaeffer & Rowe Co., L.P.A.* (1994), 68 Ohio St.3d 294, the Ohio Supreme Court recognized the tort

COPY

of abuse of process and set forth the following three elements: (1) that a legal proceeding has been set in motion in proper form and with probable cause; (2) that the proceeding has been perverted to attempt to accomplish an ulterior purpose for which it was not designed; and (3) that direct damage has resulted from the wrongful use of process. FRIC, which is the only Defendant who filed a legal proceeding, argues that it did not file suit with an "ulterior purpose". FRIC argues that it was simply trying to collect on Plaintiff's account. Plaintiff does not respond to this argument in her Reply to the Motions for Summary Judgment. The Court finds that the Plaintiff has failed to create a genuine issue of material fact on her claim for abuse of process. There is no evidence before the Court showing that FRIC filed a claim against the Plaintiff and then attempted to accomplish an ulterior purpose through this lawsuit. Shortly after the Plaintiff filed her Counterclaim, FRIC dismissed its claim altogether. For these reasons, Defendants are entitled to summary judgment on Plaintiff's abuse of process claim.

F. Class Certification and Arbitration

The Court notes that there are additional motions before the Court related to class certification and arbitration. These motions have been rendered moot. The claims asserted by the proposed class would be the same claims asserted by Plaintiff. The Court has determined that the Defendants are entitled to summary judgment on those claims. For this reason, the Court will not reach the question of class certification.

The Court also notes that the Motion to Compel Arbitration is moot. The Motion to Compel Arbitration was based on the alleged Credit Card Agreement between the parties. All parties acknowledge that the actual Credit Card Agreement at issue in this matter has not been produced. Furthermore, the claim that FRIC asserted against Plaintiff was dismissed on September 10, 2010. For these reasons, the Court will not reach the question of whether the parties should be compelled to arbitrate this case.

COPY

CONCLUSION

WHEREFORE, the Court GRANTS the Motions for Summary Judgment filed by Defendants, FRIC, FRMC, Cheek Law Office and Attorney Parri Hockenberry. Defendants are entitled to summary judgment on all of the claims asserted by Plaintiff in her Counterclaim. The Court DENIES the Motion for Summary Judgment filed by Plaintiff, Sandra Taylor Jarvis.

IT IS SO ORDERED.

This is a final appealable order and there is no just cause for delay.

Tammy O'Brien
JUDGE TAMMY O'BRIEN

Attorney Boyd W. Gentry
Attorneys James F. Burke, Jr./ John J. Horrigan

Westlaw.

R.C. § 2305.03

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)
Limitations Generally
2305.03 Lapse of time as bar to civil action

(A) Except as provided in division (B) of this section and unless a different limitation is prescribed by statute, a civil action may be commenced only within the period prescribed in sections 2305.04 to 2305.22 of the Revised Code. If interposed by proper plea by a party to an action mentioned in any of those sections, lapse of time shall be a bar to the action.

(B) No civil action that is based upon a cause of action that accrued in any other state, territory, district, or foreign jurisdiction may be commenced and maintained in this state if the period of limitation that applies to that action under the laws of that other state, territory, district, or foreign jurisdiction has expired or the period of limitation that applies to that action under the laws of this state has expired.

CREDIT(S)

(2004 S 80, eff. 4-7-05; 1953 H 1, eff. 10-1-53; GC 11218)

R.C. § 2305.03, OH ST § 2305.03

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective: May 15, 2008

West's Delaware Code Annotated Currentness
Title 10. Courts and Judicial Procedure
Part V. Limitation of Actions
Chapter 81. Personal Actions
→→ § 8106. Actions subject to 3-year limitation

(a) No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractual or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the accruing of the cause of such action; subject, however, to the provisions of §§ 8108-8110, 8119 and 8127 of this title.

(b) Contractual limitations.--

Notwithstanding any other provision of this section, a property insurance contract subject to subchapter III of Chapter 41 of Title 18:

(1) May not require that an action for a claim made under the contract be filed less than 1 year from the date of the denial of the claim by the insurer; and

(2) May permit an action for a claim made under the contract to be filed more than 1 year from the date of the denial of the claim by the insurer.

CREDIT(S)

46 Laws 1947, ch. 115, § 1; 57 Laws 1970, ch. 568, § 2; 76 Laws 2008, ch. 223, § 2, eff. May 15, 2008.

Codifications: Rev. Code Del. 1852, § 2742; Rev. Stat. Del. 1915, § 4671; Rev. Code Del. 1935, § 5129; 10 Del.C. 1953, § 8106

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

10 Del.C. § 8106, DE ST TI 10 § 8106

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.

R.C. § 2305.06

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts—Common Pleas
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)
Limitations—Contracts
2305. 06 Contract in writing

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

(1993 H 152, eff. 7-1-93; 129 v 13; 1953 H 1; GC 11221)

R.C. § 2305.06, OH ST § 2305.06

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.
R.C. § 2305.07

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title XXIII. Courts--Common Pleas
Chapter 2305. Jurisdiction; Limitation of Actions (Refs & Annos)
Limitations--Contracts
→→ 2305.07 Contract not in writing

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

CREDIT(S)

(1993 H 152, eff. 7-1-93; 129 v 13; 1953 H 1; GC 11222)

R.C. § 2305.07, OH ST § 2305.07

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C
Baldwin's Ohio Revised Code Annotated Currentness
Constitution of the State of Ohio (Refs & Annos)
Article II. Legislative (Refs & Annos)
→→ O Const II Sec. 28 Retroactive laws; laws impairing obligation of contracts

The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

Const. Art. II, § 28, OH CONST Art. II, § 28

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective:[See Text Amendments]

United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 41. Consumer Credit Protection (Refs & Annos)
Subchapter V. Debt Collection Practices (Refs & Annos)
→→ § 1692i. Legal actions by debt collectors

(a) Venue

Any debt collector who brings any legal action on a debt against any consumer shall--

(1) in the case of an action to enforce an interest in real property securing the consumer's obligation, bring such action only in a judicial district or similar legal entity in which such real property is located; or

(2) in the case of an action not described in paragraph (1), bring such action only in the judicial district or similar legal entity--

(A) in which such consumer signed the contract sued upon; or

(B) in which such consumer resides at the commencement of the action.

(b) Authorization of actions

Nothing in this subchapter shall be construed to authorize the bringing of legal actions by debt collectors.

CREDIT(S)

(Pub.L. 90-321, Title VIII, § 811, as added Pub.L. 95-109, Sept. 20, 1977, 91 Stat. 880.)

15 U.S.C.A. § 1692i, 15 USCA § 1692i

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

Westlaw.

R.C. § 1345.01

C

Effective: August 31, 2012

Baldwin's Ohio Revised Code Annotated Currentness
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1345. Consumer Sales Practices (Refs & Annos)
Unfair, Deceptive, or Unconscionable Acts or Practices (Refs & Annos)
1345.01 Definitions

As used in sections 1345.01 to 1345.13 of the Revised Code:

(A) "Consumer transaction" means a sale, lease, assignment, award by chance, or other transfer of an item of goods, a service, a franchise, or an intangible, to an individual for purposes that are primarily personal, family, or household, or solicitation to supply any of these things. "Consumer transaction" does not include transactions between persons, defined in sections 4905.03 and 5725.01 of the Revised Code, and their customers, except for transactions involving a loan made pursuant to sections 1321.35 to 1321.48 of the Revised Code and transactions in connection with residential mortgages between loan officers, mortgage brokers, or nonbank mortgage lenders and their customers; transactions involving a home construction service contract as defined in section 4722.01 of the Revised Code; transactions between certified public accountants or public accountants and their clients; transactions between attorneys, physicians, or dentists and their clients or patients; and transactions between veterinarians and their patients that pertain to medical treatment but not ancillary services.

(B) "Person" includes an individual, corporation, government, governmental subdivision or agency, business trust, estate, trust, partnership, association, cooperative, or other legal en- tity.

(C) "Supplier" means a seller, lessor, assignor, franchisor, or other person engaged in the business of effecting or soliciting consumer transactions, whether or not the person deals directly with the consumer. If the consumer transaction is in connection with a residential mortgage, "supplier" does not include an assignee or purchaser of the loan for value, except as otherwise provided in section 1345.091 of the Revised Code. For purposes of this division, in a consumer transaction in connection with a residential mortgage, "seller" means a loan officer, mortgage broker, or nonbank mortgage lender.

(D) "Consumer" means a person who engages in a consumer transaction with a supplier.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(E) "Knowledge" means actual awareness, but such actual awareness may be inferred where objective manifestations indicate that the individual involved acted with such awareness.

(F) "Natural gas service" means the sale of natural gas, exclusive of any distribution or ancillary service.

(G) "Public telecommunications service" means the transmission by electromagnetic or other means, other than by a telephone company as defined in section 4927.01 of the Revised Code, of signs, signals, writings, images, sounds, messages, or data originating in this state regardless of actual call routing. "Public telecommunications service" excludes a system, including its construction, maintenance, or operation, for the provision of telecommunications service, or any portion of such service, by any entity for the sole and exclusive use of that entity, its parent, a subsidiary, or an affiliated entity, and not for resale, directly or indirectly; the provision of terminal equipment used to originate telecommunications service; broadcast transmission by radio, television, or satellite broadcast stations regulated by the federal government; or cable television service.

(H)(1) "Loan officer" means an individual who for compensation or gain, or in anticipation of compensation or gain, takes or offers to take a residential mortgage loan application; assists or offers to assist a buyer in obtaining or applying to obtain a residential mortgage loan by, among other things, advising on loan terms, including rates, fees, and other costs; offers or negotiates terms of a residential mortgage loan; or issues or offers to issue a commitment for a residential mortgage loan. "Loan officer" also includes a loan originator as defined in division (E)(1) of section 1322.01 of the Revised Code.

(2) "Loan officer" does not include an employee of a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; an employee of a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an employee of an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(I) "Residential mortgage" or "mortgage" means an obligation to pay a sum of money evidenced by a note and secured by a lien upon real property located within this state containing two or fewer residential units or on which two or fewer residential units are to be constructed and includes such an obligation on a residential condominium or cooperative unit.

(J)(1) "Mortgage broker" means any of the following:

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(a) A person that holds that person out as being able to assist a buyer in obtaining a mortgage and charges or receives from either the buyer or lender money or other valuable consideration readily convertible into money for providing this assistance;

(b) A person that solicits financial and mortgage information from the public, provides that information to a mortgage broker or a person that makes residential mortgage loans, and charges or receives from either of them money or other valuable consideration readily convertible into money for providing the information;

(c) A person engaged in table-funding or warehouse-lending mortgage loans that are residential mortgage loans.

(2) "Mortgage broker" does not include a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; an affiliate that (a) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (b) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration; or an employee of any such entity.

(K) "Nonbank mortgage lender" means any person that engages in a consumer transaction in connection with a residential mortgage, except for a bank, savings bank, savings and loan association, credit union, or credit union service organization organized under the laws of this state, another state, or the United States; a subsidiary of such a bank, savings bank, savings and loan association, or credit union; or an affiliate that (1) controls, is controlled by, or is under common control with, such a bank, savings bank, savings and loan association, or credit union and (2) is subject to examination, supervision, and regulation, including with respect to the affiliate's compliance with applicable consumer protection requirements, by the board of governors of the federal reserve system, the comptroller of the currency, the office of thrift supervision, the federal deposit insurance corporation, or the national credit union administration.

(L) For purposes of divisions (H), (J), and (K) of this section:

(1) "Control" of another entity means ownership, control, or power to vote twenty-five per cent or more of the outstanding shares of any class of voting securities of the other entity, directly or indirectly or acting through one or more other persons.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(2) "Credit union service organization" means a CUSO as defined in 12 C.F.R. 702.2.

CREDIT(S)

(2012 H 383, eff. 8-31-12; 2009 S 124, eff. 12-28-09; 2009 H 1, eff. 10-16-09; 2008 H 545, eff. 9-1-08; 2006 S 185, eff. 1-1-07; 2000 H 177, eff. 5-17-00; 1988 S 264, eff. 7-26-88; 1980 H 1078, S 212; 1972 H 103)

R.C. § 1345.01, OH ST § 1345.01

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective: January 1, 2007

Baldwin's Ohio Revised Code Annotated Currentness
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1345. Consumer Sales Practices (Refs & Annos)
Unfair, Deceptive, or Unconscionable Acts or Practices (Refs & Annos)
→→ 1345.02 Unfair or deceptive acts or practices

(A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

(1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;

(2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

(3) That the subject of a consumer transaction is new, or unused, if it is not;

(4) That the subject of a consumer transaction is available to the consumer for a reason that does not exist;

(5) That the subject of a consumer transaction has been supplied in accordance with a previous representation, if it has not, except that the act of a supplier in furnishing similar merchandise of equal or greater value as a good faith substitute does not violate this section;

(6) That the subject of a consumer transaction will be supplied in greater quantity than the supplier intends;

(7) That replacement or repair is needed, if it is not;

(8) That a specific price advantage exists, if it does not;

(9) That the supplier has a sponsorship, approval, or affiliation that the supplier does not have;

(10) That a consumer transaction involves or does not involve a warranty, a disclaimer of warranties or other rights, remedies, or obligations if the representation is false.

(C) In construing division (A) of this section, the court shall give due consideration and great weight to federal trade commission orders, trade regulation rules and guides, and the federal courts' interpretations of subsection 45 (a)(1) of the "Federal Trade Commission Act," 38 Stat. 717 (1914), 15 U.S.C.A. 41, as amended.

(D) No supplier shall offer to a consumer or represent that a consumer will receive a rebate, discount, or other benefit as an inducement for entering into a consumer transaction in return for giving the supplier the names of prospective consumers, or otherwise helping the supplier to enter into other consumer transactions, if earning the benefit is contingent upon an event occurring after the consumer enters into the transaction.

(E)(1) No supplier, in connection with a consumer transaction involving natural gas service or public telecommunications service to a consumer in this state, shall request or submit, or cause to be requested or submitted, a change in the consumer's provider of natural gas service or public telecommunications service, without first obtaining, or causing to be obtained, the verified consent of the consumer. For the purpose of this division and with respect to public telecommunications service only, the procedures necessary for verifying the consent of a consumer shall be those prescribed by rule by the public utilities commission for public telecommunications service under division (D) of section 4905.72 of the Revised Code. Also, for the purpose of this division, the act, omission, or failure of any officer, agent, or other individual, acting for or employed by another person, while acting within the scope of that authority or employment, is the act or failure of that other person.

(2) Consistent with the exclusion, under 47 C.F.R. 64.1100(a)(3), of commercial mobile radio service providers from the verification requirements adopted in 47 C.F.R. 64.1100, 64.1150, 64.1160, 64.1170, 64.1180, and 64.1190 by the federal communications commission, division (E)(1) of this section does not apply to a provider of commercial mobile radio service insofar as such provider is engaged in the provision of commercial mobile radio service. However, when that exclusion no longer is in effect, division (E)(1) of this section shall apply to such a provider.

(3) The attorney general may initiate criminal proceedings for a prosecution under division (C) of section 1345.99 of the Revised Code by presenting evidence of criminal violations to the prosecuting attorney of any county in which the offense may be prosecuted. If the prosecuting attorney does not prosecute the violations, or at the request of the prosecuting attorney, the attorney general may proceed in the prosecution with all the rights, privileges, and

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

powers conferred by law on prosecuting attorneys, including the power to appear before grand juries and to interrogate witnesses before grand juries.

(F) Concerning a consumer transaction in connection with a residential mortgage, and without limiting the scope of division (A) or (B) of this section, the act of a supplier in doing either of the following is deceptive:

(1) Knowingly failing to provide disclosures required under state and federal law;

(2) Knowingly providing a disclosure that includes a material misrepresentation.

CREDIT(S)

(2006 S 185, eff. 1-1-07; 2000 H 177, eff. 5-17-00; 1978 H 681, eff. 8-11-78; 1972 H 103)

R.C. § 1345.02, OH ST § 1345.02

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective: January 1, 2007

Baldwin's Ohio Revised Code Annotated Currentness
Title XIII. Commercial Transactions (Refs & Annos)
Chapter 1345. Consumer Sales Practices (Refs & Annos)
Unfair, Deceptive, or Unconscionable Acts or Practices (Refs & Annos)
→→ 1345.03 Unconscionable acts or practices

(A) No supplier shall commit an unconscionable act or practice in connection with a consumer transaction. Such an unconscionable act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.

(B) In determining whether an act or practice is unconscionable, the following circumstances shall be taken into consideration:

(1) Whether the supplier has knowingly taken advantage of the inability of the consumer reasonably to protect the consumer's interests because of the consumer's physical or mental infirmities, ignorance, illiteracy, or inability to understand the language of an agreement;

(2) Whether the supplier knew at the time the consumer transaction was entered into that the price was substantially in excess of the price at which similar property or services were readily obtainable in similar consumer transactions by like consumers;

(3) Whether the supplier knew at the time the consumer transaction was entered into of the inability of the consumer to receive a substantial benefit from the subject of the consumer transaction;

(4) Whether the supplier knew at the time the consumer transaction was entered into that there was no reasonable probability of payment of the obligation in full by the consumer;

(5) Whether the supplier required the consumer to enter into a consumer transaction on terms the supplier knew were substantially one-sided in favor of the supplier;

(6) Whether the supplier knowingly made a misleading statement of opinion on which the consumer was likely to rely to the consumer's detriment;

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(7) Whether the supplier has, without justification, refused to make a refund in cash or by check for a returned item that was purchased with cash or by check, unless the supplier had conspicuously posted in the establishment at the time of the sale a sign stating the supplier's refund policy.

(C) This section does not apply to a consumer transaction in connection with a residential mortgage.

CREDIT(S)

(2006 S 185, eff. 1-1-07; 1977 H 301, eff. 9-23-77; 1972 H 103)

R.C. § 1345.03, OH ST § 1345.03

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

C

Effective:[See Text Amendments]

Baldwin's Ohio Revised Code Annotated Currentness
Title LVII. Taxation (Refs & Annos)
Chapter 5725. Financial Institutions; Dealers in Intangibles; Insurance Companies (Refs & Annos)
Definitions
→→ 5725.01 Definitions

As used in sections 5725.01 to 5725.26 of the Revised Code:

(A) "Financial institution" means:

(1) A national bank organized and existing as a national bank association pursuant to the "National Bank Act," 12 U.S.C. 21;

(2) A federal savings association or federal savings bank that is chartered under 12 U.S.C. 1464;

(3) A bank, banking association, trust company, savings and loan association, savings bank, or other banking institution that is incorporated or organized under the laws of any state;

(4) Any corporation organized under 12 U.S.C. 611 to 631;

(5) Any agency or branch of a foreign depository as defined in 12 U.S.C. 3101;

(6) A company licensed as a small business investment company under the "Small Business Investment Act of 1958," 72 Stat. 689, 15 U.S.C. 661 [sic.], as amended; or

(7) A company chartered under the "Farm Credit Act of 1933," 48 Stat. 257, 12 U.S.C. 1131(d), as amended.

Corporations or institutions organized under the "Federal Farm Loan Act" and amendments thereto, insurance companies, and credit unions shall not be considered financial institutions or dealers in intangibles within the meaning of such sections.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

(B)(1) "Dealer in intangibles" includes every person who keeps an office or other place of business in this state and engages at such office or other place in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness, or of buying or selling bonds, stocks, or other investment securities, whether on the person's own account with a view to profit, or as agent or broker for others, with a view to profit or personal earnings. Dealer in intangibles excludes institutions used exclusively for charitable purposes, insurance companies, and financial institutions. The investment of funds as personal accumulations or as business reserves or working capital does not constitute engaging in a business within the meaning of this division; but a person who, having engaged in a business that consists primarily of lending money, or discounting, buying, or selling bills of exchange, drafts, acceptances, notes, mortgages, or other evidences of indebtedness on the person's own account, remains in business primarily for the purpose of realizing upon the assets of the business is deemed a dealer in intangibles, though not presently engaged in a business that consists primarily of lending money or discounting or buying such securities.

(2) The tax commissioner shall adopt a rule defining "primarily" as that term is used in division (B)(1) of this section.

(C) "Insurance company" includes every corporation, association, and society engaged in the business of insurance of any character, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage, or acting as surety on bonds or undertakings. "Insurance company" also includes any health insuring corporation as defined in section 1751.01 of the Revised Code.

(D) "Domestic insurance company" includes every insurance company organized and existing under the laws of this state, and every unincorporated association and society formed under the laws of this state for the purpose of engaging in said business, except a company, association, or society that is an insurance holding company affiliate controlled by a nonresident affiliate and has risks in this state formerly written by its foreign affiliates in a total amount exceeding the risks outstanding on the taxpayer's latest annual report that arise from business initially written by it in this state; and excludes every foreign insurance company. As used in this division, terms defined in section 3901.32 of the Revised Code have the same meanings given to them in that section.

(E) "Foreign insurance company" includes every insurance company organized or existing under the laws of any other state, territory, country, or the United States and every insurance holding company affiliate excepted under division (D) of this section.

(F) "Credit union" means a nonprofit cooperative financial institution organized or chartered under the laws of this state, of another state, or of the United States.

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.

CREDIT(S)

(2005 H 81, eff. 4-14-06; 2005 H 66, eff. 9-29-05; 1997 H 215, eff. 6-30-97; 1972 H 1257, eff. 3-31-73; 130 v H 130; 1953 H 1; GC 5407, 5414-1, 5414-8)

R.C. § 5725.01, OH ST § 5725.01

END OF DOCUMENT

© 2013 Thomson Reuters. No Claim to Orig. US Gov. Works.