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Gallagher Sharp Newsflash: Ohio Does Not Recognize a Cause of Action for Tortious Acts in Concert Under the Restatement (2d) of Torts, § 876

Today, August 28, 2012, the Supreme Court of Ohio held that Ohio does not recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876. *DeVries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc.*, Slip Opinion No. 2012-Ohio-3828.

The plaintiff in *DeVries Dairy* was an Ohio commercial dairy farm and a member of an Indiana marketing cooperative which provided product marketing services for plaintiff and other dairy farm members. The plaintiff filed a complaint against the co-op and several other defendants who ran the co-op. The complaint alleged a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876 due to the defendants' exercise of control over all aspects of the co-op, including control over who would purchase milk produced by co-op members, the terms of such sales, and the prices that the members would receive for their milk. Plaintiff alleged that, due to defendants' actions, from approximately October 2003 through the end of April 2008 the co-op failed to pay plaintiff the amount due under the terms of the marketing agreement and bylaws of the co-op and, at the same time, ensured that other members, who were similarly situated to plaintiff, received more payouts from the co-op for their milk products.

Under the Restatement (2d) of Torts, § 876, a defendant can be held liable with another party for engaging in concerted tortious acts when it is established that the defendant has done one of the following: (a) committed a tortious act in concert with another party or pursuant to a common design with that party; or (b) gave substantial assistance or encouragement to another's tortious conduct with the knowledge that the other's conduct constitutes a breach of duty; or, (c) gave substantial assistance to another party in accomplishing a tortious result and the defendant's own conduct, when separately considered, amounts to a breach of duty to the plaintiff. While Ohio case law had, in the past, discussed the elements of a cause of action for tortious acts in concert liability under the Restatement (2d) of Torts, § 876, no court ever found the facts of any case established that tort. In *DeVries Dairy*, the Supreme Court of Ohio has now made it clear that Ohio does not even recognize such a tort under Ohio law.

Justice Paul Pfeifer was the lone dissenter from the Court's per curiam opinion. He was of the opinion that the tort should be recognized in Ohio allowing liability to be established if the facts of a case proved one of the three prongs of the standard in Restatement (2d) of Torts, § 876.

A link to the *DeVries Dairy* opinion is here: <http://www.supremecourtofohio.gov/rod/docs/pdf/0/2012/2012-ohio-3828.pdf>

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