

# Am I a party entitled to enforce a lost promissory note? The Bullet Point: Volume 3, Issue 19

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Unconscionability Challenges to Arbitration

*Zubek v. Dearborn, 8th Dist. Cuyahoga No. 107883, 2019-Ohio-3765.*

In this appeal the Eighth Appellate District reversed the trial court's finding that an arbitration agreement was unconscionable and ordered the parties to arbitrate their disputes.

**The Bullet Point:** The notion of unconscionability embodies two concepts: procedural unconscionability and substantive unconscionability: the former concerns “circumstances surrounding each of the parties to a contract such that no voluntary meeting of the minds was possible”; the latter refers to “unfair and unreasonable contract terms.” Procedural unconscionability considers the circumstances surrounding the contracting parties’ bargaining, such as the parties’ age, education, intelligence, business acumen and experience, who drafted the contract, whether alterations in the printed terms were possible, and whether there were alternative sources of supply for the goods at issue. Conversely, substantive unconscionability goes to the terms of the contract. “Substantive unconscionability involves those factors which relate to the contract terms themselves and whether they are commercially reasonable.”

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Recovery of attorney’s fees seeking to enforce settlement

*Rayco Manufacturing, Inc. v. Murphy, Rogers, Sloss & Gambel, 8th Dist. Cuyahoga No. 106714, 2019-Ohio-3756.*

In this appeal, the Eighth Appellate District resolved an intra-district split as to whether attorney’s fees spent in enforcing the terms of a settlement agreement are recoverable as compensatory damages. The court ultimately found that attorney’s fees spent in enforcing an agreement can in fact be recovered as compensatory damages.

**The Bullet Point:** Ohio follows the “American Rule,” which provides that a prevailing party in a civil action may not generally recover its attorney fees as part of the “costs of litigation” unless attorney fees are provided for by statute, the nonprevailing party acts in bad faith, or there is an enforceable contract that “specifically provides for the losing party to pay the prevailing party’s attorney fees.” However, attorney fees are allowed as compensatory damages when the fees are incurred as a direct result of the breach of a settlement agreement.

The rationale behind the exception for allowing attorney fees expended as a result of enforcing a settlement agreement is that “any fees incurred after the breach of the settlement agreement were relevant to the determination of compensatory damages, including those fees [a party was] ‘forced’ to incur by filing the action.”

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Ability to enforce a lost note

***Beneficial Financial Inc. v. Saunders, 4th Dist. Gallia No. 18CA5, 2019-Ohio-3577.***

In this appeal, the Fourth Appellate District found that the trial court did not err when it found that the plaintiff was a party entitled to enforce a promissory note that had been lost.

**The Bullet Point:** R.C. 1303.31(A) identifies three entities entitled to enforce an instrument: (1) the holder of the instrument; (2) a nonholder in possession of the instrument who has the rights of a holder; and (3) a person not in possession of the instrument who is entitled to enforce the instrument under R.C. 1303.38 or 1303.58(D). To be entitled to enforce a lost note, the party seeking judgment must establish: (1) The person was in possession of the instrument and entitled to enforce it when loss of possession occurred; (2) The loss of possession was not the result of a transfer by the person or a lawful seizure; and (3) The person cannot reasonably obtain possession of the instrument because the instrument was destroyed, its whereabouts cannot be determined, or it is in the wrongful possession of a person who is unknown, who cannot be found, or who is not amenable to service of process. Ohio recently amended its lost note statute, which now permits an assignee to enforce a lost instrument acquired from a party who was in possession and entitled to enforce the instrument at the time the loss occurred.

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