

# Am I Entitled to Indemnification?

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*McGlinchey's Commercial Law Bulletin is a biweekly update of recent, unique, and impactful cases in state and federal courts in the area of commercial litigation.*

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## Ohio

### Conversion

#### [Bradford v. A Star Properties, LLC, 9th Dist. Summit No. 2023-Ohio-3451](#)

In this appeal, the Ninth Appellate District affirmed the trial court's decision to grant defendants judgment on a claim for conversion.

**The Bullet Point:** "[C]onversion is the wrongful exercise of dominion over property to the exclusion of the rights of the owner or withholding it from [her] possession under a claim inconsistent with [her] rights." To prevail on a conversion claim, a plaintiff must demonstrate "(1) that [she] owned or had the right to control the property at the time of the conversion, (2) the defendant's wrongful act or disposition of the plaintiff's property rights, and (3) damages."

"It is not necessary that the property be wrongfully obtained" for there to be a conversion. When property is otherwise lawfully held, "[a] demand and refusal \* \* \* are usually required to prove the conversion \* \* \* [.]"

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## Mutual Assent to Arbitrate

#### [Bauer v. River City Mrtg. LLC, 1st Dist. Hamilton No. 2023-Ohio-3443.](#)

In this appeal, the First Appellate District reversed the trial court's decision and found that there was no mutual assent to arbitrate the plaintiff's claims.

**The Bullet Point:** The essential elements of contract formation are required to compel arbitration. A contract, in turn, is generally defined as a promise, or a set of promises, actionable upon breach. And the essential elements of a contract include an offer, acceptance, contractual capacity, consideration, a manifestation of mutual assent, and legality of the object and of consideration. A meeting of the minds as to the essential terms of the contract is a requirement for enforcing the contract. Courts will be reluctant to find a meeting of the minds to agree to arbitrate when the agreement permits an employer to "unilaterally amend or terminate an arbitration agreement without notice renders the agreement illusory."

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## Indemnification

### *Wildcat Drilling LLC v. Discovery Oil & Gas, LLC, Slip. Op. No. 2023-Ohio-3398.*

In this discretionary appeal, the Ohio Supreme Court held that an express indemnification provision in contract evidence obviates the need to comply with the common law notice requirements for indemnification under prior Ohio Supreme Court precedent.

**The Bullet Point:** In Ohio, parties “have a fundamental right to contract freely with the expectation that the terms of the contract will be enforced.” “Parties to a contract may include terms in derogation of the common law, but the intent to do so must be clearly indicated.”

Indemnity “is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.” An indemnity may be express or implied.

As the Court noted, “[e]xpress indemnity is based on a written agreement or contract in which one party (the indemnitor) promises to indemnify another party (the indemnitee) for payments it makes under circumstances set forth in the agreement or contract. And the nature of the indemnity relationship is determined by the intent of the parties, as expressed by the language used in the agreement or contract. *Id.* When the indemnitor expressly agrees to indemnify an indemnitee, the indemnitor is obligated to do so under the terms of the agreement or contract.” Accordingly, “the inclusion of an indemnification provision in a contract shows clear intent by the parties to deviate from the common law and thus the parties are not required to also include an express statement in the contract abrogating the common law for the common law not to apply.”

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## Florida

### Foreclosure of Towing Liens

#### *Scott Walls v. Roadway, Inc., No. 3D22-915 (Fla. 3d DCA September 20, 2023)*

The Third District affirmed the entry of final judgment in favor of a towing company on a plaintiff’s claims related to the towing, storage, and sale of his vehicle pursuant to section 713.78, Florida Statutes.

**The Bullet Point:** Pursuant to section 713.78, Florida Statutes, a towing company seeking to foreclose its lien on a vehicle must send notice to the registered owner, the insurance company insuring the vehicle, and all persons claiming a lien on the vehicle. In this appeal, the plaintiff alleged that because he provided the towing company with documentation to establish he was the owner of the subject vehicle, the towing company was obligated to send him notice pursuant to the requirements set forth in section 713.78. The Third District disagreed, reasoning that none of the plaintiff’s documents included an actual certificate of title, and the plaintiff was not identified

as the registered owner or potential owner of the vehicle. Accordingly, the statute did not require the towing company to notify the plaintiff, and the trial court's order of final summary judgment in favor of the towing company on the plaintiff's section 713.78 claim was affirmed.

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## FDUTPA Actual Damages

### *Stuart Roofing, Inc. v. Karl Thomas, No. 4D22-2580 (Fla. 4th DCA September 20, 2023)*

The Fourth District examined whether the evidence presented at trial was sufficient to establish a FDUTPA violation and prove actual damages.

**The Bullet Point:** To assert a claim for violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA"), a plaintiff must establish (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages. The measure of actual damages is generally the difference in market value between what was promised by the defendant and what was delivered. Consequential damages are not recoverable in a FDUTPA claim.

This case stems from a dispute over a metal roof installed by the appellant on a home owned by the appellee. During the trial, the appellee presented evidence establishing the market value for the roof based upon the contract price, as well as testimony and photographs demonstrating issues with the roof and checks and invoices related to expenses incurred due to damages to the home caused by the roof installation. The appellant argued on appeal that this evidence was insufficient to establish a FDUTPA violation, and the Fourth District agreed, reasoning that the plaintiff had not established actual damages. This is because the evidence presented at trial failed to establish the market value of the roof that the appellee received, and the evidence of amounts paid for repairs constitutes evidence of consequential damages, which are not recoverable in a FDUTPA claim. Accordingly, the Fourth District reversed and remanded for the trial court to enter a directed verdict in the appellant's favor on the FDUTPA claim.

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## Direct Benefit Element of Unjust Enrichment Claims

### *Chiquita Fresh North America, L.L.C. v. Port Everglades Terminal, LLC, Nos. 4D2021-3433 & 4D2021-3556 (Fla. 4th DCA September 13, 2023)*

The Fourth District concluded that the evidence presented by a plaintiff at trial did not demonstrate that a direct benefit was conferred upon the defendant, a necessary element of a cause of action for unjust enrichment.

**The Bullet Point:** Under Florida law, a claim for unjust enrichment has four elements: (1) the plaintiff has conferred a benefit on the defendant; (2) the defendant has knowledge of the benefit; (3) the defendant has accepted or retained the benefit conferred; and (4) the circumstances are such that it would be inequitable for the defendant to retain the benefit without paying fair value for it. It is well established that to support a claim for unjust enrichment; a plaintiff must have *directly* conferred a benefit on the defendant.

The plaintiff in this case was a stevedoring company, and its unjust enrichment theory was based upon improvements it made to its facilities to accommodate the defendant and secure its business. However, the plaintiff did not have any contractual agreement with the defendant, and the business relationship between the two parties was an indirect result of the defendant's contractual relationship with a third-party shipping company. The plaintiff argued that the money it spent to improve its facilities directly conferred a benefit upon the defendant, reasoning that the defendant's use of the improved facilities reduced the defendant's own space requirements and made it possible for the defendant to save \$4.6 million by reducing its lease obligation with a third party. The Fourth District ruled that the plaintiff did not directly confer any benefit on the defendant that would support a claim for unjust enrichment. This was because any benefit that the defendant realized from its renegotiated lease was an indirect, tangential benefit of its business relationship with the plaintiff that did not flow directly to the plaintiff from its dealings with the defendant. Accordingly, the final judgment in favor of the plaintiff was reversed.

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