

Can a Non-Signatory Be Compelled to Arbitrate?

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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.

Ohio

Conditions Precedent

[Berkut Inc. v. Devolver, 8th District Court of Appeals \(Ohio Ct. App. 2024\)](#)

In this appeal, the Eighth Appellate Court affirmed in part the trial court's determination that Defendant breached its contract with Plaintiff disagreeing with Defendant-appellant that Plaintiff failed to meet a condition precedent in order to effectuate the contract.

Bullet Point: In Ohio, a condition precedent is "a condition that must be performed before obligations in a contract become effective." Generally, Ohio law disfavors conditions precedent. Courts will not interpret a contract provision to impose a condition precedent absent an explicit intent by the parties, particularly in instances when a forfeiture will result. Here, the appellate court had to evaluate Defendant's argument that it was excused from paying Plaintiff because Plaintiff failed to obtain the signature of a project manager and sign a lien release form. Because the contract between Plaintiff and Defendant had no express indication that in order to receive payment Plaintiff needed a project manager to sign off, nor did it expressly need to sign a lien release, no condition precedent existed to excuse Defendant from making payment to Plaintiff.

"Picking Off" Class Representative

[Wilson v. Directions Credit Union, 6th District Court of Appeals Lucas County \(Ohio Ct. App. 2024\)](#)

In this appeal, the Sixth District Court of Appeals in Lucas County reversed the trial court's ruling granting Defendant's motion to dismiss for lack of jurisdiction after Defendant tried to pick off Plaintiff by making Plaintiff whole before a class could be certified.

Bullet Point: It is well established that "settlement of a plaintiff's claims moots an action." Once a class has been certified, the mootng of the class representative's claims does not moot the entire action, because, at that

point, the class has “acquired a legal status separate from the interest asserted by the [named representative].” *Oak Hill* at 272, quoting *Sosna v. Iowa*, 419 U.S. 393, 399, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). However, courts get concerned when a plaintiff’s claims come moot before class certification. This concept, known as “picking off” allows a class action to be mooted and prevents the class from ever becoming certified. Courts have recognized that such a defense strategy “could prevent the courts from ever reaching the class action issues, [leaving class certification] at the mercy of a defendant, even in cases where a class action would be most clearly appropriate.”

“Thus, in situations where a pending motion for class certification is pursued with reasonable diligence, the class action will not be mooted by a defendant’s efforts to ‘pick off’ claims of the named plaintiffs by tendering the relief sought.”

Evidence of Breach

Camp v. Gerwin, 1st District Court of Appeals Butler County (Ohio Ct. App. 2024)

In this appeal, the First Appellate Court affirmed the trial court’s order granting summary judgment in favor of Plaintiff for a breach of contract claim against Defendant for failing to make agreed-upon payments for the sale of Plaintiff’s business to Defendant, denying the Defendant’s assignment of error and counterclaim that it was indeed Plaintiff who breached the contract for mischaracterizing the inventory of the business upon sale.

Bullet Point: To succeed on a claim for breach of contract, the claiming party must establish evidence that the non-claiming party did not uphold their end of the bargain. Here, both Plaintiff and Defendant claim the other breached the agreement for the sale of the business. The trial court awarded summary judgment in favor of Plaintiff for his claim of breach by Defendant and Plaintiff’s motion for summary judgment on the Defendant’s claims for breach of contract based on fraud because Defendant provided no evidence of the alleged fraud, nor did the trial court find that any reasonable juror could reach any other conclusion than it was the Defendant who breached the agreement. The appellate court agreed, reasoning that because Defendant did not raise the issue of fraud at any point until litigation, nor did it provide any evidence to the same, Defendant’s claim that Plaintiff breached the contract was unsubstantiated.

Florida

Binding Non-Signatories to Arbitration Agreements

Paquin v. Campbell, No. 5d22-2859 (Fla. 5th DCA January 19, 2024)

The Fifth District examined whether non-signatories to a contract were subject to arbitration agreements contained therein under the theory of equitable estoppel.

The Bullet Point: In the arbitration context, equitable estoppel provides that a party to a lawsuit cannot rely on a contract to establish his claims while avoiding the obligation under the contract to arbitrate such claims. Accordingly, equitable estoppel binds a non-signatory to arbitration in two situations: (1) if a non-signatory sues a signatory to a contract for breach of contract, or (2) if the non-signatory has directly benefitted from the contract. At issue in this case is whether the appellants, non-signatories to the subject contract, were bound to arbitration under equitable estoppel. The Fifth District concluded that they were not, reasoning that (1) the appellants did not sue the appellees for breach or enforcement of the subject contracts, and (2) the appellants have not directly benefitted and do not seek to directly benefit from the contracts. Therefore, the order compelling arbitration was reversed.

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