# Can I enforce the arbitration clause in a terminated agreement?

**March 14, 2022**

*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

### Statute of Frauds

*Kopsky v. MURrubber Technologies, Inc.*, 9th Dist. Summit Nos. 29867, 29984, 2022-Ohio-511

In this appeal, the Ninth Appellate District affirmed the trial court's decision, agreeing that the alleged agreement was barred by the Statute of Frauds under R.C. 1335.05 as it was not in writing and any alleged agreement that may have existed was one for personal services of indefinite duration that was dependent upon the will of a third party.

**The Bullet Point:** Under Ohio's R.C. 1335.05, "[n]o action shall be brought whereby to charge the defendant * * * upon an agreement that is not to be performed within one year from the making thereof; unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him or her lawfully authorized." Simply stated, pursuant to the Statute of Frauds, certain agreements must be in writing or are unenforceable. R.C. 1335.05 is narrowly construed, and Ohio courts apply the Statute of Frauds only to agreements which, by their terms, cannot be fully performed within a year, and not to agreements which may possibly be performed within a year. Consequently, an oral agreement with an indefinite time for performance, or which is dependent upon a contingency which may or may not happen with a year, does not fall within the Statute of Frauds. Further, even if a contract could be terminated within a year, the possibility of wrongful termination is not the same as the possibility of performance within the statutory period. However, in a matter involving a "personal services contract, where a defendant's obligation to perform is contingent upon the future acts of a third party and will continue for an indefinite time in the future, the contract falls within the Statute of Frauds."

In this case, the alleged agreement between the plaintiff and the former owners of the defendant's company was an agreement for personal services. The plaintiff admitted there was no length of time stated for the agreement, and there was no discussion on how long the agreement would last or how it could be ended. As

further noted by the appellate court, the former owners' obligation to perform its part of the agreement was based upon whether a third party acted and utilized the company for its business. As such, the alleged agreement at issue was a personal services agreement of indefinite duration that was dependent upon the will of a third party. Consequently, the appellate court agreed that the alleged oral agreement was barred by the Statute of Frauds and summary judgment was properly granted in favor of the defendant.

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## Merger By Deed

*Talmadge Crossings, LLC v. The Andersons, Inc.,* 6th Dist. Lucas No. L-21-1113, 2022-Ohio-645

In this appeal, the Sixth Appellate District affirmed the trial court's decision, agreeing that the doctrine of merger by deed applied and precluded the breach of contract claim.

Th**e Bullet Point:** The merger by deed doctrine holds that "when a deed is delivered and accepted without qualification pursuant to a sales contract for real property, the contract becomes merged into the deed and no cause of action upon said prior agreement exists." Ohio's merger by deed doctrine is essentially an application of the contract doctrine of integration, which holds that "all prior documents are considered to be integrated into the final contract, and only the provisions contained in the final contract are part of the agreement." Ohio courts apply the merger by deed doctrine to determine the intent of the parties. As such, "if there is a specific survival clause in the prior contract of sale, or in a contemporaneous document delivered at the same time as the deed, which states that its provisions are to survive the delivery of the deed, then the merger doctrine does not apply." In this case, the plaintiff accepted the deed without qualification, with no protest or reservation of rights. Therefore, the doctrine of merger by deed applied. Upon closing, the purchase agreement merged with the deed, thereby precluding the plaintiff's breach of contract claim.

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## Class Action Certification

*Midland Funding, LLC v. Colvin*, 3d Dist. Hancock No. 5-21-04, 2022-Ohio-572

In this appeal, the Third Appellate District affirmed the trial court's decision, agreeing that the "predominance" and "superiority" requirements of class certification pursuant to Civ.R. 23(B)(3) were established.

**The Bullet Point:** Pursuant to Civ.R. 23(B)(3), a class action may be maintained if Civ.R. 23(A) is satisfied, and if: "(3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include: (a) the class members' interests in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already begun by or against class members; (c) the desirability or

undesirability of concentrating the litigation of the claims in the particular forum; and (d) the likely difficulties in managing a class action."

With regard to analyzing Civ.R. 23(B)(3), the Supreme Court of Ohio has stated that "it is not sufficient that common questions merely exist; rather, the common questions must represent a significant aspect of the case and they must be able to be resolved for all members of the class in a single adjudication. And, in determining whether a class action is a superior method of adjudication, the court must make a comparative evaluation of the other procedures available to determine whether a class action is sufficiently effective to justify the expenditure of judicial time and energy involved therein." A predominance inquiry is far more demanding than the Civ.R. 23(A) commonality requirement and focuses on the legal or factual questions that qualify each class member's case as a genuine controversy.

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## Enforcement of Arbitration in Terminated Agreement

*Franklin Dissolution L.P. v. Athenian Fund Mgt.*, 8th Dist. Cuyahoga No. 110641, 2022-Ohio-623

In this appeal, the Eighth Appellate District affirmed the trial court's decision, agreeing that a party does not waive enforcement of an agreement's arbitration provisions simply because the agreement has been terminated.

**The Bullet Point:** At issue in this dispute was whether a party could enforce an arbitration agreement contained in an agreement that had otherwise terminated. In Ohio, there is a presumption favoring arbitration when a dispute falls within the scope of an arbitration provision. If the trial court is "satisfied that the making of the agreement for arbitration or the failure to comply with the agreement is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the agreement." R.C. 2711.03 (A). The Ohio Supreme Court set forth the principles underlying a court's determination of whether to order arbitration pursuant to a written agreement as: "1) whether the parties agreed to submit any dispute to arbitration; 2) whether the agreement creates an obligation to arbitrate a particular grievance; 3) when deciding if the parties agreed to submit a particular grievance to arbitration, the court is not to rule on the potential merits of underlying claims; and 4) that where an arbitration provision is contained in a contract, there is a presumption of arbitrability."

Here, the management agreement specifically stated that "any dispute between the parties arising out of or relating to this Agreement or the affairs and activities of [the Partnership] shall be settled by arbitration…This agreement to arbitrate shall be specifically enforceable, the arbitration decision shall be final and judgment may be entered upon the arbitration decision in any court having jurisdiction over the subject matter of the dispute." The defendant argued that because the plaintiff denied responsibility for payment of fees under the management agreement because the agreement terminated, it was estopped from attempting to enforce the arbitration provision. However, as the appellate court explained, a party does not waive enforcement of an agreement's arbitration provisions simply because that agreement has been terminated. Moreover, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. Because the arbitration

provision in the management agreement was valid and the dispute fell within the scope of the arbitration provision, the appellate court affirmed the judgment compelling arbitration.

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## Florida

### Expert Witness Testimony on Attorney's Fees

*Phillip Morris v. Naugle*, Nos. 4D20-953 and 4D20-1287 (Fla. 4th DCA March 2, 2022)

The Fourth District held that the trial court erred in refusing a motion to exclude expert testimony where the expert provided no insight into what principles or methods were used to reach his opinion, reversed the attorney's fees and costs judgment, and remanded for further proceedings.

**The Bullet Point:** The Daubert standard applies not only to scientific testimony, but to all expert testimony. Therefore, even in a bench trial, courts must assess whether the expert's reasoning or methodology can properly be applied to the facts in issue. Where the expert provides nothing more than pure opinion, the testimony should be excluded.

The issue in this appeal is whether the trial court should have excluded the testimony of a fee expert who provided pure opinion based on his experience as a lawyer and retired circuit court judge. The appellant moved to preclude the expert on the basis that he did not rely on proper factors and thus was not qualified to testify at the fee hearing under the admissibility standard set forth in Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993). The Fourth District agreed, holding that Daubert applies to expert testimony on attorney's fees, and, even during a bench trial, a court must determine admissibility of the evidence at some point. The Court found that because the expert provided no insight into what principles he used to reach his opinion, and there were clear errors in his methodology, the trial court could not assess the admissibility of the testimony.

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### Application of the Business Judgment Rule

*New Horizons v. Harding*, No. 3D20-1471 (Fla. 3d DCA Feb. 23, 2022)

The Third District held the business judgment rule does not need to be raised in defensive pleadings to shield corporate conduct from judicial review because the rule applies presumptively by operation of law.

**The Bullet Point:** The business judgment rule protects officers and directors from judicial review of their acts, so long as they are made in good faith based on reasonable business knowledge. In Florida, directors of corporations, limited liability companies, not-for-profit corporations, and condominiums are immune from liability absent a showing of bad faith, self-dealing, or criminal conduct.
This appeal stemmed from a condominium dispute over assessments. The appellant contended that the trial court erred in failing to consider whether the actions of its directors were protected from review as the product

of a valid exercise of business judgment. The Third District agreed, concluding that the appellant did not need to raise the business judgment rule as an affirmative defense. The Court further noted that the business judgment rule shields a condominium association's decision from judicial review if that decision is within the scope of the association's authority and is reasonable, and the appellant specifically alleged its quorum of directors acted with authority, neutrality, and good faith. Accordingly, the Third District remanded the case to the trial court, constraining its examination to the circumstances surrounding the appellant's exercise of business judgment.

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### Payment of a Lien

*Scheckler v. Monroe Cnty*, No. 3D21-0464 (Fla. 3d DCA March 2, 2022)

The Third District examined whether a payment of a lien during the pendency of an appeal rendered the appeal moot.

**The Bullet Point:** A payment made to avoid penalties is generally considered involuntary or compulsory, and relief is available in the form of a refund. Where an order implementing fees or a lien on a property is challenged as a due process violation, payment of the fine in full prior to the court's determination will not render the challenge moot.

In this case, the petitioner received numerous code violations while his permit application to bring his building up to code was pending. At a code compliance hearing, the special magistrate entered a final order imposing fines for the violations and recorded the order as a lien on the property. The petitioner challenged the final order, arguing it was unconstitutional and violated his due process rights. During the pendency of the due process challenge, the petitioner paid all the outstanding fines, and, thereafter, the circuit court determined that this payment of the lien rendered the appeal moot. The Third District disagreed, finding that because the lien on the property had a coercive effect and relief was available in the form of a refund, the appeal presents a live case and controversy. The Court held that the payment of the lien was involuntary, and the finding of mootness by the circuit court both failed to apply the correct law and amounted to a violation of due process. Accordingly, the Third District granted the petition for certiorari, quashed the opinion dismissing the appeal as moot, and remanded the case.

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### Excusable Neglect and Relief from A Proposal for Settlement

*Williams v. Fernandez*, No. 2D21-802 (Fla. 2d DCA March 4, 2022)

The Second District reversed a trial court's decision to rescind a proposal for settlement after it had already been accepted, because the evidence was insufficient to establish the proposal was made by unilateral mistake as a result of excusable neglect.

**The Bullet Point:** A court should take caution in rescinding a proposal for settlement once it has been accepted. Unilateral mistake is not statutorily identified as an escape hatch for proposals for settlement, and the court

cannot grant relief from the proposal based on unilateral mistake if excusable neglect is not established. A general assertion of error in an unsworn statement, without more factual development, is insufficient to establish excusable neglect.

This appeal concerned the trial court's decision to rescind a proposal after it had already been accepted. The defendants, in seeking relief from the proposal for settlement, claimed the offer was a unilateral mistake made as a result of excusable neglect. In reversing the trial court's decision to rescind the proposal, the Second District found the evidence was insufficient to establish excusable neglect because (1) the movants failed to present any sworn evidence, and (2) there was no testimony explaining the cause of the erroneous proposal, when the error was discovered, when it was cured, or whether counsel for the defendants proofread the document before sending it. The Court further cautioned that the decision to rescind an accepted proposal should not be made lightly, noting that a proposal for settlement is a sanctions mechanism, not necessarily a contract, and its terms are not subject to negotiation.

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