

# Can I Lose the Ability to Compel Arbitration?

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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

### Intrusion Upon Seclusion

#### [Feasby v. Logan, 3rd Appellate District Paulding County \(Ohio Ct. App. 2023\)](#)

In this appeal, the Third Appellate District reversed the trial court's decision to grant judgment on the pleadings for the defendant when the plaintiff alleged that the defendant committed intentional infliction of emotional distress and invasion of privacy.

**Bullet Point:** To be actionable, the invasion of privacy must involve “the unwarranted appropriation or exploitation of one’s personality, the publicizing of one’s private affairs with which the public has no legitimate concern, *or* the wrongful intrusion into one’s private activities in such a manner as to outrage or cause mental suffering, shame or humiliation to a person of ordinary sensibilities.”

“Under Ohio law, to properly plead an invasion of privacy claim premised on the invasion into another’s seclusion, at a minimum, there must be allegations demonstrating an intrusion, physical or otherwise, into another’s solitude or private affairs.”

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### Piercing the Corporate Veil

#### [Hal Fab LLC. v. Jordan, 8th Appellate District Cuyahoga County \(2023-Ohio-4535\)](#)

In a claim for fraud and breach of contract, the 8th Appellate District reversed a trial court's decision in favor of the plaintiff primarily in part because the trial court erred in finding grounds to pierce the corporate veil against the defendant.

**Bullet Point:** In Ohio, “the corporate form may be disregarded and individual shareholders held liable for wrongs committed by the corporation when (1) control over the corporation by those to be held liable was so complete

that the corporation has no separate mind, will, or existence of its own, (2) control over the corporation by those to be held liable was exercised in such a manner as to commit fraud or an illegal act against the person seeking to disregard the corporate entity, and (3) injury or unjust loss resulted to the plaintiff from such control and wrong.” These requirements are independent and written in the conjunctive; therefore, all three must be clearly established in order to be entitled to relief.

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## Florida

### FDUTPA Claims by Non-Consumer Plaintiffs

#### [Christopher Ounjian v. Globoforce, Inc., No. 22-12590 \(11th Cir. December 12, 2023\)](#)

The Eleventh Circuit affirmed the dismissal of a non-consumer’s claim alleging violations of the Florida Deceptive and Unfair Trade Practices Act (FDUTPA).

**The Bullet Point:** To assert a claim under the FDUTPA, a plaintiff must allege (1) a deceptive or unfair act in the conduct of trade or commerce; (2) causation; and (3) actual damages. While the plaintiff need not be a consumer to assert a claim, the plaintiff must allege an unfair or deceptive practice directed at consumers.

This appeal stems from a non-consumer plaintiff’s FDUTPA claim brought in connection with the loss of his employment with the defendant. The district court dismissed the claim on the grounds that (1) the plaintiff’s claim was based on alleged actions directed at him, not at consumers; and (2) the damages he sought were not cognizable damages under the FDUTPA. The Eleventh Circuit affirmed the dismissal on appeal, concluding that even if it were to assume that the complaint sufficiently asserted deceptive or unfair practices directed at consumers, the plaintiff failed to allege damages cognizable under the FDUTPA. This is because Florida law makes clear that the actual damages required for a FDUTPA claim consist of the difference in market value between what was promised by the defendant and what was delivered, and consequential damages are not available. Accordingly, because the plaintiff’s damages resulting from the loss of his employment are not cognizable damages, the plaintiff failed to state a claim under the FDUTPA.

### Breach of Contract Damages

#### [Birdgette Shaw v. Zara Newham, No. 2D22-3300 \(Fla. 2d DCA December 20, 2023\)](#)

The Second District reversed a judgment that awarded damages in excess of what was allowed under the terms of the contract.

**The Bullet Point:** Where a party to a contract agrees to accept a certain sum as liquidated damages, the party cannot sue for actual damages in a breach of contract action. This is because a party can neither receive more than it bargained for nor be put in a better position than it would have been had the contract been properly performed. Here, the trial court awarded the appellee the full price of the parties’ contract as damages for her breach of contract claim, and the appellant argued on appeal that this was an error because the contract did not

give the appellee the option of obtaining a money judgment in the event of a breach. The Second District agreed, reasoning that the contract provides that the appellee could either seek specific performance or she could retain the appellee's deposit as liquidated damages. By awarding the full contract price in the final judgment, the court awarded damages in excess of what the contract allows, and the appellee received a windfall. Accordingly, the award of the full contract amount was reversed.

## Losing the Ability to Compel Arbitration

### *Charles Bedgood, et al., v. Wyndham Vacation Resorts, Inc., et al., No. 22-11504 (11th Cir. December 19, 2023)*

The Eleventh Circuit examined whether the appellants were "in default" within the meaning of Section 3 of the Federal Arbitration Act (FAA) and thus ineligible for a stay of litigation and whether the district court erred in declining to direct arbitration.

**The Bullet Point:** Pursuant to Section 3 of the FAA, a party is entitled to stay the litigation of an action that falls within an arbitration agreement's terms unless the party is "in default in proceeding with such arbitration." To determine whether a party has defaulted for Section 3 purposes, a court must determine whether, under the totality of the circumstances, the party acted inconsistently with the right of arbitration. In addition, under Section 4 of the FAA, "a party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate" may petition for "an order directing that such arbitration proceed in the manner provided for" in the agreement.

In this appeal, the defendant-appellants challenged the district court's refusal to stay the underlying action based upon its determination that the defendants were "in default" under Section 3 of the FAA, as well as the district court's refusal to direct arbitration to proceed. The district court reasoned that the underlying action was filed only after the plaintiffs' attempts to arbitrate their claims were thwarted by the defendants' failure to comply with the American Arbitration Association's (AAA) procedures. The Eleventh Circuit agreed, holding that the defendants' failure to comply with the rules of its chosen arbitral forum renders the remedies set forth in Section 3 of the FAA unavailable to them. The Eleventh Circuit further reasoned that the AAA is empowered to make all policy-compliance determinations, and the district court did not err in accepting its determination as the basis for its own conclusion that the defendants were in default with the arbitration proceedings.

In addition, the Eleventh Circuit found that six of the eight plaintiffs were permitted to proceed with their litigation in district court, but remanded for further proceedings as to the other two plaintiffs. Three of the plaintiffs attempted to arbitrate against one of the defendants. They received letters from the AAA declining to administer their arbitration due to the defendant's failure to comply with the AAA procedures, and only after did they file in district court. Therefore, the Eleventh Circuit concluded that they did not fail, neglect, or refuse to arbitrate, and the defendant is ineligible to move to direct arbitration under Section 4.

Three other plaintiffs did not first seek to arbitrate, but had identical arbitration agreements with the same defendant as the other three. Therefore, the Eleventh Circuit concluded the defendant was not 'aggrieved' by their failure to arbitrate since AAA would decline to administer the claims, and the defendant did not show it took any effort to come into compliance with the AAA policies. The final two plaintiffs had arbitration agreements with related but different entities, and due to the absence of evidence that AAA would refuse to

consider those claims, the Eleventh Circuit found those plaintiffs did fail to arbitrate and that failure may aggrieve the entities.

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