

## Publications

### **Client Alert: Appellate Court Affirms Newcomer Trial Victory; Implications for Ohio Trustees**

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On August 22, 2014, the Sixth District Court of Appeals affirmed on all counts a Williams County probate court's September 2012 decision in favor of PNC Bank, National Association against successor trustee and beneficiaries' various breach-of-fiduciary-duty claims. The decision in *Newcomer v. National City Bank*, (2014-Ohio-3619; 2007 Ohio App. LEXIS 6365 (Ohio App. 6<sup>th</sup> Dist.)) provides critical guidance for Ohio trustees on four key points of law.

1. The burden of proof for breach-of-fiduciary-duty claims is "clear and convincing evidence."
2. The Ohio Trust Code (OTC) imposes a "minimum standard of liability" on exculpatory clauses such that the trustee remains liable for any breach of trust committed in "bad faith or with reckless indifference," regardless of the provisions of the exculpatory clause; courts will modify or "blue pencil" clauses that are more broad and enforce them up to that statutory minimum standard.
3. A court cannot accumulate a series of negligent acts to find bad faith, willful default, or reckless indifference.
4. The OTC's statute of limitations does not apply to revive claims that were barred under an earlier statute of limitations when the OTC was enacted in 2007.

#### **Burden of Proof: Clear and Convincing Evidence**

After analyzing each of the six Ohio cases that have considered the question, the appellate court affirmed the trial court's ruling that the burden of proof for breach of fiduciary duty claims is "clear and convincing evidence," not "preponderance of the evidence." The court cited with approval an Eighth District case that explained that a heightened burden of proof is required before a trustee can be charged with "forms of misconduct" such as "disloyalty, breach of trust, or engaging in conflicting interests."

## Exculpatory Clauses: Enforceable Up to Bad Faith or Reckless Indifference

The court held that RC 5810.08 imposes a “minimum standard of liability” on exculpatory clauses and that trustees remain liable for any breach of trust “‘committed in bad faith or with reckless indifference to the purposes of the trust or the interest of the beneficiaries,’ regardless of the provisions in the trust exculpatory clause.” The exculpatory clause in the trust in this case differed slightly from the language in the OTC. It relieved the trustee of liability except for “bad faith or willful default.” The OTC talks about imposing liability for “bad faith or reckless indifference to the purposes of the trust.” The appellate court upheld the trial court’s finding of no liability on each of 13 claims of misconduct advanced by the appellants at trial, noting that the trial court had independently considered and rendered specific findings of fact on each of the three separate and distinct liability standards – bad faith, willful default and reckless indifference.

The lesson: even if the language of an exculpatory clause appears to be broader than allowed by the OTC or differs slightly, the clause is still enforceable to the extent set forth in the statute. The court may modify or “blue pencil” the clause to include the standards of bad faith and reckless indifference.

## No Accumulation of Negligent Acts

The appellate court rejected the appellants’ argument that a series of acts of alleged negligence in the administration of the trust could be accumulated to show bad faith, willful default, or reckless indifference. The court explained that “[c]onduct of a trustee committed in bad faith, willful default, or reckless indifference all involve a breach of different and distinct degrees of care and are substantially more culpable than mere negligent or erroneous conduct.” In other words, two errors in trust administration don’t make an act of bad faith any more than two wrongs make a right.

## Claims Barred By Pre-Trust Code Statutes of Limitations Remain Barred

The appellate court confirmed that claims that were barred by the statute of limitations prior to the effective date of the OTC (January 2007) are not revived by the arguably more liberal provisions of RC 5810.05 (the OTC statute of limitations). This holding may have limited application in the future in light of the time that has passed since the enactment of the OTC, but it provides clarification that the language “notwithstanding RC 2305.09” that appears in RC 5810.05 applies only where breach of trust claims were not already barred by RC 2305.09 at the time the OTC was enacted.

## Implications:

This decision, one of only a handful of appellate court decisions interpreting the OTC, is a significant win not only for PNC Bank, National Association, but also for fiduciaries throughout Ohio. The confirmation of the heightened burden of proof for breach of fiduciary duty claims will make it more challenging for plaintiffs to win, and their decision whether to bring a suit more difficult. Plaintiffs may not aggregate conduct over many years to establish bad faith and, thus, a breach of fiduciary duty. Exculpatory clauses—even those drafted many years before the OTC—will be enforced to the greatest extent possible to protect the trustee, regardless of the specific words chosen by the drafting attorney. And, finally, confirmation that claims that were time-barred at the enactment of the OTC remain time-barred provides an increased measure of peace to trustees and former trustees.

*Appellants have 45 days to request that the Supreme Court of Ohio consider this case on appeal. Please contact your Vorys attorney for further information or updates as this matter proceeds.*