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Client Alert: McHenry v. McHenry: Ohio Fifth Appellate District Rejects Rule of Proportionality for Attorney Fee Awards in Trust Cases; Upholds Award of Appellate Attorneys' Fees

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On April 26, 2017, the Ohio Fifth Appellate District rejected a rule of proportionality in awarding attorneys' fees in trust litigation. This confirmation of the ability to recover attorneys' fees—even where the monetary damage award may be small—will be an important litigation consideration for trustees and trust beneficiaries alike.

In *McHenry v. McHenry*, 2017-Ohio-1534, the trial court had awarded fees to the successful plaintiff beneficiary pursuant to R.C. 5810.04, which allows a court to award reasonable attorneys' fees in trust litigation "as justice and equity may require." In upholding the fee award, the Fifth Appellate District compared R.C. 5810.04 to the Ohio Consumer Sales Practices Act, for which the Ohio Supreme Court has rejected a rule of proportionality—in other words, that the amount of fees awarded should be proportional to the money recovered in the case. According to the Fifth Appellate District, "a rule of proportionality in trust cases would make it difficult for beneficiaries with meritorious claims against the trustee, but with relatively small potential damage claims, to seek redress in the court."

In *McHenry*, the plaintiff (daughter of the settlor, sister of the defendant) alleged that her brother tricked her into placing money from her father's life insurance into a trust account. She also alleged that she did not receive her full benefit from the trust. After a bench trial, the court awarded the plaintiff \$13,364.32 for her conversion claim and \$49,444.28 in attorneys' fees. The defendant filed three appeals that were each dismissed on procedural grounds. After the first three appeals, the trial court awarded plaintiff additional attorneys' fees of \$17,323.46 for fees spent on the appellate litigation.

On the fourth appeal, the defendant argued that the attorneys' fee award was excessive given the relatively small damages award and the fact that she had not prevailed on all of her claims. This argument was unsuccessful. In affirming the fee award, the Fifth Appellate District noted that the plaintiff had also been successful in non-monetary relief including having the defendant trustee removed, obtaining an

accounting from the trustee, and obtaining personal property due to her under the trust. The Fifth Appellate District also upheld the supplemental award of attorneys' fees for work performed on the first three appeals.

This case is further evidence that Ohio courts are not hesitating to apply the fee-shifting statute contained in the Ohio Trust Code, which is a departure from the general rule that parties in civil litigation must bear their own fees and costs, regardless of who prevails. "As justice and equity may require" is a standard that gives trial courts broad discretion. Trust litigants who both prosecute and defend should be constantly vigilant about where the arc of justice bends in their case, as they may find themselves paying not only for their own lawyer, but their opponents' as well.

Contact your Vorys attorney if you have questions about this decision or its implications.