IN THE SUPREME COURT OF OHIO

Michael K. Cundall, et. al.	:	
	:	
Plaintiffs,	:	
	:	Case No. 2008-0314
vs.	:	
	:	
U.S. Bank, N.A,	:	On Appeal from the
Predecessor Trustee, et al.	:	Hamilton County Court
	:	of Appeals, First
	:	Appellate District
Defendants.	:	

MERIT BRIEF OF DEFENDANTS-PETITIONERS
RICHARD W. CAUDILL, EXECUTOR; KEVEN E. SHELL, ANCILLARY ADMINISTRATOR;
RICHARD W. CAUDILL, SUCCESSOR TRUSTEE; KEVEN E. SHELL, SUCCESSOR TRUSTEE;
WILLIAM P. MARTIN II, SUCCESSOR TRUSTEE; D. SCOTT ELLIOTT, SUCCESSOR TRUSTEE;
G. JACK DONSON, JR., SUCCESSOR TRUSTEE; AND MICHAEL CAUDILL, SUCCESSOR TRUSTEE

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A. Procedural Posture

In 1984, Plaintiff-Respondent Michael K. Cundall, his father Cincinnati businessman Richard R. Cundall, Jr., and his siblings signed pre-injury releases for any "known or unknown" claims arising from a stock sale.[1] Twenty-two years later, Michael Cundall decided to bring claims based on this stock sale against thirty-two defendants, including parties he specifically released as well as his own children.[2] Michael Cundall's three adult children then brought cross-claims against the released parties.[3]

The trial court dismissed all claims without prejudice pursuant to Ohio Civil Rule 12(B)(6) because the Cundalls failed to abide by this Court's longstanding requirement that a plaintiff seeking to attack a release must first tender back the consideration received in exchange for the release. The trial court also ruled that (i) the Cundalls' claim against Bud Koons' estate was not timely presented to the estate and was therefore barred, and that (ii) no personal jurisdiction existed over the children and grandchildren of Bud Koons, all of whom live outside of Ohio (the "Koons beneficiaries").[4]

The First District Court of Appeals largely reversed.[5] The First District determined, contrary to the decisions of other Ohio courts and for the first time ever in Ohio, that the tender

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[1] Releases of John F. ("Bud") Koons, III, Supp. 74-83.

[2] 3/24/2006 Plaintiff's First Amended Complaint for Tortious Breach of Fiduciary Duty, Constructive Trust, Declaratory Judgment, Accounting, and Related Relief ("First Amended Complaint"), Supp. 1-58.

[3] 8/30/2006 Answer, Cross Claims, and Third-Party Complaint of Defendants Michael K. Cundall, Jr., Courtney Fletcher Cundall, and Hillary Cundall ("Cross Claims"), Supp. 163-174.

[4] Entry Granting Defendants' Motions to Dismiss at 8-9, Appx. 44-45.

[5] *Cundall v. U.S. Bank, N.A.*, 1st Dist., 174 Ohio App. 3d 421, 2007 Ohio 7067, Appx. 8-36.

rule established by the Ohio Supreme Court over one-hundred years ago does not apply when the party to whom the release was provided is a fiduciary.[6]

To support this mistaken ruling on the tender issue, the First District discussed the supposed existence of a presumption of fraud in connection with self-dealing transactions. This discussion compounded the First District's error by misstating Ohio law with respect to alleged self-dealing.[7] Furthermore, no such presumption exists where, as here, the trust agreement permits the challenged transaction.[8] Finally, contrary to prior holdings of this Court and other Ohio courts, the First District improperly applied the statute of limitations for an express trust to Plaintiffs' claim for a constructive trust.[9] The Court of Appeals refused the Defendants-Petitioners' Motion to Certify Conflicts to this Court.[10]

On June 4, 2008, the Ohio Supreme Court accepted for review Defendants-Petitioners' appeal.

This Merit Brief is filed on behalf of two groups of Petitioners (hereafter "Defendants-Petitioners") representing eight of the thirty-two defendants in this case. The first Petitioners are the estate of John F. ("Bud") Koons III through Richard W. Caudill, Personal Representative of the Estate in Florida and Keven E. Shell, Administrator of the Ohio Ancillary Estate. The second Petitioners are Successor Trustees Richard W. Caudill, Keven E. Shell, William P. Martin II, D.

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[6] *Id.* at ¶ 34, Appx. 19.

[7] *Cundall*, 2007 Ohio 7067 at ¶ 7, 34-38, Appx. 12, 19-20; *Craggett v. Adell Ins. Agency* (8th Dist. 1993), 92 Ohio App. 3d 443

[8] *Biddulph v. DiLorenzo*, 8th Dist. No. 83808, 2004 Ohio 4502, ¶ 2, 30-31.

[9] *Cundall*, 2007 Ohio 7067 at ¶ 84, Appx. 34; *Ruple v. Hiram College* (8th Dist. 1928), 35 Ohio App. 8, 15. *See Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 171-72.

[10] 1/24/2008 Entry Overruling Motion to Certify Conflicts, Appx. 47. On the same day, the Eighth District Court of Appeals applied the tender rule to a fiduciary. *Weisman v. Blaushild*, 8th Dist. No. 88815, 2008 Ohio 219, ¶ 37, 43.

Scott Elliott, G. Jack Donson, Jr. and Michael Caudill. In March 2006 when this suit was filed, these individuals served as successor trustees to certain trusts created by Bud Koons. None of the Defendants-Petitioners have served as trustee or successor trustee of any trust for the benefit of the Cundalls.

B. Facts

1. The Grandparents Trust

The focus of this suit is a trust created by John F. Koons, Sr. and Ethel B. Koons by Trust Agreement dated August 3, 1976 (the "Grandparents Trust"). John and Ethel Koons were the parents of Bud Koons, Betty Lou Cundall, and Mary Jane Mitchell.

Betty Lou Cundall was married to Cincinnati businessman Richard R. Cundall, Jr. They had four children, Michael Cundall, Peter B. Cundall, Richard R. Cundall III, and Sara Cundall Kersting.

In 1976, John and Ethel Koons were shareholders of Central Investment Corporation ("CIC"). CIC initially had been involved in the beer business as The Burger Brewing Company. It transitioned to the soft drink business, becoming a franchised bottler of PepsiCo products in northern Ohio and southern Florida. In 1976, Bud Koons was the President and a large shareholder of CIC.

The Grandparents Trust established two separate funds: Fund A for the benefit of members of Bud Koons' family and Fund B for the benefit of members of Betty Lou Cundall's family.[11] John and Ethel Koons contributed 6,209 CIC shares to the trust.[12] The shares were equally divided between Fund A and Fund B. The CIC shares were the sole assets of the trust.

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[11] Grandparents Trust at p. 4, Supp. 39.

[12] *Id.* at p. 17, Supp. 48D.

John and Ethel Koons named their son Bud Koons sole trustee of the Grandparents Trust.[13] As sole trustee, Bud Koons necessarily had to make, and was authorized to make, investment decisions concerning whether to sell or to hold the trust's sole asset, CIC shares.[14] By giving their son this authority, John and Ethel Koons anticipated and approved that Bud Koons as trustee would make decisions as to CIC shares – even though such decisions could impact Bud Koons' own interests as shareholder and President of CIC.

During the 1970s, the CIC shares in the trust were exchanged for shares of Koons-Cundall-Mitchell Corporation ("KCM"). Each share of CIC stock was exchanged for one share of KCM stock. KCM was a holding company established by members of the Koons, Cundall, and Mitchell families to hold CIC shares owned by them or for their benefit. The Grandparents Trust explicitly authorized Bud Koons, as trustee, to exchange the CIC shares for the shares of this holding company.[15]

In addition to the shares in Fund B of the Grandparents Trust, the Cundalls held other CIC shares that they converted to KCM shares. In August 1977, Betty Lou Cundall created a trust for the benefit of her husband Richard and their four children (the "Cundall Trust").[16] Betty Lou Cundall contributed 10,077 KCM shares to this trust.[17] U.S. Bank was trustee of the Cundall Trust.

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[13] Grandparents Trust at p. 1, Supp. 36.

[14] *Id.* at p. 8-9, Supp. 43-44 ("Trustee shall have full power and authority in his discretion and without being required to apply to any court for authority and without being subject ot the laws of the state or nation in respect to the investment of trust funds or the management of trust property . . . [t]o sell or exchange, publicly or privately any assets . . . for cash or on credit . . . .").

[15] Grandparents Trust at p. 10, Supp. 45.

[16] Cundall Trust, Supp. 14-35.

[17] 2/7/1984 Letters from the Cundalls, Supp. 59-73.

In addition, as of Betty Lou Cundall's death in 1977, Richard Cundall and the four Cundall children individually held, in aggregate, 3,900 KCM shares.[18]

2. 1984 Stock Sale

In 1983, for a number of reasons the Cundalls decided to sell their KCM shares.[19] First, the KCM shares provided no diversity. The entire financial performance of the Grandparents Trust and a substantial portion of the Cundall Trust depended on CIC.[20] Second, because of the intensive capital requirements to manufacture and distribute soft drinks, CIC paid only modest dividends. In 1983, interest rates were near historic highs and the Cundalls felt they could achieve substantially greater current income by selling the KCM shares.[21] Third, there was no market for KCM shares. Holding this illiquid investment foreclosed the opportunity to generate cash when needed or wanted. Fourth, selling the 3,900 shares the Cundalls held individually would provide substantial cash for the desires of the Cundall family.[22]

Therefore, as the Cundalls reported to U.S. Bank as trustee of the Cundall trust, they wanted to sell their KCM stock so that they could obtain a higher yield from the proceeds of the sale.[23]

In the Spring of 1983, the Cundalls discussed with CIC a sale of their individually held KCM shares as well as the KCM shares held by both trusts for their benefit. A well-respected

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[18] *Id.*

[19] Tobin Aff. at ¶ 5, Supp. 85-86.

[20] *See* Grandparents Trust at p. 17, Supp. 48D.

[21] *See* Tobin Aff. at ¶ 5, Supp. 85-86.

[22] *See Id.*; 2/7/1984 Letters from the Cundalls, Supp. 59-73.

[23] *See* Tobin Aff. at ¶ 5, Supp. 85-86.

Cincinnati law firm represented the Cundalls in these discussions.[24] The Cundalls had full access to CIC's financial information because the head of that family, Cincinnati businessman Richard R. Cundall, Jr., was a corporate insider. He had served for many years as an officer and director of KCM and as assistant treasurer and director of CIC.[25] Furthermore, CIC provided financial information as requested by the Cundalls' counsel.[26]

After his wife Betty Lou Cundall died in 1977, Richard Cundall as the executor of her estate reached an agreement with the IRS valuing her KCM shares at $68.21 per share.[27] This per share value was based upon a formula. Before and after 1983-84, CIC used that same formula to purchase CIC shares from shareholders desiring to sell.[28]

CIC initially offered to purchase the Cundalls' KCM shares for $155 per share in 1983, but the Cundalls chose not to sell at that price.[29] CIC had disclosed to the Cundalls that earlier that year it had purchased a block of CIC shares from Lloyd Miller at $328 per share.[30] Lloyd Miller was an aggressive, opportunistic industrialist who represented a threat to CIC. Thus, CIC paid a premium above the normal formula valuation to Lloyd Miller to obtain both his CIC shares and his agreement to not buy any more shares.

In early 1984, the Cundalls again approached CIC to sell their KCM shares. This time,

[24] Plaintiffs' Memo. in Opposition to Defendants' Motions to Dismiss at 13, Supp. 149; 2/16/1984 Schwartz, Manes & Ruby invoice, Supp. 97.

[25] T.d. 83, Memo. in Support of Motion to Dismiss at 3.

[26] 5/27/1983 Arthur Weber letter, attached as part of Exhibit E to T.d. 132, Sealed 9/25/2006 Affidavit of Richard H. Ward.

[27] Tobin Aff. at ¶ 4, Supp. 85.

[28] T.d. 83, Memo. in Support of Motion to Dismiss at 3; 7/25/2006 Affidavit of Keven E. Shell at ¶ 32, Supp. 182.

[29] Tobin Aff. at ¶ 6, Supp. 86; 5/27/1983 Arthur Weber letter, attached as part of Exhibit E to T.d. 132, Sealed 9/25/2006 Affidavit of Richard H. Ward.

[30] Tobin Aff. at ¶ 6, Supp. 86.

the Cundalls and CIC agreed upon a price of $210 per share.[31] And so in February 1984, CIC in aggregate paid the Cundalls individually and to their trusts $3,587,010 for their KCM shares.[32] This included five-year promissory notes from CIC to the Grandparents Trust in the amount of $456,361.50 and to the Cundall Trust in the amount of $1,481,319. These notes paid interest at the rate of 10% per annum, resulting in a higher income stream than the dividend being paid by CIC.[33]

At the closing, CIC became the owner of the KCM shares transferred by the Cundalls and the trusts.[34]

The Grandparents Trust specifically authorized Bud Koons as trustee to make the investment decision to sell the KCM shares held by Fund B and to invest the proceeds in other assets. Article IV of the trust agreement provides that:

> Trustee shall have full power and authority in his discretion and *without being required to apply to any court* for authority and without being subject to the laws of the state or nation in respect to the investment of Trust funds or the management of Trust property:
> . . . .
>
> 2. To invest and reinvest the Trust fund in common or preferred shares of any corporation, . . . notes, bonds, or debentures of corporations . . . and any other property of any kind or description . . . .
>
> 3. *To sell* or exchange, publicly or privately, *any assets* [of the Trust] *for cash* or on credit, with or without security . . . .[35] (emphasis supplied)

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[31] *Id.* at ¶ 5.

[32] 2/7/1984 Letters from the Cundalls, Supp. 59-73.

[33] Tobin Aff. at ¶ 12, Supp. 88.

[34] 2/7/1984 Letters from the Cundalls, Supp. 59-73.

[35] Grandparents Trust at p. 8-9, Supp. 43-44.

Article II reiterates Bud Koons' power as trustee to sell the KCM shares and reinvest the proceeds:

> *The trustee* shall hold, manage, *sell*; invest and reinvest *any securities* or other property which constitutes part of the trust funds . . . .[36]

This language necessarily applied to the KCM stock in the Grandparents Trust since John and Ethel Koons funded the Grandparents Trust with solely the CIC stock which later was traded for the KCM stock.[37]

Bud Koons' decision to sell the 3,104 shares held in Fund B of the Grandparents Trust to CIC at the Cundalls' request was an appropriate exercise of fiduciary judgment. It achieved diversification and liquidity for the trust. It met the Cundalls' need for a greater flow of income than the CIC dividend stream. Moreover, the sale was requested by the Cundalls[38] and CIC was the only available purchaser. The sale was only a part of a broader transaction in which the Cundalls sold all of their KCM shares held individually and in trust. The price of $210 per share was at or above fair market value as established by the valuation of KCM shares in Betty Lou Cundall's estate and by an appraisal by U.S. Bank, trustee of the Betty Lou Cundall Trust.[39] The price also met or exceeded previous and subsequent market transactions in CIC shares.

3. The Cundalls And Their Heirs Release Bud Koons And His Heirs, Executors, And Assigns

By letter of February 7, 1984 to CIC, the Cundalls agreed to terms for CIC to purchase

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[36] *Id.* at p. 3, Supp. 38.

[37] Grandparents Trust at p. 17, Supp. 48D.

[38] Tobin Aff. at ¶ 5, 10, 11, Supp. 85-88.

[39] Tobin Aff. at ¶ 9, Supp. 87; *see also* Internal Approval Memo., Supp. 98.

the 17,081 KCM shares.[40] This letter specifically requested and consented to the sale and also promised that the Cundalls would release the trustees of the Grandparents Trust and the Cundall Trust as a condition of closing.[41] At the closing, the Cundalls provided releases in favor of both trustees. The releases in favor of Bud Koons were signed by Richard Cundall and all four of his children, including Plaintiff-Respondent Michael Cundall. These releases expressly confirm that:

- Each Cundall "requests and approves the sale by the Trustee [Bud Koons]," and that
- On their own behalf and on behalf of their "heirs" the Cundalls release Bud Koons, his heirs, executors, and assigns from all "claims . . . known or unknown" in connection with the stock sale. [42]

The Cundalls' lawyer drafted the release that the Cundalls provided to U.S. Bank.[43] The terms of that release were substantially the same as the release that the Cundalls, including Michael Cundall, each executed in favor of Bud Koons and his executors and heirs.[44]

Having achieved the desired sale of the KCM shares, the Cundalls enjoyed the next twenty-two years of benefits from the cash they received and the high-yield diversified investments that the trustees of the Grandparents Trust and the Betty Lou Cundall Trust arranged

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[40] 2/7/1984 Letters from the Cundalls, Supp. 59-73.

[41] *Id.*

[42] The Cundall release provided that they and their heirs: [F]orever RELEASE, DISCHARGE AND ACQUIT the trustee [Bud Koons] and his heirs, executors, administrators, and other personal representatives and assignors, from all ... claims... damages, actions, and causes of action whether known or unknown, foreseen or unforeseen which he/she had, now has, or may in the future have against [Bud Koons], or in any manner whatsoever arising from or indirectly, by reason of (a) the sale of the Koons-Cundall- Mitchell shares...." Releases of Bud Koons, Supp. 74-83.

[43] Tobin Aff. at ¶ 8, Supp. 87.

[44] Release of Trustee, Supp. 94.

at their request.[45] The Cundalls quickly began drawing all the income earned on the millions of dollars of proceeds from the sale.

For the next twenty-two years no Cundall, including Plaintiff-Respondent Michael Cundall, ever made a single complaint about the stock sale.

4. CIC Shareholders at Risk but Eventually Prosper

Even as the Cundalls were enjoying their 1984 proceeds of more than $3.5 million, over the next two decades CIC shareholders faced a bumpy ride.

PepsiCo, Inc. continually chipped away at CIC's franchise rights. In 1998 PepsiCo sued CIC in federal court in Cincinnati to strip CIC's principal assets, all of its Pepsi franchises. But after nearly seven years of costly bet-the-ranch litigation, CIC prevailed in the PepsiCo lawsuit.[46] As part of the settlement of that litigation, the CIC soft drink business was sold in January 2005 for more than $300 million to PepsiAmericas, a PepsiCo dominated public company.[47]

Bud Koons passed away two months later.[48]

5. Bud Koons' Lawyers Switch Teams

Despite the fact that the Grandparents Trust specifically permitted the 1984 sale, the First District apparently was influenced to believe otherwise by a letter attached to a sealed affidavit filed in support of Plaintiffs' response to Defendants-Petitioners' Motion to Disqualify his law firm and his attorney.[49] The author of this letter was none other than Richard H. ("Dick") Ward,

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[45] Tobin Aff. at ¶ 5, Supp. 85-86.

[46] *PepsiCo, Inc. v. Cent. Inv. Corp.* (S.D. Ohio 2001), 268 F. Supp. 2d 962 & 271 F. Supp. 2d 1040.

[47] T.d. 83, Memo. In Support of Motion to Dismiss at 2.

[48] First Amended Complaint at ¶ 32, Supp. 11.

[49] *Cundall*, 2007 Ohio 7067 at ¶ 11, Appx. 12-13.

long-time attorney for Bud Koons' personal and business interests. Dick Ward's contrived March 22, 2005 letter is nothing other than evidence of his, his firm's, and his son's side-switching betrayal of their long-time clients.

For more than three decades, Dick Ward and Drew & Ward represented CIC (and later CI LLC), Bud Koons, his estate, and his trusts. Drew & Ward's most important task was to spearhead Bud Koons' estate plan.[50]

From at least 1972 forward, Drew & Ward prepared wills and trusts for Bud Koons[51] and handled his divorce and antenuptial agreements.[52] Until Bud Koons' death, Dick Ward held a power of attorney allowing him to act for Bud Koons.[53] Drew & Ward prepared over two dozen trusts for Bud Koons and his family, many of which continue in effect today.[54] Dick Ward served as trustee of many of these trusts and as legal counsel to the trustees of all.[55] In addition, Dick Ward served on the Board of Directors of CIC and then on the Board of Managers of CI LLC from 1995 until 2005.[56] For these and other legal services, Drew & Ward billed and was paid by Bud Koons, his estate, CIC, and then CI LLC more than $2 million dollars.[57]

Gift planning was a central part of Drew & Ward's representation of Bud Koons and CIC.

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[50] *See generally* 5/25/2006 Affidavit of William R. Graf at ¶ 8-10, Supp. 208; 7/25/2006 Affidavit of Keven E. Shell at ¶ 11, Supp. 177.

[51] 7/25/2006 Affidavit of Keven E. Shell at ¶ 11, Supp. 177.

[52] 7/25/2006 Affidavit of Keven E. Shell at ¶ 34, Supp. 182; 5/25/2006 Affidavit of William R. Graf at ¶ 10d, 10e, 11d, Supp. 209.

[53] 7/25/2006 Affidavit of Keven E. Shell at ¶ 23, Supp. 179.

[54] 5/25/2006 Affidavit of William R. Graf at ¶ 10(b), Supp. 208-09; 10/12/2006 Affidavit of Keven E. Shell at ¶ 11, Supp. 213.

[55] 7/25/2006 Affidavit of Keven E. Shell at ¶ 24, Supp. 179; 10/12/2006 Affidavit of Keven E. Shell at ¶ 11, Supp. 213.

[56] 7/25/2006 Affidavit of Keven E. Shell at ¶ 20, Supp. 179.

[57] 7/25/2006 Affidavit of Keven E. Shell at ¶ 8, 38, Supp. 176-77, 183.

As most of Bud Koons' wealth was in CIC stock, valuing such stock for annual gifts became critical. Year after year, Drew & Ward participated in such valuations.[58] Year after year, Drew & Ward relied on the arm's-length 1984 Cundall transaction in determining the value to assign to CIC stock for numerous federal gift tax returns, antenuptial agreements, divorce decrees, and purchases of stock by CIC.[59] Due to this and other ongoing clear contacts, Drew & Ward's representation of Bud Koons and his interests is substantially related to its representation of Michael Cundall.

Moreover, the 1992 Division of Trust discussed by the First District at paragraph 8 of its Opinion was conceived of, researched, and executed by Drew & Ward. By this Division, Fund A and Fund B of the Grandparents' Trust were formally divided into two separate trusts.[60] The Division had no economic consequences because the two Funds had always been administered separately. But it did allow Bud Koons to resign as trustee of Trust A in favor of three successor trustees.[61] One of the these three was Dick Ward.[62] For the next thirteen years, Dick Ward served as successor trustee of Trust A until he resigned in 2005.[63]

Additionally, Bud Koons executed a Florida will in 2004 drafted by Drew & Ward. As Florida law required a Florida resident to serve as the personal representative, Dick Ward and Jim Ryan could no longer be Bud Koons' co-executors.

Nevertheless, Bud Koons did not forget his long-time attorney Dick Ward. Shortly

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[58] 7/25/2006 Affidavit of Keven E. Shell at ¶ 31-32, Supp. 182.

[59] 7/25/2006 Affidavit of Keven E. Shell at ¶ 31-34, Supp. 182.

[60] *See* Division of Trust related documents, Supp. 49-58.

[61] *Id.*, Supp. 52-58.

[62] *Id.*, Supp. 52-55.

[63] 7/25/2006 Affidavit of Keven E. Shell at ¶ 30, Supp. 181.

before Bud Koons died, Dick Ward entered into a consulting agreement with CI LLC providing for Mr. Ward to receive $1.25 million over the next five years as a consultant.[64] These fees were in addition to the legal counsel that Drew & Ward would continue to provide to CI LLC, to Bud Koons, to his estate, and to his trusts.[65]

Despite the millions of dollars in legal fees that Bud Koons, CIC, and CI LLC paid to Drew & Ward over two decades, Dick Ward allowed his son and law partner, Richard G. ("Nick") Ward to rummage through Bud Koons' files immediately after his death on behalf of another Drew & Ward client, Michael K. Cundall. As shown in Defendants-Petitioners Motion to Disqualify and as alleged in their subsequent malpractice suit, Drew & Ward was simultaneously working as counsel for both Defendants-Petitioners and Michael Cundall as Drew & Ward planned this lawsuit.[66]

Dick Ward's bizarre, uninformed, March 22, 2005 letter to Jim Ryan does not validate Michael Cundall's claims as the First District suggests.[67] Rather, that letter is evidence that by March of 2005, Drew & Ward was already planning this lawsuit on Michael Cundall's behalf, even as it continued to represent Defendants-Petitioners.[68]

6. The Cundall Lawsuit

One year and a day after Bud Koons' death, on March 3, 2006, Drew & Ward and its partner Nick Ward filed a $300 million lawsuit against thirty-two defendants on behalf of

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[64] Consulting Agreement, Supp. 199-200.

[65] *Id.* at 199.

[66] 7/25/2006 Affidavit of Keven E. Shell at ¶ 10, Supp. 177; 10/12/2006 Affidavit of Keven E. Shell at ¶ 3, 4, Supp. 212.

[67] *Cundall*, 2007 Ohio 7067 at ¶ 11, Appx. 12-13.

[68] The trial court never ruled on Defendants-Petitioners Motion to Disqualify, as it instead dismissed the entire case.

Michael Cundall individually and as the newly appointed successor trustee of Trust B. Ignoring the releases he, his father, and his siblings signed in 1984, Plaintiff-Respondent Michael Cundall sued Bud Koons' estate, heirs and successor trustees over the 1984 stock sale.[69]

And even though Drew & Ward had constructed Bud Koons' estate plan, drafted many of his trusts, served as his counsel for decades, and continued performing various legal services and was paid for the same *after* Mr. Koons' death, Drew & Ward filed this lawsuit on behalf of Mr. Cundall.[70] On the day the Cundall lawsuit was filed, Dick Ward was serving as trustee of two trusts for the benefit of Bud Koons' children whom Drew & Ward named as defendants, Dick Ward was receiving his $20,833 a month consulting check, and Drew & Ward retained the right to name successor trustees to many of Mr. Koons' trusts.[71]

Michael Cundall—and his cross-claiming children—also seek a constructive trust. They assert that the 1984 transfer of KCM shares from Fund B of the Grandparents Trust to CIC was wrongful and a bargain purchase by CIC. Pursuant to this Court's decision in *Estate of Cowling*, any constructive trust must initially attach to the KCM shares that CIC acquired in 1984 – the "particular assets" allegedly "wrongfully obtained."[72] Michael Cundall and Cross-Claimants apparently hope to trace those KCM shares as held by CIC and their proceeds to the targets of the constructive trust claim – the successor trustees and the four children and seven grandchildren of Bud Koons named as defendants ("Koons beneficiaries"). Thus, there is no doubt that the Cundalls' lawsuit seeks to decimate Drew & Ward's entire estate plan for Bud Koons.

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[69] First Amended Complaint, Supp. 1-58.

[70] First Amended Complaint at 13, Supp. 13.

[71] 7/25/2006 Affidavit of Keven E. Shell. ¶ 21, 26(e), 26(n), 27.

[72] *Estate of Cowling v. Estate of Cowling*, 109 Ohio St. 3d 276, 2006 Ohio 2418, ¶ 25.

However, Michael Cundall, his side-switching counsel, and his cross-claimant children failed to comply with Ohio law. Before filing suit, Michael Cundall failed to tender any of the millions of dollars of consideration received by the Cundalls when they sold their stock.

ARGUMENT IN SUPPORT OF PROPOSITIONS OF LAW

Proposition of Law No. 1: A plaintiff who alleges that a release was obtained by fraud in the inducement must tender back the consideration received in exchange for the release before suing the released party over the released claims, even if the released party owed fiduciary duties to the plaintiff.

A) Michael Cundall and his Cross-Claiming Children Alleged That Bud Koons Obtained Their Releases Of Damages Arising Out Of The 1984 Transaction By Fraud In The Inducement.

Ordinarily, "a release of a cause of action for damages is . . . an absolute bar to a later action on any claim encompassed within the release."[73]

But in some circumstances, a release may be set aside as void for fraud in the factum.[74] Fraud in the factum occurs because:

> [W]hen the actions or representations of the releasee so impair the mind and judgment of the releasor that he fails to understand the nature or consequence of his release, there has been no meeting of the minds. Where device, trick, or want of capacity produces "no knowledge on the part of the releasor of the nature of the instrument, or no intention on his part to sign a release or such release as the one executed," there has been no meeting of the minds.[75]

This case does not concern fraud in the factum.

Alternatively, a plaintiff may seek to avoid a release because it was obtained via

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[73] *Haller v. Borror Corp.* (1990), 50 Ohio St. 3d 10, 13, *citing Perry v. M. O'Neil & Co.* (1908), 78 Ohio St. 200.

[74] *Id.* at 13.

[75] *Haller*, 50 Ohio St. 3d at 13, *citing Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 5.

misrepresentation, duress, or coercion; this is considered fraud in the inducement.[76] Unlike a claim of fraud in the factum, when a plaintiff alleges fraud in the inducement, the release "is *merely voidable* upon proof of fraud."[77] Therefore, to circumvent a release allegedly obtained by fraudulent inducement, *the plaintiff must first return or tender the consideration given for the release*.[78] Interest on the consideration must also be tendered back before filing suit.[79] This is the tender rule.

In his First Amended Complaint, Michael Cundall alleges that utilizing "various threats and cajoling," Bud Koons and U.S. Bank forced the Cundalls to sell their KCM shares "through duress, coercion, overreaching and undue influence."[80]

There is no dispute on appeal that the Cundalls' allegations of duress and coercion present a fraud in the inducement claim.[81] Thus, Michael Cundall and his cross-claiming children were required to return the consideration received in return for the releases before they can attack the releases. Their failure to do so should have been fatal to their stale lawsuit.

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[76] *Haller*, 50 Ohio St. 3d at 14.

[77] *Id.* at 13 (emphasis supplied), *citing Picklesimer*, 151 Ohio St. 1.

[78] *Haller*, 50 Ohio St. 3d at 14 (emphasis supplied). *See also Shallenberger v. Motorists Mut. Ins. Co.* (1958), 167 Ohio St. 494, 502; *In Re Estate of Gray* (1954), 162 Ohio St. 384, 390-91; *Picklesimer*, 151 Ohio St. at 4-5, *citing* 53 Corpus Juris, 1232, § 50; *Manhattan Life Ins. Co. v. Burke* (1903), 69 Ohio St. 294, 302.

[79] *Purvis v. Davish* (1st Dist. 1976), 1976 Ohio App. LEXIS 8599 *3-4.

[80] First Amended Complaint, ¶ A & D, Supp. 6-7.

[81] *Haller*, 50 Ohio St. 3d at 14; *Picklesimer*, 151 Ohio St. at 4.

B) The Tender Rule Requiring A Plaintiff Who Alleges Fraud In The Inducement To Return The Consideration Before Bringing Suit Applies To All Plaintiffs, Even To Plaintiffs Who Sue A Fiduciary They Released Twenty-Two Years Before.

Even though Michael Cundall alleges that Bud Koons fraudulently induced the Cundalls to sign releases, the First District found that the one hundred year-old tender rule, most recently affirmed by the Ohio Supreme Court in *Haller v. Borror Corp.* (1990), 50 Ohio St. 3d 10, "is not controlling here."[82] The First District purported to distinguish *Haller* as "a personal-injury case involving an arm's-length transaction, [where] there was no fiduciary relationship between the parties."[83]

Until this case, Ohio courts had routinely applied the tender rule when the releasee was a fiduciary to the releasor.[84] And so, without bothering to review *Haller*—which in fact involved termination of employment contract claims, not personal-injury claims—the First District drastically deviated from well-established Ohio law.

For <u>every</u> type of release before it, without exception, and for over a century, this Court has enforced the tender rule, requiring plaintiffs to tender back the consideration received in exchange for their releases before filing suit.[85]

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[82] *Cundall*, 2007 Ohio 7067 at ¶ 20-22, Appx. 15.

[83] *Id.*

[84] *Weisman v. Blaushild*, 8th Dist. No. 88815, 2008 Ohio 219, ¶ 37, 43 (minority shareholder's claims against fiduciary controlling and majority sharcholder over a stock buyout); *Lewis v. Mathes*, 4th Dist., 161 Ohio App. 3d 1, 2005 Ohio 1975, ¶16, 32 (minority shareholder's claims against fiduciary controlling and majority shareholders over a stock buyout).

[85] *Haller*, 50 Ohio St. 3d at 14-15 (employment related breach of contract claims); *Shallenberger*, 167 Ohio St. at 503-05 (The Supreme Court has "<u>*consistently held*</u> that a releasor of an unliquidated claim cannot recover anything on account of that claim without first avoiding the release; and that, except where, unlike the instant case, the release is void, such releasor cannot undertake to avoid that release without first tendering back the consideration received therefore.") (emphasis added); *Block v. Block* (1956), 165 Ohio St. 365, 374-77 (alimony and

In *Manhattan Life Insurance Co.*, this Court explained the tender process, stating that:

> [N]o doubt exists, of the soundness of the general proposition that where a party to a compromise desires to set aside or avoid the same, and be remitted to his original rights, he must place the other party in *statuo quo* by returning or tendering the return of whatever has been received by him under such compromise . . . [T]he petition should allege the fact of such return or tender, prior to, or at least contemporaneous with, the commencement of the suit. Further, as a general proposition, the rule obtains even though the contract of settlement was induced by the fraud or false representations of the other party; the ground being that *by electing to retain the property, the party must be conclusively held to be bound by the settlement*.[86]

In *Haller*, this Court reaffirmed the tender rule: "[a] release of liability procured through fraud in the inducement is voidable only, and *can be contested only after a return or tender of consideration*."[87] Relying on this Court's unbroken line of opinions, Ohio appellate courts have consistently applied the tender rule to releases of myriad claims – until now.[88]

Principles of equity, fairness, and public policy favor the tender rule: "the requirement of

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separation agreement); *In Re Estate of Gray*, 162 Ohio St. at 390-91 (In a case involving a fiduciary, the Court notes the tender rule and does not carve out an exception for fiduciaries. The Court held that the tender rule did not apply because the settlement did not cover the claim); *Picklesimer*, 151 Ohio St. at 4-5, 7 (personal injury claims); *Manhattan Life Ins. Co.*, 69 Ohio St. at 302 (insurance dispute).

[86] *Manhattan Life Ins. Co.*, 69 Ohio St. 294, 302-03.

[87] *Haller*, 50 Ohio St. 3d at 14 (emphasis added).

[88] *E.g. Weisman*, 2008 Ohio 219 at ¶ 37, 43 (minority shareholder's claims against fiduciary controlling and majority shareholder over a stock buyout); *Lewis*, 2005 Ohio 1975 at ¶16, 32 (minority shareholder's claims against fiduciary controlling and majority shareholders over a stock buyout); *Adams v. State of Ohio* (10th Dist. June 28, 1996), 1996 Ohio App. LEXIS 2752, *9 (employment claims); *Erwin v. Allstate Ins. Co.* (1st Dist. June 2, 1993), 1993 Ohio App. LEXIS 2782 *3-4 (property damage claims); *Harchick v. Baio* (8th Dist. 1989), 62 Ohio App. 3d 176, 180 (personal injury claims); *Stone v. City of Rocky River* (8th Dist. Oct. 31, 1985), 1985 Ohio App. LEXIS 9080 *5 (claims for injuries due to improper police interrogation); *Kirk v. Kirk* (3d. Dist. Dec. 30, 1983), 1983 Ohio App. LEXIS 12970 *7 (alimony and child support claims); *Axx v. Schirg* (6th Dist. May 21, 1976), 1976 Ohio App. LEXIS 7935 *4 (personal injury claims); *Kercher v. Brown* (2d. Dist. 1947), 72 N.E.2d 588, 589-90 (automobile injury claims); *Walker v. Empire Life Ins. Co.* (8th Dist. 1905), 18 Ohio C.C. (n.s.) 591, 595 (breach of insurance contract claims).

a tender before rescission . . . is an equitable one. He who seeks equity must first do equity. The defendant has the same right to invoke equitable principles as the plaintiff has."[89] Likewise, this Court found the tender rule fair because: "a releasor ought not be allowed to retain the benefit of his act of compromise *and at the same time* attack its validity when he understood the nature and consequence of his act, regardless of the basic nature of the inducement employed."[90] This Court also found that public policy favors tender because "the law favors the prevention of litigation by compromise and settlement of controversies."[91]

Moreover, as a preeminent national treatise notes, unless the releasor tenders back the consideration, if the defendant–releasee's "contention as to the validity of the releasor's claim is sustained," then the plaintiff–releasor "will . . . be in the possession of funds or property to which he is not entitled, and the risk that the releasor may prove to be insolvent is thus cast upon the releasee."[92]

Despite the equity, fairness, and public policy favoring enforcement of the tender rule, the First District determined that the tender rule does not apply in the fiduciary context because it believed that no cited cases, no Ohio cases, and no cases from other jurisdictions have applied the tender rule in the fiduciary context.[93] The First District was incorrect in each respect.

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[89] *Kercher*, 72 N.E.2d at 590.

[90] *Haller*, 50 Ohio St. 3d at 14 (emphasis added), *citing Shallenberger*, 167 Ohio St. 494; *Picklesimer*, 151 Ohio St. at 7; *Weisman*, 2008 Ohio 219 at ¶ 26; Annotation, 134 A.L.R. 9 (1941) ("The reasons advanced by the courts as justifying the [tender rule] are usually referable to the argument, applicable to the rescission of contracts generally, that it would be inconsistent and unjust to permit one to attach a contract he has executed and at the same time retain the benefits granted him thereunder.").

[91] *Haller*, 50 Ohio St. 3d at 14, *citing White v. Brocaw* (1863),14 Ohio St. 339, 346; *Shallenberger*, 167 Ohio St. at 505; *Weisman*, 2008 Ohio 219 at ¶ 26.

[92] Annotation, 134 A.L.R. 9 (1941).

[93] *Cundall*, 2007 Ohio 7067 at ¶ 24-25, Appx. 16.

Both the Eighth and the Fourth Districts have applied the tender rule in the fiduciary context.[94] The plaintiffs in both cases, *Weisman* and *Lewis*, were minority shareholders in close corporations. When they were asked to leave the company, both plaintiffs released the majority and controlling shareholders—who were also corporate officers—in connection with a stock buyout agreement.[95]

Majority and controlling shareholders in a close corporation owe a fiduciary duty of the "utmost good faith and loyalty."[96] And even the First District has recognized that there is a fiduciary relationship between officers and stockholders that "is one of trust as to all corporate matters" so that "the officers and directors are frequently called trustees."[97]

Despite the fiduciary and trustee duties owed by majority and controlling shareholders and corporate officers, the Eighth and Fourth Districts both found that the plaintiffs should have tendered back the consideration received for the release before they filed suit over the released claims – even though the plaintiffs alleged that the majority and controlling shareholders

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[94] *Weisman*, 2008 Ohio 219 at ¶ 37, 43; *Lewis*, 2005 Ohio 1975 at ¶ 27, 32.

[95] *Lewis*, 2005 Ohio 1975 at ¶ 2-4. Lewis held only one third of the company's stock. *Id.* at ¶ 2. The *Lewis* trial court found that: "By combining their interests, [the other two shareholders] became controlling shareholders in the company." *Lewis v. Mathes* (Washington Cty. C.P. Mar. 3, 2004), No. 02 OT 274 at 1. The controlling shareholders in *Lewis* were the President and the Secretary Treasurer of the corporation. Release attached as Exh. B to Complaint, *Lewis v. Mathes* (Washington Cty. C.P. Mar. 3, 2004), No. 02 OT 274. The majority shareholder in *Weisman* was the president and CEO of the company. *Weisman*, 2008 Ohio 219 at ¶ 1.

[96] *Crosby v. Beam* (1989), 47 Ohio St. 3d 105, 108, 109; *Miller v. McCann* (1st Dist. Dec. 26, 1997), 1997 Ohio App. LEXIS 5778 *5. The duty is owed when "the minority shareholder is an officer of the corporation." *Miller*, 1997 Ohio App. LEXIS 5778 at *6.

[97] *Nienaber v. Katz* (1st Dist. 1942), 69 Ohio App. 153, 158. *Accord*, *Stepak v. Schey* (1990), 51 Ohio St. 3d 8, 14 ("It is well recognized that directors of a corporation occupy a fiduciary relationship to the corporation and its shareholders and are held strictly accountable and even liable if corporate property or funds are wasted or mismanaged due to their inattention *to the duties of their trust*.") (emphasis supplied).

fraudulently induced them to sign the release.[98] As the Eighth District explained in *Weisman*:

> The law in Ohio governing releases is well settled . . . . [and] clear. . . . Since [the minority shareholder] agreed to the release provision in exchange for consideration in the [settlement agreement], they *only had one option. They first had to rescind and tender back the consideration – before they could bring their suit*."[99]

In its recent *Weisman* decision, the Eighth District also explained that when, as the Cundalls did, "the parties have negotiated the release with the assistance of legal counsel, and both sides have agreed to the language included in the release, there is an assumption that the parties are fully aware of the terms and scope of their agreement."[100]

Nor is the tender rule unique to Ohio. It is considered generally applicable in American courts by leading national legal treatises.[101] And so courts around the country, including federal courts in Ohio, require plaintiffs to tender back consideration before suing their fiduciaries for released claims and claiming that their fiduciaries fraudulently induced their release.[102]

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[98] *Weisman*, 2008 Ohio 219 at ¶ 13, 37, 43; *Lewis*, 2005 Ohio 1975 at ¶ 17, 27, 32.

[99] *Weisman*, 2008 Ohio 219 at ¶ 31, 37 (emphasis in original).

[100] *Weisman*, 2008 Ohio 219 at ¶ 24, *quoting Task v. Nat'l City Bank* (8th Dist. Feb. 10, 1994), 1994 Ohio App. LEXIS 437 *11-12.

[101] 66 Am. Jur. 2d *Release* § 45 (2001) ("Generally speaking, one who seeks to avoid the effect of a release must first return or tender the consideration paid him in connection with his execution of the release."); Annotation, 134 A.L.R. 8 (1941) ("The general principle that one who seeks to avoid the effect of a release or compromise of a claim, demand, or cause of action (whether in an action or proceeding brought solely to cancel or rescind the release or instrument . . . or in an action brought for the dual purpose of setting aside the release or settlement and recovering on the original claim or demand) must first return or tender the consideration, whether money or property, paid him in connection with his execution of the settlement or release, has found application or recognition in a large number of cases involving the release or settlement of a wide variety of claims or demands.").

[102] *Goldstein v. Murland* (E.D. Pa. June 24, 2002), 2002 U.S. Dist. LEXIS 11331 *2-3, 10 n.8 (law partners); *Rinke v. Auto. Moulding Co.* (Mich. App. 1997), 573 N.W.2d 344, 345-46 (minority shareholders); *Environ Prods., Inc. v. Advanced Polymer Tech. Inc.* (E.D. Pa. June 30, 1997), 1997 U.S. Dist. LEXIS 9582 *3, 9-11 (joint venturers); *Jiffy Lube Int'l v. Jiffy Lube of Pa., Inc.* (E.D. Pa. 1994), 848 F.Supp. 569, 574, 576-78 (joint venturers under both Maryland and Pennsylvania law); *Rue v. Helmkampf* (Mo. App. 1983), 657 S.W.2d 76, 76, 78-80 (joint

There is no distinction between the fiduciary duties owed by the fiduciaries in these cases and the fiduciary duties owed by Bud Koons. All fiduciaries relationships—not just those entitled "trustee/beneficiary" relationships—"require the highest duty of care."[103] Even the First District recognizes this, finding that the "punctilio of honor" which Justice Cardozo applies to another type of fiduciary, a joint venturer, applies just as well to Bud Koons as an intervivos trustee.[104]

The First District's decision not to apply the tender rule in the fiduciary context stands alone. It is in conflict with over a century of law from this Court, other Ohio appellate courts, and courts around the country applying the tender rule to all releases, including releases of fiduciaries.

The significance of faithful application of the tender rule cannot be overstated. An inter vivos trustee like Bud Koons is not the only kind of fiduciary who owes the "highest duty of care" to others. Fiduciaries have many other roles in society, whether they be joint venturers, majority and controlling shareholders, directors, agents, partners, or attorneys.

If this Court were to determine that the tender rule no longer applies to fiduciaries, then no fiduciary could realistically settle a dispute. The validity of untold thousands of releases and

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venturers); *First Nat'l Bank v. Gardner* (Ky. 1961), 348 S.W.2d 839, 842 (executor). The federal courts also apply the tender rule to ERISA fiduciaries. *Samms v. Quanex Corp.* (6th Cir. Oct. 17, 1996), 1996 U.S. App. LEXIS 27356 *7-8; *Bittinger v. Tecumseh Prods. Co.* (E.D. Mich. 1998), 83 F.Supp. 2d 851, 871-72; *Wittorf v. Shell Oil Co.* (5th Cir. 1994), 37 F.3d 1151, 1154; *Ljubisaveljevic v. Nat'l City Corp.* (S.D. Ohio May 30, 2007), 2007 U.S. Dist. LEXIS 39126 *23-24; *see Taylor v. Visteon Corp.* (6th Cir. 2005), 149 Fed. Appx. 422, 426-27. The "common law of trusts" defines the scope of ERISA fiduciaries' "powers and duties." *Cent. States, S.E. & S.W. Areas Pension Fund v. Cent. Transp.* (U.S. 1985), 472 U.S. 559, 570.

[103] Black's Law Dictionary, "fiduciary relationship," p. 640 (7th ed. 1999).

[104] *Cundall*, 2007 Ohio 7067 at ¶ 27, Appx. 17, *citing Meinhard v. Salmon* (N.Y. 1928), 249 N.Y. 458, 464.

settlements would be compromised. And the public policy encouraging resolution of disputes would be endangered.

Nor is there an analytically sound method for limiting the First District's holding to inter vivos trustees. After all, inter vivos trustees owe no greater duty to their beneficiaries than that owed by any other fiduciary. The lower courts of this State would certainly recognize as much when other persons to whom fiduciary duties are owed argue that they should be permitted to retain the consideration received in return for a release when suing over their released claims. This Court's tender rule cannot apply to some fiduciaries and not to others.

There is no reason why beneficiaries of inter vivos trustees should be permitted to sue over released claims while keeping the consideration received for the release in hand, but no other persons to whom fiduciary duties get to enjoy such extraordinary status.

This Court has applied the tender rule correctly and uniformly for well over a century for very good reasons. Without the tender rule, a release is nothing but a hollow promise given to a fiduciary to obtain funds that will then be used to bring a lawsuit against that same fiduciary over the very claims that were released.

The people of this State deserve better stability from the law that governs them. The Court should not allow the demise of releases and settlements that would accompany the First District's evisceration of the tender rule. This Court's tender rule should not be abandoned.

C. The Trial Court Properly Dismissed Michael Cundall's Cross-Claiming Children For Failure To Tender.

Michael Cundall is not the only party in this case suing over released claims. On appeal to the First District, Michael Cundall's adult children incorrectly argued that the dismissal of their claims against Bud Koons for failure to tender was improper because the release signed by

their father on behalf of himself and his "heirs" does not apply to them.[105] The First District did not address Cross-Claimants' appeal.

Michael Cundall did not release Bud Koons only on his own behalf. He also released the claims of "his/her heirs."[106] As Michael Cundall's children are his heirs pursuant to the Ohio descent and distribution statute,[107] Michael Cundall's release of Bud Koons and his heirs and executors binds the Cundall children. Under Ohio law, Plaintiff Cundall was permitted to execute a pre-injury release on behalf of his children, without prior court approval.[108]

To avoid their father's release, Cross-Claimants told the First District that they really are suing as "beneficiaries and contingent beneficiaries of the Grandparents Trust."[109] They apparently rely on language allowing distributions during Bud Koons' lifetime "for the benefit of BETTY LOU CUNDALL, her spouse, descendants, and spouses of descendants."[110]

But in releasing all claims of his "heirs," Plaintiff Cundall released his children's claims as "beneficiaries and contingent beneficiaries" of the Grandparents Trust. The Trust defines

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[105] A.d. 11, Brief of Cross-Claimants/Defendants/Appellants Michael K. Cundall, Jr, Courtney Fletcher Cundall and Hillary Cundall (hereinafter "Brief of Cross-Claimants") at 5.

[106] Releases of Bud Koons, Supp. 74-83.

[107] R.C. 2105.06, Appx. 48-49. *C.f.* 31 Ohio Jurisprudence 3d, Decedents' Estates § 20, at 51 ("the term 'heirs' is often used to refer to children").

[108] *Zivich v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St. 3d 367, 372. The release was a pre-injury release because the stock sale did not occur until after Michael Cundall signed his release. Michael Cundall's Release of Bud Koons ("The beneficiary requests and approves the sale by the Trustee . . . ."). Releases of Bud Koons, Supp. 74-83. *See also* R.C. 5803.03, Appx. 55 (where "there is no conflict of interest . . . with respect to a particular question or dispute . . . a parent may represent and bind the parent's minor or unborn child . . ."). This provision of Ohio's Trust Code applies to pending proceedings unless the court finds that retroactivity would be unfair. *See* R.C. 5811.03, Appx 64. Retroactive application is fair in this instance because the Ohio Trust Code merely codifies Ohio's recognition of this doctrine. *Cushman v. Cushman*, 12th Dist., 1984 Ohio App. LEXIS 10990 *4-5.

[109] A.d. 11, Brief of Cross-Claimants at 5.

[110] Grandparents Trust at 4, Supp. 39.

"descendants" as "lineal descendants of one of the Grantor's children named above, born in lawful wedlock."[111] Pursuant to the Ohio descent and distribution statute, the term "heirs" includes "lineal descendants."[112] Therefore, by releasing the claims of his heirs, Michael Cundall released the claims of all of his lineal descendants who were or could be beneficiaries of the Grandparents Trust.

Moreover, there is no doubt that Cross-Claimants' interest in the final distribution from the Grandparents Trust was purely contingent.[113] The contingency—Michael Cundall's death—never occurred. Whatever interest Cross-Claimants had was extinguished because their father remained alive at Bud Koons' death.[114] Therefore, Cross-Claimants cannot sue these Defendants based on any interest they claim in the final distribution because they were not in privity with Bud Koons with respect to that final distribution.[115]

Though any claims they had based on the 1984 transaction were released by their father, Cross-Claimants fail to allege that they tendered the consideration their father received in connection with the 1984 stock sale. As a result, the trial court properly dismissed these barred

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[111] Grandparents Trust at 5, Supp. 40.

[112] *Casey v. Gallagher* (1967), 11 Ohio St. 2d 42, syllabus paragraph one (the word "heirs" denominates "those designated by the statute of descent and distribution to inherit from the ancestor as of the time of application of such statute."); R.C. 2105.06, Appx. 48-49 (" When a person dies intestate . . . property shall be distributed . . . in the following course: (A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes.").

[113] Grandparents Trust at 5-6, Supp. 40-41 (At the death of the last to die of Betty Lou Cundall and Bud Koons, the trustee was to distribute Cundall's share to "the then living descendants of BETTY LOU CUNDALL, per stirpes.").

[114] *Id.*

[115] *C.f. Lewis v. Star Bank* (12th Dist. 1993), 90 Ohio App.3d 709, 711-12 (beneficiaries with a vested interest subject to complete defeasance did not have the privity necessary to sue a trustee), *jurisdictional motion overruled* (1994), 68 Ohio St. 3d 1473.

cross-claims.[116]

Proposition of Law No. 2: There Is No "Presumption of Fraud" To Alleged Self-Dealing By The Trustee Of An Inter Vivos Trust Where The Trust Agreement Permits The Actions At Issue.

As part of its rejection of the application of the tender rule in this case, the First District relies heavily on what it labeled as a "presumption of fraud" in fiduciary duty/self-dealing cases. The presumption of fraud that the First District invokes to justify its rejection of the tender rule does not apply here under the well-recognized law of fiduciary duty in Ohio.

The Grandparents Trust Agreement specifically permitted and contemplated Bud Koons' alleged "self-dealing" conduct. Knowing full well that they had funded the Grandparents Trust with only CIC stock, John and Ethel Koons gave their son Bud Koons: "*full power and authority* in his discretion and *without being required to apply to any court* for authority and without being subject to the laws of the state or nation in respect to the investment of trust funds or the management of trust property . . . . *[t]o sell* . . . publicly or privately, *any assets* . . . for cash or on credit . . . ."[117]

Article II of the Grandparents Trust reiterates Bud Koons' power as trustee to sell the CIC shares: "[t]he trustee shall hold, manage, *sell*; invest, and reinvest *any securities* or other property which constitutes part of the trust funds . . . ."[118]

The longstanding law of Ohio is that the presumption of impropriety of an alleged self-dealing transaction is either overcome or simply not operative where the trustee was authorized to perform the actions at issue by the trust instrument. Under the Ohio Trust Code, a

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[116] Entry Granting Defendants' Motions to Dismiss at 8-9, Appx. 44-45.

[117] Grandparents Trust at 8-9, Supp. 43-44 (emphasis supplied).

[118] Grandparents Trust at 3, Supp. 38 (emphasis supplied).

trustee does not commit a breach of his duty of loyalty in connection with a transaction involving trust property and the trustee's own personal account where "[t]he transaction was authorized by the terms of the trust."[119] Though the Ohio Trust Code is relatively new, the principle it embraces is well established. For instance, according to the Restatement (Second) of Trusts, "by the terms of the trust the trustee may be permitted to sell trust property to himself individually . . . ."[120]

Ohio case law is consistent with these principles. In *Biddulph v. DeLorenzo*, for example, the court permitted the trustee to sell property to an LLC created by her husband where the trust instrument authorized the self-dealing.[121] That court did not regard the transaction at issue as presumptively fraudulent because: i) the trust instrument authorized the transaction and ii) "the trustee's actions [i.e. the sale] were not otherwise limited by statutory or common law" since the trust was an inter vivos trust, not a testamentary trust.[122]

Broad language standing alone in a trust instrument may not necessarily authorize a trustee to deal with trust property on his own account.[123] But Ohio courts also recognize that if due to the relationships between the parties the trust instrument authorizes the transaction, then there is no impropriety.

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[119] R.C. 5808.02(B)(1), Appx. 57.

[120] Restatement (Second) of Trusts § 170, comment t. *See also* Scott on Trusts §17.2.11 at 1136-1139 ("The terms of a trust may permit a trustee to do what, in the absence of such a provision, would be a violation of the duty of loyalty.").

[121] *Biddulph v. DeLorenzo,* 8th Dist. No. 83808, 2004 Ohio 4502, ¶ 3, 28 ("[T]he trust instrument empowered the trustee to sell the trust property, without a court order, at public or private sale, in such manner and upon such terms as the trustee deemed necessary or desirable. The trust instrument also authorized the trustee to purchase any assets from the estate in her individual capacity.").

[122] *Biddulph,* 2004 Ohio 4502 at ¶ 30, 31.

[123] *See In re Binder's Estate* (1940), 137 Ohio St. 26, 43-44.

The decision in *Huntington National Bank v. Wolfe* provides a good example.[124] In that case, the beneficiary challenged both the co-trustees' decision to distribute cash instead of the corporate shares that originally funded the trust and the amount the corporation paid for those shares.[125] One of the co-trustees was a shareholder, officer, and director of that corporation, as well as the uncle of the beneficiary.[126] The co-trustees distributed cash instead of shares due to concerns about the impact of the beneficiary's stock ownership on the management of the company.[127] The court affirmed the trial court's finding that the trustees did not breach their fiduciary duty in selling the stock because:

> [T]he settlor *must have understood* that his Co-Trustee would take into consideration the interests of the corporation as well as the interest of the beneficiary in making any decisions concerning the family corporations' stock held by the Trusts. It is apparent that the settlor[]'s intent was to allow both the interest of the corporation of which his Trusts held stock to be considered along with the interest of his beneficiaries. *This Court is bound by the intent of the settlor*.[128]

Moreover, the court found that "[s]o long as a trustee executes the trust in good faith and within the limits of sound discretion, a court of equity will not interfere with that discretion or undertake to substitute its discretion therefor."[129] After all, the court explains, "the mere fact that a different judgment might also be reasonable does not render the reasonable judgment exercised by the trustees improper *merely because of the existence of an inherent conflict of*

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[124] *Huntington Nat'l Bank v. Wolfe* (10th Dist. 1994), 99 Ohio App.3d 585.

[125] *Id.*, 99 Ohio App. 3d at 590.

[126] *Id.*, 99 Ohio App. 3d at 588, 595.

[127] *Id.*, 99 Ohio App. 3d at 591.

[128] *Huntington Nat'l Bank*, 99 Ohio App. 3d at 595 (emphasis supplied).

[129] *Huntington Nat'l Bank*, 99 Ohio App. 3d at 594, *citing Hopkins v. Cleveland Trust Co.* (1955), 163 Ohio St. 539, 549.

interest which was both anticipated and created by the settlor himself."[130]

The grantors of the trust at issue here, John and Ethel Koons, were the parents of Bud Koons. They were large shareholders of CIC, contributing 6,309 of their CIC shares to the trust. They made those CIC shares the sole asset of the trust.[131] They made Bud Koons the sole trustee of the trust.[132] They did so knowing that Bud Koons, their chosen trustee, was the President and a large shareholder of CIC. Plaintiff characterizes CIC as closely-held.[133] CIC was also the probable (and perhaps only) purchaser of any block of shares. Even if the Cundalls had not requested the sale, Bud Koons, as sole trustee, certainly would be called upon to make decisions as to the CIC shares that comprised the sole asset of the Grandparents Trust. And Bud Koons as President and shareholder of CIC would certainly have an interest in Bud Koons' decisions as trustee.

To the extent that the Cundalls characterize these facts as self-dealing, as the court stated in *Huntington National Bank*, the Grantors "both anticipated and created" the alleged conflict.[134] Had the Grantors wished to avoid the conflict, they would have chosen someone other than Bud Koons as trustee.

And just as in *Biddulph* and *Huntington National Bank*, John and Ethel Koons knew that their son Bud would possess dual duties that could conflict. Nevertheless, John and Ethel Koons gave him "full power and authority in his discretion and without being required to apply to any court for authority" to sell the sole asset that they funded their trust with, CIC and then KCM

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[130] *Huntington Nat'l Bank*, 99 Ohio App. 3d at 597 (emphasis supplied).

[131] Grandparents Trust at 17, Supp. 48D.

[132] *Id.* at 1, Supp. 36.

[133] First Amended Complaint at ¶ A, 14, Supp. at 6, 9.

[134] *Huntington Nat'l Bank*, 99 Ohio App. 3d at 597-98.

stock, "publicly or privately."[135] The *Huntington National Bank* court explains that by giving Bud Koons the "full" power and authority to sell the trust assets, John and Ethel Koons "intended the trustee[] to have the same type of power to sell property making up the trust res as the settlor[s themselves] would have had.[136]

Other provisions of the Grandparents Trust Agreement further demonstrate that John and Ethel Koons authorized Bud Koons as trustee to deal with Bud Koons as president and a large shareholder of CIC. For example, Article IV(7) states John and Ethel's intention to "ensure" that CIC or KCM shares held in the trust are voted consistently with the shares held by Bud Koons.[137]

By giving their son discretion to sell trust assets without court approval knowing very well that he was President and a large shareholder of CIC, John and Ethel Koons authorized Bud Koons to sell the Cundalls' KCM stock to CIC in 1984. The First District Court of Appeals should not be permitted to gainsay John and Ethel Koons' intent more than three decades after they established their trust.

John and Ethel Koons' intent is not the only thing the First District undermined by applying a presumption of fraud. At R.C. 5801.10, the Trust Code endorses settlements between trustees and beneficiaries. Thus, by applying a presumption of fraud, the First District also has compromised the efficacy of Ohio's Trust Code.

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[135] Grandparents Trust at 8-9, Supp. 43-44.

[136] *Huntington Nat'l Bank*, 99 Ohio App. 3d at 597-98.

[137] Grandparents Trust at 10, Supp. 45. *See also Id.* (granting Bud Koons discretion to transfer the CIC shares to a holding company formed for the purpose of holding CIC shares owned by the Koons family, a provision Bud Koons exercised in exchanging CIC shares for KCM shares).

Proposition of Law No. 3: Fiduciaries may overcome a presumption of fraud by showing that: the plaintiffs had competent and disinterested advice or that they entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, or that their consent was not obtained by reason of the power of the influence to which the relation gave rise.

In *dicta* the First District discusses the burden that a fiduciary must meet to overcome the so-called presumption of fraud in an alleged self-dealing transaction.[138] That discussion does not reflect Ohio law. This Court certainly does not need to reach this issue to rule in Defendants-Petitioners' favor on either the application of the tender rule or on the constructive trust issue. However, to the extent that the court of appeals intended to bind any trial courts in the First District with its *dicta* statements or to bind these parties below, its error was manifest. Likewise, to the extent that the First District intended this discussion to support its decision on the tender issue, it does not do so.

A plaintiff who challenges a fiduciary's alleged self-dealing actions can get the benefit of a presumption that the transactions at issue are improper provided that the plaintiff satisfies certain prerequisites.[139] However, the fiduciary can rebut that presumption.[140] In this case, the presumption is already rebutted.

The First District had no need to reach to a New York case to obtain a standard for rebutting the presumption of fraud. Though the First District inexplicably ignored Ohio law on this point, Ohio's courts have already provided a standard. In *Craggett*, the Eighth District set forth three alternative and independent showings that the fiduciary can make in order to rebut the

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[138] *Cundall*, 2007 Ohio 7067 at ¶ 37, Appx. 20, *citing Birnbaum v. Birnbaum* (N.Y. App. 1986), 117 A.D.2d 409.

[139] *McAdams v. McAdams* (1909), 80 Ohio St. 232, 242; *Craggett v. Adell Ins. Agency* (8th Dist. 1993), 92 Ohio App. 3d 443, 451; *C.f. Rheinscheld v. McKinley* (4th Dist. Jan. 27, 1988), 1988 Ohio App. LEXIS 240 *11-12, *discretionary motion denied* (1988), 37 Ohio St. 3d 701.

[140] *Id.*

presumption of fraud:

1. Plaintiff had competent and disinterested advice; or,

2. Plaintiff entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect; or,

3. Plaintiff's consent was not obtained by reason of the power of the influence of which the relation gave rise.[141]

In setting forth this standard, the Eighth District relies on this Court's *McAdams* decision.[142]

In addition, the Ohio common law as reflected in the Ohio Trust Code allows self-dealing transactions where, *inter alia*, (i) the trust agreement allows the transaction; (ii) there was a consent, release, or ratification from the beneficiary; or (iii) where the investment complies with the prudent investor rule.[143]

Therefore, the rebuttal standard that the First District suggests applies here is wholly inconsistent with what Ohio courts have said. For example, the New York standard says nothing about whether the presumption is rebutted when the beneficiary who seeks to unwind a past

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[141] *Craggett*, 92 Ohio App. 3d at 451, *citing McAdams v. McAdams* (1909), 80 Ohio St. 232 (emphasis added). Two Ohio cases set forth similar standards. *McAdams*, 80 Ohio St. 232 at 243 ("the other party had competent and disinterested or independent advice, or that he performed the act or entered into the transaction voluntarily, deliberately and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise."), *citing* Kerr on Fraud, 151; *Yost v. Wood* (5th Dist. July 11, 1988), 1988 Ohio App. LEXIS 2791 *8-9 ("A rebuttal is accomplished where it is shown that the client had competent and disinterested advice *or* that he entered into the transaction voluntarily, deliberately, and advisedly, knowing its nature and effect, and that his consent was not obtained by reason of the power of influence to which the relation gave rise) (emphasis in original). *See also Estate of Smith* (N.C. App.), 487 S.E.2d 807, 813 (the presumption of fraud may be rebutted just by evidence that the other party obtained independent advice), *review denied* (N.C. 1997), 494 S.E.2d 410, *citing Watts v. Cumberland Cty. Hosp. Sys., Inc.* (N.C. 1986), 343 S.E.2d 879, 884.

[142] *Craggett*, 92 Ohio App. 3d at 451, *citing McAdams v. McAdams* (1909), 80 Ohio St. 232.

[143] R.C. 5808.02(B)(1), (B)(4), and (E) respectively, Appx 57-58. *Huntington Nat'l Bank*, 99 Ohio App. 3d at 594-597; *Hopkins v. Cleveland Trust Co.* (1955), 163 Ohio St. 539, 548-49.

transaction had or should have had competent or independent advice in connection with that transaction. But in *Gray v. Hafer*, the presumption was rebutted where it was "evident" that the plaintiffs were "men of affairs" who "were acting under independent advice" and had "full access to all sources of information."[144] And in *Yost*, the court found that the presumption had been successfully rebutted where the plaintiff, a "shrewd and competent businessman," declined to obtain "independent advice" despite being advised to do so by his fiduciary.[145]

Michael Cundall has already admitted that the Cundalls had the benefit of the independent, third-party advice necessary to overcome the presumption of fraud when they decided to sell their shares in 1984 to CIC.[146] Thus, dispositive evidence already exists on the rebuttal question.

But even without this dispositive evidence, Defendants-Petitioners have more than ample evidence to overcome the presumption of fraud. The record in this case reflects that (i) the Trust Agreement permitted the 1984 transaction; (ii) Plaintiff provided a written consent and release in connection with the transaction; and (iii) Plaintiff repeatedly ratified the transaction during the more than 20 year period when he chose not to challenge the transaction.

The First District never addressed these (and other) recognized grounds for rebutting the presumption of impropriety that applies to a claimed self-dealing transaction. This Court should not allow the First District's misstatement of Ohio law on this rebuttal standard to remain.

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[144] *Gray v. Hafer* (Cincinnati Superior Ct. 1904), 15 Ohio Dec. 256, 261.

[145] *Yost*, 1988 Ohio App. LEXIS 2791 at *12.

[146] Plaintiffs' Memo. in Opposition to Defendants' Motions to Dismiss at 13, Supp. 149; 2/16/1984 Schwartz, Manes & Ruby invoice, Supp. 97.

Proposition of Law No. 4: The statute of limitations on a lawsuit seeking to impose a constructive trust begins to run in favor of the constructive trustee from the date of the initial, alleged wrongful transfer, not from the termination of the express trusteeship.

In addition to its erroneous decision on Ohio's tender rule, the First District erroneously treated the alleged constructive trustee defendants identical to trustees of an express trust when applying the statute of limitations. As a result, according to the First District, the statute of limitations began to run in favor of the alleged constructive trustees—the successor trustee defendants and the Koons beneficiaries—when Bud Koons ceased to be trustee of Trust B in 2005 rather than when the initial, alleged wrongful transfer occurred in 1984.[147] This holding is inconsistent with the sole case from this Court cited by the First District, *Peterson v. Teodosio*.[148] The First District's holding is also inconsistent with other decisions of this Court, with many long-standing Ohio lower court decisions, and with the rulings of courts in other jurisdictions.

Here, Michael Cundall and Cross-Claimants allege that KCM shares were wrongfully transferred to CIC in February 1984 and that CIC paid inadequate consideration for the KCM shares.[149] Michael Cundall and Cross-Claimants hope to trace proceeds from the KCM shares acquired by CIC in 1984 to the successor trustee defendants and the Koons beneficiaries and to impose a constructive trust over those proceeds.[150]

As shown in subsection A below, the remedy of recovering property from alleged constructive trustees is very different from the remedy of recovering damages from an express trustee, including for purposes of the statute of limitations.

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[147] *Cundall*, 2007 Ohio 7067 at ¶ 84, Appx. 34.

[148] *Cundall*, 2007 Ohio 7067 at ¶ 84, Appx. 34, *citing Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 172.

[149] First Amended Complaint at ¶ A, Supp. 6-7; Cross Claims at ¶ 7, 21, Supp. 170, 172.

[150] *Id.* at prayer ¶ II, Supp. 12; Cross Claims at ¶ 20-24, prayer ¶ B, Supp. 172-73.

As shown in subsection B below, when there is a wrongful transfer of property, as alleged here, the cause of action arises immediately and the statute of limitations runs in favor of the transferee, as constructive trustee, from the date of the wrongful transfer – here 1984. Subsection C below demonstrates that the exemption preventing the statute of limitations from running in favor of the express trustee does not prevent the statute of limitations from running in favor of a constructive trustee. Overwhelming authority supports both subsections.

There is nothing unjust about requiring claimants to proceed promptly against alleged constructive trustees. The Cundalls were free to sue their express trustee, Bud Koons, along with any persons they believed to be constructive trustees immediately in February 1984. Trust beneficiaries regularly bring suit against incumbent trustees for alleged breaches of fiduciary duty, including self-dealing.[151] And while historically (before adoption of the Ohio Trust Code) beneficiaries might enjoy an exemption from the statute of limitations running on claims against incumbent express trustees, there has never been such exemption as to constructive trustees.

The rule that the statute runs immediately in favor of constructive trustees is vital to protect the rights of property owners against claims that could have and should have been brought within the normal statute of limitations – not twenty-two years after the fact as the Cundalls seek to do here.

A. A Claim For A Remedy Of Constructive Trust Is Different From a Claim For Damages Against An Express Trustee.

The law treats express trustees and constructive trustees very differently for purposes of the statute of limitations. Thus, the First District's decision to treat express trustees and

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[151] *E.g. Dater v. Charles H. Dater Found.*, 1st Dist. Nos. C-020675, C-020784, 2003 Ohio 7148, *discretionary appeal denied* (2004), 102 Ohio St. 3d 1459, 2004 Ohio 2569, *Biddulph,* 2004 Ohio 4502.

constructive trustees the exact same for purposes of the statute of limitations is clear error.

To support its decision, the panel describes a constructive trust as a remedy. While a constructive trust is "remedial" in that it allows a plaintiff to recover property being wrongfully held by others, the panel failed to consider the nature of the constructive trust remedy.

In *Estate of Cowling* this Court describes when and how a constructive trust may be obtained.[152] A constructive trust is a remedy for the "wrongful deprivation" of property.[153] So by making a request for constructive trust, the plaintiff may bring additional parties into court – namely persons holding property of which the plaintiff is wrongfully deprived. The constructive trust "must be imposed on particular assets," i.e. the property that the constructive trustee wrongfully obtained.[154] A plaintiff seeking a constructive trust may, by clear and convincing evidence, trace the wrongfully obtained "particular assets" to other property.[155]

Therefore, obtaining a constructive trust remedy is quite different from bringing a claim for damages against an express trustee. The First District's decision to treat constructive trustees and express trustees identically ignores the marked differences between constructive trustees and express trustees illustrated in *Cowling*.

B. The Statute of Limitations Runs in Favor of a Constructive Trustee From the Date of the Initial, Alleged Wrongful Transfer.

Plaintiff Michael Cundall alleges that in 1984 Bud Koons breached his fiduciary duty by transferring KCM shares from Fund B of the Grandparents Trust to CIC and by causing the

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[152] *Estate of Cowling v. Estate of Cowling* (2006), 109 Ohio St. 3d 276, 2006 Ohio 2418, ¶ 18-26.

[153] *Id.*, 2006 Ohio 2418 at ¶ 22.

[154] *Estate of Cowling*, 2006 Ohio 2418 at ¶ 25.

[155] *Id.*, 2006 Ohio 2418 at ¶ 23.

transfer of other Cundall-owned shares to CIC.[156] CIC allegedly paid "inadequate consideration" for these KCM shares.[157] Michael Cundall and Cross-Claimants seek a constructive trust with respect to this transaction.[158]

Where an express trustee improperly transfers trust property, the remedies available to the beneficiary include imposing a constructive trust on the property in the hands of the transferee.[159]

Here, the KCM shares that the Cundalls asked CIC to purchase in 1984 are the "particular assets" that Plaintiff claims were wrongfully transferred. Pursuant to *Cowling*, the constructive trust remedy attaches to those assets and the identifiable proceeds held by the constructive trust claim.[160]

Bogert, the leading treatise on trusts, reports that the statute of limitations on claims for constructive trusts runs from the date of the wrongful transfer—February 1984 in this case—including where the wrongful transfer results from self-dealing:

> If the reason that equity decrees a constructive trust is that the title to property has been wrongfully acquired, then *a cause of action for its recovery immediately accrues* . . . . Illustrations of this type of situation are . . . where title is obtained by . . . *a breach of duty of loyalty on the part of a fiduciary* . . . . Many court decisions support this position.[161]

In *Peterson*, the Ohio Supreme Court expressly adopts this rule, stating that: "[w]hen the statute [for a constructive trust] will commence to run is dependent upon whether the wrong is in

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[156] First Amended Complaint at ¶ A, 8, 10, Supp. 6-7, 9-10.

[157] *Id.* at ¶ A, 8, Supp. 6-7, 9.

[158] *Id.* at prayer ¶ II, Supp. 12; Cross Claims at ¶ 20-24, prayer ¶ B, Supp. 172-73.

[159] *Staley v. Kreinbihl* (1949), 152 Ohio St. 315, 318; *McCauley v. German Nat'l Bank* (Hamilton County Common Pleas 1914), 1914 Ohio Misc. LEXIS 137 *12-13; 91 Ohio Jurisprudence Trusts 3d, § 278 (2005).

[160] *Estate of Cowling*, 2006 Ohio 2418 at ¶ 25.

[161] 9 Bogert, The Law of Trusts and Trustees, § 953 (2d ed. 1978) (emphasis supplied).

an unlawful acquisition, or, if the property was lawfully acquired, the date of the wrong in its conversion or misapplication . . . ."[162] Numerous Ohio decisions[163] and decisions from other jurisdictions[164] affirm that the statute of limitations runs in favor of a constructive trustee from the date of the alleged wrongful transfer which creates the constructive trust.

Pursuant to these authorities, the Cundalls had a right to pursue the alleged constructive trust remedy immediately upon the closing of the sale in February 1984. The statute of limitations began running in favor of alleged constructive trustees, including those to whom the Cundalls seek to trace proceeds from 1984.[165]

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[162] *Peterson v. Teodosio* (1973), 34 Ohio St. 2d 161, 172, *citing* 9 Bogert, The Law of Trusts and Trustees, § 953 (2d ed. 1978).

[163] *Veazie v. McGugin* (1883), 40 Ohio St. 365, 375-76 (statute runs from date the constructive trustee took possession of property and protects those claiming title through the constructive trustee); *Ruple v. Hiram Coll.* (8th Dist. 1928), 35 Ohio App. 8, 15; *Allen v. Deardoff* (12th Dist. 1921), 14 Ohio App. 16, 19-20; *McCauley v. German Nat'l Bank* (Hamilton County Common Pleas 1914), 1914 Ohio Misc. LEXIS 137 *14-16 (claim for constructive trust accrues upon the receipt by the constructive trustee); *Ward v. Ward* (Lucas Cty. App.), 12 Ohio Cir. Dec. 59, 65.

[164] *Powers v. McDaniel* (Tex. Civ. App. 1990), 785 S.W. 2d 915, 918 ("The statute of limitations begins to run against the enforcement of a constructive trust by the beneficiary against the trustee at the inception of the trust."); *Wholey v. Cal-Maine Foods, Inc.* (Miss. 1988), 530 So.2d 136, 140 ("The right to enforce an implied or constructive trust accrues at the time of performance of the act from which the trust results."); *Vick v. G.T. Vick* (Tenn. App. 1968), 449 S.W.2d 717, 721 ("In the case of a constructive trust, the statute begins to run from the date when the wrongful and adverse holding begins and is or should be known to the complainant."); *Redding v. Main* (Ky. App. 1946), 196 S.W.2d 887, 889 ("The statute of limitations runs against either a constructive or resulting trust from the time it is created."); *Knox v. Knox* (Minn. 1946), 25 N.W.2d 225, 232 (The statute of limitations runs against "a constructive trust, from the date when the wrongful and adverse holdings begins and is, or should be, known to the plaintiff."); *Johnson v. Graff* (S.D. 1946), 23 N.W.2d 166, 168 (The statute of limitations for a "constructive trust begins to run from the time the act was done by which the party became charged as trustee."); *Farmers Banking & Trust Co. v. Bender* (Md. 1939), 3 A.2d 743, 747 (The statute of limitations for a constructive trust begins to run from the date the trustee breached its duty by transferring trust assets to the alleged constructive trustee).

[165] *Veazie*, 40 Ohio St. at 375-76 (statute of limitations runs in favor of the alleged constructive trustee and protects those "claiming under him").

Plaintiff and Cross-Claimants assert that the successor trustees and Koons beneficiaries are the current constructive trustees. Cross-Claimants allege that the successor trustees and Koons beneficiaries have been unjustly enriched by the 1984 transaction and that a constructive trust is a remedy for unjust enrichment.[166] Plaintiff's First Amended Complaint does not specifically mention unjust enrichment. However, in proceedings in the trial court, Plaintiff characterized Count 3 as asserting a claim for unjust enrichment and as seeking a constructive trust over assets held by the successor trustees and Koons beneficiaries.[167]

Ohio cases establish that the statute of limitations for unjust enrichment, six years, runs from the date the alleged wrongful transfer deprived the plaintiff of his property.[168] Thus, the unjust enrichment claim of Plaintiffs and Cross-claimants reinforces Defendants-Petitioners' argument that since the allegedly wrongful transfer occurred in 1984, the statute of limitations for constructive trust, as well as unjust enrichment, began to run in 1984.[169]

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[166] Cross Claims at ¶ 20-24, prayer ¶ B, Supp. 172-73.

[167] T.d. 172 Plaintiff's Consolidated Reply to Defendants' Memoranda in Opposition to Plaintiff's Amended Motion for Leave to File a Second Amended Complaint at 3 ("The first amended complaint was adequate to state a claim for . . . unjust enrichment and to put everyone on notice"); T.d. 171 Plaintiff's Reply to Memorandum of Defendants Nicholas Koons Baker and Carson Nye Koons Baker Opposing Plaintiff's Amended Motion for Leave to File a Second Amended Complaint at 2-3 (asserting that the unjust enrichment claim applies to the Koons beneficiaries as well as the successor trustees); T.d. 198 Transcript of Proceedings at 60 (Plaintiff's counsel states that he was seeking unjust enrichment with constructive trust as the equitable remedy).

[168] *LeCrone v. LeCrone*, 10th Dist. No. 04AP-312, 2004 Ohio 6526 ¶ 20-21, *discretionary appeal denied* (2005), 105 Ohio St. 3d 1517, 2005 Ohio 1880; *Ignash v. First Serv. Fed. Credit Union*, 10th Dist. No. 01AP-1326, 2002 Ohio 4395, ¶ 17, 20, *discretionary appeal denied* (2003), 98 Ohio St. 3d 1410, 2003 Ohio 60; *Palm Beach Co. v. Dun & Bradstreet, Inc.* (1st Dist. 1995), 106 Ohio App. 3d 167, 175.

[169] As the Koons beneficiaries argue, even if the statute of limitations as to Michael Cundall's cross-claiming children did not begin running until they were eighteen, the six-year statute of limitations has still run on their claims.

Moreover, before embracing the unjust enrichment theory in the trial court, Plaintiff Cundall accepted the four-year statute of limitations of R.C. 2305.09 as the statute applicable to the First Amended Complaint.[170] Under that theory, the statute of limitations expired in February 1988, more than twenty years ago.

Under either theory, the statute of limitations has run on the Cundalls' claim for constructive trust. As is discussed next, no exemption has delayed the running of that statute of limitations. Thus, the demand of Plaintiff and Cross-Claimants for a constructive trust has been time barred for nearly two decades.

C. The Exemption That Prevents the Statute of Limitations From Running in Favor of Express Trustees Does Not Apply to Constructive Trustees.

It is the law of Ohio and other jurisdictions that the exemption from the statute of limitations applicable to express trustees does not apply to constructive trustees. The First District misconstrued and misapplied this Court's decision in *Peterson* to reach the opposite conclusion.[171] The First District misread *Peterson*.[172] Moreover, the First District's decision to treat constructive trustees identically to express trustees and allow an exemption to the statute of limitations to claims for constructive trust contradicts prior decisions of this Court, Ohio's lower courts, and case law from many other jurisdictions.

The main issue in *Peterson* was whether the fraud statute of limitations in R.C. 2305.09(C) bars an action between a deceased partner's estate and the surviving partner. The Court considered whether the complaint alleged a "continuing and subsisting trust" such that the

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[170] T.d. 98, Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss, at 24.

[171] *Cundall*, 2007 Ohio 7067 at ¶ 84, Appx. 34, *citing Peterson*, 34 Ohio St. 2d at 172.

[172] *Peterson*, 34 Ohio St. 2d at 172, *citing* 9 Bogert, The Law of Trusts and Trustees, § 953 (2d ed. 1978).

statute of limitations did not commence to run until the death of the trustee under R.C. 2305.22.[173] The Court refers to the latter as the "exception of a 'continuing and subsisting trust' in the Ohio statutes of limitation . . . ."[174] That exception, originally developed by equity courts, permits a beneficiary to wait to sue a trustee (regardless of any applicable time bar for the underlying action) until the trustee ceases to be a trustee. The Court notes that a "technical trust cognizable in equity" has to exist before the "continuing or subsisting trust" exception will apply.[175]

The *Peterson* Court held that a constructive trust claim is not exempted from the statute of limitations, stating that: "[c]onstructive trusts, by their very nature, are not technical direct trusts cognizable solely in equity, and, therefore, are not continuing and subsisting trusts exempted from the statutes of limitation."[176]

In so holding this Court reverses the court of appeals, which had decided that a continuing and subsisting trust had been alleged by virtue of the constructive trust allegations in the complaint.[177] The First District in this case made essentially the same error that was corrected by *Peterson*, where this Court held that making an allegation of constructive trust does not give a plaintiff the benefit of the exemption to the statute of limitations. The *Peterson* plaintiff's claim was time barred.

This Court does state in *Peterson*, as the First District in this case notes, that "statutes of

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[173] *Id.*, 34 Ohio St. 2d at 165. R.C. 2305.22 as it existed when *Peterson* was decided was amended Jan. 1, 2007. Appx. 51.

[174] *Peterson*, 34 Ohio St. 2d at 167.

[175] *Id.*, 34 Ohio St. 2d at 170. *Accord, e.g., Yearly v. Long* (1883), 40 Ohio St. 27, 32.

[176] *Id.*, 34 Ohio St. 25 at 171-72.

[177] *Id.*, 34 Ohio St. 25 at 171.

limitations attach to causes of action and not to the remedial form in which the action is brought."[178] However, that statement does not support the First District's ultimate finding. The *Peterson* Court actually made that statement to support its holding that since the plaintiff's fraud claim was barred by the statute of limitations, no allegation of constructive trust exempted the plaintiff's claim from the statute of limitations. That holding supports the position that the constructive trust allegations here are not exempt from the statutes of limitation and are thus time-barred.

Furthermore, the quoted language and holding are consistent with and do not undermine the principles *Peterson* adopts supporting dismissal of the constructive trust claims against the successor trustees and Koons beneficiaries. *Peterson* embraces the two principles supporting dismissal.

First, this Court adopts the language from Bogert stating that "[w]hen the statute will commence to run is dependent upon whether the wrong is an unlawful acquisition," in which case the "cause of action for its recovery immediately accrues . . . ."[179]

Second, this Court unequivocally holds that "constructive trusts" over the unlawfully acquired property "are not continuing and subsisting trusts exempted from the statute of limitations."[180]

Cases from this Court predating *Peterson* are in full accord. In *Yearly*, this Court held that "direct and express trusts" are exempted from the application of the statute of limitations but that this did not include "the almost innumerable cases of implied and constructive trusts

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[178] *Id.*, 34 Ohio St. 25 at 172.

[179] *Peterson*, 34 Ohio St. 25 at 172.

[180] *Id.*

so-called."[181] Similarly, in *Veazie* this Court held that in "cases of constructive trusts the statute may be pleaded successfully."[182]

And in *Douglas,* a case where an attorney improperly held money belonging to a client, this Court provides a very good reason why this situation does not give rise to a continuing and subsisting trust that would be excepted from the statute of limitations.[183] This Court explains that "to hold that the statute of limitations is not applicable to any case which may, even with propriety, be denominated a trust, would, in a great measure, defeat the plain and manifest intention of the legislature."[184]

The *Peterson* Court also places great reliance on the Bogert treatise.[185] That treatise confirms the general rule that claims for constructive trust, like the Cundalls' claim, are not exempted from the statute of limitations as claims involving a continuing and subsisting trust would be exempted.[186] That section of the treatise divides constructive trust cases into two categories, those where the wrong is in the unlawful acquisition of trust property and those where there is an unlawful retention of trust property that was lawfully acquired. According to the treatise, examples of the former include "where title is obtained by misrepresentation, duress or undue influence, . . . [or] a breach of the duty of loyalty of the part of a fiduciary. . . ."[187] In that situation, "the Statute has been held to run from the date when the beneficiary knew or should have known of the wrongful conduct." The Cundalls' allegations fall squarely within this

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[181] *Yearly*, 40 Ohio St. at 32.

[182] *Veazie*, 40 Ohio St. at 375-76.

[183] *Douglas v. Corry* (1889), 46 Ohio St. 349, 350-51.

[184] *Douglas*, 46 Ohio St. at 350-51.

[185] *E.g., Peterson*, 34 Ohio St.2d at 172, *citing* 9 Bogert, Trust and Trustees (2 ed.), § 953.

[186] 9 Bogert, The Law of Trusts and Trustees, § 953 (2d ed. 1978) (emphasis supplied).

[187] *Id.* at 656.

category of conduct.[188]

Thus, the fact that Bud Koons was the trustee for a continuing and subsisting trust does not change the result that should apply here with respect to the constructive trust that the Plaintiff and Cross-Claimants seek. CIC, *not Bud Koons*, purchased the Cundalls' KCM shares in 1984.[189] Even if Bud Koons himself had controlled CIC at the time (which he did not) and even if he may have "benefited" from the transaction indirectly (which is questionable because the purchase was at fair market value), that would not change the fact that under *Cowling*, a constructive trust remedy only reaches the "particular assets"—the KCM shares—which were acquired by CIC, a separate legal entity.

Both the First District and the Cundalls suggest that a constructive trust is a remedy for unjust enrichment.[190] Thus, both the First District and the Cundalls implicitly recognize that the constructive trust claim against third parties does not piggy back on the direct claim against the trustee.

Lower court decisions in Ohio are in accord with *Peterson* and the Bogert treatise. For example, in *Ruple* the court explicitly held that: "only direct, express trusts are exempt from the

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[188] *Id.* at 653 (when a plaintiff alleges, as he has here, that "the reason that equity decrees a constructive trust is that the title to the property has been wrongfully acquired, then a cause of action for its recovery immediately accrues"). *See also Peterson*, 34 Ohio St. 2d at 172.

[189] The First District incorrectly states that Bud Koons purchased the shares in 1984. *Cundall*, 2007 Ohio 7067 at ¶ 86, Appx. 35 ("If the Cundalls are able to prove that Bud wrongfully acquired the CIC stock, and that his descendants and trusts are legal owners of property that rightfully belongs to the Cundalls, a constructive trust would be appropriate.") (emphasis added). But the Amended Complaint shows on its face that Bud did not acquire the stock. First Amended Complaint at ¶ A, C, Supp. 6-7.

[190] *Cundall*, 2007 Ohio 7067 at ¶ 85, Appx. at 34-24; Cross Claims at ¶ 20-24, Supp. 10-11.

statute of limitations."[191] Furthermore, the court found, "trusts which arise from an implication of law, or constructive trusts, are not within the rule, but are subject to the operation of the statute."[192]

In *Ruple*, the plaintiff alleged that an express trustee had wrongfully paid money to a trust company that, in turn, had transferred the money to the defendants.[193] The court notes that no trust relationship existed between the defendants and the plaintiff but that if the wrongful payment to the defendants "created a trust, it must have been a constructive trust only."[194] And because there was only a constructive trust involved, there was no exemption from the statute of limitations.

Consistent with these Ohio cases, Ohio Jurisprudence sets forth the following rule that governs the Cundalls' claim:

> Where money or property, the subject of an existing trust, is paid out . . . or conveyed, in breach of trust, to one who thereby becomes chargeable as a constructive trustee, the rule is that the statute at once begins to run in his favor.[195]

Likewise, courts in other jurisdictions uniformly recognize that while the statute of limitations may not run against an express trust until termination of the trusteeship, that rule does not apply to constructive trusts.[196]

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[191] *Ruple*, 38 Ohio App. at 15. *Accord*, *Allen*, 14 Ohio App. at 19-20; *McCauley*, 1914 Ohio Misc. LEXIS 137 *17.

[192] *Ruple*, 38 Ohio App. at 15, *quoting* 2 Wood on Limitation (4th Ed.) § 200.

[193] *Ruple*, 38 Ohio App. at 8-11.

[194] *Ruple*, 38 Ohio App. at 14-15.

[195] 91 Ohio Jurisprudence 3d, Trusts § 565.

[196] *Villarreal v. Glacken* (Md. App. 1985), 492 A.2d 328, 335-36 ("the statute of limitations will be applied [to constructive trusts] . . . . [a]s a general rule, the statute of limitations does not apply to cases of express and continuing trusts . . . ."); *Hart v. Nat'l Bank of Birmingham* (5th Cir. 1967), 373 F.2d 202, 207-08 ("Conversely, the cases distinguish between express trusts and trust created by operation of law (constructive trusts) and limit strictly the exception tolling the

Thus, when a party seeks to impose a constructive trust, it cannot take advantage of any "suspension" of the statute of limitations that might apply to an express trust, even where the constructive trust is allegedly justified because of an express trustee's actions.[197]

The impact of the First District's ruling is manifest. A claim that should have been asserted twenty years ago is now being permitted to move forward. Key witnesses, including Bud Koons himself, are now deceased. Permitting the claim to move forward now and possibly encumber property years later injects uncertainty with respect to the current and prospective ownership of significant amounts of property.

Moreover, correct application of the statute of limitations to constructive trustees does not impact beneficiaries' rights against the express trustee, the alleged wrongdoer.

Indeed, the irony here is that under the recently enacted Ohio Trust Code, the rule that the statute of limitations does not run against an incumbent express trustee has been abolished.[198] The statute of limitations now begins running when a beneficiary has knowledge of a wrongful transfer. So at a time when the Ohio legislature is trying to prevent the litigation of stale claims, the First District incorrectly expanded the ability of parties to do just that.

As this Court has repeatedly recognized, statutes of limitations serve an important function in Ohio. In addition to ensuring "fairness to the defendant," they "suppress[] stale and

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statute of limitations to cases involving express trusts."); *Redding*, 196 S.W.2d at 889 (while the statute of limitations does not apply to continuing and subsisting trusts, the "statute of limitations runs against either a constructive or resulting trust from the time it is created."); *Cone v. Dunham* (Conn. 1890), 20 A. 311, 313 ("in the case of an express trust, the statute of limitations has no application . . . . All trusts arising by operation of law, whether implied, resulting, or constructive, are subject to the statute of limitations.").

[197] *Ruple*, 38 Ohio App. at 15. *Accord*, *Allen*, 14 Ohio App. at 19-20; *McCauley*, 1914 Ohio Misc. LEXIS 137 *17; *Ward*, 12 Ohio Cir. Dec. at 65.

[198] R.C. 5810.05, Appx. 62.

fraudulent claims," and avoid problems associated with having to marshal proof in a case that may be a decade or two old.[199] All of these interests are served by an application of the statute of limitations in this case. Moreover, given these rationales, lower courts should be loathe to read new exemptions into statutes of limitations. That, however, is what the First District did here when it erroneously expanded the scope of R.C. 2305.22 and rewrote the language of the exemption previously adopted, but now repealed, by the Ohio legislature. The First District's faulty ruling on the constructive trust claim should not be permitted to stand.

CONCLUSION

Perhaps feeling sympathetic for a beneficiary who complains that he was wronged because his own trustee permitted stock to be sold, the First District went out of its way to allow Michael Cundall to bring his lawsuit against that trustee. Not only is that sympathy misplaced, but will have disastrous consequences.

In reversing the dismissal of Michael Cundall's lawsuit the First District struck down over a hundred years of Ohio law. In abrogating the tender rule, the First District has called into question the validity of untold thousands of releases and settlements that Ohio's citizens have relied on as a matter of course. And by tossing aside the statute of limitations on constructive trust claims, the First District endangers long-settled property rights.

Ohio law should not be so casually obliterated.

We respectfully request that the Court reverse the opinion of the First District Court of Appeals.

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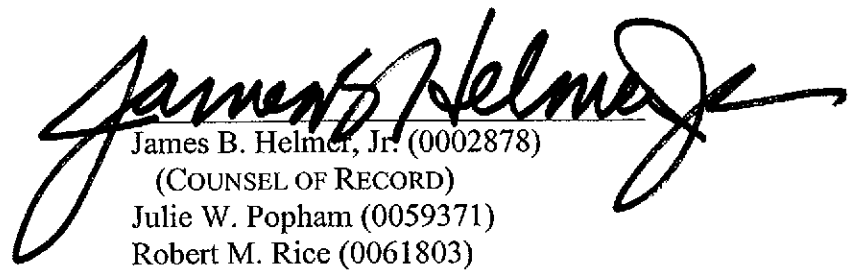
[199] *Doe v. Archdiocese of Cincinnati*, 109 Ohio St.3d 491, 2006 Ohio 2625, ¶ 10.

Respectfully submitted,



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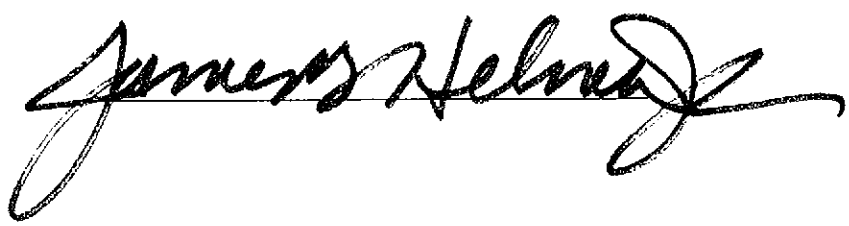

Appendix

IN THE SUPREME COURT OF OHIO

Michael K. Cundall, et. al.	:	08-0314
Plaintiffs,	:	On Appeal from the Hamilton County Court of Appeals, First Appellate District
vs.	:	
U.S. Bank, N.A, Predecessor Trustee, et al.	:	Court of Appeals Case Nos. C070081 C070082
Defendants.	:	

A0403452
A0408943

NOTICE OF APPEAL OF DEFENDANT-APPELLANTS RICHARD W. CAUDILL, EXECUTOR; KEVEN E. SHELL, ANCILLARY ADMINISTRATOR; RICHARD W. CAUDILL, SUCCESSOR TRUSTEE; KEVEN E. SHELL, SUCCESSOR TRUSTEE; WILLIAM P. MARTIN II, SUCCESSOR TRUSTEE; D. SCOTT ELLIOTT, SUCCESSOR TRUSTEE; G. JACK DONSON, JR., SUCCESSOR TRUSTEE; AND MICHAEL CAUDILL, SUCCESSOR TRUSTEE

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EXHIBIT 1

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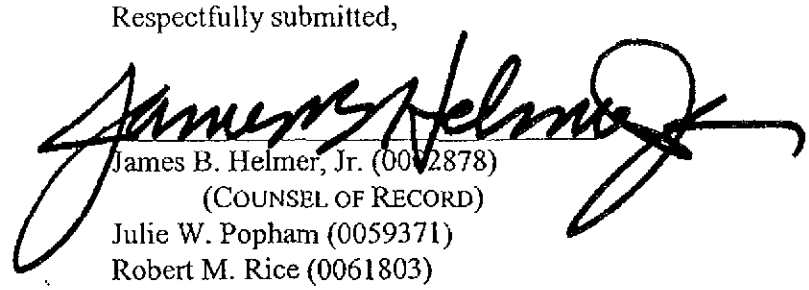
NOTICE OF APPEAL

Defendant-Appellants Richard W. Caudill, Executor; Keven E. Shell, Ancillary Administrator; Richard W. Caudill, Successor Trustee; Keven E. Shell, Successor Trustee; William P. Martin II, Successor Trustee; D. Scott Elliott, Successor Trustee; G. Jack Donson, Jr., Successor Trustee; and Michael Caudill, Successor Trustee hereby give notice of appeal to the Supreme Court of Ohio from the judgment from the Hamilton County Court of Appeals, First Appellate District case Nos. C0700081 & C0700082 on December 28, 2007.

This case raises a question of public and great general interest.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on February 7, 2008, a copy of this Notice of Appeal was sent by ordinary U.S. mail to the following counsel:

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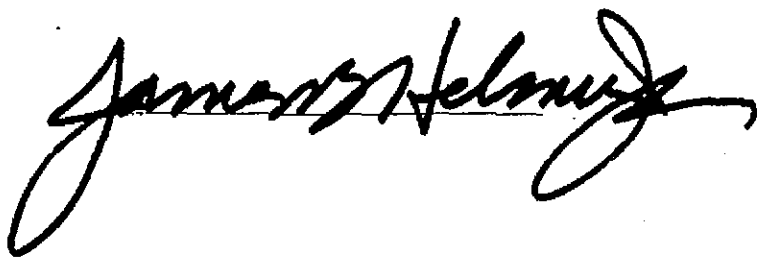

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

MICHAEL K. CUNDALL, INDIVIDUALLY, and MICHAEL K. CUNDALL, SUCCESSOR TRUSTEE,	:	APPEAL NOS. C-070081 C-070082
	:	TRIAL NO. A-0602080
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
U.S. BANK, N.A., PREDECESSOR TRUSTEE, RICHARD W. CAUDILL, EXECUTOR OF THE ESTATE OF JOHN F. KOONS, III, DECEASED, KEVEN E. SHELL, ANCILLARY ADMINISTRATOR OF THE ESTATE OF JOHN F. KOONS, III, DECEASED, KEVEN E. SHELL, SUCCESSOR TRUSTEE, RICHARD W. CAUDILL, SUCCESSOR TRUSTEE, WILLIAM P. MARTIN II, D. SCOTT ELLIOT, G. JACK DONSON, JR., MICHAEL CAUDILL, DEBORAH KOONS GARCIA, JOHN F. KOONS, IV, JAMES B. KOONS, CAROLINE M. KOONS, KATHLEEN M. KOONS BAKER, MAURA L. KOONS, JEREMY B. KOONS, MORGAN N. KOONS, CHRISTINA KOONS, NICHOLAS KOONS BAKER, and CARSON NYE KOONS BAKER,	:	
Defendants-Appellees,	:	
PETER B. CUNDALL, et al.,	:	
Defendants,	:	
and	:	
MICHAEL K. CUNDALL, JR., COURTNEY FLETCHER CUNDALL, and HILLARY CUNDALL,	:	
Cross-Claimants/Defendants-Appellants.	:	

EXHIBIT 2

This cause was heard upon the appeal, the record, the briefs, and arguments.

The judgment of the trial court is affirmed in part, reversed in part, and cause remanded for the reasons set forth in the Opinion filed this date.

Further, the court holds that there were reasonable grounds for this appeal, allows no penalty and orders that costs are taxed under App. R. 24.

The court further orders that 1) a copy of this Judgment with a copy of the Opinion attached constitutes the mandate, and 2) the mandate be sent to the trial court for execution under App. R. 27.

To The Clerk:

Enter upon the Journal of the Court on December 28, 2007 per Order of the Court.

By: _____
Presiding Judge

IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

MICHAEL K. CUNDALL, INDIVIDUALLY, and MICHAEL K. CUNDALL, SUCCESSOR TRUSTEE,	:	APPEAL NOS. C-070081 C-070082
	:	TRIAL NO. A-0602080
Plaintiff-Appellant,	:	*OPINION.*
vs.	:	
U.S. BANK, N.A., PREDECESSOR TRUSTEE, RICHARD W. CAUDILL, EXECUTOR OF THE ESTATE OF JOHN F. KOONS, III, DECEASED, KEVEN E. SHELL, ANCILLARY ADMINISTRATOR OF THE ESTATE OF JOHN F. KOONS, III, DECEASED, KEVEN E. SHELL, SUCCESSOR TRUSTEE, RICHARD W. CAUDILL, SUCCESSOR TRUSTEE, WILLIAM P. MARTIN II, D. SCOTT ELLIOT, G. JACK DONSON, JR., MICHAEL CAUDILL, DEBORAH KOONS GARCIA, JOHN F. KOONS, IV, JAMES B. KOONS, CAROLINE M. KOONS, KATHLEEN M. KOONS BAKER, MAURA L. KOONS, JEREMY B. KOONS, MORGAN N. KOONS, CHRISTINA KOONS, NICHOLAS KOONS BAKER, and CARSON NYE KOONS BAKER,	:	PRESENTED TO THE CLERK OF COURTS FOR FILING DEC 28 2007 COURT OF APPEALS
Defendants-Appellees,	:	
PETER B. CUNDALL, et al.,	:	
Defendants,	:	
and	:	
MICHAEL K. CUNDALL, JR., COURTNEY FLETCHER CUNDALL, and HILLARY CUNDALL,	:	
Cross-Claimants/Defendants-Appellants.	:	

EXHIBIT 3

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause Remanded

Date of Judgment Entry on Appeal: December 28, 2007

Drew & Ward and *Richard G. Ward,* for Plaintiff-Appellant,

William H. Blessing for Cross-Claimants/Defendants-Appellants,

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Peter L. Cassady, Brian G. Dershaw, and *Beckman, Weil, Shepardson, LLC,* for Defendants-Appellees Deborah Koons Garcia, John F. Koons, IV, James B. Koons, Caroline M. Koons, Kathleen M. Koons, Maura L. Koons, Jeremy B. Koons, and Morgan N. Koons,

Donald J. Mooney, Jr., Pamela K. Ginsburg, and *Ulmer & Berne, LLP,* for Defendants-Appellees Christina Koons, Nicholas Koons Baker, and Carson Nye Koons Baker,

James B. Helmer, Jr., Julie W. Popham, Robert M. Rice, Erin M. Campbell, and *Helmer, Martins, Rice & Popham* and *Taft, Stettinius & Hollister, LLP,* for Defendants-Appellees Richard W. Caudill, Executor, Keven E. Shell, Ancillary Administrator, Richard W. Caudill, Successor Trustee, Keven E. Shell, Successor Trustee, William P. Martin II, Successor Trustee, D. Scott Elliott, Successor Trustee, G. Jack Donson, Jr., Successor Trustee, and Michael Caudill, Successor Trustee.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Judge.

{¶1} Michael Cundall sued a group of defendants for tortious breach of fiduciary duty, a constructive trust, a declaratory judgment, an accounting, and related relief. The suit alleged egregious breaches of trust. The trial court dismissed the case. Michael and his children, the cross-claimants, now appeal. We reverse the trial court's judgment in all respects except for the dismissal of U.S. Bank.

I. Two Trusts

{¶2} John F. Koons, Sr. ("John"—we use first names because many of the parties have the same last names) was president and chief executive officer of Central Investment Corporation ("CIC"), which had originally owned the Burger Brewing Company in Cincinnati, but had diversified into soft-drink bottling, which prospered long after the brewery had closed. John F. Koons, III, ("Bud") succeeded his father as president and CEO of CIC. (Another corporation, Koons-Cundall-Mitchell, was a holding company for CIC stock. To make the case simpler to understand, we refer to both as CIC.)

{¶3} In 1976, John and his wife, Ethel, created a trust ("the Grandparents Trust"). They placed 6,309 shares of CIC stock in the trust. Bud served as trustee of the Grandparents Trust from its creation. The trust document instructed the trustee to equally divide the initial assets into Fund A ("the Koons Fund"), for the benefit of Bud's children, and Fund B ("the Cundall Fund"), for the benefit of John and Ethel's daughter Betty Lou Cundall's children.

And it directed the trustee to divide equally any additional amounts contributed by any person, unless the amounts were specifically earmarked for one of the funds. The two funds were to be separate for accounting and distribution purposes. The trust document specifically prevented Bud from distributing the income or principal of the trust either to Bud directly or for his benefit. But it gave Bud the power to sell any assets of the trust for cash "without being subject to the laws of the state or nation," whatever that may mean.

{¶4} Betty Lou created a separate trust in 1977. The Betty Lou Trust contained 10,077 shares of CIC stock. U.S. Bank (formerly First National Bank of Cincinnati, Firstar, and Star) was the trustee of the Betty Lou Trust from its inception until 1996. U.S. Bank also served as the commercial banker for Bud's company, CIC.

{¶5} In 1983, Bud offered to purchase the Cundall family's shares of CIC stock, including the shares that were in the Cundall Fund and the Betty Lou Trust. Bud's first offer, for $155 per share, was refused. Shortly thereafter, CIC purchased company stock from another shareholder, Lloyd Miller, at $328 per share.

{¶6} Michael alleged that Bud had approached him and his siblings—the beneficiaries of the Cundall Fund—and told them that he would stop distributing dividends and that the CIC shares would be worth nothing if they did not sell. (As sole trustee for the Grandparents Trust, Bud had the unfettered power to distribute income or principal as he saw fit.) In 1984, the Cundall family sold back to the company all their shares of CIC, from both the Cundall Fund and the Betty Lou Trust, for $210 per share, $118 less per share than what Miller had received for his shares. The Cundalls signed documents that purported to release

the trustees—Bud as trustee of the Grandparents Trust and U.S. Bank as the trustee for the Betty Lou Trust—from any liability for the sale in exchange for their "consent" to the sale. That is, Bud, as fiduciary, procured a release from the beneficiaries for selling the trust stock to his own corporation.

{¶7} Michael's "bullying" allegation was just that and, as with all other allegations, remains to be proved. But if it is true, it is a patently egregious violation of a fiduciary duty. And even if it is not true, there is a strong presumption that the dealings were unfair.

{¶8} In 1992, Bud Koons signed a "Division of Trust" document. It divided the Grandparents Trust into two new trusts, A ("the Koons Trust") and B ("the Cundall Trust"). At that time, the CIC stock that remained in the Koons Trust was worth $1,011 per share. But the allegedly "equal" trusts were equal no longer: the Koons Trust was valued at $2,656,908 and the Cundall Trust was valued at $536,431. Bud resigned as trustee of the Koons Trust, but continued serving as trustee for the Cundall Trust until his death in 2005. Odd.

{¶9} In 1996, U.S. Bank was removed as trustee of the Betty Lou Trust.

{¶10} In February 2005, Pepsiamericas Inc. bought CIC for $3009.74 per share, or approximately $340 million. In March 2005, shortly after Pepsi bought CIC, Bud died.

II. Who Will be Trustee?

{¶11} The original trust instrument that had created the Grandparents Trust named three successor trustees if Bud ceased to be the trustee. Shortly after Bud died, one of three named successor trustees began examining the trust.

He wrote a letter to another named successor trustee questioning the huge disparity in values, since the assets were supposed to be evenly split, and speculated that any trustee or lawyer who knew or should have known about the disparity could be exposed to personal liability.

{¶12} All three of the named successor trustees declined to serve as fiduciaries. The trust specified that in the event that the three were unable or unwilling to serve as trustee, U.S. Bank would be appointed as the trustee. U.S. Bank eventually also declined to serve as trustee.

{¶13} Michael apparently became aware of the disparity in the funds and petitioned the trial court to become Bud's successor as the trustee of the Grandparents Trust. He took over as the trustee in November 2005.

III. Case Filed and Dismissed

{¶14} In March 2006, Michael filed suit against Bud's estate, the successor trustees, the Koons children and grandchildren, the Cundall children and grandchildren, and U.S. Bank. According to Michael, he named everyone so that any of the beneficiaries could come forward and make whatever claims they wanted. Some of the Cundalls filed cross-claims against Bud's estate, the trustees, and the Koons beneficiaries.

{¶15} Michael alleged that Bud had breached his fiduciary duty to the beneficiaries of the Cundall Fund by mishandling the trust funds. Further, he alleged that Bud and U.S. Bank had breached their fiduciary duties and defrauded the Cundalls by misrepresenting the true value of the CIC stock and by self-dealing.

{¶16} In January 2007, the trial court dismissed the case on a Civ.R. 12(B) motion, holding that the Cundalls were required to tender the consideration they had received from the 1984 sale of their CIC stock before bringing suit. The trial court dismissed with prejudice U.S. Bank and Bud's estate on statute-of-limitations grounds. It dismissed without prejudice the out-of-state Koons beneficiaries for lack of personal jurisdiction. The trial court also denied as moot Michael's motion to file a second amended complaint and all other pending motions. This appeal followed.

IV. Assignments of Error

{¶17} Michael asserts seven assignments of error. He contends that the trial court erred by (1) granting the motions to dismiss on the basis of the "tender rule"; (2) disregarding the facts alleged in the complaint and considering documents outside of the complaint on a Civ.R. 12(B)(6) motion; (3) granting U.S. Bank's motion to dismiss on statute-of-limitations grounds; (4) dismissing the claims against Bud's estate; (5) denying Michael's motion to file a second amended complaint; (6) granting the out-of-state defendants' motions to dismiss for lack of personal jurisdiction; and (7) denying Michael's request for an accounting.

{¶18} The Cundall children also assert assignments of error that overlap Michael's first, fourth, and sixth assignments of error, so we consider these together.

V. Tender not Necessary

{¶19} In 1984, CIC bought back all of its shares in both the Cundall Fund of the Grandparents Trust and the Betty Lou Trust. The Cundalls signed releases

purporting to discharge Bud—the trustee of the Grandparents Trust—and U.S. Bank—the trustee of the Betty Lou Trust—from all liability stemming from the transaction.

{¶20} The trial court, relying on *Haller v. Borror Corporation*,[1] dismissed the Cundalls' case primarily because the Cundalls had not tendered back the money that they had received from the stock transaction. But *Haller* is not controlling here.

{¶21} *Haller* was a personal-injury tort case. The Ohio Supreme Court laid out the rules for tender in tort cases. If a release is procured by fraud in the factum—when a misrepresentation prevents a meeting of the minds about the nature of the document—the release is void, and thus a tender is not required. But if a release is procured by fraud in the inducement—when the party understands the document, but is induced to sign by a fraudulent misrepresentation within the document—the release is voidable, and the party is required to tender any consideration given in return for the release before filing suit. The goal in the latter situation is to restore the parties to the status quo ante; that is, where they were before they settled the case. In an arm's-length transaction, it would be manifestly unfair to have a party keep the money in the meantime and argue that they should get more.

{¶22} The differentiation of types of fraud in *Haller* does not apply to this case. *Haller* was a personal-injury case involving an arm's-length transaction, and there was no fiduciary relationship between the parties.

[1] (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

{¶23} But "ordinary rules of fraud or undue influence do not apply where there is a fiduciary relationship."[2]

{¶24} We have found no Ohio cases—or any cases from *anywhere*—directly on point on the tender issue, probably because no one has been clever or audacious enough to propose such a theory.

{¶25} None of the cases cited in support of the tender theory involve a fiduciary relationship in which the fiduciary benefited from a transaction with the party who was owed a fiduciary duty. In *Lewis v. Mathes*,[3] for example, the plaintiff claimed that the defendants had breached a fiduciary duty. But nothing in the case suggested that a fiduciary relationship existed, because the plaintiffs and the defendants were equal shareholders in a corporation. We have found no case in any jurisdiction that requires a tender when a fiduciary has allegedly breached its duty by self-dealing. And we will surely not create such a requirement here.

{¶26} In this case, both U.S. Bank and Bud were trustees, and thus they were in fiduciary relationships with the Cundalls.[4] Therefore, both U.S. Bank and Bud undertook a duty of loyalty. The duty of loyalty arises not from a provision in the trust, but on account of the trustee-beneficiary relationship.[5] The duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.[6] The duty of loyalty is "the essence of the

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[2] *Muth v. Maxton* (1954), 53 O.O. 263, 119 N.E.2d 162.
[3] 161 Ohio App.3d 1, 2005-Ohio-1975, 829 N.E.2d 318.
[4] *O'Neill v. O'Neill*, 169 Ohio App.3d 852, 2006-Ohio-6426, 865 N.E.2d 917, at ¶8.
[5] 3 Scott, Trusts (5 Ed.2007) 1077, Section 17.2.
[6] Id.

fiduciary relationship."[7] Fiduciaries have the burden of proving the "perfect fairness and honesty" of a transaction that was entered into during the fiduciary relationship.[8] Whether the fiduciary has demonstrated the fairness of a transaction is a question of fact for a jury.[9]

{¶27} Fiduciaries have a duty to "administer the trust solely in the interests of the beneficiaries."[10] Perhaps Justice Cardozo stated it best: "Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior."[11]

{¶28} This "punctilio of an honor" will be enforced by this court.

{¶29} Some defendants contend that because the Grandparents Trust instrument gave Bud unfettered discretion to sell assets for cash without "being subject to the laws of Ohio," the transaction could not have been fraudulent. Nonsense. What law was the trustee under—none? Bud clearly was under the jurisdiction of Ohio and was therefore subject to Ohio's laws; and a trustee may not "take advantage of liberal provisions of a trust instrument to relieve himself from the legal responsibility of a fiduciary under the law."[12] Statutory and

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[7] Boxx, Of Punctilios and Paybacks: The Duty of Loyalty Under the Uniform Trust Code (2002), 67 Mo.L.Rev. 297, 280, quoting Shepherd, The Law of Fiduciaries (1981), 48.
[8] *Atwater v. Jones* (1902), 24 Ohio C.C. (N.S.) 328, 34 Ohio C.D. 605; *Kime v. Addlesperger* (1903), 2 Ohio C.C. (N.S.) 270, 277, 14 Ohio C. D. 397; *Peterson v. Mitchener* (1947), 79 Ohio App. 125, 133, 71 N.E.2d 510.
[9] *Monaghan v. Rietzke* (1949), 85 Ohio App. 497, 501, 89 N.E.2d 159.
[10] R.C. 5808.02. See, also, Restatement of the Law 2d, Trusts (1992), Section 170; 853 Rounds, Tax Management: Estates, Gifts, and Trusts: Fiduciary Liability of Trustees and Personal Representatives (2003), A-25.
[11] *Meinhard v. Salmon* (1928), 249 N.Y. 458, 464, 164 N.E. 545.
[12] *In re Estate of Binder* (1940), 137 Ohio St. 26, 43-44, 27 N.E.2d 939.

common law govern the rights and responsibilities of fiduciaries.[13] And even though the new Ohio Trust Code mandates that a trustee is not liable for breach of trust if the beneficiary has consented to the conduct,[14] that provision does not apply if the consent is procured by improper conduct of the trustee, a fact that Michael alleged. Furthermore, the transaction in question took place in 1984, long before the 2007 Ohio Trust Code was enacted.

{¶30} Even if we were to disregard the statutory laws of Ohio, the common law would still apply, and a fiduciary duty still would exist. Thus Bud and U.S. Bank had the highest duty to act solely in the Cundalls' best interests concerning both the signing of the releases and the sales of CIC stock.[15] Perhaps they did. But it is their burden to so prove.

{¶31} When a fiduciary—or an entity connected with the fiduciary—ends up with property originally in the trust, bells ring and sirens wail.

{¶32} Self-dealing—when trustees use the trust property for their own personal benefit—is considered "particularly egregious behavior."[16] And any direct dealings between a trustee and a beneficiary are "viewed with suspicion."[17]

{¶33} Many jurisdictions have held that transactions between a fiduciary and a beneficiary entered into during the fiduciary relationship are presumptively fraudulent.[18] Other jurisdictions have held that releases will not be upheld if one

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[13] *Biddulph v. Delorenzo*, 8th Dist. No. 83808, 2004-Ohio-4502, at ¶27.
[14] R.C. 5810.09.
[15] See, also, Restatement of the Law 2d, Trusts (1992), Sections 170 and 206.
[16] 857 Horwood and Wolven, Tax Management: Estates, Gifts and Trusts: Managing Litigation Risks of Fiduciaries (2007), A-18.
[17] Bogert, Trusts & Trustees, (2 Ed.1995) 542, Section 943.
[18] See, e.g., *Grubb v. Estate of Wade* (Ind.App.2002), 768 N.E.2d 957, 962; *Brown v. Commercial Natl. Bank* (1968), 94 Ill.App.2d 273, 279, 237 N.E.2d 567; *Birnbaum v. Birnbaum* (N.Y.App.1986), 117 A.D.2d 409, 416-417, quoting *In re Rees' Estate* (1947), 72 N.Y.S.2d 598, 599.

party is at a disadvantage because it has depended on the fiduciary to protect its interests,[19] or if the release protects the fiduciary against fraud, violates public policy, or relieves the fiduciary of a duty imposed by law.[20]

VI. Releases Are Highly Suspect

{¶34} After examining Ohio statutes, Ohio case law, and other jurisdictions' case law, we believe that documents that purport to release a fiduciary from liability concerning a transaction that occurred during the fiduciary relationship, where the fiduciary has gained some benefit, are highly suspect. And a beneficiary may challenge this type of transaction without tendering back the consideration given for the release—the so-called "tender rule" has absolutely no application in the fiduciary setting.

{¶35} Bud and U.S. Bank gained from the releases because they purported to absolve them from any potential liability, even if the stock sale itself was a breach of their fiduciary duties.

{¶36} Bud, and perhaps U.S. Bank, also gained from the stock sale. Bud was CEO of the corporation that bought the shares. Bud's side of the family benefited from the unequal division of the trust. U.S. Bank was the commercial banker for the corporation.

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[19] *Gugel v. Hiscox* (1910), 122 N.Y.S. 557, 138 A.D. 61.
[20] *United States v. United States Cartridge Co.* (C.A.8, 1952), 198 F.2d 456, 464. See, also, *Arst v. Stifel, Nicolaus & Co.* (D.Kan.1997), 954 F.Supp. 1483, 1493, quoting *Belger Cartage Serv. v. Holland Construction* (1978), 224 Kan. 320, 330, 582 P.2d 1111; *Mid-America Sprayers, Inc. v. United States Fire Ins. Co.* (1983), 8 Kan.App.2d 451, 455, 660 P.2d 1380; *Ganley Bros. v. Butler Bros. Bldg. Co.* (Minn.1927), 212 N.W. 602, 603.

{¶37} In a slightly different context, a New York court put it thus: "[Any] acquisition of the shares of the beneficiaries by one of the fiduciaries must be dealt with as presumptively void unless affirmative proof is made by the fiduciaries that their dealings with each beneficiary was in every instance aboveboard and fully informative. The fiduciaries in such circumstances have the obligation to show affirmatively not only that they acted in good faith but that they volunteered to the beneficiaries every bit of information which personal inquiry by the beneficiaries would have disclosed."[21]

{¶38} If the releases and stock sales are to be proved valid in this case, the burden is on the fiduciaries to show that they acted with the utmost good faith and exercised the most scrupulous honesty toward the beneficiaries, placed the beneficiaries' interests before their own, did not use the advantage of their trustee positions to gain any benefit at the beneficiaries' expense, and did not place themselves in a position in which their interests might have conflicted with their fiduciary obligations.[22]

{¶39} We are aware of the argument that since Bud did not himself purchase the shares—they were purchased by the corporation he was CEO and majority shareholder of—it was not technically self-dealing. This court has previously, and correctly, rejected that argument.[23]

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[21] *Birnbaum v. Birnbaum* (1986), 503 N.Y.S.2d 451, 117 A.D.2d 409, quoting *In re Rees' Estate* (1947), 72 N.Y.S. 2d 598, 599.
[22] See, e.g., *Atwater v. Jones*, supra; *Bacon v. Donnet*, 9th Dist. No. 21201, 2003-Ohio-1301, at ¶¶ 29-30; *Schoch v. Bloom* (1965) 5 Ohio Misc. 155, 158; *In re Guardianship of Marshall* (May 26, 1998), 12th Dist. Nos. CA96-11-239 and CA96-11-244; 3 Scott, Trusts (5 Ed.2007) 1078, Section 17.2.
[23] *In re Trust U/W of Woltering* (1999), 1st Dist. No. C-970913.

{¶40} Therefore, the Cundalls were not required to tender back the consideration. The trial court erred by dismissing Michael and his children's claims on this ground. The Cundalls' first assignment of error is sustained.

VII. Civ.R. 12(B): Evidentiary Materials

{¶41} An appeals court reviews a trial court's entry of a Civ.R. 12(B) dismissal de novo.[24] When determining the validity of a dismissal under the rule, we accept as true all factual allegations in the complaint.[25]

{¶42} Civ.R. 12 states, "When a motion to dismiss for failure to state a claim upon which relief can be granted presents matters outside the pleading and such matters are not excluded by the court, the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56." Michael argues that the trial court erred by considering documents outside the pleadings and by not considering the entire trust document. Michael had filed a Civ.R. 12(F) motion to strike the documents attached to the defendants' motions to dismiss.

{¶43} There is no evidence that the trial court failed to consider the entire trust document. But the trial court might have improperly considered evidence outside the pleadings.

{¶44} The trial court considered the documents that released U.S. Bank and Bud from liability and the letters concerning the stock transaction. Both were attached to Bud's personal representatives' motion to dismiss.

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[24] *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶5.
[25] Id.

{¶45} The Ohio Supreme Court has determined that a court may consider documents outside the complaint to ascertain whether it has subject-matter jurisdiction under Civ.R. 12(B)(1).[26] This court has held that a trial court may consider documents that are referred to or incorporated in the complaint.[27] In this case, the complaint specifically referred to the releases. Therefore, the releases were properly considered by the trial court.

{¶46} The complaint did not refer to the letters that detailed the sale terms. The trial court did not state for what purpose it had considered the letters. If the court considered the letters for the purpose of determining if it had jurisdiction over the case, it did so properly. The court could only consider materials that established the relevant dates for statute-of-limitations purposes.

{¶47} But the court was not permitted to consider the letters for Civ.R. 12(B)(6) purposes. The complaint discussed the stock sale, but did not incorporate or specifically refer to the letters.

{¶48} We do not know for what purpose the trial court considered these letters because the trial court's entry focused predominantly on the tender issue as its reason for granting the Civ.R. 12(B) motions. But our decision makes the issue moot.

VIII. U.S. Bank—Motion to Dismiss

{¶49} This court reviews the trial court's Civ.R. 12 decisions de novo, so we consider whether each set of defendants should have been dismissed from the

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[26] *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus.
[27] *Coors v. Fifth Third Bank*, 1st Dist. No. C-050927, 2006-Ohio-4505, at ¶11.

case. The trial court dismissed U.S. Bank from the case because the statute of limitations had run. We agree with the trial court's determination. U.S. Bank was out of the picture in 1996 when it ceased to be the trustee for the Betty Lou Trust, and the statute of limitations began to run at that time.

{¶50} In the amended complaint, Michael alleged that U.S. Bank had served as the trustee of the Betty Lou Trust and that it had breached its fiduciary duty. In 1984, when CIC bought back its stock from the Betty Lou Trust, U.S. Bank was both the trustee of the Betty Lou Trust and the commercial banker for CIC. Michael alleged that U.S. Bank had breached its fiduciary duties to the Cundalls by participating in and enabling the stock sale, which was not in the best interests of the beneficiaries. He alleged that U.S. Bank had engaged in self-dealing by approving a stock sale that would have benefited one of its powerful customers. Further, Michael alleged that U.S. Bank knew and misrepresented the true value of the stock, and that Michael had not discovered the fraud until after Bud's death in 2005.

{¶51} U.S. Bank argues that the statute of limitations began to run in 1984, when the transaction had occurred. Alternatively, it argues that its last involvement in the trust was in 1996, well outside the four-year limitations period. Finally, it argues that the Cundalls could not have recently discovered fraud, because they claimed that they had been bullied by Bud in 1984 to sell the stock, and because CIC had purchased back its stock back from another person for a higher price several months before the Cundalls sold their stock.

{¶52} The statute of limitations for breach of a fiduciary duty and fraud is four years.[28] For a trustee, the statute of limitations will not begin running until the fiduciary relationship has ended.[29] The statute of limitations does not begin to run in actions for fraud until the fraud is discovered or, through reasonable diligence, ought to have been discovered.[30]

{¶53} The "discovery rule"—the tolling of the statute of limitations until fraud is discovered—is not available to those who should have discovered fraud, but failed to discover it due to neglect or willful ignorance.[31]

{¶54} We believe that if the Cundalls had exercised reasonable diligence, they would have discovered any alleged fraud the U.S. Bank had perpetrated on them. In 1984, they knew that CIC had purchased Miller's shares at a much higher price. They also knew that U.S. Bank was CIC's commercial banker.

{¶55} We do not know why the Cundalls removed U.S. Bank as trustee from the Betty Lou Trust in 1996. But once that relationship ended, it was the Cundalls' responsibility to investigate whether any fraud had taken place during the trusteeship. Therefore, the statute of limitation began to run in 1996, when U.S. Bank ceased to serve as trustee of the Betty Lou Trust, and the limitations period ended in 2000.

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[28] R.C. 2305.09.
[29] *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675.
[30] Id.; *Wooten v. Republic Savings Bank*, 2nd Dist. No. 06-CA-24, 2007-Ohio-3804, at ¶43; *Harris v. Liston* (1999), 86 Ohio St.3d 203, 207, 714 N.E.3d 377.
[31] *Cline v. Cline*, 7th Dist. No. 05 CA 822, 2007-Ohio-1391, at ¶23.

IX. Limitations and Presentment: Bud Koons

{¶56} The trial court dismissed Michael's claims and the Cundall defendants' cross-claims against the trustees for several of Bud's trusts and the personal representatives of Bud's estate because Michael had brought the suit outside the limitations period. Bud's representatives and the successor trustees argue that R.C. 2117.06 barred Michael and the Cundall defendants from bringing claims against Bud's estate.

{¶57} R.C. 2117.06 requires all claims against an estate to be presented within six months of the decedent's death.[32] But the statute only applies to claims that pursue recovery against the estate. R.C. 2117.06(G) states that the six-month statute of limitations does not apply unless "any recovery on a claim * * * [comes] from the assets of an estate."

{¶58} If Michael and the Cundall cross-claimants plan to pursue recovery strictly against Bud's trusts, life insurance policies, pension plans, or other monies that have passed or will pass outside Bud's estate, the time limits in R.C. 2117.06 do not apply. As noted above, R.C. 2117.06(G) makes exceptions for plaintiffs who wish to recover from sources other than the estate. And Michael was not required to allege in his complaint that he was relying solely on the trusts for recovery rather than on the assets of Bud's estate.[33]

{¶59} Many estate-planning devices ensure that property is passed outside of probate. Some of these are trusts, life insurance, pension plans, payable-on-death accounts, and advances made prior to death. Any property that

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[32] R.C. 2117.06(B).
[33] *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, at ¶22.

passes outside of probate is not part of the estate.[34] If Michael and the Cundall cross-claimants prove their allegations against Bud, they may pursue recovery against any property that has passed or will pass outside of the estate.

{¶60} The personal representatives and successor trustees also argue that the Cundalls' claims were barred by the four-year statute of limitations. Not so. Michael filed well within the limitations period. He alleged that Bud, as the trustee of the Cundall Fund, had fallen below the standard of care and had breached his fiduciary duty. The statute of limitations for tortious breach of trust begins to run when the trustee ceases to serve as trustee.[35] Here, Bud served as the trustee of the Cundall Fund of the Grandparents Trust (and later the Cundall Trust) until he died in 2005, so the statute of limitations will expire in 2009.

{¶61} Thus R.C. 2117.06 did not prevent Michael and the Cundall cross-claimants from making a claim against Bud's estate, because they are pursuing recovery against property that will pass or has passed outside Bud's estate. And the four-year statute of limitations began running when Bud ceased to be the trustee of the Cundall Trust at his death in 2005.

X. Second Amended Complaint

{¶62} Michael filed the original complaint on March 3. He amended his complaint on March 24. On June 1, all the nonCundall defendants filed motions to dismiss. Michael sought to file a second amended complaint on July 18.

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[34] Id.

[35] *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675. See, also, *Cassner v. Bank One Trust Co., N.A.*, 10th Dist. No. 03AP-1114, 2004-Ohio-3484, at ¶29; *Hosterman v. First Natl. Bank & Trust Co.* (1946), 79 Ohio App. 37, 38, 68 N.E.2d 325.

{¶63} Civ.R. 15 provides that a party may amend its pleading once before a responsive pleading is filed. Otherwise, a party must obtain leave of the court to amend its complaint. The rule states that "[l]eave of court shall be freely given when justice so requires." The rule encourages liberal amendment. "Where it is possible that the plaintiff, by an amended complaint, may set forth a claim upon which relief can be granted, and it is tendered timely and in good faith and no reason is apparent or disclosed for denying leave, the denial of leave to file such amended complaint is an abuse of discretion."[36]

{¶64} The trial court erroneously dismissed the case due to lack of a tender and determined that Michael's motion to file a second amended complaint was futile. As discussed earlier, Michael was not required to tender back the consideration. We hold that the denial of leave for a second amendment was erroneous, and upon remand, the trial court should allow the amended complaint.

XI. Jurisdiction

{¶65} Michael and the Cundall cross-claimants contend that the trial court erred by dismissing the claims against out-of-state trust beneficiaries for lack of personal jurisdiction. The out-of-state Koons defendants argue that they had no minimum contacts with Ohio, that the Ohio long-arm statute did not reach them, that R.C. 5802.02 could not apply to them retroactively, and that Michael was attempting to use in rem jurisdiction as a "wormhole" to in personam

[36] *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113.

jurisdiction. Because we are convinced that Ohio has personal jurisdiction over all defendants, it is not necessary to discuss in rem jurisdiction—or wormholes.

{¶66} The Cundalls had the burden of establishing the trial court's jurisdiction.[37] In response to a motion to dismiss, the Cundalls were required only to make a prima facie case of jurisdiction.[38] We review the trial court's grant of the jurisdictional motion de novo.[39]

{¶67} R.C. 5802.02 became effective January 1, 2007, four days before the trial court's entry of dismissal and ten months after the original complaint. The statute gives Ohio jurisdiction over both trustees and beneficiaries of a trust located in Ohio for any dispute involving the trust.[40] According to R.C. 5811.03,[41] which describes the retroactive applicability of the newly enacted Ohio Trust Code, R.C. 5802.02 governs all judicial proceedings commenced prior to January 1, 2007 unless it would "substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties." (The statute also says that the new code "do[es] not affect an act done before the effective date of those chapters." The Koons defendants make much of this provision, but it is not applicable to the issue of jurisdiction in this case.)

{¶68} Retroactive application of R.C. 5802.02 would not substantially interfere with the judicial proceedings. This case is in its infancy. The record reflects that little, if any, discovery has been conducted related to the issues on appeal.

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[37] *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165.
[38] Id. at 307.
[39] *Information Leasing Corp. v. Baxter*, 1st Dist. No. C-020029, 2002-Ohio-3930, ¶4.
[40] R.C. 5802.02(B).
[41] R.C. 5811.03(A)(3).

{¶69} Nor would the retroactive application of R.C. 5802.02 prejudice the rights of the parties, because Ohio courts could have taken jurisdiction over the out-of-state Koons defendants even without the statute. They took the money, and with that came jurisdiction.

XII. Even Without the Statute, Jurisdiction is Proper

{¶70} The Cundalls had to demonstrate (1) that jurisdiction over the out-of-state trust beneficiaries was proper under Ohio's long-arm statute and applicable civil rule,[42] and (2) that the exercise of personal jurisdiction over the out-of-state trust beneficiaries would comport with federal due-process requirements.[43]

{¶71} Ohio's long-arm statute delineates those instances that render defendants amenable to the jurisdiction of Ohio.[44] Included among these provisions is a grant of jurisdiction when a person "[transacts] any business in this state."[45] Courts construe "transacting any business" broadly, and the phrase includes "having dealings with."[46] Courts resolve questions about the applicability of R.C. 2307.382(A)(1) and Civ.R. 4.3(A)(1) on "highly particularized fact situations, thus rendering any generalization unwarranted."[47]

{¶72} The Koons defendants are beneficiaries of trusts established and administered in Ohio. Clearly, the Koons defendants have dealings with Ohio—

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[42] R.C. 2307.382 and Civ.R. 4.3.
[43] *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541.
[44] R.C. 2307.382(A).
[45] R.C. 2307.382(A)(1).
[46] *Goldstein*, supra, at 236; *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.* (1990), 53 Ohio St.3d 73, 75, 559 N.E.2d 477.
[47] *United States Sprint Communications Co. Partnership v. K's Foods* (1994), 68 Ohio St.3d 181, 185, 1994-Ohio-504, 624 N.E.2d 1048.

they have accepted money from the trusts. Accepting funds from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute.

{¶73} Jurisdiction over the Koons defendants also comports with federal due-process requirements. In *Mullane v. Central Hanover Bank & Trust Co.*, the United States Supreme Court addressed a state's right to preside over issues concerning trusts: "[T]he interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident, provided its procedure accords full opportunity to appear and be heard."[48] Although this case only addressed closing a trust, it clearly should apply to the administration of trusts in general.

{¶74} The trial court also had jurisdiction over the Koons defendants under *International Shoe Co. v. Washington*[49] and its progeny. Due process requires that a nonresident defendant have certain minimum contacts with the forum state such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[50] The Supreme Court emphasized that the minimum-contacts analysis "cannot simply be mechanical or quantitative," and that whether due process is satisfied depends "upon the quality and nature of the activity."[51]

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[48] (1950), 339 U.S. 306; 70 S. Ct. 652.
[49] (1945), 326 U.S. 310, 66 S.Ct. 154.
[50] Id. at 316.
[51] Id. at 319.

{¶75} *International Shoe* provided some general guideposts for jurisdictional questions. Jurisdiction is firmly established when the defendant's activities are "[not only] continuous and systematic, but also give rise to the liabilities sued on."[52] Continuous and systematic activities can also be "so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities."[53] Finally, even single acts committed within the forum can confer jurisdiction over a nonresident defendant "because of their nature and quality and the circumstances of their commission."[54]

{¶76} We hold that a regular beneficiary of an Ohio-administered trust meets the requisite minimum contacts in Ohio to support personal jurisdiction under federal constitutional standards. By accepting distributions from an Ohio trust, the Koons defendants carried on activities in Ohio and benefited from its laws. These activities were of a continuous and systematic nature such that maintenance of this suit in Ohio does not offend traditional notions of fair play and substantial justice.

{¶77} The Supreme Court added another layer to the due-process analysis in *Asahi Metals Indus. Co. v. Superior Court.*[55] Through a "reasonableness" inquiry, a court must consider the burden on the defendant, the interests of the forum state, and the plaintiff's interest in obtaining relief.[56] It must also weigh the "interstate judicial system's interest in obtaining the most

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[52] Id. at 317.
[53] Id. at 318.
[54] Id.
[55] (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026.
[56] Id. at 113.

efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies."[57] In *Asahi*, these factors divested that court of jurisdiction, but in *Burger King v. Rudzewicz*, the Supreme Court explained that these factors may "serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required."[58]

{¶78} Here, the *Asahi* factors strengthen the reasonableness of Ohio's jurisdiction over the Koons defendants. The interstate judicial system's interest in obtaining the most efficient resolution of the controversy weighs heavily against the Koonses' position. It is unclear whether Michael would be able to bring suit in any other forum. But even if that is possible, Ohio as the situs of the trust is the best-positioned state to fashion a potential remedy. The nonresident defendants are scattered throughout the country. The only reasonable site for this litigation is Ohio. We are aware of the burden that the nonresident defendants face by litigating in Ohio, but conclude that the *Asahi* factors operate against them in this case.

{¶79} Finally, it cannot be said that being an ongoing beneficiary of an Ohio-established-and-administered trust is a "random," "fortuitous," or "attenuated" contact, or the "unilateral activity of another party."[59] As fittingly articulated in the official comment to Section 202 of the Uniform Trust Code, "[it seems] reasonable to require beneficiaries to go to the seat of the trust when

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[57] Id., quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 100 S.Ct. 559.
[58] *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 477, 105 S.Ct. 2174.
[59] Id. at 474.

litigation has been instituted there concerning a trust in which they claim beneficial interests, much as the rights of shareholders of a corporation can be determined at a corporate seat. The settlor has indicated a principal place of administration by its selection of a trustee or otherwise, and it is reasonable to subject rights under the trust to the jurisdiction of the Court where the trust is properly administered."

{¶80} This is in keeping with the Supreme Court's explanation of the role of foreseeability in the personal-jurisdiction analysis. "[The] foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there."[60]

XIII. But the Statute Applies

{¶81} Effective only days before the trial court rendered its opinion, R.C. 5802.02 codified what was already the law of personal jurisdiction as it related to trustees and beneficiaries of an Ohio trust. We agree with the Ohio legislature, as well as the other 19 other jurisdictions that have adopted the Uniform Trust Code,[61] that the provision for personal jurisdiction over those persons who accept a distribution from a state-administered trust is constitutional.[62] And we note

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[60] *Burger King Corp.*, supra, at 475, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297.
[61] Kansas, Nebraska, Wyoming, New Mexico, District of Columbia, Utah, Maine, Tennessee, New Hampshire, Missouri, Arkansas, Virginia, South Carolina, Oregon, North Carolina, Alabama, Florida, Pennsylvania, and North Dakota.
[62] Uniform Trust Code 202; R.C. 5802.02.

that we have found no court that has held this or any other provision of the UTC unconstitutional.[63]

{¶82} Because Ohio's exercise of jurisdiction over the out-of-state defendants comports with the state's long-arm statute as well as due-process requirements, the retroactive application of R.C. 5802.02 does not prejudice the parties. Even without the statute, jurisdiction is proper in Ohio. Furthermore, the retroactive application of R.C. 5802.02 would not substantially interfere with the judicial proceedings. Thus, R.C. 5802.02 applies, and Ohio jurisdiction over the out-of-state Koons defendants in this case is proper.

XIV. Constructive Trust

{¶83} If the Cundalls are able to prove their allegations, they will be entitled to compensatory and perhaps punitive damages.

{¶84} The Koons defendants argue that the statute of limitations bars any claim for a constructive trust because the statute of limitations for a constructive trust begins to run on the date of the initial transfer. Not so. Statutes of limitation attach to causes of action.[64] That the remedy is a constructive trust is irrelevant because, as we have already stated, the Cundalls' cause of action arose when Bud ceased to be the trustee.

{¶85} A constructive trust is an equitable remedy that corrects unjust enrichment.[65] When a person owns legal title to property, but equity recognizes

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[63] See, e.g., *In re Trust Created by Inman* (2005), 269 Neb. 376, 693 N.W.2d 514; *In re Harris Testamentary Trust* (2003), 275 Kan. 946, 69 P.3d 1109.
[64] *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113.
[65] *Estate of Cowling v. Estate of Cowling*, 109 Ohio St.3d 276, 2006-Ohio-2418, 847 N.E.2d 405, at ¶19.

that the person should not retain all or some of the benefit of that property, a court may impose a constructive trust, which converts the owner into a trustee.[66] A constructive trust is usually imposed when property has been obtained wrongfully.

{¶86} If the Cundalls are able to prove that Bud wrongfully acquired the CIC stock, and that his descendants and trusts are legal owners of property that rightfully belongs to the Cundalls, a constructive trust would be appropriate. When property is wrongfully obtained by the wrongdoer, and the wrongdoer subsequently transfers the property to third parties, a court will impose a constructive trust on that property.[67] Upon remand, the Cundalls will bear the burden of proving that the court should impose a constructive trust.[68]

XV. Accounting

{¶87} Michael argues that the trial court erred by denying his request for an accounting of the trusts.

{¶88} By statute,[69] a trustee must provide reports to current beneficiaries. Since Michael is not a current beneficiary of any of the trusts administered by any of the defendants, the statute does not apply.

{¶89} But once the parties continue with discovery, Michael will have a right to any nonprivileged documents the parties have concerning the trusts.

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[66] Id.
[67] Id. at ¶26.
[68] Id. at ¶20.
[69] R.C. 5808.13.

Civ.R. 26 allows parties to obtain discovery on any matter relevant to the action, as long as the material is not privileged.

XVI. Reversed, Except as to U.S. Bank

{¶90} For the foregoing reasons, we affirm the trial court's dismissal of U.S. Bank because the limitations period had run. We reverse all other aspects of the trial court's judgment and remand this case for further proceedings.

Judgment affirmed in part, and
reversed in part, and cause remanded.

HENDON and DINKELACKER, JJ., concur.

Please Note:

The court has recorded its own entry on the date of the release of this opinion.

THE COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

MICHAEL K. CUNDALL, et al.,	:	Case No. A0602080
Plaintiffs,	:	Judge Ethna M. Cooper
v.	:	
U.S. BANK, N.A., TRUSTEE, et al.,	:	**ENTRY GRANTING DEFENDANTS' MOTIONS TO DISMISS**
Defendants.	:	

This matter is before the Court on Defendants' Motions to Dismiss. Having reviewed the Motions to Dismiss, Plaintiffs' Memorandum in Opposition, the Supplemental Memoranda, all pertinent pleadings, and having considered the oral argument of counsel presented to the Court on October 16, 2006, the Court finds the Motions to Dismiss well-taken for the reasons that follow.

I. BACKGROUND

This action arises from a 1984 sale of stock in a closely-held family corporation. In 1984, Plaintiff and his family sold all of their shares in the Koon-Cundall-Mitchell Corporation ("KCM") to Central Investment Company ("CIC").[1] In his First Amended Complaint, Plaintiff Michael Cundall alleges that his Uncle, John F. Koons, III ("Bud Koons"), used his power and influence in CIC and as the trustee appointed to various family trusts to "threaten and cajole" his sister's family, (the Cundall family), into providing "releases and/or consents" in connection with the sale of stock owned by the Cundall family and stock held in trust for their benefit.[2]

EXHIBIT 4

[1] KMC was a holding company whose sole asset was shares of CIC.

[2] A more detailed history of the Koons/Cundall families, the family corporation and the trusts at issue is provided in the First Amended Complaint, the parties' briefs, and oral argument on the Motion to Dismiss.

In addition, Plaintiffs allege that U.S. Bank, also a former trustee, breached its fiduciary duty by, among other things, knowingly concealing the true value of the stock in an attempt to mislead the Plaintiffs and failing to seek court approval for the transaction.

Plaintiffs further allege that through the alleged breach of their respective fiduciary duties, Defendant U.S. Bank and the deceased Bud Koons, engaged in conduct that unfairly benefited Koons beneficiaries to the detriment of Cundall beneficiaries. Consequently, in bringing this action for tortious breach of fiduciary duty, constructive trust, declaratory judgment, accounting and related relief, Plaintiffs have sued the personal representatives of the estate of Bud Koons, successor trustees of various Koons trusts and the beneficiaries of various trusts in addition to U.S. Bank.

* * *

At the heart of Plaintiffs' complaint are the stock sale and the accompanying releases allegedly obtained and "achieved through duress, coercion, overreaching and undue influence" by an uncle who used "various threats and cajoling" [3] and a bank who allegedly concealed the true value of the stock in an effort to please its other clients, Bud Koons and CIC. Although Plaintiffs refer to a specific transaction and release in their First Amended Complaint, Plaintiffs fail to mention any operative dates or attach a stock purchase agreement or release to their complaint. Also significantly missing from the First Amended Complaint is an allegation that the Plaintiffs (or any Cundall) returned the consideration they were given in exchange for the release. As discussed below, because a releasor may not attack the validity of a release for fraud in the inducement unless he first

[3] The Plaintiffs further claim that because of the discretionary powers of their uncle trustee, they were afraid to challenge him. (First Amend. Compl. at ¶ E.)

tenders back the consideration he received for making the release, all claims related to the 1984 stock sale and release are barred as a matter of law. *Haller v. Borror Corp.* (Ohio 1990), 50 Ohio St.3d 10, 552 N.E.2d 207, (paragraph two of the Syllabus).

II. LAW

A. Ohio Civil Rule 12(B)(6) Standard

Civ. R. 12(B)(6) dismissal "motions are procedural in nature and test the sufficiency of the complaint. When ruling on a Civ.R. 12(B)(6) motion, courts consider all factual allegations in the complaint to be true and make all reasonable inferences in favor of the nonmoving party." *Coors v. Fifth Third Bank*, 1 Dist. No. C-050927, 2006-Ohio-4505, ¶ 12, 2006 WL 2520322 (slip op.). Before this Court can grant a dismissal of a complaint, it must appear beyond doubt that the plaintiff can prove no set of facts warranting a recovery. Id. However, a plaintiff's "factual allegations must be distinguished from unsupported conclusions. Unsupported conclusions are not deemed true, nor are they sufficient to withstand a dismissal motion." Id.

Moreover, in considering a motion to dismiss for failure to state a claim, the mere submission of evidentiary material in support of a dismissal "does not require a court to convert the motion into one for summary judgment. A trial court has the power to exclude the extraneous evidence[.]" Id. at ¶ 10. While a court should not rely on evidence outside the complaint when resolving a Civ. R. 12(B)(6) motion, the court may consider materials that are referred to or incorporated in the complaint. Id. at ¶ 11, 13.

When ruling upon the dismissal motions in this case, the Court relies solely upon the First Amended Complaint, excluding from its review all extraneous evidence not referred to or incorporated in the complaint. Thus, the Court may consider the letters

from the Cundalls embodying the terms of the stock purchase agreement and releases attached to the Personal Representative's Motion to Dismiss as the stock purchase agreement and the release were referred to in the First Amended Complaint.

B. **Release/Tender Rule**

A release of a cause of action for damages is generally an "absolute bar to a later action on any claim encompassed within the release. To avoid that bar, the releasor must *allege* that the release was obtained by fraud and that he has tendered back the consideration received for his release." *Haller*, 50 Ohio St.3d 10, at 13 (emphasis added, internal citations omitted). Tender is required where the fraud alleged would render the release voidable. If, on the other hand, the fraud alleged would render the release void, no tender of consideration is required and none need be alleged. Id. citing *Picklesimer v. Baltimore & Ohio RR. Co.* (1949), 151 Ohio St. 1, 84 N.E.2d 214.

Whether a release of liability is void or voidable upon an allegation of fraud will hinge on the nature of the fraud alleged. "A release obtained by fraud in the factum is void *ab initio*, while a release obtained by fraud in the inducement is merely voidable." Id.

A release is obtained by fraud in the factum, and is void ab initio, "where an intentional act or misrepresentation of one party precludes a meeting of the minds concerning the nature or character of the purported agreement." Id. In such cases, the releasor fails to understand the nature or consequence of the release as a result of "device, trick or want of capacity" and the releasor has no intention to sign such a release. *Haller*, 50 Ohio St.3d at 13 citing *Picklesimer*, 151 Ohio St. at 5.

However, a "release of liability procured through fraud in the inducement is voidable only, and can be contested only after a return or tender of consideration." *Haller*, 50 Ohio St.3d at 14. Cases of fraud in the inducement are those in which the plaintiff admits that he released his claim for damages and received consideration therefore, but asserts that he was induced to do so by the defendant's fraud or misrepresentation. "'The fraud relates not to the nature of the release, but to the facts inducing its execution.' ... In that event, there is no failure of understanding of the party to be bound by the release ... Rather, the releasor claims that he was induced to grant the release upon the wrongful conduct or misrepresentation of the person so benefited. The misrepresentation may concern the economic value of the claim released, and wrongful conduct may include even coercion and duress." *Haller*, 50 Ohio St.3d at 14 citing *Picklesimer*, supra, and *National Bank v. Wheelock* (1895), 52 Ohio St. 534, 40 N.E. 636. "Whether the fraud as alleged is in the factum or in the inducement is an issue of law for the court." Id. at 14-15.

As recognized by the Ohio Supreme Court, the foregoing distinctions between fraud in the factum and fraud in the inducement reflect two well-settled principles of law: "First, the law favors the prevention of litigation by the compromise and settlement of controversies. Second, a releasor ought not be allowed to retain the benefit of his act of compromise and at the same time attack its validity when he understood the nature and consequence of his act, *regardless* of the basic nature of the inducement employed." *Haller*, 50 Ohio St.3d at 14 (emphasis added).

The plaintiffs in *Haller*, like Plaintiffs here, did not allege that they failed to understand the release they signed. Rather, they alleged that the value of the

consideration paid was misrepresented to them and that their release was procured through duress. As the court noted in *Haller*, "neither cause constitutes fraud in the factum. They are purely matters of fraud in the inducement. The pleadings therefore set up an allegation of a settlement agreement and release that is only voidable, and in order to attack that release for fraud, the Hallers were first required to tender back the consideration they received." Id.

Likewise, in *Lewis v. Mathes* (4 Dist.), 161 Ohio App.3d 1, 8, 2005-Ohio-1975, ¶ 17, 829 N.E.2d 318, the plaintiff alleged fraud in the inducement rather than fraud in factum when he sought to avoid the release he executed on the ground that the individual defendants and the Corporation misrepresented the Corporation's earnings and, therefore, misrepresented the value of his one-third interest in the Corporation.

III. ANALYSIS

Assuming there was fraud, as the Court must on a motion to dismiss, there is no question that, as a matter of law, the fraud alleged – coercion, duress, misrepresentation of value – is fraud in the inducement. Under established Ohio case law, Plaintiffs cannot bring suit on the released claims without having tendered the consideration the Cundalls received in the transaction in which they granted the releases. Such tender had to be made prior to filing suit and Plaintiffs were required to allege the fact of tender in the First Amended Complaint. Plaintiffs have done neither.

Notwithstanding the foregoing, Plaintiffs argue that the tender rule should not apply in this case for several reasons. First and foremost, Plaintiffs argue that the tender rule does not apply in this fiduciary duty case because "self-dealing by a trustee is presumptively fraudulent." (Plaintiffs' Suppl. Opp. Memo., p. 1.)

However, the Court has found no recognized exception to the tender rule announced by the Ohio Supreme Court in *Haller*. Nor, has the Court found any authority to suggest that it should look outside of the fraud in the factum/fraud in the inducement framework prescribed by the Ohio Supreme Court in *Haller* for a case involving a self-dealing trustee, particularly where, as here, the fraud alleged by Plaintiffs so clearly constitutes fraud in the inducement. Regardless of the basic nature of the inducement allegedly employed here (i.e. self-dealing by a trustee),[4] there is simply no authority that would permit the Court to disregard Ohio Supreme Court precedent and so elevate the status of these Plaintiffs that they should somehow be permitted to keep the benefit of their bargain while challenging its validity at the same time.

Plaintiffs also argue that the tender rule should not apply to them because, as the beneficial owners, the "Cundalls already owned all the stock at issue" and since all that the Cundalls received was the value of their stock, there was no separate consideration for the release." (Plaintiffs' Suppl. Opp. Memo., p. 3, 4.) In *Lewis*, supra, the court rejected a strikingly similar argument. In that case, the plaintiff argued that he should not be required to return the $68,000 consideration that he received in order to maintain his causes of action because (1) the monetary consideration he received was solely for the purchase of his stock at the value determined by the corporate valuation, and (2) he received no monetary consideration in exchange for the mutual release. *Lewis*, 2005-Ohio-1975. As the court in *Lewis* noted, in the absence of the stock purchase agreement and mutual release, the defendants were not obligated to buy the plaintiff's shares at any

[4] Although Plaintiffs allege that U.S. Bank breached its fiduciary duty in agreeing to the stock sale and release, the Court can perceive no basis for Plaintiff's unsupported conclusion that U.S. Bank engaged in "self-dealing" when U.S. Bank stood to gain nothing of consequence as a result of the stock sale.

price. Id. at ¶ 28. Thus, the Plaintiff was required to return the consideration that he received to avoid the release and pursue his causes of action against the defendants. Id. at ¶ 30, 32.

Plaintiffs allege nothing in the First Amended Complaint to demonstrate that CIC was required or obligated to purchase the Cundalls' stock. Indeed, the premise of Plaintiffs' complaint is that the Cundalls were coerced into selling their stock – not that others were forced to purchase their stock. Furthermore, Plaintiffs do not allege or point to anything in the trust agreements that would necessarily preclude the Cundalls from selling their stock or CIC from purchasing it. On the contrary, nothing in the trust agreement prohibits the sale of family stock. The trust expressly authorizes the sale or exchange of any asset, without limitation.[5]

Plaintiffs cannot avoid the tender requirement because there is no preexisting obligation to sell or purchase the stock nor is there any other basis to sever the stock purchase and the releases. Akin to the situation in *Lewis*, the stock purchase agreement here (embodied in the letters from the Cundalls), specifically refers to and incorporates the releases signed by the Cundalls as a condition of the sale. Accordingly, the consideration received, the agreement to sell the stock, cannot be severed from the releases.

III. CONCLUSION

For the foregoing reasons, the failure to tender and to allege tender requires dismissal of all claims of all parties related to any claim encompassed in the releases. The Court is not aware of any circumstances that would necessarily foreclose the possibility that Plaintiffs or the Cundalls might tender the consideration received. Accordingly, the

[5] See Grandparent's Trust, Article II and IV(3).

dismissal of the claims and cross-claims herein based on the failure to tender must be without prejudice.

In addition, for the reasons stated in the Defendants' respective briefs, the Court also finds merit in the Defendants' arguments to dismiss: (1) with prejudice the claims against U.S. Bank on statute of limitation grounds; (2) without prejudice the claims against out-of-state Koons beneficiaries for lack of personal jurisdiction; and, (3) with prejudice the claims against the personal representatives of the Koons Estate for failure to present the tort claims within the statutory period.

Because the proposed Second Amended Complaint does not allege tender, Plaintiffs' Motion for Leave to File a Second Amended Complaint is denied as futile. All other pending motions are denied as moot.

There is no just cause for delay.

IT IS SO ORDERED.

Judge Ethna M. Cooper

COURT OF COMMON PLEAS
ENTER
HON. ETHNA M. COOPER
THE CLERK SHALL SERVE NOTICE TO PARTIES PURSUANT TO CIVIL RULE 58 WHICH SHALL BE TAXED AS COSTS HEREIN.

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IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

MICHAEL K. CUNDALL, INDIVIDUALLY AND MICHAEL K. CUNDALL, SUCCESSOR TRUSTEE,

Appellants,

vs.

U.S. BANK, N.A., PREDECESSOR TRUSTEE, ET AL.,

Appellees.

APPEAL NO. C-070081
C-070082
(Consolidated Trial Nos. A-0403452 and A-0408943)

ENTRY OVERRULING MOTION TO CERTIFY CONFLICTS

This cause came on to be considered upon the motion of the appellees to certify conflicts under App. Rule 25(A) and upon the memorandum in opposition.

The Court finds that the motion is not well taken and is overruled.

To The Clerk:

Enter upon the Journal of the Court on JAN 2 4 2008 **per order of the Court.**

By: _____ **(Copies sent to all counsel)**
Presiding Judge

EXHIBIT 5

LEXSTAT OHIO REV CODE 2105.06

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 21. COURTS -- PROBATE -- JUVENILE
CHAPTER 2105. DESCENT AND DISTRIBUTION

Go to the Ohio Code Archive Directory

ORC Ann. 2105.06 (2008)

§ 2105.06. Statute of descent and distribution

When a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course:

(A) If there is no surviving spouse, to the children of the intestate or their lineal descendants, per stirpes;

(B) If there is a spouse and one or more children of the decedent or their lineal descendants surviving, and all of the decedent's children who survive or have lineal descendants surviving also are children of the surviving spouse, then the whole to the surviving spouse;

(C) If there is a spouse and one child of the decedent or the child's lineal descendants surviving and the surviving spouse is not the natural or adoptive parent of the decedent's child, the first twenty thousand dollars plus one-half of the balance of the intestate estate to the spouse and the remainder to the child or the child's lineal descendants, per stirpes;

(D) If there is a spouse and more than one child or their lineal descendants surviving, the first sixty thousand dollars if the spouse is the natural or adoptive parent of one, but not all, of the children, or the first twenty thousand dollars if the spouse is the natural or adoptive parent of none of the children, plus one-third of the balance of the intestate estate to the spouse and the remainder to the children equally, or to the lineal descendants of any deceased child, per stirpes;

(E) If there are no children or their lineal descendants, then the whole to the surviving spouse;

(F) If there is no spouse and no children or their lineal descendants, to the parents of the intestate equally, or to the surviving parent;

(G) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes;

(H) If there are no brothers or sisters or their lineal descendants, one-half to the paternal grandparents of the intestate equally, or to the survivor of them, and one-half to the maternal grandparents of the intestate equally, or to the survivor of them;

(I) If there is no paternal grandparent or no maternal grandparent, one-half to the lineal descendants of the deceased grandparents, per stirpes; if there are no such lineal descendants, then to the surviving grandparents or their lineal descendants, per stirpes; if there are no surviving grandparents or their lineal descendants, then to the next of kin of the intestate, provided there shall be no representation among such next of kin;

(J) If there are no next of kin, to stepchildren or their lineal descendants, per stirpes;

(K) If there are no stepchildren or their lineal descendants, escheat to the state.

HISTORY:

GC § 10503-4; 114 v 320(339); 116 v 385; Bureau of Code Revision, 10-1-53; 128 v 155 (Eff 11-9-59); 136 v S 145 (Eff 1-1-76); 136 v S 466 (Eff 5-26-76); 141 v S 248 (Eff 12-17-86); 148 v S 152. Eff 3-22-2001.

NOTES:

Section Notes

The provisions of § 3 of SB 152 (148 v --) read as follows:

SECTION 3. *Sections 2105.06, 2105.061, 2106.11,* and *2127.04 of the Revised Code*, as amended by this act, shall apply to the estates of decedents who die on or after the effective date of this act.

Related Statutes & Rules

Cross-References to Related Statutes

Action to sell real estate, denial by court, *RC § 2127.04.*

Adopted child, legal rights, *RC § 3107.15.*

Authorizing agent for cremation, *RC § 4717.22.*

Capacity of illegitimate children to inherit, *RC § 2105.17.*

Dower, *RC § 2103.02.*

Election by surviving spouse, *RC § 2106.01.*

Citation to make election, *RC § 2106.02.*

Election made by one under legal disability, *RC § 2106.08.*

Election made in person, *RC § 2106.06.*

Election to receive mansion house, *RC § 2106.10.*

Estate tax not to be apportioned against property that passes as elective or intestate share under certain conditions, *RC § 2113.86.*

Gifts received by will not to be included in reports to ethics commission, *RC §§ 102.02, 102.02.2.*

Heirs of aliens may inherit, *RC § 2105.16.*

Living and died construed, *RC § 2105.02.*

Parentage actions, statutes of limitations, *RC § 3111.05.*

Parent who abandons minor child barred from intestate succession from child; status as next of kin or heir at law, *RC § 2105.10.*

Parties to will contest, *RC § 2107.73.*

Passing of real property subject to monetary charge of surviving spouse, *RC § 2105.06.1.*

Payment of specific monetary share to surviving spouse, *RC § 2106.11.*

Persons prohibited from benefiting by the death of another, *RC § 2105.19.*

Probate court as superior guardian of all wards, *RC § 2111.50.*

Proceedings in case of presumption of death, *RC § 2121.02.*

Release from administration, *RC § 2113.03.*

LEXSTAT OHIO REV CODE 2305.09

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
TORTS

Go to the Ohio Code Archive Directory

ORC Ann. 2305.09 (2008)

§ 2305.09. Four-year limitation for certain actions; five-year limitation for identity fraud

Except as provided for in division (C) of this section, an action for any of the following causes shall be brought within four years after the cause thereof accrued:

(A) For trespassing upon real property;

(B) For the recovery of personal property, or for taking or detaining it;

(C) For relief on the ground of fraud, except when the cause of action is a violation of *section 2913.49 of the Revised Code*, in which case the action shall be brought within five years after the cause thereof accrued;

(D) For an injury to the rights of the plaintiff not arising on contract nor enumerated in *sections 1304.35*, *2305.10* to *2305.12*, and *2305.14 of the Revised Code*;

(E) For relief on the grounds of a physical or regulatory taking of real property.

If the action is for trespassing under ground or injury to mines, or for the wrongful taking of personal property, the causes thereof shall not accrue until the wrongdoer is discovered; nor, if it is for fraud, until the fraud is discovered.

HISTORY:

RS § 4982; S&S 541; S&C 948; 51 v 57, § 15; 64 v 145; 81 v 210; GC § 11224; 112 v 237; Bureau of Code Revision, 10-1-53; 129 v 13(177) (Eff 7-1-62); 145 v S 147. Eff 8-19-94; 150 v H 161, § 1, eff. 5-31-04; 152 v H 46, § 1, eff. 9-1-08.

NOTES:

Section Notes

The effective date is set by § 3 of 152 v H 46.

The effective date is set by section 6 of H.B. 161 (150 v.--).

EFFECT OF AMENDMENTS

152 v H 46, effective September 1, 2008, added the exception to the beginning of the introductory paragraph; and added the exception to the end of (C).

LEXSTAT OHIO REV CODE 2305.22

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 23. COURTS -- COMMON PLEAS
CHAPTER 2305. JURISDICTION; LIMITATION OF ACTIONS
COMMENCEMENT OF ACTION

Go to the Ohio Code Archive Directory

ORC Ann. 2305.22 (2008)

§ 2305.22. Provisions not applicable to action for conveyance of real property

Sections 2305.03 to *2305.21*, *1302.98*, and *1304.35 of the Revised Code*, respecting lapse of time as a bar to suit, do not apply in the case of an action by a vendee of real property, in possession thereof, to obtain a conveyance of the real property.

HISTORY:

RS § 4974; S&C 941; 51 v 57, § 6; GC § 11236; Bureau of Code Revision, 10-1-53; 129 v 13(178) (Eff 7-1-62); 145 v S 147. Eff 8-19-94; 151 v H 416, § 1, eff. 1-1-07.

NOTES:

Section Notes

EFFECT OF AMENDMENTS

151 v H 416, effective January 1, 2007, deleted "a continuing and subsisting trust, not to" preceding "an action", and substituted "of the real property" for "of it".

Related Statutes & Rules

Cross-References to Related Statutes

Commencement of action, *RC § 2305.17*.

Lapse of time a bar, *RC § 2305.03*.

Qualified beneficiary or representative may request report of management of inter vivos trust; effect of report, *RC § 1340.03.1*.

Comparative Legislation

SUBSISTING TRUST: IN--Burns *Ind. Code Ann. § 30-4-6-12*

KY--*KRS § 413.340*

EXHIBIT 8

LEXSTAT OHIO REV CODE 5801.10

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
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TITLE 58. OHIO TRUST CODE
OHIO TRUST CODE
CHAPTER 5801. GENERAL PROVISIONS AND DEFINITIONS

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ORC Ann. 5801.10 (2008)

§ 5801.10. (UTC 111) Private settlement agreements

(A) As used in this section, "creditor" means any of the following:

(1) A person holding a debt or security for a debt entered into by a trustee on behalf of the trust;

(2) A person holding a debt secured by one or more assets of the trust;

(3) A person having a claim against the trustee or the assets of the trust under *section 5805.06 of the Revised Code*;

(4) A person who has attached through legal process a beneficiary's interest in the trust.

(B) The parties to an agreement under this section shall be all of the following, or their representatives under the representation provisions of Chapter 5803. of the Revised Code, except that only the settlor and any trustee are required to be parties to an amendment of any revocable trust:

(1) The settlor if living and if no adverse income or transfer tax results would arise from the settlor's participation;

(2) All beneficiaries;

(3) All currently serving trustees;

(4) Creditors, if their interest is to be affected by the agreement.

(C) The persons specified in division (B) of this section may by written instrument enter into an agreement with respect to any matter concerning the construction of, administration of, or distributions under the terms of the trust, the investment of income or principal held by the trustee, or other matters. The agreement may not effect a termination of the trust before the date specified for the trust's termination in the terms of the trust, change the interests of the beneficiaries in the trust except as necessary to effect a modification described in division (C)(5) or (6) of this section, or include terms and conditions that could not be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law. The invalidity of any provision of the agreement does not affect the validity of other provisions of the agreement. Matters that may be resolved by a private settlement agreement include, but are not limited to, all of the following:

(1) Determining classes of creditors, beneficiaries, heirs, next of kin, or other persons;

(2) Resolving disputes arising out of the administration or distribution under the terms of the trust, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the terms of the trust;

(3) Granting to the trustee necessary or desirable powers not granted in the terms of the trust or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the terms of the trust or, if inconsistent with the express provisions or purposes of the terms of the trust, are necessary for the due administration of the terms of the trust;

(4) Modifying the terms of the trust, if the modification is not inconsistent with any dominant purpose or objective of the trust;

(5) Modifying the terms of the trust in the manner required to qualify the gift under the terms of the trust for the charitable estate or gift tax deduction permitted by federal law, including the addition of mandatory governing instrument requirements for a charitable remainder trust as required by the Internal Revenue Code and regulations promulgated under it in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(6) Modifying the terms of the trust in the manner required to qualify any gift under the terms of the trust for the estate tax marital deduction available to noncitizen spouses, including the addition of mandatory governing instrument requirements for a qualified domestic trust under *section 2056A of the Internal Revenue Code* and regulations promulgated under it in any case in which all parties interested in the trust have submitted written agreements to the proposed changes or written disclaimer of interest;

(7) Resolving any other matter that arises under Chapters 5801. to 5811. of the Revised Code.

(D) No agreement shall be entered into under this section affecting the rights of a creditor without the creditor's consent or affecting the collection rights of federal, state, or local taxing authorities.

(E) Any agreement entered into under this section that complies with the requirements of division (C) of this section shall be final and binding on the trustee, the settlor if living, all beneficiaries, creditors who are parties to the agreement, and their heirs, successors, and assigns.

(F) Notwithstanding anything in this section, in division (D) of *section 5803.03 of the Revised Code*, or in any other rule of law to the contrary, a trustee serving under the terms of the trust shall only represent its own individual or corporate interests in negotiating or entering into an agreement subject to this section. No trustee serving under the terms of the trust shall be considered to represent any settlor, beneficiary, or the interests of any settlor or beneficiary in negotiating or entering into an agreement subject to this section.

(G) Any party to a private settlement agreement entered into under this section may request the court to approve the agreement, to determine whether the representation as provided in Chapter 5803. of the Revised Code was adequate, and to determine whether the agreement contains terms and conditions the court could have properly approved.

(H) If an agreement entered into under this section contains a provision requiring binding arbitration of any disputes arising under the agreement, the provision is enforceable.

(I) Nothing in this section affects any of the following:

(1) The right of a beneficiary to disclaim under *section 5815.36 of the Revised Code*;

(2) The termination or modification of a trust under *section 5804.10, 5804.11, 5804.12, 5804.13, 5804.14, 5804.15*, or *5804.16 of the Revised Code*;

(3) The ability of a trustee to divide or consolidate a trust under *section 5804.17 of the Revised Code*.

(J) Nothing in this section restricts or limits the jurisdiction of any court to dispose of matters not covered by agreements under this section or to supervise the acts of trustees appointed by that court.

(K) This section shall be liberally construed to favor the validity and enforceability of agreements entered into under it.

(L) A trustee serving under the trust instrument is not liable to any third person arising from any loss due to that trustee's actions or inactions taken or omitted in good faith reliance on the terms of an agreement entered into under this section.

(M) This section does not apply to any of the following:

(1) A charitable trust that has one or more charitable organizations as qualified beneficiaries;

(2) A charitable trust the terms of which authorize or direct the trustee to distribute trust income or principal to one or more charitable organizations to be selected by the trustee, or for one or more charitable purposes described in division (A) of *section 5804.05 of the Revised Code*, if any of the following apply:

(a) The distributions may be made on the date that an agreement under this section would be entered into.

(b) The distributions could be made on the date that an agreement under this section would be entered into if the interests of the current beneficiaries of the trust terminated on that date, but the termination of those interests would not cause the trust to terminate.

(c) The distributions could be made on the date that an agreement under this section would be entered into if the trust terminated on that date.

HISTORY:

151 v H 416, § 1, eff. 1-1-07; 152 v H 499, § 1, eff. 9-12-08.

NOTES:

Section Notes

OFFICIAL COMMENT

Uniform Trust Code § 111.

While the Uniform Trust Code recognizes that a court may intervene in the administration of a trust to the extent its jurisdiction is invoked by interested persons or otherwise provided by law (*see* Section 201(a)), resolution of disputes by nonjudicial means is encouraged. This section facilitates the making of such agreements by giving them the same effect as if approved by the court. To achieve such certainty, however, subsection (c) requires that the nonjudicial settlement must contain terms and conditions that a court could properly approve. Under this section, a nonjudicial settlement cannot be used to produce a result not authorized by law, such as to terminate a trust in an impermissible manner.

Trusts ordinarily have beneficiaries who are minors, incapacitated, unborn or unascertained. Because such beneficiaries cannot signify their consent to an agreement, binding settlements can ordinarily be achieved only through the application of doctrines such as virtual representation or appointment of a guardian ad litem, doctrines traditionally available only in the case of judicial settlements. The effect of this section and the Uniform Trust Code more generally is to allow for such binding representation even if the agreement is not submitted for approval to a court. For the rules on representation, including appointments of representatives by the court to approve particular settlements, see Article 3.

Subsection (d) is a nonexclusive list of matters to which a nonjudicial settlement may pertain. Other matters which may be made the subject of a nonjudicial settlement are listed in the Article 3 General Comment. The fact that the trustee and beneficiaries may resolve a matter nonjudicially does not mean that beneficiary approval is required. For example, a trustee may resign pursuant to Section 705 solely by giving notice to the qualified beneficiaries and any cotrustees. But a nonjudicial settlement between the trustee and beneficiaries will frequently prove helpful in working out the terms of the resignation.

Because of the great variety of matters to which a nonjudicial settlement may be applied, this section does not attempt to precisely define the "interested persons" whose consent is required to obtain a binding settlement as provided in subsection (a). However, the consent of the trustee would ordinarily be required to obtain a binding settlement with respect to matters involving a trustee's administration, such as approval of a trustee's report or resignation.

EFFECT OF AMENDMENTS

152 v H 499, effective September 12, 2008, rewrote (C); in (E), inserted "creditors who are parties to the agreement"; and, in (F), twice substituted "terms of the trust" for "trust instrument".

LexisNexis 50 State Surveys, Legislation & Regulations

Trusts

LEXSTAT OHIO REV CODE 5803.03

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TITLE 58. OHIO TRUST CODE
OHIO TRUST CODE
CHAPTER 5803. REPRESENTATION

Go to the Ohio Code Archive Directory

ORC Ann. 5803.03 (2008)

§ 5803.03. (UTC 303) Representation by fiduciaries and parents

To the extent there is no conflict of interest between the representative and the person represented or among those being represented with respect to a particular question or dispute, all of the following apply:

(A) A guardian of the estate may represent and bind the estate that the guardian of the estate controls.

(B) A guardian of the person may represent and bind the ward if a guardian of the estate has not been appointed.

(C) An agent having authority to act with respect to the particular question or dispute may represent and bind the principal.

(D) Except as provided in division (F) of *section 5801.10 of the Revised Code*, a trustee may represent and bind the beneficiaries of the trust.

(E) A personal representative of a decedent's estate may represent and bind persons interested in the estate.

(F) A parent may represent and bind the parent's minor or unborn child if neither a guardian for the child's estate or a guardian of the person has been appointed. If a minor or unborn child is not represented by a parent under this division, another person may represent and bind the minor or unborn child under *section 5803.04 of the Revised Code* if the requirements of that section are met.

HISTORY:

151 v II 416, § 1, eff. 1-1-07; 152 v H 499, § 1, eff. 9-12-08.

NOTES:

Section Notes

OFFICIAL COMMENT

Uniform Trust Code § 303.

This section allows for representation of persons by their fiduciaries (conservators, guardians, agents, trustees, and personal representatives), a principle that has long been part of the law. Paragraph (6), which allows parents to represent their children, is more recent, having originated in 1969 upon approval of the Uniform Probate Code. This section is not limited to representation of beneficiaries. It also applies to representation of the settlor. Representation is not available if

the fiduciary or parent is in a conflict position with respect to the particular matter or dispute, however. A typical conflict would be where the fiduciary or parent seeking to represent the beneficiary is either the trustee or holds an adverse beneficial interest.

Paragraph (2) authorizes a guardian to bind and represent a ward if a conservator of the ward's estate has not been appointed. Granting a guardian authority to represent the ward with respect to interests in the trust can avoid the need to seek appointment of a conservator. This grant of authority to act with respect to the ward's trust interest may broaden the authority of a guardian in some States although not in States that have adopted the Section 1-403 of the Uniform Probate Code, from which this section was derived. Under the Uniform Trust Code, a "conservator" is appointed by the court to manage the ward's property, a "guardian" to make decisions with respect to the ward's personal affairs. *See* Section 103.

Paragraph (3) authorizes an agent to represent a principal only to the extent the agent has authority to act with respect to the particular question or dispute. Pursuant to Sections 411 and 602, an agent may represent a settlor with respect to the amendment, revocation or termination of the trust only to the extent this authority is expressly granted either in the trust or the power. Otherwise, depending on the particular question or dispute, a general grant of authority in the power may be sufficient to confer the necessary authority.

EFFECT OF AMENDMENTS

152 v H 499, effective September 12, 2008, added the last sentence to (F).

LEXSTAT OHIO REV CODE 5808.02

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TITLE 58. OHIO TRUST CODE
OHIO TRUST CODE
CHAPTER 5808. DUTIES AND POWERS OF TRUSTEE

Go to the Ohio Code Archive Directory

ORC Ann. 5808.02 (2008)

§ 5808.02. (UTC 802) Duty of loyalty

(A) A trustee shall administer the trust solely in the interests of the beneficiaries.

(B) Subject to the rights of persons dealing with or assisting the trustee as provided in *section 5810.12 of the Revised Code*, a sale, encumbrance, or other transaction involving the investment or management of trust property entered into by the trustee for the trustee's own personal account or that is otherwise affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary affected by the transaction unless one of the following applies:

(1) The transaction was authorized by the terms of the trust or by other provisions of the Revised Code.

(2) The transaction was approved by the court.

(3) The beneficiary did not commence a judicial proceeding within the time allowed by *section 5810.05 of the Revised Code*.

(4) The beneficiary consented to the trustee's conduct, ratified the transaction, or released the trustee in compliance with *section 5810.09 of the Revised Code*.

(5) The transaction involves a contract entered into or claim acquired by the trustee before the person became or contemplated becoming trustee.

(C) A sale, encumbrance, or other transaction involving the investment or management of trust property is presumed to be affected by a conflict between personal and fiduciary interests if it is entered into by the trustee with one of the following:

(1) The trustee's spouse;

(2) The trustee's descendant, sibling, or parent or the spouse of a trustee's descendant, sibling, or parent;

(3) An agent or attorney of the trustee;

(4) A corporation or other person or enterprise in which the trustee, or a person that owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment.

(D) A transaction not concerning trust property in which the trustee engages in the trustee's individual capacity involves a conflict between personal and fiduciary interests if the transaction concerns an opportunity properly belonging to the trust.

(E) An investment by a trustee that is permitted by other provisions of the Revised Code is not presumed to be affected by a conflict between personal and fiduciary interests if the investment otherwise complies with the prudent investor rule of Chapter 5809. of the Revised Code.

(F) In voting shares of stock or in exercising powers of control over similar interests in other forms of enterprise, the trustee shall act in the best interests of the beneficiaries. If the trust is the sole owner of a corporation or other form of enterprise, the trustee shall elect or appoint directors or other managers who will manage the corporation or enterprise in the best interests of the beneficiaries.

(G) This section does not preclude either of the following:

(1) Any transaction authorized by another section of the Revised Code;

(2) Unless the beneficiaries establish that it is unfair, any of the following transactions:

(a) An agreement between a trustee and a beneficiary relating to the appointment or compensation of the trustee;

(b) Payment of reasonable compensation to the trustee;

(c) A transaction between a trust and another trust, decedent's estate, or guardianship of which the trustee is a fiduciary or in which a beneficiary has an interest;

(d) A deposit of trust money in a regulated financial-services institution that is an affiliate of the trustee;

(e) An advance by the trustee of money for the protection of the trust.

(H) The court may appoint a special fiduciary to make a decision with respect to any proposed transaction that might violate this section if entered into by the trustee.

HISTORY:

151 v H 416, § 1, eff. 1-1-07.

NOTES:

Section Notes

OFFICIAL COMMENT

Uniform Trust Code § 802.

This section addresses the duty of loyalty, perhaps the most fundamental duty of the trustee. Subsection (a) states the general principle, which is copied from *Restatement (Second) of Trusts Section 170(1)* (1959). A trustee owes a duty of loyalty to the beneficiaries, a principle which is sometimes expressed as the obligation of the trustee not to place the trustee's own interests over those of the beneficiaries. Most but not all violations of the duty of loyalty concern transactions involving the trust property, but breaches of the duty can take other forms. For a discussion of the different types of violations, see George G. Bogert & George T. Bogert, The Law of Trusts and Trustees Section 543 (Rev. 2d ed. 1993); and 2A Austin W. Scott & William F. Fratcher, The Law of Trusts Sections 170-170.24 (4th ed. 1987). The "interests of the beneficiaries" to which the trustee must be loyal are the beneficial interests as provided in the terms of the trust. *See* Section 103(8).

The duty of loyalty applies to both charitable and noncharitable trusts, even though the beneficiaries of charitable trusts are indefinite. In the case of a charitable trust, the trustee must administer the trust solely in the interests of effectuating the trust's charitable purposes. *See Restatement (Second) of Trusts Section 379* cmt. a (1959).

Duty of loyalty issues often arise in connection with the settlor's designation of the trustee. For example, it is not uncommon that the trustee will also be a beneficiary. Or the settlor will name a friend or family member who is an officer of a company in which the settlor owns stock. In such cases, settlors should be advised to consider addressing in the terms of the trust how such conflicts are to be handled. Section 105 authorizes a settlor to override an otherwise applicable duty of loyalty in the terms of the trust. Sometimes the override is implied. The grant to a trustee of authority to make a discretionary distribution to a class of beneficiaries that includes the trustee implicitly authorizes the trustee to make distributions for the trustee's own benefit.

Subsection (b) states the general rule with respect to transactions involving trust property that are affected by a conflict of interest. A transaction affected by a conflict between the trustee's fiduciary and personal interests is voidable by a beneficiary who is affected by the transaction. Subsection (b) carries out the "no further inquiry" rule by making transactions involving trust property entered into by a trustee for the trustee's own personal account voidable without further proof. Such transactions are irrebuttably presumed to be affected by a conflict between personal and fiduciary interests. It is immaterial whether the trustee acts in good faith or pays a fair consideration. *See Restatement (Second) of Trusts Section 170* cmt. b (1959).

The rule is less severe with respect to transactions involving trust property entered into with persons who have close business or personal ties with the trustee. Under subsection (c), a transaction between a trustee and certain relatives and business associates is presumptively voidable, not void. Also presumptively voidable are transactions with corporations or other enterprises in which the trustee, or a person who owns a significant interest in the trustee, has an interest that might affect the trustee's best judgment. The presumption is rebutted if the trustee establishes that the transaction was not affected by a conflict between personal and fiduciary interests. Among the factors tending to rebut the presumption are whether the consideration was fair and whether the other terms of the transaction are similar to those that would be transacted with an independent party.

Even where the presumption under subsection (c) does not apply, a transaction may still be voided by a beneficiary if the beneficiary proves that a conflict between personal and fiduciary interests existed and that the transaction was affected by the conflict. The right of a beneficiary to void a transaction affected by a conflict of interest is optional. If the transaction proves profitable to the trust and unprofitable to the trustee, the beneficiary will likely allow the transaction to stand. For a comparable provision regulating fiduciary investments by national banks, see *12 C.F.R. Section 9.12(a)*.

As provided in subsection (b), no breach of the duty of loyalty occurs if the transaction was authorized by the terms of the trust or approved by the court, or if the beneficiary failed to commence a judicial proceeding within the time allowed or chose to ratify the transaction, either prior to or subsequent to its occurrence. In determining whether a beneficiary has consented to a transaction, the principles of representation from Article 3 may be applied.

Subsection (b)(5), which is derived from Section 3-713(1) of the Uniform Probate Code, allows a trustee to implement a contract or pursue a claim that the trustee entered into or acquired before the person became or contemplated becoming trustee. While this subsection allows the transaction to proceed without automatically being voidable by a beneficiary, the transaction is not necessarily free from scrutiny. In implementing the contract or pursuing the claim, the trustee must still complete the transaction in a way that avoids a conflict between the trustee's fiduciary and personal interests. Because avoiding such a conflict will frequently be difficult, the trustee should consider petitioning the court to appoint a special fiduciary, as authorized by subsection (i), to work out the details and complete the transaction.

Subsection (d) creates a presumption that a transaction between a trustee and a beneficiary not involving trust property is an abuse by the trustee of a confidential relationship with the beneficiary. This subsection has limited scope. If the trust has terminated, there must be proof that the trustee's influence with the beneficiary remained. Furthermore, whether or not the trust has terminated, there must be proof that the trustee obtained an advantage from the relationship. The fact the trustee profited is insufficient to show an abuse if a third party would have similarly profited in an arm's length transaction. Subsection (d) is based on *Cal. Prob. Code Section16004(c). See also* 2A Austin W. Scott & William F. Fratcher Section 170.25 (4th ed. 1987), which states the same principle in a slightly different form: "Where he deals directly with the beneficiaries, the transaction may stand, but only if the trustee makes full disclosure and takes no advantage of his position and the transaction is in all respects fair and reasonable."

Subsection (e), which allows a beneficiary to void a transaction entered into by the trustee that involved an opportunity belonging to the trust, is based on *Restatement (Second) of Trusts Section 170* cmt. k (1959). While normally associated with corporations and with their directors and officers, what is usually referred to as the corporate opportunity doctrine also applies to other types of fiduciary. The doctrine prohibits the trustee's pursuit of certain business activities, such as entering into a business in direct competition with a business owned by the trust, or the purchasing of an investment that the facts suggest the trustee was expected to purchase for the trust. For discussion of the corporate opportunity doctrine, see Kenneth B. Davis, Jr., *Corporate Opportunity and Comparative Advantage, 84 Iowa L. Rev. 211 (1999);* and Richard A. Epstein, *Contract and Trust in Corporate Law: The Case of Corporate Opportunity, 21 Del. J. Corp. L. 5 (1996). See also* Principles of Corporate Governance: Analysis and Recommendations Section 5.05 (American Law Inst. 1994).

Subsection (f) creates an exception to the no further inquiry rule for trustee investment in mutual funds. This exception applies even though the mutual fund company pays the financial-service institution trustee a fee for providing investment advice and other services, such as custody, transfer agent, and distribution, that would otherwise be provided by agents of the fund. Mutual funds offer several advantages for fiduciary investing. By comparison with common trust funds, mutual fund shares may be distributed in-kind when trust interests terminate, avoiding liquidation and the associated recognition of gain for tax purposes. Mutual funds commonly offer daily pricing, which gives trustees and beneficiaries better information about performance. Because mutual funds can combine fiduciary and nonfiduciary accounts, they can achieve larger size, which can enhance diversification and produce economies of scale that can lower investment costs.

Mutual fund investment also has a number of potential disadvantages. It adds another layer of expense to the trust, and it causes the trustee to lose control over the nature and timing of transactions in the fund. Trustee investment in mutual funds sponsored by the trustee, its affiliate, or from which the trustee receives extra fees has given rise to litigation implicating the trustee's duty of loyalty, the duty to invest with prudence, and the right to receive only reasonable compensation. Because financial institution trustees ordinarily provide advisory services to and receive compensation from the very funds in which they invest trust assets, the contention is made that investing the assets of individual trusts in these funds is imprudent and motivated by the effort to generate additional fee income. Because the financial institution trustee often will also charge its regular fee for administering the trust, the contention is made that the financial institution trustee's total compensation, both direct and indirect, is excessive.

Subsection (f) attempts to retain the advantages of mutual funds while at the same time making clear that such investments are subject to traditional fiduciary responsibilities. Nearly all of the States have enacted statutes authorizing trustees to invest in funds from which the trustee might derive additional compensation. Portions of subsection (f) are based on these statutes. Subsection (f) makes clear that such dual investment-fee arrangements are not automatically presumed to involve a conflict between the trustee's personal and fiduciary interests, but subsection (f) does not otherwise waive or lessen a trustee's fiduciary obligations. The trustee, in deciding whether to invest in a mutual fund, must not place its own interests ahead of those of the beneficiaries. The investment decision must also comply with the enacting jurisdiction's prudent investor rule. To obtain the protection afforded by subsection (f), the trustee must disclose at least annually to the beneficiaries entitled to receive a copy of the trustee's annual report the rate and method by which the additional compensation was determined. Furthermore, the selection of a mutual fund, and the resulting delegation of certain of the trustee's functions, may be taken into account under Section 708 in setting the trustee's regular compensation. *See also* Uniform Prudent Investor Act Sections 7 and 9 and Comments; Restatement (Third) of Trusts: Prudent Investor Rule Section 227 cmt. m (1992).

Subsection (f) applies whether the services to the fund are provided directly by the trustee or by an affiliate. While the term "affiliate" is not used in subsection (c), the individuals and entities listed there are examples of affiliates. The term is also used in the regulations under ERISA. An "affiliate" of a fiduciary includes (1) any person who directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with the fiduciary; (2) any officer, director, partner, employee, or relative of the fiduciary, and any corporation or partnership of which the fiduciary is an officer, director or partner. *See 29 C.F.R. Section 2510.3-21(e).*

Subsection (g) addresses an overlap between trust and corporate law. It is based on *Restatement of Trusts (Second) Section 193* cmt. a (1959), which provides that "[i]t is the duty of the trustee in voting shares of stock to use proper care to promote the interest of the beneficiary," and that the fiduciary responsibility of a trustee in voting a control block "is heavier than where he holds only a small fraction of the shares." Similarly, the Department of Labor construes ERISA's duty of loyalty to make share voting a fiduciary function. *See 29 C.F.R. Section 2509.94-2.* When the trust owns the entirety of the shares of a corporation, the corporate assets are in effect trust assets that the trustee determines to hold in corporate form. The trustee may not use the corporate form to escape the fiduciary duties of trust law. Thus, for example, a trustee whose duty of impartiality would require the trustee to make current distributions for the support of current beneficiaries may not evade that duty by holding assets in corporate form and pleading the discretion of corporate directors to determine dividend policy. Rather, the trustee must vote for corporate directors who will follow a dividend policy consistent with the trustee's trust-law duty of impartiality.

Subsection (h) contains several exceptions to the general duty of loyalty, which apply if the transaction was fair to the beneficiaries. Subsection (h)(1)-(2) clarify that a trustee is free to contract about the terms of appointment and rate of compensation. Consistent with *Restatement (Second) of Trusts Section 170* cmt. r (1959), subsection (h)(3) authorizes a trustee to engage in a transaction involving another trust of which the trustee is also trustee, a transaction with a decedent's estate or a conservatorship estate of which the trustee is personal representative or conservator, or a transaction with another trust or other fiduciary relationship in which a beneficiary of the trust has an interest. The

authority of a trustee to deposit funds in a financial institution operated by the trustee, as provided in subsection (h)(4), is recognized as an exception to the duty of loyalty in a number of state statutes although deemed to be a breach of trust in *Restatement (Second) of Trusts Section 170* cmt. m (1959). The power to deposit funds in its own institution does not negate the trustee's responsibility to invest prudently, including the obligation to earn a reasonable rate of interest on deposits. Subsection (h)(5) authorizes a trustee to advance money for the protection of the trust. Such advances usually are of small amounts and are made in emergencies or as a matter of convenience. Pursuant to Section 709(b), the trustee has a lien against the trust property for any advances made.

2003 Amendment. The amendment revises subsection (f) to clarify that compensation received from a mutual fund for providing services to the fund is in addition to the trustee's regular compensation. It also clarifies that the trustee obligation to notify certain of the beneficiaries of compensation received from the fund applies only to compensation received for providing investment management or advisory services. The amendment conforms subsection (f) to the drafters' original intent.

Subsection (f) formerly provided:

(f) An investment by a trustee in securities of an investment company or investment trust to which the trustee, or its affiliate, provides services in a capacity other than as trustee is not presumed to be affected by a conflict between personal and fiduciary interests if the investment complies with the prudent investor rule of [Article] 9. The trustee may be compensated by the investment company or investment trust for providing those services out of fees charged to the trust if the trustee at least annually notifies the persons entitled under Section 813 to receive a copy of the trustee's annual report of the rate and method by which the compensation was determined.

2004 Amendment. Section 802(f) creates an exception to the prohibition on self-dealing for certain investments in mutual funds in which the trustee, or its affiliate, provides services in a capacity other than that as trustee. As originally drafted, Section 802(f) provided that the exception applied only if the investment complied with the Uniform Prudent Investor Act and the trustee notified the qualified beneficiaries of the additional compensation received for providing the services. However, the Uniform Prudent Investor Act itself contains its own duty of loyalty provision (Section 5), thereby arguably limiting or undoing this exception to the UTC's loyalty provision. The amendment, by providing that the investment does not violate the duty of loyalty under the UTC if it "otherwise" complies with the Uniform Prudent Investor Act, is intended to negate the implication that the investment must also comply with the Uniform Prudent Investor Act's own duty of loyalty provision.

Practice Manuals & Treatises

Selection of Trustees: A Detailed Review of Gift, Estate and Income Tax Effects and Non-Tax Effects, 38-3 Univ of Miami Law Center on Est Planning P 303

LexisNexis 50 State Surveys, Legislation & Regulations

Trusts

LEXSTAT OHIO REV CODE 5810.05

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JULY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH JULY 20, 2008 ***

TITLE 58. OHIO TRUST CODE
OHIO TRUST CODE
CHAPTER 5810. BREACH OF TRUST

Go to the Ohio Code Archive Directory

ORC Ann. 5810.05 (2008)

§ 5810.05. (UTC 1005) Limitation of action against trustee; other principles barring claims

(A) A beneficiary may not commence a proceeding against a trustee for breach of trust more than two years after the date the beneficiary, a representative of the beneficiary, or a beneficiary surrogate is sent a report that adequately discloses the existence of a potential claim for breach of trust and informs the beneficiary, the representative of the beneficiary, or the beneficiary surrogate of the time allowed for commencing a proceeding against a trustee.

(B) A report adequately discloses the existence of a potential claim for breach of trust if it provides sufficient information so that the beneficiary or the representative of the beneficiary knows of the potential claim or should know of the existence of the potential claim.

(C) If division (A) of this section does not apply, notwithstanding *section 2305.09 of the Revised Code*, a judicial proceeding by a beneficiary against a trustee for breach of trust must be commenced within four years after the first of the following to occur:

(1) The removal, resignation, or death of the trustee;

(2) The termination of the beneficiary's interest in the trust;

(3) The termination of the trust;

(4) The time at which the beneficiary knew or should have known of the breach of trust.

(D) Nothing in Chapters 5801. to 5811. of the Revised Code limits the operation of any principle of law or equity, including the doctrines of laches, unclean hands, estoppel, and waiver, that can bar claims.

HISTORY:

151 v H 416, § 1, eff. 1-1-07; 152 v H 499, § 1, eff. 9-12-08.

NOTES:

Section Notes

OFFICIAL COMMENT

Uniform Trust Code § 1005.

EXHIBIT 12

The one-year and five-year limitations periods under this section are not the only means for barring an action by a beneficiary. A beneficiary may be foreclosed by consent, release, or ratification as provided in Section 1009. Claims may also be barred by principles such as estoppel and laches arising in equity under the common law of trusts. *See* Section 106.

The representative referred to in subsection (a) is the person who may represent and bind a beneficiary as provided in Article 3. During the time that a trust is revocable and the settlor has capacity, the person holding the power to revoke is the one who must receive the report. *See* Section 603(a) (rights of settlor of revocable trust).

This section addresses only the issue of when the clock will start to run for purposes of the statute of limitations. If the trustee wishes to foreclose possible claims immediately, a consent to the report or other information may be obtained pursuant to Section 1009. For the provisions relating to the duty to report to beneficiaries, see Section 813.

Subsection (a) applies only if the trustee has furnished a report. The one-year statute of limitations does not begin to run against a beneficiary who has waived the furnishing of a report as provided in Section 813(d).

Subsection (c) is intended to provide some ultimate repose for actions against a trustee. It applies to cases in which the trustee has failed to report to the beneficiaries or the report did not meet the disclosure requirements of subsection (b). It also applies to beneficiaries who did not receive notice of the report, whether personally or through representation. While the five-year limitations period will normally begin to run on termination of the trust, it can also begin earlier. If a trustee leaves office prior to the termination of the trust, the limitations period for actions against that particular trustee begins to run on the date the trustee leaves office. If a beneficiary receives a final distribution prior to the date the trust terminates, the limitations period for actions by that particular beneficiary begins to run on the date of final distribution.

If a trusteeship terminates by reason of death, a claim against the trustee's estate for breach of fiduciary duty would, like other claims against the trustee's estate, be barred by a probate creditor's claim statute even though the statutory period prescribed by this section has not yet expired.

This section does not specifically provide that the statutes of limitations under this section are tolled for fraud or other misdeeds, the drafters preferring to leave the resolution of this question to other law of the State.

EFFECT OF AMENDMENTS

152 v H 499, effective September 12, 2008, added (D).

LEXSTAT OHIO REV CODE 5811.03

*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH AUGUST 12, 2008 ***
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TITLE 58. OHIO TRUST CODE
OHIO TRUST CODE
CHAPTER 5811. MISCELLANEOUS PROVISIONS

Go to the Ohio Code Archive Directory

ORC Ann. 5811.03 (2008)

§ 5811.03. (UTC 1106) Application to existing relationships

(A) Except as otherwise provided in Chapters 5801. to 5811. of the Revised Code, all of the following apply:

(1) Chapters 5801. to 5811. of the Revised Code apply to all trusts created before, on, or after their effective date.

(2) Chapters 5801. to 5811. of the Revised Code apply to all judicial proceedings concerning trusts commenced on or after their effective date.

(3) Chapters 5801. to 5811. of the Revised Code apply to judicial proceedings concerning trusts commenced before the effective date of those chapters unless the court finds that application of a particular provision of those chapters would substantially interfere with the effective conduct of the judicial proceedings or prejudice the rights of the parties, in which case the particular provision does not apply, and the superseded law applies.

(4) Any rule of construction or presumption provided in Chapters 5801. to 5811. of the Revised Code applies to trust instruments executed before the effective date of those chapters unless there is a clear indication of a contrary intent in the terms of the trust.

(5) Chapters 5801. to 5811. of the Revised Code do not affect an act done before the effective date of those chapters.

(B) If a right is acquired, extinguished, or barred upon the expiration of a prescribed period that has commenced to run under any other statute before the effective date of Chapters 5801. to 5811. of the Revised Code, that statute continues to apply to the right even if it has been repealed or superseded.

HISTORY:

151 v H 416, § 1, eff. 1-1-07.

NOTES:

Section Notes

OFFICIAL COMMENT

Uniform Trust Code § 1106.

EXHIBIT 13

The Uniform Trust Code is intended to have the widest possible effect within constitutional limitations. Specifically, the Code applies to all trusts whenever created, to judicial proceedings concerning trusts commenced on or after its effective date, and unless the court otherwise orders, to judicial proceedings in progress on the effective date. In addition, any rules of construction or presumption provided in the Code apply to preexisting trusts unless there is a clear indication of a contrary intent in the trust's terms. By applying the Code to preexisting trusts, the need to know two bodies of law will quickly lessen.

This Code cannot be fully retroactive, however. Constitutional limitations preclude retroactive application of rules of construction to alter property rights under trusts that became irrevocable prior to the effective date. Also, rights already barred by a statute of limitation or rule under former law are not revived by a possibly longer statute or more liberal rule under this Code. Nor is an act done before the effective date of the Code affected by the Code's enactment.

The Uniform Trust Code contains an additional effective date provision. Pursuant to Section 602(a), prior law will determine whether a trust executed prior to the effective date of the Code is presumed to be revocable or irrevocable.

For a comparable uniform law effective date provision, see Uniform *Probate Code § 8-101*.