

IN THE SUPREME COURT OF OHIO

MICHAEL K. CUNDALL, et al., : Case No. 08-0314  
: :  
Plaintiffs, : :  
: :  
vs. : :  
: :  
U.S. BANK TRUSTEE, et al., : :  
: :  
Defendants. : :

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MERIT BRIEF OF DEFENDANTS-APPELLANTS  
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AND CARSON NYE KOONS BAKER

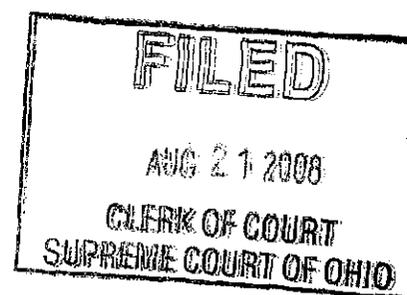
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## STATEMENT OF THE CASE AND FACTS

This case arises from a stock sale that occurred over 20 years ago. The Plaintiff Michael Cundall (“Cundall”) and his children now seek to rescind their agreement to the sale of that stock, and seek a remedy from out-of-state trust beneficiaries who played no role in the 1984 sale.

In 1976, the parents of the late John F. Koons III (“Bud Koons”) created a trust containing shares of Central Investment Corporation (“CIC”), naming Bud Koons as trustee. (Appx. 7). Michael Cundall and other Cundall family member were among the beneficiaries of that Trust. In 1984, the Cundall family members voluntarily agreed to sell to CIC shares in a company called Koons-Cundall-Mitchell (“KCM”), a holding company that owned stock of CIC. The Cundall family interests in KCM were in part owned by them outright and in part owned by two trusts, one of which was the trust created to benefit the Cundalls by Bud Koons’ parents. (Appx. 8, Supp. 1-4). Members of the Cundall family now seek to overturn the transactions they, their predecessors and their trustees voluntarily agreed to in 1984, because the stock they sold in 1984 would have been far more valuable if held until 2005.

This brief is filed on behalf of Christina Koons (“Christina”), one of Bud Koons’s children, and her children, Appellants Nicholas Koons Baker (“Nicholas”) and Carson Nye Koons Baker (“Carson”) (collectively referred to as “the Washington State Beneficiaries” or the “Koons Beneficiaries”).<sup>1</sup> They are beneficiaries of trusts established by Bud Koons and of a separate, irrevocable trust share of the trust described above, established by Bud Koons’ parents. They are long time citizens of the State of Washington. (Supp. 55). They and other Koons

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<sup>1</sup> The Koons Beneficiaries also include additional Koons family members represented by separate counsel in this case. For purposes of the issues raised in this appeal, Christina, Nicholas and Carson share the defenses available to the other Koons Beneficiaries.

Beneficiaries were named as defendants by the Cundalls on claims for declaratory judgment, and in a cross-claim for unjust enrichment (Supp. 114).

In the amended complaint filed March 24, 2006, plaintiff Cundall alleges that, in 1984, he and his family members were somehow coerced by Bud Koons, then a Trustee, to approve the sale of trust owned shares in KCM. (Supp. 62, ¶¶ B-D). That claim is made despite the facts that (1) the Cundall family had the assistance of their own legal counsel in 1984; (2) the Cundall family, and trusts benefiting them, received more than \$3.5 million in exchange for their KCM shares in 1984; and (3) they released Bud Koons in writing for any claims arising from such sale. (Supp. 7-8, 15).

Twenty-two years after the stock sale, Cundall now claims he and his family were harmed because CIC increased in value after 1984 and ultimately was sold in 2005 “for approximately \$400 million.” (Supp. 63). Cundall alleges that Bud Koons breached his fiduciary duties by mishandling trust funds and misrepresenting the value of the stock the Cundalls agreed to sell in 1984. Cundall named all of the Koons Beneficiaries as defendants because they are (or have been) beneficiaries of trusts that held stock in CIC, the company that purchased the Cundall family’s KCM shares in 1984. (Supp. 63). On August 30, 2006, Cundall’s children, defendants Michael Cundall, Jr., Courtney Fletcher Cundall and Hillary Cundall (“the Cundall Children”), filed a cross-claim against the Koons Beneficiaries. (Supp. 114).

There are no allegations that the Koons Beneficiaries participated in or were even aware of the actions of Bud Koons in 1984. In fact, two of the Washington State Beneficiaries, Carson and Nicholas, were not born in 1984. (Supp. 54). The sole claim in Cundall’s amended complaint against the Koons Beneficiaries, Count IV, alleges that “Plaintiffs and Defendants are all entitled to a declaration of their rights and obligations under the trusts as such may be

modified or rearranged by the court.” (Supp. 67). Count IV neither describes what “rights” plaintiff asserts against the Koons Beneficiaries nor asks for recovery of past distributions to them.

The Cundall Children’s cross-claim (Count Three) alleges that in 1984 the Koons Beneficiaries “received a benefit in the form of an increase in the value of the CIC stock owned by them, held for their benefit in Fund A, and held for their benefit in the Koons Trusts...,” and that “it would be unjust for the Koons Beneficiaries to retain the benefit without payment to the Cundall Beneficiaries...” (Supp. 123). The cross-claim seeks a constructive trust “on these proceeds for the benefit of the Cundall Beneficiaries, including Cross-Claimants.” (Supp. 123). The constructive trust that the Cundall Children seek to impose apparently encompasses some portion of past trust distributions to the Washington State Beneficiaries. (Supp. 130). As a result, the cross-claim poses a threat to the personal assets of the Washington State Beneficiaries based on distributions they received from irrevocable trusts that were established more than six years ago.

All of the Koons Beneficiaries moved to dismiss the complaint and cross-claim, arguing, inter alia, that the court lacked personal jurisdiction over them as out-of-state defendants and that the claims were barred by the applicable six-year statute of limitations.

The Washington State Beneficiaries have lived in the State of Washington for many years. (Supp. 55). They neither conduct any business nor own any real estate in Ohio; Nicholas and Carson Koons have only rarely visited the State of Ohio. (Supp. 55). In response, the trial court dismissed without prejudice the claims against all of the Koons Beneficiaries for lack of personal jurisdiction. (Appx. 43). On December 28, 2007, the court of appeals reversed, finding

that the trial court could exercise personal jurisdiction simply because the Koons Beneficiaries had received distributions from an Ohio trust. (Appx. 28).

The Washington State Beneficiaries present the following argument, and also adopt the arguments and propositions of law offered by the other Defendants-Appellants in this case.

### ARGUMENT

#### PROPOSITION OF LAW NUMBER 1:

**WHERE THE ONLY ALLEGED CONTACT OUT-OF-STATE DEFENDANTS HAVE WITH THE STATE OF OHIO IS THEIR RECEIPT OF PAYMENTS SENT FROM WITHIN THE STATE OF OHIO, AN OHIO COMMON PLEAS COURT LACKS PERSONAL JURISDICTION OVER THEM ON CLAIMS FOR UNJUST ENRICHMENT.**

The United States and Ohio Constitutions prevent an Ohio Common Pleas Court from exercising personal jurisdiction over out-of-state defendants whose contacts with Ohio are limited to the occasional receipt of trust distributions from an Ohio trust. The newly adopted Ohio Trust Code, R.C. 5801-5811, cannot override the Ohio and United States Constitutions by subjecting out-of-state beneficiaries to suit in Ohio, particularly in a case filed before the Code took effect.

As trusts become increasingly more common devices in estate planning or the preservation of family wealth, the frequency of litigation arising from the interpretation or enforcement of trusts undoubtedly will increase. Ohio families use trusts to provide for the care or education of successive generations. As those generations move to different states or nations, the fundamental constitutional right to due process is implicated if out-of-state trust beneficiaries can be haled into an Ohio court every time a dispute arises that might implicate the trusts that could benefit them, or which challenge past distributions from such trusts.

While the trial court agreed that it had no jurisdiction over any of the Koons Beneficiaries, the court of appeals found that the Koons Beneficiaries are subject to personal jurisdiction based on the simplistic premise that “they took the money [trust distributions or payment for personally held stock] and with that came jurisdiction.”<sup>2</sup> No authority relied on by the court, however, allows the exercise of personal jurisdiction simply because an out-of-state defendant received a payment from a source within the forum state.

In determining whether an Ohio court has personal jurisdiction over a nonresident defendant, a court remains “obligated” under this Court’s precedent to apply a two-part test, determining (1) whether Ohio’s long-arm statute, R.C. 2307.382 and the complementary Rule 4.3, Ohio Rules of Civil Procedure, confer jurisdiction, and (2) whether granting jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution.<sup>3</sup>

Due process is satisfied if a forum has either specific or general jurisdiction over a non-resident defendant.<sup>4</sup> Specific jurisdiction turns upon the relationship between the defendant, the forum, and the litigation, and exists only when the litigation at hand arises out of or relates to a defendant’s “minimum contacts” with the forum.<sup>5</sup> General jurisdiction, on the other hand, is based upon “continuous and systematic” contacts with the forum that are unrelated to the underlying litigation.<sup>6</sup>

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<sup>2</sup> Appx. 26, *Cundall v. U.S. Bank*, 1<sup>st</sup> Dist. Nos. C-070081, C-0700826, 2007-Ohio-7067, ¶ 69.

<sup>3</sup> *U.S. Sprint Communications Co. Ltd. Partnership v. Mr. K's Foods, Inc.*, 68 Ohio St.3d 181, 183-184, 1994-Ohio-504, 624 N.E.2d 1048, 1051; *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541, 543.

<sup>4</sup> *Helicopteros Nacionales de Colombia, S.A. v. Hall* (1984), 466 U.S. 408, 414-415 nn.8-9, 104 S.Ct. 1868, 80 L.Ed.2d 404.

<sup>5</sup> *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 472, 105 S.Ct. 2174, 85 L.Ed.2d 528.

<sup>6</sup> *Helicopteros*, 466 U.S. at 415 n. 9.

Only if permitted by Ohio's Long-Arm Statute and if constitutional due process requirements are met can an Ohio court exercise personal jurisdiction over a non-resident defendant.<sup>7</sup> The assertion of long-arm jurisdiction under R.C. 2307.382(A)(1)-(9) requires that any claim against the Washington State Beneficiaries must arise from their "transacting any business in the state," "causing tortious injury by any act or omission in this state," or "having an interest in, using or possessing real property in this state." Although the Washington State Beneficiaries neither reside in, conduct business in, nor own real property in Ohio (Supp. 55), the court of appeals found that the mere *acceptance* of funds transmitted from Ohio constitutes "transacting any business in the state."<sup>8</sup> But neither this Court nor the United States Supreme Court has gone so far in finding "minimum contacts" from such passive, rather than purposeful, conduct by a non-resident defendant.

The United States Supreme Court has found that the "'constitutional touchstone' of the determination whether an exercise of personal jurisdiction comports with due process 'remains whether the defendant *purposefully* established 'minimum contacts' in the forum state.'"<sup>9</sup> Such "minimum contacts must have a basis in some act by which the defendant *purposefully* avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws."<sup>10</sup>

Contrary to the court of appeals' decision, jurisdiction cannot be based simply on the receipt by an out-of-state defendant of payments from Ohio. The exercise of personal jurisdiction is justified only "'where the contacts proximately result from *actions* by the

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<sup>7</sup> *Goldstein v. Christiansen*, 70 Ohio St.3d at 236.

<sup>8</sup> Appx. 26, *Cundall v. U.S. Bank, N.A.*, 2007-Ohio-7067 ¶ 72.

<sup>9</sup> *Asahi Metal Industries Co. Ltd. v. Superior Ct. of California* (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026, 1030, 92 L.Ed.2d 92, 102, quoting *Burger King v. Rudzewicz* (1985), 471 U.S. 462, 474 (emphasis added).

<sup>10</sup> *Asahi*, 480 U.S. at 112, quoting *Burger King*, 471 U.S. at 475 (emphasis in original).

defendant *himself* that create a “substantial connection” with the forum state.”<sup>11</sup> As explained by the United States Supreme Court, “[t]he ‘substantial connection’ between the defendant and the forum State necessary for a finding of minimum contacts must come about *by the action of the defendant purposefully directed toward the forum state.*”<sup>12</sup> The mere acceptance by a non-resident defendant beneficiary of distributions from an Ohio trust, without more, hardly amounts to an act “purposefully directed toward” Ohio.<sup>13</sup> Furthermore, only the acts of the *defendants*, and not some third party satisfy the jurisdictional requirement.<sup>14</sup> Thus, the United States Supreme Court has held that acceptance of positions as officers and directors of a corporation chartered in the forum state or owning stock or other interests in the corporation,<sup>15</sup> or receiving checks from a bank in the forum state<sup>16</sup> do not satisfy the minimum contacts requirement for jurisdiction. Courts in other jurisdictions have held that a beneficiary’s receipt of monetary benefits from a trust created in the forum state,<sup>17</sup> a bank’s receipt of trust assets transferred out of

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<sup>11</sup> *Id.* (emphasis in original).

<sup>12</sup> *Id.* (internal citation omitted) (emphasis in original).

<sup>13</sup> See Appx. 107, *State ex rel. DeLuca v. Krichbaum* (Mar. 29, 1995), Mahoning App. No. 94 C.A. 144, 1995 Ohio App. LEXIS 1354 (holding that relators’ receipt and cashing of checks from person in Ohio did not satisfy due process requirements where this was the only contact with Ohio).

<sup>14</sup> *Helicopteros Nacionales de Colombia, supra*, 466 U.S. at 417. See also Appx. 118, *Arthur, Ross & Peters v. Housing, Inc.* (5th Cir. 1975), 508 F.2d 562, 565 (holding that plaintiff’s unilateral act of mailing payment to nonresident from the forum state did not satisfy the contact requirements for personal jurisdiction over the nonresident defendant).

<sup>15</sup> *Shaffer v. Heitner* (1977), 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683.

<sup>16</sup> *Helicopteros*, 466 U.S. at 417-18.

<sup>17</sup> Appx. 111, *C&H Development Co. v. McIvor* (N.D. Cal. Aug. 6, 1996), 1996 U.S. Dist. LEXIS 12029, \*9 (finding that unilateral action on the part of the decedent is not sufficient to demonstrate that a trust beneficiary purposefully availed herself of the privilege of doing business in the forum state).

the forum state,<sup>18</sup> a defendant's being named as a beneficiary on an annuity contract,<sup>19</sup> and a defendant's receipt of a contractual payment from the forum state<sup>20</sup> are all insufficient to satisfy the requirements for personal jurisdiction.

In this case, the Washington State Beneficiaries lack sufficient contacts with the State of Ohio to justify the exercise of personal jurisdiction to support a judgment against them. The plaintiff and cross-claimants have failed to establish the existence of a purposeful action by Christina, Nicholas or Carson "directed toward" Ohio. Nevertheless, the court of appeals found, without citation to any authority on point, that "the Koons defendants have dealings with Ohio" solely because "they have accepted money from the trusts. Accepting money from a trust with its situs in Ohio firmly establishes jurisdiction under Ohio's long-arm statute."<sup>21</sup> This finding contravenes the unambiguous direction of the United States Supreme Court requiring a plaintiff to demonstrate *an action purposefully directed at the forum state* to establish personal jurisdiction over an out-of-state defendant.

Likewise, the mere receipt of distributions by an out-of-state beneficiary from an Ohio trust would not cause a beneficiary reasonably to anticipate being "haled into court" in Ohio. As

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<sup>18</sup> Appx. 115, *First American Bank of Virginia, N/A v. Reilly* (Ind. Ct. App. 1990), 563 N.E.2d 142 (holding there was no personal jurisdiction over a nonresident trustee whose only contact with the state was receipt of the residuary estate when it was transferred out of the forum).

<sup>19</sup> Appx. 133, *Saler v. Irick* (Ind. Ct. App. 2003), 800 N.E.2d 960, 970-71 (the court found, however, there were sufficient contacts for jurisdiction over a separate claim pertaining to payable-on-death benefits from a decedent's bank account because the defendant had gone to the forum state, presented the proper documentation, and made deliberate efforts to receive payment.)

<sup>20</sup> Appx. 118, *Arthur, Ross & Peters v. Housing, Inc.*, *supra*, 508 F.2d at 565; Appx. 121, *Frazier v. Preferred Credit Corp.* (W.D. Tenn. Jul. 31, 2002), 2002 U.S. Dist. LEXIS 19416 (finding no personal jurisdiction over owners of trust estate holding second mortgage loans secured by property in the forum state and receiving payments sent from the forum state); Appx. 130, *Whitener v. Whitener* (1982), 56 N.C. App. 599, 289 S.E.2d 887, *rev. denied*, 306 N.C. 393, 294 S.E.2d 221 (finding lack of personal jurisdiction over non-resident defendant who received note payments sent from the forum state).

<sup>21</sup> Appx. 26-27, *Cundall v. U.S. Bank, N.A.*, 2007-Ohio-7067, ¶ 72.

stated in *Hoover v. Society Bank of Eastern Ohio*,<sup>22</sup> “the mere creation of [a] trust in Ohio is not sufficient to invest this Court with personal jurisdiction over non-resident defendants.”

The cases relied on by the court of appeals uniformly involved defendants which had *purposefully* transacted business in Ohio. For example, in *U.S. Sprint Communications Co. v. Mr. K's Foods, Inc.*,<sup>23</sup> the defendant New York corporation had shipped products into Ohio and solicited sales through telephone calls into Ohio. In *Goldstein v. Christiansen*,<sup>24</sup> a defendant Florida accounting firm had mailed financial statements to Ohio investors who later alleged fraud based on those financial statements. In *Kentucky Oaks Mall v. Mitchell's Formal Wear, Inc.*<sup>25</sup> the defendant Georgia corporation had entered into a lease with an Ohio corporation, made phone calls into Ohio and mailed checks to Ohio. This Court, not surprisingly, found all these defendants were conducting business in Ohio, and had such minimum contacts with Ohio that would lead them to expect that they could be “haled into court” in Ohio.

In contrast, the Washington State Beneficiaries simply received occasional checks from Ohio trusts. Cross-claimants have neither shown (1) that their claim arises out of or relates to any activities of the Washington State Beneficiaries that were “purposely directed” at Cross-Claimants,<sup>26</sup> nor (2) that the Washington State Beneficiaries engaged in the type of purposeful activities in Ohio that “are continuous and systematic,” as required under *International Shoe*<sup>27</sup> and its progeny to support a constitutional exercise of personal jurisdiction.

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<sup>22</sup> Appx. 142, (N.D. Ohio App. 12, 1991), Case No. 5:90CV 1245, 1991 U.S. Dist LEXIS 19073, \*36.

<sup>23</sup> 68 Ohio St. 3d 181, 1994-Ohio-504, 624 N.E. 2d 1048.

<sup>24</sup> 70 Ohio St. 232, 1994-Ohio-229, 638 N.E. 2d 541.

<sup>25</sup> (1990), 53 Ohio St. 3d 73, 559 N.E. 2d 477.

<sup>26</sup> *Burger King v. Rudzewicz* (1985), 471 U.S. at 472-73 (citation omitted).

<sup>27</sup> *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 317, 66 S.Ct.154, 159, 90 L.Ed. 95, 102.

**PROPOSITION OF LAW NUMBER 2:**

**R.C. 5802.02(B) OF THE OHIO TRUST CODE CANNOT BE APPLIED RETROACTIVELY TO IMPOSE PERSONAL JURISDICTION OVER OUT-OF-STATE DEFENDANTS FOR THE PURPOSE OF RECOVERING PRIOR TRUST DISTRIBUTIONS IN A CASE FILED BEFORE THE STATUTE'S EFFECTIVE DATE.**

**A. The Ohio Trust Code Cannot Supersede Constitutional Requirements of Due Process**

To assert personal jurisdiction over the Koons Beneficiaries, Cundall and the Cundall Children rely on R.C. 5802.02(B) of the new Ohio Trust Code (OTC), which took effect on January 1, 2007. It provides:

*With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from the trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.*<sup>28</sup>

This statute became effective more than 20 years after the alleged cause of action arose in 1984, and nearly a year after this action was filed in 2006.

As argued in more detail in a separate memorandum filed by other Koons Beneficiaries, R.C. 5802.02(B) cannot be applied retroactively to allow personal jurisdiction over out-of-state beneficiaries, particularly where the exercise of jurisdiction would violate the Due Process Clause of the Fourteenth Amendment of the United States Constitution.<sup>29</sup> A state law cannot

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<sup>28</sup> R.C. 5802.02(B) (2007) (emphasis added).

<sup>29</sup> *Office of Sen. Mark Dayton v. Hanson* (2007), \_\_\_ U.S. \_\_\_, 127 S.Ct. 2018, 2021, 167 L.Ed.2d 898, 902 (Statutes should be interpreted so as to avoid constitutional difficulties).

override the U.S. Constitution.<sup>30</sup> R.C. 5802.02 cannot be construed so as to violate the constitutional requirements of due process, addressed earlier in this memorandum.<sup>31</sup>

**B. By Its Own Terms, the Ohio Trust Code Does Not Retroactively Apply to Impose Jurisdiction over Christina, Nicholas and Carson.**

The new OTC does not permit retroactive application of OTC provisions that would “substantially interfere with the effective conduct of the judicial proceedings” or “prejudice the rights of the parties.”<sup>32</sup> Nor may a provision of the OTC be applied to “affect an act done before the effective date of those chapters.”<sup>33</sup> In this case, a statute that retroactively provides a court with personal jurisdiction over out-of-state beneficiaries solely based on their receipt of distributions prior to January 1, 2007 is inconsistent with the OTC’s own provision limiting retroactive application. Such an exercise of jurisdiction retroactively would prejudice the Washington State Beneficiaries’ rights, interfere with proceedings months in process, and affect acts that occurred long before January 1, 2007.

**C. Section 28, Article II of the Ohio Constitution Prevents Retroactive Application of the Ohio Trust Code**

Section 28, Article II of the Ohio Constitution prevents the retroactive application of R.C. 5802.02(B).<sup>34</sup> This Court has previously noted that the retroactivity clause “nullifies those new laws that ‘reach back and create new burdens, new duties, new obligations, or new liabilities not

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<sup>30</sup> The United States “Constitution . . . shall be the Supreme Law of the Land; and the Judges in every state shall be bound thereby, anything in the Constitution or Laws of any State notwithstanding.” U.S. Const. art. VI cl. 2.

<sup>31</sup> See *Hamilton v. Fairfield Twp.* (12th Dist. 1996), 112 Ohio App.3d 255, 678 N.E.2d 599; *State of Ohio v. Sinito* (1975), 43 Ohio St.2d 98, 101, 330 N.E.2d 896.

<sup>32</sup> R.C. 5811.03(A)(3).

<sup>33</sup> R.C. 5811.03(A)(5).

<sup>34</sup> “The general assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.” Section 28, Article II, Ohio Constitution.

existing at the time [the statute becomes effective]. . . .”<sup>35</sup> The test for unconstitutional retroactivity depends on whether the General Assembly expressly intended the statute to apply retroactively and, if so, “whether the statute is substantive, rendering it *unconstitutionally* retroactive, as opposed to merely remedial.”<sup>36</sup>

Here, retroactive application would prejudice the rights of out-of-state beneficiaries and create “new burdens,” “new obligations, or new liabilities” for the Washington State Beneficiaries by allowing the Cundall children to “hale them into Court” for the reimbursement of prior trust distributions they received based on transactions that occurred over twenty years ago. Further, the application of R.C. 5802.02 would be “substantive” because it would be used to attack “a past transaction,” i.e., past distributions of trust assets. This Court explained that a retroactive statute is substantive, and therefore *unconstitutionally* retroactive – if it impairs vested rights, affects an accrued substantive right, or imposes new or additional burdens, duties, obligations, or liabilities as to past transaction.<sup>37</sup>

In violation of Section 28, Article II of the Ohio Constitution, the claims of the Cundall children, if successful, would impose “new or additional burdens, duties, obligations, or liabilities” upon Christina, Nicholas and Carson that would require them to refund past trust distributions that either have already been spent for things such as college tuition or expenses, or that are now commingled with their own personal assets.

By its own terms, however, jurisdiction under R.C. 5802.02(B) applies only to claims “with respect to their interests in the trust,” not to distributions already received from the trusts. To that extent, the statute seems to create some type of quasi *in rem* jurisdiction, extending not to

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<sup>35</sup> *Bielat v. Bielat*, 87 Ohio St.3d 350, 352-53, 2000-Ohio-451, 721 N.E.2d 28, 32 (citation omitted).

<sup>36</sup> 87 Ohio St.3d at 353 (emphasis in original).

<sup>37</sup> *Id.* at 354 (emphasis in original).

the Koons Beneficiaries themselves, but only to the assets held in Ohio that may someday benefit them. The Court may be able to avoid ruling that R.C. 5802.02 violates the Ohio or United States Constitution through a proper construction of the statute. When there is a potential conflict between a statute and the Ohio or the United States Constitution, a court must first attempt to construe the statute so as to be compatible with constitutional requirements before ruling that the statute is unconstitutional.<sup>38</sup> To avoid the obvious conflict with Constitutional due process requirements, R.C. 5802.02 *could* be construed to limit jurisdiction over out-of state beneficiaries only to those claims involving funds *still held in an Ohio Trust* (“their interests in the trust”). Such an exercise of jurisdiction would not extend to a claim against the personal assets of out-of-state beneficiaries derived from past trust distributions. But the court of appeals simply failed to address the express limitation of R.C. 5802.02 to the beneficiaries’ “interests in the trust,” wrongly holding that the OTC allows the exercise of personal jurisdiction over the Koons Beneficiaries without any limitation, simply because the out-of-state defendants benefited from an Ohio trust. Such a broad exercise of jurisdiction flatly violates Constitutional guarantees of due process.

**PROPOSITION OF LAW NUMBER 3:**

**THE SIX-YEAR STATUTE OF LIMITATION SET BY R.C. 2305.07 APPLIES TO CLAIMS FOR UNJUST ENRICHMENT, AND BEGINS TO RUN AT THE TIME OF THE TRANSACTION GIVING RISE TO THE ALLEGED UNJUST ENRICHMENT.**

In holding that the statute of limitations had not expired on the claims for the creation of a constructive trust, the court of appeals failed to distinguish between separate causes of action asserted against different defendants. While focusing on the remedy of constructive trust sought

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<sup>38</sup> *State ex rel. Purdy v. Clermont Co. Bd. of Ed.* (1996), 77 Ohio St.3d 338, 345-46, 673 N.E.2d 1351, 1356. (“courts must apply all presumptions and pertinent rules of construction so as to uphold, if at all possible, a statute or ordinance assailed as unconstitutional.”) (citation omitted).

by Cundall and the Cundall children, the court of appeals failed to distinguish the causes of action brought against express trustee Bud Koons (fraud and breach of fiduciary duty) from the causes of action for unjust enrichment brought against the alleged constructive trustees: the Koons Beneficiaries.

In *Estate of Cowling v. Estate of Cowling*,<sup>39</sup> this Court noted that a constructive trust is a *remedy* for the “wrongful deprivation” of property, which allows a plaintiff to bring parties allegedly holding that property into court, possibly to disgorge the property that they may have unjustly retained. This constructive trust remedy is quite different from a claim for damages arising from allegedly fraudulent conduct, or breach of fiduciary duty, brought against an express trustee such as Bud Koons. The court of appeals’ confusion between the distinct claims made against Bud Koons, as opposed to the claim against the Koons Beneficiaries, resulted in a decision that improperly applied the same statute of limitations to the claims of fraud and breach of fiduciary duty against trustee Bud Koons to the claim of unjust enrichment asserted against the Koons Beneficiaries, who never had (let alone breached) any fiduciary responsibilities to plaintiffs.

The court of appeals found that the statute of limitations for fraud or breach of fiduciary duty against Bud Koons and his representatives did not begin to run until 2005, when Bud Koons died and ceased acting as a trustee for one of the trusts at issue in this case.<sup>40</sup> Whether or not that conclusion was correct, the court of appeals treated a claim for unjust enrichment against constructive trustees as if it was a claim for fraud or breach of fiduciary duty against an express

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<sup>39</sup> 109 Ohio St.3d 296, 2006-Ohio-2418, 847 N.E.2d 405, ¶¶ 18-26.

<sup>40</sup> Appx. 21, *Cundall v. U.S. Bank, N.A.*, 2007-Ohio-7067, ¶ 52.

trustee.<sup>41</sup> The court of appeals also failed to address the distinct statute of limitations applicable to the Cundall children's claim against the Koons Beneficiaries for unjust enrichment.<sup>42</sup>

Whether or not the court of appeals properly ruled on the statute of limitations applicable to the claims against Bud Koons, any claim for unjust enrichment against the Koons Beneficiaries would have accrued in 1984, when Bud Koons allegedly "forced other Cundall family members to sell all of their [KCM] shares back to CIC for the same price, thereby unjustly enriching the Koons Beneficiaries."<sup>43</sup> (Supp. 120-121).

Ohio's statute of limitations for a claim of unjust enrichment is six years *running from the date of the event that caused the unjust enrichment*.<sup>44</sup> Under Ohio law, the claim accrues on the date money or property is retained under circumstances in which it is unjust to do so.<sup>45</sup>

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<sup>41</sup> *Ruple v. Hiram College* (1928), 35 Ohio App. 8, 15, 171 N.E. 417 ("It is well settled that a subsisting, recognized, and acknowledged trust, . . . , is not within the operation of the statute of limitations. But this rule must be understood as applying only to those technical and continuing trusts which are alone cognizable in a court of equity; and 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."), quoting 2 Wood on Limitation (4th Ed.) § 200.

<sup>42</sup> While the trial court did not reach the issue of the applicable statute of limitations in dismissing the claims against the Cundall beneficiaries, this Court may affirm dismissal of Count Three of the Cundall Children's cross-claims against the Washington State Beneficiaries on independent grounds found in the record, including a lack of jurisdiction. *See Joyce v. General Motors Corp.* (1990), 49 Ohio St. 3d 93, 96, 551 N.E.2d 172, 174; *Agricultural Ins. Co. v. Constantine* (1944), 144 Ohio St.275, 284, 58 N.E.2d 658, 663. Even if a court of appeals rejects a legal rationale for a decision, it may affirm the decision on independent grounds. *See Lumbermans Mut. Cas. Co. v. Belsz*, 8th Dist. Nos. 82903 and 82919, 2003-Ohio-7072, ¶ 33.

<sup>43</sup> The stock sale was not *to* Bud Koons, but rather to CIC. Moreover, the shares at issue are shares of KCM, not CIC. The court of appeals seems to have lost sight of these facts, stating: "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." Appx. 32, *Cundall*, 2005-Ohio-1975, ¶ 86.

<sup>44</sup> *See* R.C. 2305.07 (the statute of limitations for "a contract not in writing, express or implied"); *Ignash v. First Service Federal Credit Union*, Franklin App. No. 01AP-1326, 2002-Ohio-4395, ¶ 17, citing *Liberty Mut. Ins. Co. v. Indus. Comm.* (1988), 40 Ohio St.3d 109, 110-111, 532 N.E.2d 124,125. *See also* *LeCrone v. LeCrone* (10th Dist. No. 04AP-312), 2004-Ohio-6526, ¶ 20.

<sup>45</sup> *Palm Beach Co. v. Dun & Bradstreet, Inc.* (1995), 106 Ohio App.3d 167, 175, 665 N.E.2d 718 (where plaintiff alleged that the receipt of money was unlawful, the claim accrued when the

“There is no exception to measure the statute of limitations from the time the alleged unjust enrichment was discovered, as there is for fraud.”<sup>46</sup> As a result, the claim expired in 1990, and is barred by the statute of limitations, depriving the trial court of subject matter jurisdiction over the claim.<sup>47</sup>

Because the claim for unjust enrichment is time-barred, any remedy for unjust enrichment in the form of a constructive trust arising from alleged unjust enrichment is barred by the same six-year statute of limitations, which began to run at the time of the disputed 1984 stock transfer: “If the cause of action in which imposition of a constructive trust is sought as a remedy is barred by a statute of limitation, the imposition of a constructive trust is likewise barred.”<sup>48</sup> Where a remedy of constructive trust is sought based on a claim that an innocent property owner has been unjustly enriched by the wrongful or unjustified act of another, the statute of limitations for claims against the property owner runs from the date of the allegedly wrongful transfer of property which creates the constructive trust. In this case the transfer that allegedly resulted in benefits to the Koons Beneficiaries was the stock sale in 1984.

“If 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.”<sup>49</sup> The Ohio Supreme Court has adopted this rule.<sup>50</sup> Other Ohio decisions affirm that the statute runs

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overpayment occurred). See also *LeCrone v. LeCrone*, *supra*, 2004-Ohio-6526, ¶ 20; *Ignash v. First Service Federal Credit Union*, *supra*, 2002-Ohio-4395, ¶ 20.

<sup>46</sup> *Binsack v. Hipp* (6th Dist. H-97-029, Jun. 5, 1998), 1998 Ohio App. LEXIS 2370, \*17.

<sup>47</sup> See R.C. 2305.07.

<sup>48</sup> *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113, 121.

<sup>49</sup> 9 Bogert, *Trusts and Trustees*, (2d ed.), § 953. To illustrate this point, Bogert provides the example of title obtained by “a breach of loyalty on the part of a fiduciary.” *Id.* Thus, the court of appeals’ holding that the cause of action against Bud Koons did not arise until Bud Koons “ceased to be a trustee,” (Appx. 31, *Cundall*, 2005-Ohio-1975, ¶ 84), also is in error.

<sup>50</sup> *Peterson v. Teodosio*, 34 Ohio St.2d at 172.

from the time of the wrongful transfer.<sup>51</sup> Here, the alleged wrongful transfer was in 1984, and the statute would have expired in 1990.

While the Cundall children/cross-claimants were minors in 1984, when the alleged wrongful transfer of stock occurred (Supp. 120-121), the limitations on their claims has run in any event. More than six years have elapsed since the youngest cross-claimant turned 18 in 1995 (Supp. 126-128), meaning that the six-year statute of limitations ran at the latest in 2001.<sup>52</sup>

Whether or not the claim against Bud Koons began to run in 1984 or at his death in 2005, the claim for unjust enrichment *against the Washington State Beneficiaries*, and for the creation of a constructive trust over their irrevocable trust funds and any past distributions they received, is barred by the six-year statute of limitations applicable to claims for unjust enrichment.

**PROPOSITION OF LAW NO. 4:**

**PRIOR TO FILING SUIT TO RECOVER PROPERTY THROUGH A REMEDY OF CONSTRUCTIVE TRUST, A PLAINTIFF WHO SIGNED A RELEASE BUT NOW ALLEGES THAT THE PROPERTY WAS OBTAINED THROUGH ANOTHER PERSON'S FRAUD IN THE INDUCEMENT MUST TENDER BACK THE CONSIDERATION HE RECEIVED IN EXCHANGE FOR THE PROPERTY.**

More than 20 years after the fact, the Cundalls seek a "do-over." In a separate brief, the Administrator of the Estate of Bud Koons and the Trustees of various trusts at issue in this case have correctly argued that Ohio's tender-back rule bars the Cundalls' effort to take a "mulligan" with respect to their 1984 decision to authorize the sale of KCM shares, without first tendering back more than \$3 million paid by CIC in 1984 for those KCM shares. Even if the Cundalls

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<sup>51</sup> See, e.g., *Veazie v. McGugin* (1883), 40 Ohio St. 365, 375-76 (the statute runs from date the constructive trustee took possession of property and protects those claiming title through the constructive trust); *Ruple v. Hiram College* (Ohio App. 8th Dist. 1928), 35 Ohio App. 8; *Allen v. Deardoff* (1st Dist. 1921), 14 Ohio App. 16, 19-20.

<sup>52</sup> Under R.C. 2305.16, which tolls the statute due to minority, the claim must be presented within the limitations period once the age of majority is reached.

could prove fraud in the inducement by Bud Koons as they allege, under Ohio law they first must tender back the consideration they received at the time they parted with the property (shares) they now seek to recover.<sup>53</sup>

With no applicable authority to support its ruling, the court of appeals reversed the trial court and refused to apply the tender-back rule, concluding that *Haller* does not apply where the defendant owed a fiduciary duty to the Plaintiff.<sup>54</sup> As Appellants Caudill and others argue in detail, this conclusion is not supported by applicable case law, and is in direct conflict with a recent decision of the Eighth District Court of Appeals in a case in which the defendant owed a fiduciary duty to the plaintiff.<sup>55</sup>

But regardless of the court of appeals' decision that the tender-back rule does not apply where the defendant allegedly owed a fiduciary duty, that rationale does not protect the Cundalls' claim against any of the Koons Beneficiaries. The Koons Beneficiaries did not owe a fiduciary duty to the Cundalls when they agreed to sell the stock and signed a Release in 1984.

The Cundalls seek equitable remedies. They ask for rescission of the 1984 transaction even though the Cundalls signed releases in exchange for payments. They also seek the creation of a constructive trust imposed on trust assets and trust distributions already received by the Koons Beneficiaries. However, as noted by the Second District Court of Appeals in *Kercher v. Brown*,<sup>56</sup> "the requirement of 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

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<sup>53</sup> See *Haller v. Borrer Corp.* (1990), 50 Ohio St. 3d 10, 13-14, 552 N.E.2d 207, citing *Manhattan Life Ins. Co. v. Burke* (1903), 69 Ohio St. 294, 70 N.E. 74 and *Shallenberger v. Motorists Mut. Ins. Co.* (1958), 167 Ohio St. 494, 150 N.E.2d 295.

<sup>54</sup> Appx. 12, *Cundall*, 2007-Ohio-7067, ¶ 22.

<sup>55</sup> *Weisman v. Blaushild*, 8th Dist. No. 88815, 2008-Ohio-219, discretionary appealed not allowed, 2008-Ohio-2595, 887 N.E.2d 1203.

<sup>56</sup> (2nd Dist. 1947), 49 Ohio L. Abs. 25, 72 N.E. 2d 588, 590.

the plaintiff has.” In *Haller*, this Court spoke of the equitable principles that are the foundation of the tender-back rule, noting that “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.”<sup>57</sup> The Court also noted that public policy favors tender, because the rule encourages “the prevention of litigation by compromise and settlement of controversies.”<sup>58</sup>

The Koons Beneficiaries had no fiduciary duties to the Cundalls in 1984. They had no involvement in the 1984 transactions. As a result, the novel “fiduciary duty” exception to the tender-back rule created by the court of appeals, even if upheld as to the claims against Bud Koons and U.S. Bank, does not apply to the Koons Beneficiaries. The claims for unjust enrichment and for the creation of a constructive trust made against the Washington State Beneficiaries by Cundall and the Cundall children should be dismissed because the Cundalls have not tendered-back of the approximately \$3.5 million received in 1984 by the Cundalls for the KCM shares.

### CONCLUSION

For the reasons discussed above, multiple reasons exist to reverse the decision of the Court of Appeals, including lack of personal jurisdiction over out-of-state defendants, expiration of the statute of limitations, and failure to tender consideration as a condition precedent to maintaining the action. Accordingly, this Court should reverse the decision of the Court of Appeals and direct dismissal of all claims against the Defendants-Appellants Christina Koons,

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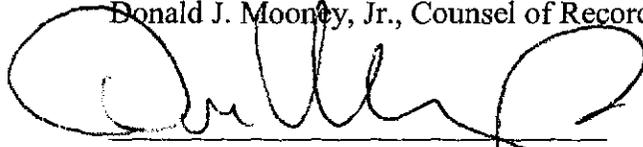
<sup>57</sup> 50 Ohio St. 3d at 14.

<sup>58</sup> Id.

Nicholas Koons Baker and Carson Nye Koons Baker for lack of personal jurisdiction and because the claims are barred by the applicable statute of limitations.

Respectfully submitted,

Donald J. Mooney, Jr., Counsel of Record

A handwritten signature in black ink, appearing to read 'P. Ginsburg', written over a horizontal line.

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**APPENDIX TO MERIT BRIEF**

Appx. Page No.

Notice of Appeal of Defendants-Appellants Christina Koons,  
Nicholas Koons Baker and Carson Nye Koons Baker dated  
February 11, 2008 .....1

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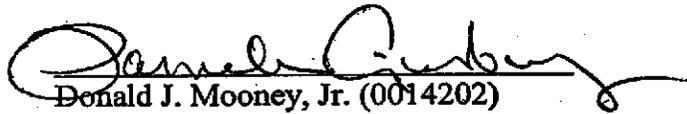
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**Notice of Appeal of Defendants-Appellants Christina Koons,  
Nicholas Koons Baker and Carson Nye Koons Baker**

Defendants-Appellants Christina Koons, Nicholas Koons Baker And Carson Nye Koons Baker hereby give notice of appeal to the Supreme Court of Ohio from the judgment of the Hamilton County Court of Appeals, First Judicial District, in case Nos. C070081 and C070082 on December 28, 2007.

This case raises questions of public or great general interest.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certified that I have caused a copy of the foregoing Notice of Appeal to be served by ordinary mail upon the following this 8<sup>th</sup> day of February 2008:

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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,

Plaintiff-Appellant,

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.

: APPEAL NOS. C-070081  
                  C-070082  
: TRIAL NO. A-0602080

: *OPINION.*

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COURT OF APPEALS

**OHIO FIRST DISTRICT COURT OF APPEALS**

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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,*

*Frost Brown Todd, LLC, and Susan Grogan Faller, for Defendant-Appellee U.S. Bank,*

*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,*

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

**OHIO FIRST DISTRICT COURT OF APPEALS**

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**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.

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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, Firststar, 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

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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.

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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.

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{¶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

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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. Borrer Corporation*,<sup>1</sup> 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.

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<sup>1</sup> (1990), 50 Ohio St.3d 10, 552 N.E.2d 207.

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{¶23} But “ordinary rules of fraud or undue influence do not apply where there is a fiduciary relationship.”<sup>2</sup>

{¶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*,<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup> The duty of loyalty requires a trustee who has a personal stake in a transaction to adhere to a particularly high standard of behavior.<sup>6</sup> The duty of loyalty is “the essence of the

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<sup>2</sup> *Muth v. Maxton* (1954), 53 O.O. 263, 119 N.E.2d 162.

<sup>3</sup> 161 Ohio App.3d 1, 2005-Ohio-1975, 829 N.E.2d 318.

<sup>4</sup> *O'Neill v. O'Neill*, 169 Ohio App.3d 852, 2006-Ohio-6426, 865 N.E.2d 917, at ¶8.

<sup>5</sup> 3 Scott, Trusts (5 Ed.2007) 1077, Section 17.2.

<sup>6</sup> *Id.*

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fiduciary relationship.”<sup>7</sup> Fiduciaries have the burden of proving the “perfect fairness and honesty” of a transaction that was entered into during the fiduciary relationship.<sup>8</sup> Whether the fiduciary has demonstrated the fairness of a transaction is a question of fact for a jury.<sup>9</sup>

{¶27} Fiduciaries have a duty to “administer the trust solely in the interests of the beneficiaries.”<sup>10</sup> 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.”<sup>11</sup>

{¶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.”<sup>12</sup> Statutory and

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<sup>7</sup> *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.

<sup>8</sup> *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.

<sup>9</sup> *Monaghan v. Rietzke (1949)*, 85 Ohio App. 497, 501, 89 N.E.2d 159.

<sup>10</sup> 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.

<sup>11</sup> *Meinhard v. Salmon (1928)*, 249 N.Y. 458, 464, 164 N.E. 545.

<sup>12</sup> *In re Estate of Binder (1940)*, 137 Ohio St. 26, 43-44, 27 N.E.2d 939.

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common law govern the rights and responsibilities of fiduciaries.<sup>13</sup> 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,<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup> And any direct dealings between a trustee and a beneficiary are “viewed with suspicion.”<sup>17</sup>

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

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<sup>13</sup> *Biddulph v. Delorenzo*, 8th Dist. No. 83808, 2004-Ohio-4502, at ¶27.

<sup>14</sup> R.C. 5810.09.

<sup>15</sup> See, also, *Restatement of the Law 2d, Trusts* (1992), Sections 170 and 206.

<sup>16</sup> 857 *Horwood and Wolven, Tax Management: Estates, Gifts and Trusts: Managing Litigation Risks of Fiduciaries* (2007), A-18.

<sup>17</sup> *Bogert, Trusts & Trustees*, (2 Ed.1995) 542, Section 943.

<sup>18</sup> 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.

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

***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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<sup>19</sup> *Gugel v. Hiscox* (1910), 122 N.Y.S. 557, 138 A.D. 61.

<sup>20</sup> *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.

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{¶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.”<sup>21</sup>

{¶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.<sup>22</sup>

{¶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.<sup>23</sup>

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<sup>21</sup> *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.

<sup>22</sup> 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.

<sup>23</sup> *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.<sup>24</sup> When determining the validity of a dismissal under the rule, we accept as true all factual allegations in the complaint.<sup>25</sup>

{¶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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<sup>24</sup> *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, 814 N.E.2d 44, at ¶5.

<sup>25</sup> *Id.*

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{¶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).<sup>26</sup> This court has held that a trial court may consider documents that are referred to or incorporated in the complaint.<sup>27</sup> 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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<sup>26</sup> *Southgate Development Corp. v. Columbia Gas Transmission Corp.* (1976), 48 Ohio St.2d 211, 358 N.E.2d 526, paragraph one of the syllabus.

<sup>27</sup> *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.

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{¶52} The statute of limitations for breach of a fiduciary duty and fraud is four years.<sup>28</sup> For a trustee, the statute of limitations will not begin running until the fiduciary relationship has ended.<sup>29</sup> 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.<sup>30</sup>

{¶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.<sup>31</sup>

{¶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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<sup>28</sup> R.C. 2305.09.

<sup>29</sup> *State ex rel. Lien v. House* (1944), 144 Ohio St. 238, 247, 58 N.E.2d 675.

<sup>30</sup> *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.

<sup>31</sup> *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.<sup>32</sup> 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.<sup>33</sup>

{¶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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<sup>32</sup> R.C. 2117.06(B).

<sup>33</sup> *Wells v. Michael*, 10th Dist. No. 05AP-1353, 2006-Ohio-5871, at ¶22.

passes outside of probate is not part of the estate.<sup>34</sup> 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.<sup>35</sup> 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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<sup>34</sup> *Id.*

<sup>35</sup> *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.

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{¶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.”<sup>36</sup>

{¶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

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<sup>36</sup> *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 297 N.E.2d 113.

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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.<sup>37</sup> In response to a motion to dismiss, the Cundalls were required only to make a prima facie case of jurisdiction.<sup>38</sup> We review the trial court's grant of the jurisdictional motion de novo.<sup>39</sup>

{¶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.<sup>40</sup> According to R.C. 5811.03,<sup>41</sup> 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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<sup>37</sup> *Giachetti v. Holmes* (1984), 14 Ohio App.3d 306, 307, 471 N.E.2d 165.

<sup>38</sup> *Id.* at 307.

<sup>39</sup> *Information Leasing Corp. v. Baxter*, 1st Dist. No. C-020029, 2002-Ohio-3930, ¶4.

<sup>40</sup> R.C. 5802.02(B).

<sup>41</sup> R.C. 5811.03(A)(3).

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{¶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,<sup>42</sup> and (2) that the exercise of personal jurisdiction over the out-of-state trust beneficiaries would comport with federal due-process requirements.<sup>43</sup>

{¶71} Ohio's long-arm statute delineates those instances that render defendants amenable to the jurisdiction of Ohio.<sup>44</sup> Included among these provisions is a grant of jurisdiction when a person "[transacts] any business in this state."<sup>45</sup> Courts construe "transacting any business" broadly, and the phrase includes "having dealings with."<sup>46</sup> 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."<sup>47</sup>

{¶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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<sup>42</sup> R.C. 2307.382 and Civ.R. 4.3.

<sup>43</sup> *Goldstein v. Christiansen*, 70 Ohio St.3d 232, 235, 1994-Ohio-229, 638 N.E.2d 541.

<sup>44</sup> R.C. 2307.382(A).

<sup>45</sup> R.C. 2307.382(A)(1).

<sup>46</sup> *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.

<sup>47</sup> *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.

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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."<sup>48</sup> 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*<sup>49</sup> 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."<sup>50</sup> 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."<sup>51</sup>

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<sup>48</sup> (1950), 339 U.S. 306; 70 S. Ct. 652.

<sup>49</sup> (1945), 326 U.S. 310, 66 S.Ct. 154.

<sup>50</sup> *Id.* at 316.

<sup>51</sup> *Id.* at 319.

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{¶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."<sup>52</sup> 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."<sup>53</sup> 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."<sup>54</sup>

{¶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*.<sup>55</sup> 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.<sup>56</sup> It must also weigh the "interstate judicial system's interest in obtaining the most

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<sup>52</sup> *Id.* at 317.

<sup>53</sup> *Id.* at 318.

<sup>54</sup> *Id.*

<sup>55</sup> (1987), 480 U.S. 102, 108-109, 107 S.Ct. 1026.

<sup>56</sup> *Id.* at 113.

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efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies.”<sup>57</sup> 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.”<sup>58</sup>

{¶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.”<sup>59</sup> 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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<sup>57</sup> *Id.*, quoting *World-Wide Volkswagen Corp. v. Woodson* (1980), 444 U.S. 286, 100 S.Ct. 559.

<sup>58</sup> *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 477, 105 S.Ct. 2174.

<sup>59</sup> *Id.* at 474.

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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."<sup>60</sup>

*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,<sup>61</sup> that the provision for personal jurisdiction over those persons who accept a distribution from a state-administered trust is constitutional.<sup>62</sup> And we note

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<sup>60</sup> *Burger King Corp.*, supra, at 475, quoting *World-Wide Volkswagen Corp.*, 444 U.S. at 297.

<sup>61</sup> 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.

<sup>62</sup> 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.<sup>63</sup>

{¶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.<sup>64</sup> 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.<sup>65</sup> When a person owns legal title to property, but equity recognizes

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<sup>63</sup> 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.

<sup>64</sup> *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 172, 297 N.E.2d 113.

<sup>65</sup> *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.<sup>66</sup> 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.<sup>67</sup> Upon remand, the Cundalls will bear the burden of proving that the court should impose a constructive trust.<sup>68</sup>

#### *XV. Accounting*

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

{¶88} By statute,<sup>69</sup> 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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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at ¶26.

<sup>68</sup> *Id.* at ¶20.

<sup>69</sup> R.C. 5808.13.

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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.

ENTERED  
DEC 28 2007



D76491719

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

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

Plaintiff-Appellant,

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  
GARCLA, 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.

: APPEAL NOS. C-070081  
C-070082  
: TRIAL NO. A-06020801 ✓  
: JUDGMENT ENTRY.

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 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"<sup>3</sup> 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

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<sup>3</sup> 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. Borrer 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),<sup>4</sup> 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

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<sup>4</sup> 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.

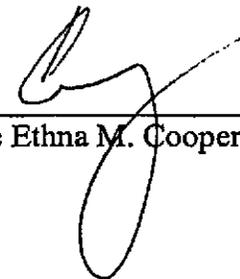
dismissal of the claims and cross-claims herein based on the failure to tender must be without prejudice.

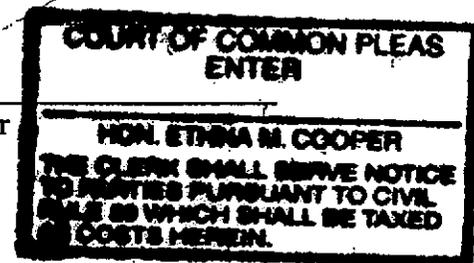
In addition, for the reasons stated in the Defendants' respective briefs, the Court also finds merit in the Defendants' arguments to dismiss: (1) with prejudice the claims against U.S. Bank on statute of limitation grounds; (2) without prejudice the claims against out-of-state Koons beneficiaries for 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.

  
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Judge Ethna M. Cooper



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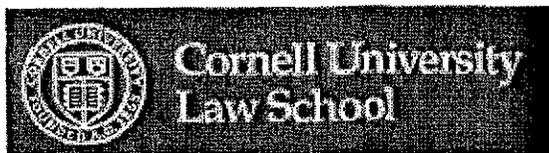
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# United States Constitution

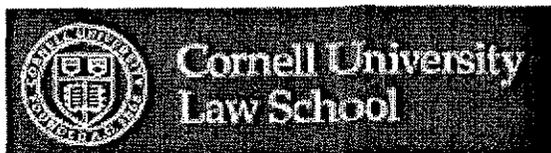
## Article VI

All debts contracted and engagements entered into, before the adoption of this Constitution, shall be as valid against the United States under this Constitution, as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

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## United States Constitution

### Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of Insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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## ARTICLE II: LEGISLATIVE

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### *REPEALED. WHEN SESSIONS SHALL COMMENCE.*

§25

(1851, rep. 1973)

### *LAWS TO HAVE A UNIFORM OPERATION.*

§26 All laws, of a general nature, shall have a uniform operation throughout the state; nor, shall any act, except such as relates to public schools, be passed, to take effect upon the approval of any other authority than the General Assembly, except, as otherwise provided in this constitution.

(1851)

### *ELECTION AND APPOINTMENT OF OFFICERS; FILLING VACANCIES.*

§27 The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this constitution, or the constitution of the United States, shall be made in such manner as may be directed by law; but no appointing power shall be exercised by the General Assembly, except as prescribed in this constitution; and in these cases, the vote shall be taken "viva voce."

(1851, am. 1953)

### *RETROACTIVE LAWS.*

§28 The General Assembly shall have no power to pass retroactive laws, or laws impairing the obligation of contracts; but may, by general laws, authorize courts to carry into effect, upon such terms as shall be just and equitable, the manifest intention of parties, and officers, by curing omissions, defects, and errors, in instruments and proceedings, arising out of their want of conformity with the laws of this state.

(1851)

### *NO EXTRA COMPENSATION; EXCEPTIONS.*

§29 No extra compensation shall be made to any officer, public agent, or contractor, after the service shall have been rendered, or the contract entered into; nor shall any money be paid, on any claim, the subject matter of which shall not have been provided for by preexisting law, unless such compensation, or claim, be allowed by two-thirds of the members elected to each branch of the General Assembly.

(1851)

### *NEW COUNTIES.*

§30 No new county shall contain less than four hundred square miles of territory, nor shall any county be reduced below that amount; and all laws creating new counties, changing county lines, or removing county seats, shall, before taking effect, be submitted to the electors of the several counties to be affected thereby, at the next general election after the passage thereof, and be adopted by a majority of all the electors voting at such election, in each of said counties; but any county now or hereafter containing one hundred thousand inhabitants, may be divided, whenever a majority of the voters residing in each of the proposed divisions shall approve of the law passed for that purpose; but no town or city within the same shall be divided, nor shall either of the divisions contain less than twenty thousand inhabitants.

(1851)

### *COMPENSATION OF MEMBERS AND OFFICERS OF THE GENERAL ASSEMBLY.*

§31 The members and officers of the General Assembly shall receive a fixed compensation, to be prescribed by law, and no other allowance or perquisites, either in the payment of postage or otherwise; and no change in their compensation shall take effect during their term of office.

(1851)

### *DIVORCES AND JUDICIAL POWER.*

§32 The General Assembly shall grant no divorce, nor exercise any judicial power not herein expressly conferred.

(1851)

### *MECHANICS' AND CONTRACTOR'S LIENS.*

§33 Laws may be passed to secure to mechanics, artisans, laborers, subcontractors and material men, their just dues by direct lien upon the property, upon which they have bestowed labor or for which they have furnished material. No other provision of the constitution shall impair or limit this power.

(1912)

### *WELFARE OF EMPLOYEES.*

§34 Laws may be passed fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety and general

or outlots lying on, adjacent to, or along such streets or alleys who have occupied them in the manner mentioned in this section.

Effective Date: 10-01-1953

### **2305.06 Contract in writing.**

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a specialty or an agreement, contract, or promise in writing shall be brought within fifteen years after the cause thereof accrued.

Effective Date: 07-01-1993

### **2305.07 Contract not in writing - statutory liability.**

Except as provided in sections 126.301 and 1302.98 of the Revised Code, an action upon a contract not in writing, express or implied, or upon a liability created by statute other than a forfeiture or penalty, shall be brought within six years after the cause thereof accrued.

Effective Date: 07-01-1993

### **2305.08 Partial payment.**

If payment has been made upon any demand founded on a contract, or a written acknowledgment thereof, or a promise to pay it has been made and signed by the party to be charged, an action may be brought thereon within the time limited by sections 2305.06 and 2305.07 of the Revised Code, after such payment, acknowledgment, or promise.

Effective Date: 10-01-1953

### **2305.09 Four years - certain torts.**

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;
- (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.

## **2305.16 Tolling due to minority or unsound mind.**

Unless otherwise provided in sections 1302.98, 1304.35, and 2305.04 to 2305.14 of the Revised Code, if a person entitled to bring any action mentioned in those sections, unless for penalty or forfeiture, is, at the time the cause of action accrues, within the age of minority or of unsound mind, the person may bring it within the respective times limited by those sections, after the disability is removed. When the interests of two or more parties are joint and inseparable, the disability of one shall inure to the benefit of all.

After the cause of action accrues, if the person entitled to bring the action becomes of unsound mind and is adjudicated as such by a court of competent jurisdiction or is confined in an institution or hospital under a diagnosed condition or disease which renders the person of unsound mind, the time during which the person is of unsound mind and so adjudicated or so confined shall not be computed as any part of the period within which the action must be brought.

Effective Date: 07-06-2001

## **2307.382 Personal jurisdiction.**

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;
- (7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.
- (8) Having an interest in, using, or possessing real property in this state;
- (9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Effective Date: 09-09-1988

## **CHAPTER 5801: OHIO TRUST CODE**

### **5801.01 General definitions.**

As used in Chapters 5801. to 5811. of the Revised Code:

(A) "Action," with respect to an act of a trustee, includes a failure to act.

(B) "Ascertainable standard" means a standard relating to an individual's health, education, support, or maintenance within the meaning of section 2041(b)(1)(A) or 2514(c)(1) of the Internal Revenue Code.

(C) "Beneficiary" means a person that has a present or future beneficial interest in a trust, whether vested or contingent, or that, in a capacity other than that of trustee, holds a power of appointment over trust property, or a charitable organization that is expressly designated in the terms of the trust to receive distributions. "Beneficiary" does not include any charitable organization that is not expressly designated in the terms of the trust to receive distributions, but to whom the trustee may in its discretion make distributions.

(D) "Beneficiary surrogate" means a person, other than a trustee, designated by the settlor in the trust instrument to receive notices, information, and reports otherwise required to be provided to a current beneficiary under divisions (B)(8) and (9) of section 5801.04 of the Revised Code.

(E) "Charitable trust" means a trust, or portion of a trust, created for a charitable purpose described in division (A) of section 5804.05 of the Revised Code.

(F) "Current beneficiary" means a beneficiary that, on the date the beneficiary's qualification is determined, is a distributee or permissible distributee of trust income or principal.

(G) "Environmental law" means a federal, state, or local law, rule, regulation, or ordinance relating to protection of the environment.

(H) "Guardian of the estate" means a guardian appointed by a court to administer the estate of any individual or to serve as conservator of the property of an individual eighteen years of age or older under section 2111.021 of the Revised Code.

(I) "Guardian of the person" means a guardian appointed by a court to make decisions regarding the support, care, education, health, and welfare of any individual or to serve as conservator of the person of an individual eighteen years of age or older under section 2111.021 of the Revised Code. "Guardian of the person" does not include a guardian ad litem.

(J) "Internal Revenue Code" means the "Internal Revenue Code of 1986," 100 Stat. 2085, 26 U.S.C. 1 et seq., as amended.

(K) "Interests of the beneficiaries" means the beneficial interests provided in the terms of the trust.

(L) "Jurisdiction," with respect to a geographic area, includes a state or country.

(M) "Mandatory distribution" means a distribution of income or principal, including a distribution upon termination of the trust, that the trustee is required to make to a beneficiary under the terms of the trust. Mandatory distributions do not include distributions that a trustee is directed or authorized to make pursuant

to a support or other standard, regardless of whether the terms of the trust provide that the trustee "may" or "shall" make the distributions pursuant to a support or other standard.

(N) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental agency or instrumentality, public corporation, or any other legal or commercial entity.

(O) "Power of withdrawal" means a presently exercisable general power of appointment other than a power exercisable by a trustee that is limited by an ascertainable standard or that is exercisable by another person only upon consent of the trustee or a person holding an adverse interest.

(P) "Property" means anything or any interest in anything that may be the subject of ownership.

(Q) "Qualified beneficiary" means a beneficiary to whom, on the date the beneficiary's qualification is determined, any of the following applies:

(1) The beneficiary is a distributee or permissible distributee of trust income or principal.

(2) The beneficiary would be a distributee or permissible distributee of trust income or principal if the interests of the distributees described in division (Q)(1) of this section terminated on that date, but the termination of those interests would not cause the trust to terminate.

(3) The beneficiary would be a distributee or permissible distributee of trust income or principal if the trust terminated on that date.

(R) "Revocable," as applied to a trust, means revocable at the time of determination by the settlor alone or by the settlor with the consent of any person other than a person holding an adverse interest. A trust's characterization as revocable is not affected by the settlor's lack of capacity to exercise the power of revocation, regardless of whether an agent of the settlor under a power of attorney, or a guardian of the person or estate of the settlor, is serving.

(S) "Settlor" means a person, including a testator, who creates, or contributes property to, a trust. If more than one person creates or contributes property to a trust, each person is a settlor of the portion of the trust property attributable to that person's contribution except to the extent another person has the power to revoke or withdraw that portion.

(T) "Spendthrift provision" means a term of a trust that restrains both voluntary and involuntary transfer of a beneficiary's interest.

(U) "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, a territory or possession of the United States, or an Indian tribe or band recognized by federal law or formally acknowledged by a state.

(V) "Terms of a trust" means the manifestation of the settlor's intent regarding a trust's provisions as expressed in the trust instrument or as may be established by other evidence that would be admissible in a judicial proceeding.

(W) "Trust instrument" means an instrument executed by the settlor that contains terms of the trust and any amendments to that instrument.

(X) "Trustee" includes an original, additional, and successor trustee and a cotrustee.

(Y)(1) "Wholly discretionary trust" means a trust to which all of the following apply:

(a) The trust is irrevocable.

(b) Distributions of income or principal from the trust may or shall be made to or for the benefit of the beneficiary only at the trustee's discretion.

(c) The beneficiary does not have a power of withdrawal from the trust.

(d) The terms of the trust use "sole," "absolute," "uncontrolled," or language of similar import to describe the trustee's discretion to make distributions to or for the benefit of the beneficiary.

(e) The terms of the trust do not provide any standards to guide the trustee in exercising its discretion to make distributions to or for the benefit of the beneficiary.

(f) The beneficiary is not the settlor, the trustee, or a cotrustee.

(g) The beneficiary does not have the power to become the trustee or a cotrustee.

(2) A trust may be a wholly discretionary trust with respect to one or more but less than all beneficiaries.

(3) If a beneficiary has a power of withdrawal, the trust may be a wholly discretionary trust with respect to that beneficiary during any period in which the beneficiary may not exercise the power. During a period in which the beneficiary may exercise the power, both of the following apply:

(a) The portion of the trust the beneficiary may withdraw may not be a wholly discretionary trust with respect to that beneficiary;

(b) The portion of the trust the beneficiary may not withdraw may be a wholly discretionary trust with respect to that beneficiary.

(4) If the beneficiary and one or more others have made contributions to the trust, the portion of the trust attributable to the beneficiary's contributions may not be a wholly discretionary trust with respect to that beneficiary, but the portion of the trust attributable to the contributions of others may be a wholly discretionary trust with respect to that beneficiary. If a beneficiary has a power of withdrawal, then upon the lapse, release, or waiver of the power, the beneficiary is treated as having made contributions to the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code;

(b) If the donor of the property subject to the beneficiary's power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in section 2503(b) of the Internal Revenue Code;

(c) If the donor of the property subject to the beneficiary's power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in section 2503(b) of the Internal Revenue Code.

(5) Notwithstanding divisions (Y)(1)(f) and (g) of this section, a trust may be a wholly discretionary trust if the beneficiary is, or has the power to become, a trustee only with respect to the management or the investment of the trust assets, and not with respect to making discretionary distribution decisions. With respect to a trust established for the benefit of an individual who is blind or disabled as defined in 42 U.S.C. 1382c(a)(2) or (3), as amended, a wholly discretionary trust may include either or both of the following:

(a) Precatory language regarding its intended purpose of providing supplemental goods and services to or for the benefit of the beneficiary, and not to supplant benefits from public assistance programs;

(b) A prohibition against providing food, clothing, and shelter to the beneficiary.

Effective Date: 01-01-2007

### **5801.011 Short title.**

Chapters 5801. to 5811. of the Revised Code may be cited as the Ohio trust code.

Effective Date: 01-01-2007

### **5801.02 Application of trust chapters.**

Except as otherwise provided in any provision of Chapters 5801. to 5811. of the Revised Code, those chapters apply to charitable and noncharitable inter vivos express trusts and to trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust. Chapters 5801. to 5811. of the Revised Code apply to testamentary trusts to the extent provided by section 2109.69 of the Revised Code.

Effective Date: 01-01-2007

### **5801.03 Actual and constructive knowledge of facts.**

(A) Subject to division (B) of this section, a person has knowledge of a fact if any of the following apply:

(1) The person has actual knowledge of the fact.

(2) The person has received notice or notification of the fact.

(3) From all the facts and circumstances known to the person at the time in question, the person has reason to know the fact.

(B) An organization that conducts activities through employees has notice or knowledge of a fact involving a trust only from the time an employee having responsibility to act for the trust received the information or the information would have been brought to the employee's attention if the organization had exercised reasonable diligence. An organization exercises reasonable diligence if it maintains reasonable routines for communicating significant information to the employee having responsibility to act for the trust and there is reasonable compliance with the routines. Reasonable diligence does not require an employee of the organization to communicate information unless the communication is part of the individual's regular duties or the individual knows a matter involving the trust would be materially affected by the information.

Effective Date: 01-01-2007

### **5801.04 Trustee powers, duties, and relations -- beneficiaries' rights.**

(A) Except as otherwise provided in the terms of the trust, Chapters 5801. to 5811. of the Revised Code govern the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(B) The terms of a trust prevail over any provision of Chapters 5801. to 5811. of the Revised Code except the following:

- (1) The requirements for creating a trust;
- (2) The duty of a trustee to act in good faith and in accordance with the purposes of the trust;
- (3) The requirement that the trust have a purpose that is lawful, not contrary to public policy, and possible to achieve;
- (4) The power of the court to modify or terminate a trust under sections 5804.10 to 5804.16 of the Revised Code;
- (5) The effect of a spendthrift provision and the rights of certain creditors and assignees to reach a trust as provided in Chapter 5805. of the Revised Code;
- (6) The power of the court under section 5807.02 of the Revised Code to require, dispense with, or modify or terminate a bond;
- (7) The power of the court under division (B) of section 5807.08 of the Revised Code to adjust a trustee's compensation specified in the terms of the trust which is unreasonably low or high;
- (8) Subject to division (C) of this section, the duty under divisions (B)(2) and (3) of section 5808.13 of the Revised Code to notify current beneficiaries of an irrevocable trust who have attained twenty-five years of age of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports;
- (9) Subject to division (C) of this section, the duty under division (A) of section 5808.13 of the Revised Code to respond to the request of a current beneficiary of an irrevocable trust for trustee's reports and other information reasonably related to the administration of a trust;
- (10) The effect of an exculpatory term under section 5810.08 of the Revised Code;
- (11) The rights under sections 5810.10 to 5810.13 of the Revised Code of a person other than a trustee or beneficiary;
- (12) Periods of limitation for commencing a judicial proceeding;
- (13) The power of the court to take any action and exercise any jurisdiction that may be necessary in the interests of justice;
- (14) The subject-matter jurisdiction of the court for commencing a proceeding as provided in section 5802.03 of the Revised Code.

(C) With respect to one or more of the current beneficiaries, the settlor, in the trust instrument, may waive or modify the duties of the trustee described in divisions (B)(8) and (9) of this section. The waiver or modification may be made only by the settlor designating in the trust instrument one or more beneficiary surrogates to receive any notices, information, or reports otherwise required under those divisions to be provided to the current beneficiaries. If the settlor makes a waiver or modification pursuant to this division, the trustee shall provide the notices, information, and reports to the beneficiary surrogate or surrogates in lieu of providing them to the current beneficiaries. The beneficiary surrogate or surrogates shall act in good faith to protect the interests of the current beneficiaries for whom the notices, information, or reports are received. A waiver or modification made under this division shall be effective for so long as the beneficiary surrogate or surrogates, or their successor or successors designated in accordance with the terms of the trust instrument, act in that capacity.

Effective Date: 01-01-2007

### **5801.05 Application of common law and equity principles.**

The common law of trusts and principles of equity continue to apply in this state, except to the extent modified by Chapters 5801. to 5811. or another section of the Revised Code.

Effective Date: 01-01-2007

### **5801.06 Designated jurisdiction -- controlling law.**

The law of the jurisdiction designated in the terms of a trust determines the meaning and effect of the terms unless the designation of that jurisdiction's law is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue. In the absence of a controlling designation in the terms of the trust, the law of the jurisdiction having the most significant relationship to the matter at issue determines the meaning and effect of the terms.

Effective Date: 01-01-2007

### **5801.07 Connection with designated jurisdiction -- transfer.**

(A) Without precluding other means for establishing a sufficient connection with the designated jurisdiction, the terms of a trust designating the principal place of administration of the trust are valid and controlling if a trustee's principal place of business is located in or a trustee is a resident of the designated jurisdiction or if all or part of the administration occurs in the designated jurisdiction.

(B) A trustee is under a continuing duty to administer the trust at a place appropriate to its purposes, its administration, and the interests of the beneficiaries.

(C) Without precluding the right of the court to order, approve, or disapprove a transfer, the trustee, in furtherance of the duty prescribed by division (B) of this section, may transfer the trust's principal place of administration to another state or to a jurisdiction outside of the United States.

(D) The trustee shall notify the current beneficiaries of a proposed transfer of a trust's principal place of administration not less than sixty days before initiating the transfer. The notice of a proposed transfer shall include all of the following:

- (1) The name of the jurisdiction to which the principal place of administration is to be transferred;
- (2) The address and telephone number at the new location at which the trustee can be contacted;
- (3) An explanation of the reasons for the proposed transfer;
- (4) The date on which the trustee expects the proposed transfer to occur.

(E) In connection with a transfer of the trust's principal place of administration, the trustee may transfer some or all of the trust property to a successor trustee designated in the terms of the trust or appointed pursuant to section 5807.04 of the Revised Code.

Effective Date: 01-01-2007

### **5801.08 Methods of notice - waiver.**

(A) Notice to a person or the sending of a document to a person under Chapters 5801. to 5811. of the Revised Code shall be accomplished in a manner reasonably suitable under the circumstances and likely to result in receipt of the notice or document. Permissible methods of notice or for sending a document include first-class mail, personal delivery, delivery to the person's last known place of residence or place of business, or a properly directed electronic message.

(B) Notice otherwise required or a document otherwise required to be sent under Chapters 5801. to 5811. of the Revised Code is not required to be provided to a person whose identity or location is unknown to and not reasonably ascertainable by the trustee.

(C) The person to be notified or sent a document may waive notice or the sending of a document under Chapters 5801. to 5811. of the Revised Code.

(D) Notice of a judicial proceeding must be given as provided in the applicable rules of civil procedure.

Effective Date: 01-01-2007

### **5801.09 Notice to beneficiary by request.**

(A) Whenever Chapters 5801. to 5811. of the Revised Code require notice to current or qualified beneficiaries of a trust, the trustee shall also give notice to any other beneficiary who has sent the trustee a request for notice.

(B) A person appointed to enforce a trust created for the care of an animal or another noncharitable purpose as provided in section 5804.08 or 5804.09 of the Revised Code has the rights of a current beneficiary under Chapters 5801. to 5811. of the Revised Code.

Effective Date: 01-01-2007

### **5801.10 Agreement among interested parties regarding trust matters.**

(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 trust instrument, the investment of income or principal held by the trustee, or other matters. The agreement is valid only to the extent that it does not effect a termination of the trust before the date specified for the trust's termination in the trust instrument, does not 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, and includes terms and conditions that could be properly approved by the court under Chapters 5801. to 5811. of the Revised Code or other applicable law. 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 trust instrument, including disputes over the construction of the language of the trust instrument or construction of the language of other writings that affect the trust instrument;
- (3) Granting to the trustee necessary or desirable powers not granted in the trust instrument or otherwise provided by law, to the extent that those powers either are not inconsistent with the express provisions or purposes of the trust instrument or, if inconsistent with the express provisions or purposes of the trust instrument, are necessary for the due administration of the trust instrument;
- (4) Modifying the trust instrument, if the modification is not inconsistent with any dominant purpose or objective of the trust;
- (5) Modifying the trust instrument in the manner required to qualify the gift under the trust instrument 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 trust instrument in the manner required to qualify any gift under the trust instrument 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, 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 trust instrument 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 trust instrument 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.

Effective Date: 01-01-2007

## **CHAPTER 5802: JURISDICTION OF COURT**

### **5802.01 Judicial intervention in trust administration.**

(A) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(B) An inter vivos trust is not subject to continuing judicial supervision unless ordered by the court. Trusts created pursuant to a section of the Revised Code or a judgment or decree of a court are subject to continuing judicial supervision to the extent provided by the section, judgment, or decree or by court order.

(C) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

Effective Date: 01-01-2007

### **5802.02 Personal jurisdiction over trustee and beneficiaries.**

(A) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(B) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from the trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(C) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

Effective Date: 01-01-2007

### **5802.03 Concurrent jurisdiction regarding inter vivos trust.**

The probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

Effective Date: 01-01-2007

## **CHAPTER 5803: REPRESENTATIVES**

### **5803.01 Notice to and consent by representative.**

(A) Notice to a person who may represent and bind another person under this chapter has the same effect as if notice were given directly to the other person.

(B) The consent of a person who may represent and bind another person under this chapter is binding on the person represented unless the person represented objects to the representation before the consent would otherwise have become effective.

(C) Except as otherwise provided in sections 5804.11 and 5806.02 of the Revised Code, a person who under this chapter may represent a settlor who lacks capacity may receive notice and give a binding consent on the settlor's behalf.

(D) A settlor may not represent and bind a beneficiary under this chapter with respect to the termination or modification of a trust under division (A) of section 5804.11 of the Revised Code.

Effective Date: 01-01-2007

### **5803.02 Holder of power of appointment may represent persons subject to power.**

To the extent there is no conflict of interest between the holder of a general testamentary power of appointment and the persons represented with respect to the particular question or dispute, the holder may represent and bind persons whose interests, as permissible appointees, takers in default, or otherwise, are subject to the power.

Effective Date: 01-01-2007

### **5803.03 Powers of representative.**

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.

Effective Date: 01-01-2007

#### **5803.04 Representation by person having same interest.**

Unless otherwise represented, a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown and not reasonably ascertainable may be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented.

Effective Date: 01-01-2007

#### **5803.05 Appointment to represent unrepresented interest.**

(A) If the court determines that an interest is not represented under this chapter or that the otherwise available representation might be inadequate, the court may appoint a representative to receive notice, give consent, and otherwise represent, bind, and act on behalf of a minor, incapacitated individual, unborn individual, or person whose identity or location is unknown. A representative may be appointed to represent several persons or interests.

(B) A representative may act on behalf of the individual represented with respect to any matter arising under Chapters 5801. to 5811. of the Revised Code, whether or not a judicial proceeding concerning the trust is pending.

(C) In making decisions, a representative may consider general benefit accruing to the living members of the individual's family.

Effective Date: 01-01-2007

## **CHAPTER 5804: CREATION, MODIFICATION, REVOCATION, AND TERMINATION**

### **5804.01 Methods of creation of trusts.**

A trust may be created by any of the following methods:

- (A) Transfer of property to another person as trustee during the settlor's lifetime or by will or other disposition taking effect upon the settlor's death;
- (B) Declaration by the owner of property that the owner holds identifiable property as trustee;
- (C) Exercise of a power of appointment in favor of a trustee;
- (D) A court order.

Effective Date: 01-01-2007

### **5804.02 General requirements for creation of trust.**

(A) A trust is created only if all of the following apply:

- (1) The settlor of the trust, other than the settlor of a trust created by a court order, has capacity to create a trust.
- (2) The settlor of the trust, other than the settlor of a trust created by a court order, indicates an intention to create the trust.
- (3) The trust has a definite beneficiary or is one of the following:
  - (a) A charitable trust;
  - (b) A trust for the care of an animal, as provided in section 5804.08 of the Revised Code;
  - (c) A trust for a noncharitable purpose, as provided in section 5804.09 of the Revised Code.
- (4) The trustee has duties to perform.
- (5) The same person is not the sole trustee and sole beneficiary.

(B) A beneficiary is definite if the beneficiary can be ascertained now or in the future, subject to any applicable rule against perpetuities.

(C) A power in a trustee to select a beneficiary from an indefinite class is valid. If the power is not exercised within a reasonable time, the power fails, and the property subject to the power passes to the persons who would have taken the property had the power not been conferred.

(D) A trust is valid regardless of the existence, size, or character of the corpus of the trust. This division

applies to any trust that was executed prior to, or is executed on or after, the effective date of Chapters 5801. to 5811. of the Revised Code.

(E) A trust is not invalid because a person, including, but not limited to, the creator of the trust, is or may become the sole trustee and the sole holder of the present beneficial enjoyment of the corpus of the trust, provided that one or more other persons hold a vested, contingent, or expectant interest relative to the enjoyment of the corpus of the trust upon the cessation of the present beneficial enjoyment. A merger of the legal and equitable titles to the corpus of a trust described in this division does not occur in its creator, and, notwithstanding any contrary provision of Chapter 2107. of the Revised Code, the trust is not a testamentary trust that is required to comply with that chapter in order for its corpus to be legally distributed to other beneficiaries in accordance with the provisions of the trust upon the cessation of the present beneficial enjoyment. This division applies to any trust that satisfies the provisions of this division, whether the trust was executed prior to, on, or after October 10, 1991.

Effective Date: 01-01-2007

### **5804.03 Validity of nontestamentary trusts.**

A trust not created by will is validly created if its creation complies with the law of the jurisdiction in which the trust instrument was executed or the law of the jurisdiction in which, at the time of creation, any of the following applies:

- (A) The settlor was domiciled in, had a place of abode in, or was a national of the jurisdiction.
- (B) A trustee was domiciled or had a place of business in the jurisdiction.
- (C) Any trust property was located in the jurisdiction.

Effective Date: 01-01-2007

### **5804.04 Trust purposes must be legitimate.**

A trust may be created only to the extent that its purposes are lawful, not contrary to public policy, and possible to achieve. A trust exists, and its assets shall be held, for the benefit of its beneficiaries in accordance with the interests of the beneficiaries in the trust.

Effective Date: 01-01-2007

### **5804.05 Purposes of charitable trust - enforcement.**

(A) A charitable trust may be created for the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, or other purposes the achievement of which is beneficial to the community.

(B) If the terms of a charitable trust do not indicate a particular charitable purpose or beneficiary, the court may select one or more charitable purposes or beneficiaries. The selection must be consistent with the settlor's intention to the extent it can be ascertained.

(C) The settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust.

Effective Date: 01-01-2007

### **5804.06 Trust induced by fraud, duress, or undue influence void.**

A trust is void to the extent its creation was induced by fraud, duress, or undue influence. As used in this section, "fraud," "duress," and "undue influence" have the same meanings for trust validity purposes as they have for purposes of determining the validity of a will.

Effective Date: 01-01-2007

### **5804.07 Written instrument not required.**

Except as required by any section of the Revised Code not in Chapters 5801. to 5811. of the Revised Code, a trust is not required to be evidenced by a trust instrument, but the creation of an oral trust and its terms may be established only by clear and convincing evidence.

Effective Date: 01-01-2007

### **5804.08 Trust to provide for care of animal.**

(A) A trust may be created to provide for the care of an animal alive during the settlor's lifetime. The trust terminates upon the death of the animal or, if the trust was created to provide for the care of more than one animal alive during the settlor's lifetime, upon the death of the last surviving animal.

(B) A person appointed in the terms of a trust or, if no person is so appointed, a person appointed by the court may enforce a trust authorized by this section. A person having an interest in the welfare of an animal that is provided care by a trust authorized by this section may request the court to appoint a person to enforce the trust or to remove a person appointed.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest.

Effective Date: 01-01-2007

### **5804.09 Trust created for noncharitable purpose.**

Except as otherwise provided in section 5804.08 of the Revised Code or any other section of the Revised Code:

(A) A trust may be created for a noncharitable purpose without a definite or definitely ascertainable beneficiary or for a noncharitable but otherwise valid purpose to be selected by the trustee. A trust created for a noncharitable purpose may not be enforced for more than twenty-one years.

(B) A trust authorized by this section may be enforced by a person appointed in the terms of the trust or, if no person is so appointed, by a person appointed by the court.

(C) The property of a trust authorized by this section may be applied only to its intended use, except to the extent the court determines that the value of the trust property exceeds the amount required for the intended use. Except as otherwise provided in the terms of the trust, property not required for the intended use must be distributed to the settlor if then living or to the settlor's successors in interest.

Effective Date: 01-01-2007

### **5804.10 Termination of trust by revocation or by terms.**

(A) In addition to the methods of termination prescribed by sections 5804.11 to 5804.14 of the Revised Code, a trust terminates to the extent the trust is revoked or expires pursuant to its terms, a court determines that no purpose of the trust remains to be achieved, or a court determines that the purposes of the trust have become unlawful or impossible to achieve.

(B) A trustee or beneficiary may commence a proceeding to approve or disapprove a proposed modification or termination under sections 5804.11 to 5804.16 of the Revised Code or to approve or disapprove a trust combination or division under section 5804.17 of the Revised Code. The settlor may commence a proceeding to approve or disapprove a proposed modification or termination under section 5804.11 of the Revised Code. The settlor of a charitable trust may maintain a proceeding to modify the trust under section 5804.13 of the Revised Code.

Effective Date: 01-01-2007

### **5804.11 Termination or modification of noncharitable irrevocable trust.**

(A) If upon petition the court finds that the settlor and all beneficiaries consent to the modification or termination of a noncharitable irrevocable trust, the court shall enter an order approving the modification or termination even if the modification or termination is inconsistent with a material purpose of the trust. An agent under a power of attorney may exercise a settlor's power to consent to a trust's modification or termination only to the extent expressly authorized by both the power of attorney and the terms of the trust. The settlor's guardian of the estate may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized. The guardian of the settlor's person may exercise a settlor's power to consent to a trust's modification or termination with the approval of the court supervising the guardianship if an agent is not so authorized and a guardian of the estate has not been appointed. This division applies only to irrevocable trusts created on or after the effective date of Chapters 5801. to 5811. of the Revised Code and to revocable trusts that become irrevocable on or after the effective date of Chapters 5801. to 5811. of the Revised Code. This division does not apply to a noncharitable irrevocable trust described in 42 U.S.C. 1396p(d)(4).

(B) A noncharitable irrevocable trust may be terminated upon consent of all of the beneficiaries if the court concludes that continuance of the trust is not necessary to achieve any material purpose of the trust. A noncharitable irrevocable trust may be modified, but not to remove or replace the trustee, upon consent of all of the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust. A spendthrift provision in the terms of the trust may, but is not presumed to, constitute a material purpose of the trust.

(C) Upon termination of a trust under division (A) or (B) of this section, the trustee shall distribute the trust property as agreed by the beneficiaries.

(D) If not all of the beneficiaries consent to a proposed modification or termination of the trust under division (A) or (B) of this section, the court may approve the modification or termination if the court is satisfied of both of the following:

- (1) That if all of the beneficiaries had consented, the trust could have been modified or terminated under this section;
- (2) That the interests of a beneficiary who does not consent will be adequately protected.

Effective Date: 01-01-2007

### **5804.12 Judicial action due to change of circumstances.**

(A) The court may modify the administrative or dispositive terms of a trust or terminate the trust if because of circumstances not anticipated by the settlor modification or termination will further the purposes of the trust. To the extent practicable, the court shall make the modification in accordance with the settlor's probable intention.

(B) The court may modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or impair the trust's administration.

(C) Upon termination of a trust under this section, the trustee shall distribute the trust property in a manner consistent with the purposes of the trust.

Effective Date: 01-01-2007

### **5804.13 Judicial action where charitable purpose frustrated.**

(A) Except as otherwise provided in division (B) of this section, if a particular charitable purpose becomes unlawful, impracticable, or impossible to achieve, all of the following apply:

- (1) The trust does not fall in whole or in part.
- (2) The trust property does not revert to the settlor or the settlor's successors in interest.
- (3) The court may apply cy pres to modify or terminate the trust by directing that the trust property be applied or distributed, in whole or in part, in a manner consistent with the settlor's charitable purposes. In accordance with section 109.25 of the Revised Code, the attorney general is a necessary party to a judicial proceeding brought under this section.

(B) A provision in the terms of a charitable trust for the distribution of the trust property to a noncharitable beneficiary prevails over the power of the court under division (A) of this section to apply cy pres to modify or terminate the trust.

Effective Date: 01-01-2007

### **5804.14 Termination or modification where costs exceed value.**

(A)(1) Except as provided in division (A)(2) of this section, after notice to the qualified beneficiaries, the

trustee of an inter vivos trust consisting of trust property having a total value of less than one hundred thousand dollars may terminate the trust if the trustee concludes that the value of the trust property is insufficient to justify the cost of administration.

(2) Division (A)(1) of this section does not apply to any of the following:

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

(b) 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:

(i) The distributions may be made on the date that the trust would be terminated under division (A)(1) of this section.

(ii) The distributions could be made on the date that the trust would be terminated under division (A)(1) of this section 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.

(iii) The distributions could be made on the date that the trust would be terminated under division (A)(1) of this section, if the trust terminated on that date but not under that division.

(B) If an inter vivos trust consists of trust property having a total value of less than one hundred thousand dollars, the court may modify or terminate the trust or remove the trustee and appoint a different trustee if it determines that the value of the trust property is insufficient to justify the cost of administration.

(C) Upon the termination of a trust pursuant to division (A)(1) of this section, the trustee shall distribute the trust estate in accordance with any provision specified in the trust instrument for the premature termination of the trust. If there is no provision of that nature in the trust instrument, the trustee shall distribute the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the trustee determines to be equitable. For purposes of distributing the trust estate among the beneficiaries of the trust under this division, the trustee shall consider all of the following:

(1) The existence of any agreement among the beneficiaries with respect to their beneficial interests;

(2) The actuarial values of the separate beneficial interests of the beneficiaries;

(3) Any expression of preference of the beneficiaries that is contained in the trust instrument.

(D) Upon the termination of a trust pursuant to division (B) of this section, the probate court shall order the distribution of the trust estate in accordance with any provision specified in the trust instrument for the premature termination of the trust. If there is no provision of that nature in the trust instrument, the probate court shall order the distribution of the trust estate among the beneficiaries of the trust in accordance with their respective beneficial interests and in a manner that the court determines to be equitable. For purposes of ordering the distribution of the trust estate among the beneficiaries of the trust under this division, the court shall consider the three factors listed in division (C) of this section.

(E) The existence of a spendthrift or similar provision in a trust instrument or will does not preclude the termination of a trust pursuant to this section.

(F) This section does not apply to an easement for conservation or preservation.

Effective Date: 01-01-2007

### **5804.15 Reformation to conform to settlor's intention.**

The court may reform the terms of a trust, even if they are unambiguous, to conform the terms to the settlor's intention if it is proved by clear and convincing evidence that both the settlor's intent and the terms of the trust were affected by a mistake of fact or law, whether in expression or inducement.

Effective Date: 01-01-2007

### **5804.16 Modification to achieve settlor's tax objectives.**

To achieve the settlor's tax objectives, the court may modify the terms of a trust in a manner that is not contrary to the settlor's probable intention. The court may provide that the modification has retroactive effect.

Effective Date: 01-01-2007

### **5804.17 Combination or division of trusts.**

After notice to the qualified beneficiaries, a trustee may combine two or more trusts into a single trust or divide a trust into two or more separate trusts if the result does not impair the rights of any beneficiary or adversely affect achievement of the purposes of the trust.

Effective Date: 01-01-2007

### **5804.18 When certain trust is irrevocable.**

A trust described in 42 U.S.C. 1396p(d)(4) is irrevocable if the terms of the trust prohibit the settlor from revoking it, whether or not the settlor's estate or the settlor's heirs are named as the remainder beneficiary or beneficiaries of the trust upon the settlor's death.

Effective Date: 01-01-2007

## **CHAPTER 5805: SPENDTHRIFT TRUST PROVISIONS**

### **5805.01 Validity and effect of spendthrift provisions.**

(A) A spendthrift provision is valid only if it restrains both voluntary and involuntary transfer of a beneficiary's interest or if it restrains involuntary transfer of a beneficiary's interest and permits voluntary transfer of a beneficiary's interest only with the consent of a trustee who is not the beneficiary.

(B) A term of a trust providing that the interest of a beneficiary is held subject to a "spendthrift trust," or words of similar import, is sufficient to restrain both voluntary and involuntary transfer of the beneficiary's interest.

(C) A beneficiary may not transfer an interest in a trust in violation of a valid spendthrift provision and, except as otherwise provided in this chapter and in section 5810.04 of the Revised Code, a creditor or assignee of the beneficiary may not reach the interest or a distribution by the trustee before its receipt by the beneficiary. Real property or tangible personal property that is owned by the trust but that is made available for a beneficiary's use or occupancy in accordance with the trustee's authority under the trust instrument shall not be considered to have been distributed by the trustee or received by the beneficiary for purposes of allowing a creditor or assignee of the beneficiary to reach the property.

Effective Date: 01-01-2007

### **5805.02 Enforceability and enforcement of spendthrift provisions.**

(A) As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or another state.

(B) Subject to section 5805.03 of the Revised Code, a spendthrift provision is unenforceable against either of the following:

(1) The beneficiary's child or spouse who has a judgment or court order against the beneficiary for support, but only if distributions can be made for the beneficiary's support or the beneficiary is entitled to receive mandatory distributions under the terms of the trust;

(2) A claim of this state or the United States to the extent provided by the Revised Code or federal law.

(C) A spendthrift provision is enforceable against the beneficiary's former spouse.

(D) A claimant described in division (B) of this section may obtain from the court an order attaching present or future distributions to or for the benefit of the beneficiary. The court may limit the award to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support.

(E) The only exceptions to the effectiveness of a spendthrift provision are those described in divisions (B) and (D) of this section, in division (B) of section 5805.05 of the Revised Code, and in sections 5805.06 and 5810.04 of the Revised Code.

Effective Date: 01-01-2007

### **5805.03 Creditors of discretionary trust beneficiary may not reach interest.**

Notwithstanding anything to the contrary in division (B) of section 5805.02 of the Revised Code, no creditor or assignee of a beneficiary of a wholly discretionary trust may reach the beneficiary's interest in the trust, or a distribution by the trustee before its receipt by the beneficiary, whether by attachment of present or future distributions to or for the benefit of the beneficiary, by judicial sale, by obtaining an order compelling the trustee to make distributions from the trust, or by any other means, regardless of whether the trust instrument includes a spendthrift provision.

Effective Date: 01-01-2007

### **5805.04 Creditor may not compel discretionary distribution - exceptions.**

(A) As used in this section, "child" includes any person for whom an order or judgment for child support has been entered in this or any other state.

(B) Except as otherwise provided in divisions (C) and (D) of this section, whether or not a trust contains a spendthrift provision, a creditor of a beneficiary may not compel a distribution that is subject to the trustee's discretion, even if the discretion is expressed in the form of a standard of distribution or the trustee has abused the discretion.

(C) Division (B) of this section does not apply to this state for any claim for support of a beneficiary in a state institution if the terms of the trust do not include a spendthrift provision and do include a standard for distributions to or for the beneficiary under which the trustee may make distributions for the beneficiary's support.

(D) Unless the settlor has explicitly provided in the trust that the beneficiary's child or spouse or both are excluded from benefiting from the trust, to the extent a trustee of a trust that is not a wholly discretionary trust has not complied with a standard of distribution or has abused a discretion, both of the following apply:

(1) The court may order a distribution to satisfy a judgment or court order against the beneficiary for support of the beneficiary's child or spouse, provided that the court may order the distributions only if distributions can be made for the beneficiary's support under the terms of the trust and that the court may not order any distributions under this division to satisfy a judgment or court order against the beneficiary for support of the beneficiary's former spouse.

(2) The court shall direct the trustee to pay to the child or spouse the amount that is equitable under the circumstances but not more than the amount the trustee would have been required to distribute to or for the benefit of the beneficiary had the trustee complied with the standard or not abused the discretion.

(E) Even if a trust does not contain a spendthrift provision, to the extent a beneficiary's interest in a trust is subject to the exercise of the trustee's discretion, whether or not such discretion is subject to one or more standards of distribution, the interest may not be ordered sold to satisfy or partially satisfy a claim of the beneficiary's creditor or assignee.

(F) If the trustee's or cotrustee's discretion to make distributions for the trustee's or cotrustee's own benefit is limited by an ascertainable standard, a creditor may not reach or compel distribution of the beneficial interest except to the extent the interest would be subject to the creditor's claim if the beneficiary were not acting as trustee or cotrustee.

Effective Date: 01-01-2007

### **5805.05 Attachment of mandatory distributions absent spendthrift provision.**

(A) To the extent that a trust that gives a beneficiary the right to receive one or more mandatory distributions does not contain a spendthrift provision, the court may authorize a creditor or assignee of the beneficiary to attach present or future mandatory distributions to or for the benefit of the beneficiary or to reach the beneficiary's interest by other means. The court may limit an award under this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the support needs of the beneficiary, the beneficiary's spouse, and the beneficiary's dependent children or, with respect to a beneficiary who is the recipient of public benefits, the supplemental needs of the beneficiary if the trust was not intended to provide for the beneficiary's basic support. If in exercising its power under this section the court decides to order either a sale of a beneficiary's interest or that a lien be placed on the interest, in deciding between the two types of action, the court shall consider among any other factors it considers relevant the amount of the claim of the creditor or assignee and the proceeds a sale would produce relative to the potential value of the interest to the beneficiary.

(B) Whether or not a trust contains a spendthrift provision, a creditor or assignee of a beneficiary may reach a mandatory distribution the beneficiary is entitled to receive if the trustee has not made the distribution to the beneficiary within a reasonable time after the designated distribution date.

Effective Date: 01-01-2007

### **5805.06 Rights of settlor's creditors - power of withdrawal.**

(A) Whether or not the terms of a trust contain a spendthrift provision, all of the following apply:

(1) During the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors.

(2) With respect to an irrevocable trust, a creditor or assignee of the settlor may reach the maximum amount that can be distributed to or for the settlor's benefit. If a trust has more than one settlor, the amount the creditor or assignee of a particular settlor may reach may not exceed the settlor's interest in the portion of the trust attributable to that settlor's contribution.

(3) With respect to a trust described in 42 U.S.C. section 1396p(d)(4)(A) or (C), the court may limit the award of a settlor's creditor under division (A)(1) or (2) of this section to the relief that is appropriate under the circumstances, considering among any other factors determined appropriate by the court, the supplemental needs of the beneficiary.

(B) For purposes of this section, all of the following apply:

(1) The holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to

the extent of the property subject to the power during the period the power may be exercised.

(2) Upon the lapse, release, or waiver of the power of withdrawal, the holder is treated as the settlor of the trust only to the extent the value of the property affected by the lapse, release, or waiver exceeds the greatest of the following amounts:

(a) The amount specified in section 2041(b)(2) or 2514(e) of the Internal Revenue Code;

(b) If the donor of the property subject to the holder's power of withdrawal is not married at the time of the transfer of the property to the trust, the amount specified in section 2503(b) of the Internal Revenue Code;

(c) If the donor of the property subject to the holder's power of withdrawal is married at the time of the transfer of the property to the trust, twice the amount specified in section 2503(b) of the Internal Revenue Code.

Effective Date: 01-01-2007

### **5805.07 Trust property not subject to personal obligations of trustee.**

Trust property is not subject to personal obligations of the trustee, even if the trustee becomes insolvent or bankrupt.

Effective Date: 01-01-2007

## **CHAPTER 5806: POWERS OF SETTLOR**

### **5806.01 Capacity of settlor same as testator.**

The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.

Effective Date: 01-01-2007

### **5806.02 Revocation or amendment of trust.**

(A) Unless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust. This division does not apply to a trust created under an instrument executed before the effective date of this section.

(B) If a revocable trust is created or funded by more than one settlor, all of the following apply:

(1) To the extent the trust consists of community property, either spouse acting alone may revoke the trust, but the trust may be amended only by joint action of both spouses.

(2) To the extent the trust consists of property other than community property, each settlor may revoke or amend the trust with regard to the portion of the trust property attributable to that settlor's contribution.

(3) Upon the revocation or amendment of the trust by less than all of the settlors, the trustee shall promptly notify the other settlors of the revocation or amendment.

(C) The settlor may revoke or amend a revocable trust by substantial compliance with a method provided in the terms of the trust or, if the terms of the trust do not provide a method, by any other method manifesting clear and convincing evidence of the settlor's intent, provided that a revocable trust may not be revoked or amended by a will or codicil, regardless of whether it refers to the trust or specifically devises property that would otherwise have passed according to the terms of the trust unless the terms of the trust expressly allow it to be revoked or amended by a will or codicil.

(D) Upon revocation of a revocable trust, the trustee shall deliver the trust property as the settlor directs.

(E) An agent under a power of attorney may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only to the extent expressly authorized by both the terms of the trust and the power.

(F) A guardian of the estate of the settlor or, if no guardian of the estate has been appointed, a guardian of the person of the settlor may exercise a settlor's powers with respect to revocation, amendment, or distribution of trust property only with the approval of the court supervising the guardianship.

(G) A trustee who does not know that a trust has been revoked or amended is not liable to the settlor or settlor's successors in interest for distributions made and other actions taken on the assumption that the trust had not been amended or revoked.

Effective Date: 01-01-2007

### **5806.03 Control of rights of beneficiaries and duties of trustees.**

(A) During the lifetime of the settlor of a revocable trust, whether or not the settlor has capacity to revoke the trust, the rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor. If the trustee breaches its duty during the lifetime of the settlor, any recovery obtained from the trustee after the settlor becomes incapacitated or dies shall be apportioned by the court. If the settlor is living when the recovery is obtained, the court shall apportion the recovery between the settlor and the trust, or allocate the entire recovery to the settlor or the trust, as it determines to be equitable under the circumstances. If the settlor is not living when the recovery is obtained, the court shall apportion the recovery between the settlor's estate and the trust, or allocate the entire recovery to the settlor's estate or the trust, as it determines to be equitable under the circumstances.

(B) During the period the power may be exercised, the holder of a power of withdrawal has the rights of a settlor of a revocable trust under this section to the extent of the property subject to the power.

Effective Date: 01-01-2007

### **5806.04 Actions concerning certain revocable trusts.**

(A) Any of the following actions pertaining to a revocable trust that is made irrevocable by the death of the settlor of the trust shall be commenced within two years after the date of the death of the settlor of the trust:

- (1) An action to contest the validity of the trust;
- (2) An action to contest the validity of any amendment to the trust that was made during the lifetime of the settlor of the trust;
- (3) An action to contest the revocation of the trust during the lifetime of the settlor of the trust;
- (4) An action to contest the validity of any transfer made to the trust during the lifetime of the settlor of the trust.

(B) Upon the death of the settlor of a revocable trust that was made irrevocable by the death of the settlor, the trustee, without liability, may proceed to distribute the trust property in accordance with the terms of the trust unless either of the following applies:

- (1) The trustee has actual knowledge of a pending action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust.
- (2) The trustee receives written notification from a potential contestant of a potential action to contest the validity of the trust, any amendment to the trust, the revocation of the trust, or any transfer made to the trust during the lifetime of the settlor of the trust, and the action is actually filed within ninety days after the written notification was given to the trustee.

(C) If a distribution of trust property is made pursuant to division (B) of this section, a beneficiary of the trust shall return any distribution to the extent that it exceeds the distribution to which the beneficiary is entitled if the trust, an amendment to the trust, or a transfer made to the trust later is determined to be invalid.

(D) This section applies only to revocable trusts that are made irrevocable by the death of the settlor of the trust if the grantor dies on or after July 23, 2002.

Effective Date: 01-01-2007

## **CHAPTER 5807: TRUSTEES**

### **5807.01 Acceptance or rejection of trusteeship.**

(A) Except as otherwise provided in division (C) of this section, a person designated as trustee accepts the trusteeship by substantially complying with a method of acceptance provided in the terms of the trust or, if the terms of the trust do not provide a method or the method provided in the terms is not expressly made exclusive, by accepting delivery of the trust property, exercising powers or performing duties as trustee, or otherwise indicating acceptance of the trusteeship.

(B) A person designated as trustee who has not yet accepted the trusteeship may reject the trusteeship. A designated trustee who does not accept the trusteeship within a reasonable time after knowing of the designation is deemed to have rejected the trusteeship.

(C) A person designated as trustee, without accepting the trusteeship, may do either or both of the following:

(1) Act to preserve the trust property If, within a reasonable time after acting, the person sends a rejection of the trusteeship to the settlor or, if the settlor is dead or lacks capacity, to a qualified beneficiary;

(2) Inspect or investigate trust property to determine potential liability under environmental or other law or for any other purpose.

Effective Date: 01-01-2007

### **5807.02 Bond of trustee.**

(A) A trustee shall give bond to secure performance of the trustee's duties only if the court finds that a bond is needed to protect the interests of the beneficiaries or is required by the terms of the trust and the court has not dispensed with the requirement.

(B) The court may specify the amount of a bond, its liabilities, and whether sureties are necessary. The court may modify or terminate a bond at any time.

(C) A regulated financial-service institution qualified to do trust business in this state need not give bond, even if required by the terms of the trust.

Effective Date: 01-01-2007

### **5807.03 Cotrustees - delegation - liability.**

(A) If there are three or more cotrustees serving, the cotrustees may act by majority decision.

(B) If a vacancy occurs in a cotrusteeship, the remaining cotrustees may act for the trust.

(C) A cotrustee must participate in the performance of a trustee's function unless the cotrustee is unavailable to perform the function because of absence, illness, disqualification under other law, or other temporary incapacity or the cotrustee has properly delegated the performance of the function to another trustee.

(D) If a cotrustee is unavailable to perform duties because of absence, illness, disqualification under other law, or other temporary incapacity and prompt action is necessary to achieve the purposes of the trust or to avoid injury to the trust property, the remaining cotrustee or a majority of the remaining cotrustees may act for the trust.

(E) A trustee may delegate to a cotrustee duties and powers that a prudent trustee of comparable skills could properly delegate under the circumstances. A delegation made under this division shall be governed by section 5808.07 of the Revised Code. Unless a delegation was irrevocable, a trustee may revoke a delegation previously made.

(F) Except as otherwise provided in division (G) of this section, and subject to divisions (C) and (E) of this section, a trustee who does not join in an action of another trustee is not liable for the action.

(G) Except as otherwise provided in this division, each trustee shall exercise reasonable care to prevent a cotrustee from committing a serious breach of trust and to compel a cotrustee to redress a serious breach of trust. A trustee is not required to exercise reasonable care of that nature under this division, and a trustee is not liable for resulting losses, when section 5815.25 of the Revised Code is applicable or there is more than one other trustee and the other trustees act by majority vote.

(H) A dissenting trustee who joins in an action at the direction of the majority of the trustees and who notified any cotrustee of the dissent at or before the time of the action is not liable for the action.

Effective Date: 01-01-2007

#### **5807.04 Vacancy defined - priority in filling - additional trustees.**

(A) A vacancy in a trusteeship occurs under any of the following circumstances:

- (1) A person designated as trustee rejects the trusteeship;
- (2) A person designated as trustee cannot be identified or does not exist;
- (3) A trustee resigns;
- (4) A trustee is disqualified or removed;
- (5) A trustee dies;
- (6) A guardian of the estate or person is appointed for an individual serving as trustee.

(B) If one or more cotrustees remain in office, a vacancy in a trusteeship need not be filled. A vacancy in a trusteeship must be filled if the trust has no remaining trustee.

(C) A vacancy in a trusteeship of a noncharitable trust that is required to be filled must be filled in the following order of priority:

- (1) By a person designated in the terms of the trust to act as successor trustee;
- (2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;

(3) By a person appointed by unanimous agreement of the qualified beneficiaries;

(4) By a person appointed by the court.

(D) A vacancy in a trusteeship of a charitable trust that is required to be filled must be filled in the following order of priority:

(1) By a person designated in the terms of the trust to act as successor trustee;

(2) By a person appointed by someone designated in the terms of the trust to appoint a successor trustee;

(3) By a person selected by the charitable organizations expressly designated to receive distributions under the terms of the trust;

(4) By a person appointed by the court.

(E) Whether or not a vacancy in a trusteeship exists or is required to be filled, the court may appoint an additional trustee or special fiduciary whenever the court considers the appointment necessary for the administration of the trust.

Effective Date: 01-01-2007

### **5807.05 Resignation of trustee - notice - approval.**

(A) A trustee may resign upon at least thirty days' notice to the qualified beneficiaries, the settlor, if living, and all cotrustees or with the approval of the court.

(B) In approving a resignation of a trustee, the court may issue orders and impose conditions reasonably necessary for the protection of the trust property.

(C) Any liability of a resigning trustee or of any sureties on the trustee's bond for acts or omissions of the trustee is not discharged or affected by the trustee's resignation.

Effective Date: 01-01-2007

### **5807.06 Removal of trustee - grounds - protective measures.**

(A) The settlor, a cotrustee, or a beneficiary may request the court to remove a trustee, or the court may remove a trustee on its own initiative.

(B) The court may remove a trustee for any of the following reasons:

(1) The trustee has committed a serious breach of trust;

(2) Lack of cooperation among cotrustees substantially impairs the administration of the trust;

(3) Because of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, the court determines that removal of the trustee best serves the interests of the beneficiaries.

(C) Pending a final decision on a request to remove a trustee, or in lieu of or in addition to removing a trustee, the court may order any appropriate relief under division (B) of section 5810.01 of the Revised Code that is necessary to protect the trust property or the interests of the beneficiaries.

Effective Date: 01-01-2007

### **5807.07 Powers and duties of removed or resigned trustee.**

(A) Unless a cotrustee remains in office or the court otherwise orders, and until the trust property is delivered to a successor trustee or other person entitled to it, a trustee who has resigned or been removed has the duties of a trustee and the powers necessary to protect the trust property.

(B) A trustee who has resigned or been removed shall proceed expeditiously to deliver the trust property within the trustee's possession to the cotrustee, successor trustee, or other person entitled to it.

Effective Date: 01-01-2007

### **5807.08 Compensation of trustee.**

(A) If the terms of a trust do not specify the trustee's compensation, a trustee is entitled to compensation that is reasonable under the circumstances.

(B) If the terms of a trust specify the trustee's compensation, the trustee is entitled to be compensated as specified, but the court may allow more or less compensation if the duties of the trustee are substantially different from those contemplated when the trust was created or the compensation specified by the terms of the trust would be unreasonably low or high.

Effective Date: 01-01-2007

### **5807.09 Reimbursement of trustee for administrative expenses.**

(A) A trustee is entitled to be reimbursed out of the trust property, with interest as appropriate, for expenses that were properly incurred in the administration of the trust and, to the extent necessary to prevent unjust enrichment of the trust, expenses that were not properly incurred in the administration of the trust.

(B) An advance by the trustee of money for the protection of the trust gives rise to a lien against trust property to secure reimbursement with reasonable interest.

Effective Date: 01-01-2007

## **CHAPTER 5808: TRUST ADMINISTRATION**

### **5808.01 Duties of trustee generally.**

Upon acceptance of a trusteeship, the trustee shall administer the trust in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with Chapters 5801. to 5811. of the Revised Code.

Effective Date: 01-01-2007

### **5808.02 Duty of loyalty to beneficiaries - voidable transactions - conflicts of interest.**

(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.

Effective Date: 01-01-2007

### **5808.03 Multiple beneficiaries -- duty of impartiality.**

If a trust has two or more beneficiaries, the trustee shall act impartially in investing , managing, and distributing the trust property, giving due regard to the beneficiaries' respective interests .

Effective Date: 01-01-2007

### **5808.04 Duty to act as prudent person.**

A trustee shall administer the trust as a prudent person would and shall consider the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.

Effective Date: 01-01-2007

### **5808.05 Reasonable administrative costs allowed.**

Except as otherwise permitted by law, in administering a trust , a trustee may incur only costs that are appropriate and reasonable in relation to the assets, the purposes of the trust, and the skills of the trustee.

Effective Date: 01-01-2007

### **5808.06 Trustee to use any special skills or expertise.**

A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, shall use those special skills or expertise.

Effective Date: 01-01-2007

### **5808.07 Delegation of powers and duties.**

(A) A trustee may delegate duties and powers that a prudent trustee having comparable skills could properly delegate under the circumstances. In accordance with this division, a trustee shall exercise reasonable care, skill, and caution in doing all of the following:

- (1) Selecting an agent, cotrustee, or other fiduciary to whom the delegation is made;
- (2) Establishing the scope and terms of the delegation consistent with the purposes and terms of the trust;
- (3) Periodically reviewing the agent's, cotrustee's, or other fiduciary's actions in order to monitor the agent's, cotrustee's, or other fiduciary's performance and compliance with the terms of the delegation.

(B) In performing a delegated function, an agent, cotrustee, or other fiduciary owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(C) A trustee who complies with division (A) of this section is not liable to the beneficiaries of the trust or to the trust for the decisions or actions of the agent, cotrustee, or other fiduciary to whom the function was delegated.

(D) By accepting the delegation of powers or duties from the trustee of a trust that is subject to the laws of this state, an agent, cotrustee, or other fiduciary submits to the jurisdiction of this state.

Effective Date: 01-01-2007

### **5808.08 Direction of settlor contrary to terms - power of modification.**

(A) While a trust is revocable, the trustee may follow a direction of the settlor that is contrary to the terms of the trust.

(B) As provided in section 5815.25 of the Revised Code, a trustee is not liable for losses resulting from certain actions or failures to act when other persons are granted certain powers with respect to the administration of the trust.

(C) The terms of a trust may confer upon a trustee or other person a power to direct the modification or termination of the trust.

(D) A person other than a beneficiary who holds a power to direct is presumptively a fiduciary who, as a fiduciary, is required to act in good faith with regard to the purposes of the trust and the interests of the beneficiaries. The holder of a power to direct is liable for any loss that results from breach of a fiduciary duty.

Effective Date: 01-01-2007

### **5808.09 Taking control and protection of property.**

A trustee shall take reasonable steps to take control of and protect the trust property.

Effective Date: 01-01-2007

### **5808.10 Adequate records of administration.**

(A) A trustee shall keep adequate records of the administration of the trust.

(B) A trustee shall keep trust property separate from the trustee's own property.

(C) Except as otherwise provided in division (D) of this section and in section 2131.21 of the Revised Code, a trustee not subject to federal or state banking regulation shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(D) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

Effective Date: 01-01-2007

### **5808.11 Enforcement and defense of claims.**

A trustee shall take reasonable steps to enforce claims of the trust and to defend claims against the trust.

Effective Date: 01-01-2007

### **5808.12 Collection of trust property - successor trustees.**

A trustee shall take reasonable steps to collect trust property held by third persons. The responsibility of a successor trustee with respect to the administration of the trust by a prior trustee shall be governed by section 5815.24 of the Revised Code.

Effective Date: 01-01-2007

### **5808.13 Keeping beneficiaries informed - requests -- required reports.**

(A) A trustee shall keep the current beneficiaries of the trust reasonably informed about the administration of

the trust and of the material facts necessary for them to protect their interests. Unless unreasonable under the circumstances, a trustee shall promptly respond to a beneficiary's request for information related to the administration of the trust.

(B) A trustee shall do all of the following:

(1) Upon the request of a beneficiary, promptly furnish to the beneficiary a copy of the trust instrument. If the settlor of a revocable trust that has become irrevocable has completely restated the terms of the trust, the trust instrument furnished by the trustee shall be the restated trust instrument, including any amendments to the restated trust instrument. Nothing in division (B)(1) of this section limits the ability of a beneficiary to obtain a copy of the original trust instrument, any other restatements of the original trust instrument, or amendments to the original trust instrument and any other restatements of the original trust instrument in a judicial proceeding with respect to the trust.

(2) Within sixty days after accepting a trusteeship, notify the current beneficiaries of the acceptance and of the trustee's name, address, and telephone number;

(3) Within sixty days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, notify the current beneficiaries of the trust's existence, of the identity of the settlor or settlors, of the right to request a copy of the trust instrument, and of the right to a trustee's report as provided in division (C) of this section;

(4) Notify the current beneficiaries in advance of any change in the method or rate of the trustee's compensation.

(C) A trustee shall send to the current beneficiaries, and to other beneficiaries who request it, at least annually and at the termination of the trust, a report of the trust property, liabilities, receipts, and disbursements, including the source and amount of the trustee's compensation, a listing of the trust assets, and, if feasible, the trust assets' respective market values. Upon a vacancy in a trusteeship, unless a cotrustee remains in office, a report for the period during which the former trustee served must be sent to the current beneficiaries by the former trustee. A personal representative or guardian may send the current beneficiaries a report on behalf of a deceased or incapacitated trustee.

(D) A beneficiary may waive the right to a trustee's report or other information otherwise required to be furnished under this section. A beneficiary, with respect to future reports and other information, may withdraw a waiver previously given.

(E) The trustee may provide information and reports to beneficiaries to whom the provided information and reports are not required to be provided under this section.

(F) Divisions (B)(2) and (3) of this section apply only to a trustee who accepts a trusteeship on or after the effective date of this section, to an irrevocable trust created on or after the effective date of this section, and to a revocable trust that becomes irrevocable on or after the effective date of this section.

Effective Date: 01-01-2007

### **5808.14 Judicial standard of review for discretionary trusts.**

(A) The judicial standard of review for discretionary trusts is that the trustee shall exercise a discretionary

power reasonably, in good faith, and in accordance with the terms and purposes of the trust and the interests of the beneficiaries, except that a reasonableness standard shall not be applied to the exercise of discretion by the trustee of a wholly discretionary trust. The greater the grant of discretion by the settlor to the trustee, the broader the range of permissible conduct by the trustee in exercising it.

(B) Subject to division (D) of this section, and unless the terms of the trust expressly indicate that a rule in this division does not apply:

(1) A person other than a settlor who is a beneficiary and trustee of a trust that confers on the trustee a power to make discretionary distributions to or for the trustee's personal benefit may exercise the power only in accordance with an ascertainable standard.

(2) A trustee may not exercise a power to make discretionary distributions to satisfy a legal obligation of support that the trustee personally owes another person.

(C) A power whose exercise is limited or prohibited by division (B) of this section may be exercised by a majority of the remaining trustees whose exercise of the power is not so limited or prohibited. If the power of all trustees is so limited or prohibited, the court may appoint a special fiduciary with authority to exercise the power.

(D) Division (B) of this section does not apply to any of the following:

(1) A power held by the settlor's spouse who is the trustee of a trust for which a marital deduction, as defined in section 2056(b)(5) or 2523(e) of the Internal Revenue Code, was previously allowed;

(2) Any trust during any period that the trust may be revoked or amended by its settlor;

(3) A trust if contributions to the trust qualify for the annual exclusion under section 2503(c) of the Internal Revenue Code.

Effective Date: 01-01-2007

### **5808.15 General powers of trustee.**

(A) A trustee, without authorization by the court, may exercise powers conferred by the terms of the trust and, except as limited by the terms of the trust, may exercise all of the following powers:

(1) All powers over the trust property that an unmarried competent owner has over individually owned property;

(2) Any other powers appropriate to achieve the proper investment, management, and distribution of the trust property;

(3) Any other powers conferred by Chapters 5801. to 5811. of the Revised Code.

(B) The exercise of a power is subject to the fiduciary duties prescribed by Chapter 5808. of the Revised Code.

Effective Date: 01-01-2007

### **5808.16 Specific powers of trustee.**

Without limiting the authority conferred by section 5808.15 of the Revised Code, a trustee may do all of the following:

- (A) Collect trust property and accept or reject additions to the trust property from a settlor or any other person;
- (B) Acquire or sell property, for cash or on credit, at public or private sale;
- (C) Exchange, partition, or otherwise change the character of trust property;
- (D) Deposit trust money in an account in a regulated financial-service institution;
- (E) Borrow money, with or without security, and mortgage or pledge trust property for a period within or extending beyond the duration of the trust;
- (F) With respect to an interest in a proprietorship, partnership, limited liability company, business trust, corporation, or other form of business or enterprise, continue the business or other enterprise and take any action that may be taken by shareholders, members, or property owners, including merging, dissolving, or otherwise changing the form of business organization or contributing additional capital;
- (G) With respect to stocks or other securities, exercise the rights of an absolute owner, including the right to do any of the following:
  - (1) Vote, or give proxies to vote, with or without power of substitution, or enter into or continue a voting trust agreement;
  - (2) Hold a security in the name of a nominee or in other form without disclosure of the trust so that title may pass by delivery;
  - (3) Pay calls, assessments, and other sums chargeable or accruing against the securities and sell or exercise stock subscription or conversion rights;
  - (4) Deposit the securities with a depository or other regulated financial-service institution.
- (H) With respect to an interest in real property, construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries;
- (I) Enter into a lease for any purpose as lessor or lessee, including a lease or other arrangement for exploration and removal of natural resources, with or without the option to purchase or renew, for a period within or extending beyond the duration of the trust;
- (J) Grant an option involving a sale, lease, or other disposition of trust property or acquire an option for the acquisition of property, including an option exercisable beyond the duration of the trust, and exercise an option so acquired;

- (K) Insure the property of the trust against damage or loss and insure the trustee, the trustee's agents, and beneficiaries against liability arising from the administration of the trust;
- (L) Abandon or decline to administer property of no value or of insufficient value to justify its collection or continued administration;
- (M) With respect to possible liability for violation of environmental law, do any of the following:
- (1) Inspect or investigate property the trustee holds or has been asked to hold, or property owned or operated by an organization in which the trustee holds or has been asked to hold an interest, for the purpose of determining the application of environmental law with respect to the property;
  - (2) Take action to prevent, abate, or otherwise remedy any actual or potential violation of any environmental law affecting property held directly or indirectly by the trustee, whether taken before or after the assertion of a claim or the initiation of governmental enforcement;
  - (3) Decline to accept property into trust or disclaim any power with respect to property that is or may be burdened with liability for violation of environmental law;
  - (4) Compromise claims against the trust that may be asserted for an alleged violation of environmental law;
  - (5) Pay the expense of any inspection, review, abatement, or remedial action to comply with environmental law.
- (N) Pay or contest any claim, settle a claim by or against the trust, and release, in whole or in part, a claim belonging to the trust;
- (O) Pay taxes, assessments, compensation of the trustee and of employees and agents of the trust, and other expenses incurred in the administration of the trust;
- (P) Exercise elections with respect to federal, state, and local taxes;
- (Q) Select a mode of payment under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, exercise rights under any employee benefit or retirement plan, annuity, or life insurance policy payable to the trustee, including the right to indemnification for expenses and against liabilities, and take appropriate action to collect the proceeds;
- (R) Make loans out of trust property, including loans to a beneficiary on terms and conditions the trustee considers to be fair and reasonable under the circumstances, and the trustee has a lien on future distributions for repayment of those loans;
- (S) Pledge the property of a revocable trust to guarantee loans made by others to the settlor of the revocable trust, or, if the settlor so directs, to guarantee loans made by others to a third party;
- (T) Appoint a trustee to act in another jurisdiction with respect to trust property located in the other jurisdiction, confer upon the appointed trustee all of the powers and duties of the appointing trustee, require that the appointed trustee furnish security, and remove any trustee so appointed;
- (U) Pay an amount distributable to a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated, by paying it directly to the beneficiary or applying it for the beneficiary's benefit, or

by doing any of the following:

- (1) Paying it to the beneficiary's guardian of the estate, or, if the beneficiary does not have a guardian of the estate, the beneficiary's guardian of the person;
  - (2) Paying it to the beneficiary's custodian under sections 5814.01 to 5814.09 of the Revised Code and, for that purpose, creating a custodianship;
  - (3) If the trustee does not know of a guardian of the person or estate, or custodian, paying it to an adult relative or other person having legal or physical care or custody of the beneficiary, to be expended on the beneficiary's behalf;
  - (4) Managing it as a separate fund on the beneficiary's behalf, subject to the beneficiary's continuing right to withdraw the distribution.
- (V) On distribution of trust property or the division or termination of a trust, make distributions in divided or undivided interests, allocate particular assets in proportionate or disproportionate shares, value the trust property for those purposes, and adjust for resulting differences in valuation;
- (W) Resolve a dispute concerning the interpretation of the trust or its administration by mediation, arbitration, or other procedure for alternative dispute resolution;
- (X) Prosecute or defend an action, claim, or judicial proceeding in any jurisdiction to protect trust property and the trustee in the performance of the trustee's duties;
- (Y) Sign and deliver contracts and other instruments that are useful to achieve or facilitate the exercise of the trustee's powers;
- (Z) On termination of the trust, exercise the powers appropriate to wind up the administration of the trust and distribute the trust property to the persons entitled to it.

Effective Date: 01-01-2007

### **5808.17 Powers and duties of trustee on termination.**

- (A) Upon termination or partial termination of a trust, the trustee may send to the beneficiaries a proposal for distribution. The right of any beneficiary to object to the proposed distribution terminates if the beneficiary does not notify the trustee of an objection within thirty days after the proposal was sent but only if the proposal informed the beneficiary of the right to object and of the time allowed for objection.
- (B) Upon the occurrence of an event terminating or partially terminating a trust, the trustee shall proceed expeditiously to distribute the trust property to the persons entitled to it, subject to the right of the trustee to retain a reasonable reserve for the payment of debts, expenses, and taxes.
- (C) A release by a beneficiary of a trustee from liability for breach of trust is invalid to the extent that it was induced by improper conduct of the trustee or that the beneficiary, at the time of the release, did not know of the beneficiary's rights or of the material facts relating to the breach.

Effective Date: 01-01-2007

## **CHAPTER 5809: OHIO UNIFORM PRUDENT INVESTOR ACT**

### **5809.01 Trustee duty to comply with act.**

(A)(1) As used in the Revised Code, the "Ohio Uniform Prudent Investor Act" means sections 5809.01 to 5809.08, 5808.03, 5808.05, and 5808.06, division (A) of section 5808.02, and division (B) of section 5808.07 of the Revised Code, and those sections may be cited as the "Ohio Uniform Prudent Investor Act."

(2) As used in the Ohio Uniform Prudent Investor Act, "trustee" means a trustee under any testamentary, inter vivos, or other trust.

(B) Except as provided in division (C) or (D) of this section, a trustee who invests and manages trust assets under the Ohio Uniform Prudent Investor Act owes a duty to the beneficiaries of the trust to comply with the Ohio Uniform Prudent Investor Act.

(C) The Ohio Uniform Prudent Investor Act may be expanded, restricted, eliminated, or otherwise altered, without express reference by the instrument creating a trust to the Ohio Uniform Prudent Investor Act or any section of the Revised Code that is part of that act.

(D) A trustee is not liable to a beneficiary of a trust to the extent the trustee acted in reasonable reliance on the provisions of the trust.

Effective Date: 01-01-2007

### **5809.02 Standard of care - portfolio strategy - risk and return objectives.**

(A) A trustee shall invest and manage trust assets as a prudent investor would, by considering the purposes, terms, distribution requirements, and other circumstances of the trust. In satisfying this requirement, the trustee shall exercise reasonable care, skill, and caution.

(B) A trustee shall make a reasonable effort to verify facts relevant to the investment and management of trust assets.

(C) A trustee's investment and management decisions respecting individual trust assets shall not be evaluated in isolation but in the context of the trust portfolio as a whole and as part of an overall investment strategy having risk and return objectives reasonably suited to the trust.

(D) Among circumstances that a trustee shall consider in investing and managing trust assets are the following as are relevant to the trust or its beneficiaries:

(1) The general economic conditions;

(2) The possible effect of inflation or deflation;

(3) The expected tax consequences of investment decisions or strategies;

(4) The role that each investment or course of action plays within the overall trust portfolio, which may include

financial assets, interests in closely held enterprises, tangible and intangible personal property, and real property;

(5) The expected total return from income and appreciation of capital;

(6) Other resources of the beneficiaries;

(7) Needs for liquidity, regularity of income, and preservation or appreciation of capital;

(8) An asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.

Effective Date: 01-01-2007

### **5809.03 Investment authority - diversification.**

(A) A trustee may invest in any kind of property or type of investment provided that the investment is consistent with the requirements and standards of the Ohio Uniform Prudent Investor Act.

(B) A trustee shall diversify the investments of a trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.

Effective Date: 01-01-2007

### **5809.04 Duties at inception of trusteeship.**

Within a reasonable time after accepting a trusteeship or receiving trust assets, a trustee shall review the trust assets and make and implement decisions concerning the retention and disposition of trust assets in order to bring the trust portfolio into compliance with the purposes, terms, distribution requirements, and other circumstances of the trust, and in order to comply with the requirements and standards of the Ohio Uniform Prudent Investor Act.

Effective Date: 01-01-2007

### **5809.05 Reviewing compliance.**

Compliance with the Ohio Uniform Prudent Investor Act shall be determined in light of the facts and circumstances existing at the time of a trustee's decision or action and not by hindsight.

Effective Date: 01-01-2007

### **5809.06 Delegation of investment and management functions.**

(A) A trustee may delegate investment and management functions of a trust that a prudent trustee having comparable skills could properly delegate under the circumstances. A trustee that exercises its delegation authority under this division shall comply with the requirements of division (A) of section 5808.07 of the Revised Code.

(B) In performing investment or management functions of a trust that are delegated to an agent, an agent owes a duty to the trust to exercise reasonable care to comply with the terms of the delegation.

(C) A trustee who delegates a function to an agent in compliance with division (A) of this section is not liable to the beneficiaries of the trust or to the trust for the decisions or actions of the agent to whom the function was delegated.

(D) By accepting the delegation of investment or management functions of a trust that is subject to the laws of this state, an agent submits to the jurisdiction of this state.

Effective Date: 01-01-2007

### **5809.07 Language invoking standard of act.**

The following terms or comparable language in the provisions of a trust, unless otherwise limited or modified, authorizes any investment or strategy permitted by the Ohio Uniform Prudent Investor Act: "investments permissible by law for investment of trust funds"; "legal investments"; "authorized investments"; "using the judgment and care under the circumstances then prevailing that persons of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds considering the probable income as well as the probable safety of their capital"; "prudent man rule"; "prudent trustee rule"; "prudent person rule"; and "prudent investor rule."

Effective Date: 01-01-2007

### **5809.08 Application and construction.**

(A) The Ohio Uniform Prudent Investor Act shall be applied and construed to effectuate the general purpose to make uniform the law with respect to the subject of these sections among the states enacting it.

(B) The Ohio Uniform Prudent Investor Act applies to trusts existing on or created after March 22, 1999. As applied to trusts existing on March 22, 1999, the Ohio Uniform Prudent Investor Act governs only decisions or actions occurring after March 22, 1999.

(C) The temporary investment of cash or funds pursuant to section 5815.26 or 2109.372 of the Revised Code shall be considered a prudent investment in compliance with the Ohio Uniform Prudent Investor Act.

Effective Date: 01-01-2007

## **CHAPTER 5810: BREACH OF TRUST**

### **5810.01 Breach of trust defined - judicial remedies.**

- (A) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.
- (B) To remedy a breach of trust that has occurred or may occur, the court may do any of the following:
- (1) Compel the trustee to perform the trustee's duties;
  - (2) Enjoin the trustee from committing a breach of trust;
  - (3) Compel the trustee to redress a breach of trust by paying money, restoring property, or other means;
  - (4) Order a trustee to account;
  - (5) Appoint a special fiduciary to take possession of the trust property and administer the trust;
  - (6) Suspend the trustee;
  - (7) Remove the trustee as provided in section 5807.06 of the Revised Code;
  - (8) Reduce or deny compensation to the trustee;
  - (9) Subject to section 5810.12 of the Revised Code, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds;
  - (10) Order any other appropriate relief.

Effective Date: 01-01-2007

### **5810.02 Liability to beneficiaries for breach -- contribution.**

(A) A trustee who commits a breach of trust is liable to the beneficiaries affected for the greater of the following:

- (1) The amount required to restore the value of the trust property and trust distributions to what they would have been had the breach not occurred;
- (2) The profit the trustee made by reason of the breach.

(B) Except as otherwise provided in this division, if more than one trustee is liable to the beneficiaries for a breach of trust, a trustee is entitled to contribution from the other trustee or trustees. A trustee is not entitled to contribution if the trustee was substantially more at fault than another trustee or if the trustee committed the breach of trust in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries. A trustee who received a benefit from the breach of trust is not entitled to contribution from another trustee to the extent of the benefit received.

Effective Date: 01-01-2007

### **5810.03 Trustee not accountable or liable for profit or loss absent breach.**

(A) Absent a breach of trust, a trustee is not accountable to a beneficiary for any profit made by the trustee arising from the administration of the trust.

(B) Absent a breach of trust, a trustee is not liable to a beneficiary for a loss or depreciation in the value of trust property or for not having made a profit.

Effective Date: 01-01-2007

### **5810.04 Award of costs, expenses, and attorney fees from trust.**

In a judicial proceeding involving the administration of a trust, including a trust that contains a spendthrift provision, the court, as justice and equity may require, may award costs, expenses, and reasonable attorney's fees to any party, to be paid by another party, from the trust that is the subject of the controversy, or from a party's interest in the trust that is the subject of the controversy.

Effective Date: 01-01-2007

### **5810.05 Limitations period for action against trustee.**

(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.

Effective Date: 01-01-2007

**5810.06 Trustee reliance on terms of trust.**

A trustee who acts in reasonable reliance on the terms of the trust as expressed in the trust instrument is not liable to a beneficiary for a breach of trust to the extent the breach resulted from the reliance.

Effective Date: 01-01-2007

**5810.07 Reasonable care to ascertain material event.**

If the happening of an event, including marriage, divorce, performance of educational requirements, or death, affects the administration or distribution of a trust, a trustee who has exercised reasonable care to ascertain the happening of the event is not liable for a loss resulting from the trustee's lack of knowledge.

Effective Date: 01-01-2007

**5810.08 Enforceability of exculpatory trust term.**

A term of a trust relieving a trustee of liability for breach of trust is unenforceable to the extent that it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries or was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship to the settlor.

Effective Date: 01-01-2007

**5810.09 Beneficiary consent to conduct constituting breach.**

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach, released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless the consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee or, at the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

Effective Date: 01-01-2007

**5810.10 Personal contract and tort liability of trustee.**

(A) Except as otherwise provided in the contract, for contracts entered into on or after March 22, 1984, a trustee is not personally liable on a contract properly entered into in the trustee's fiduciary capacity in the course of administering the trust if the trustee in the contract disclosed the fiduciary capacity. The words "trustee," "as trustee," "fiduciary," or "as fiduciary," or other words that indicate one's trustee capacity, following the name or signature of a trustee are sufficient disclosure for purposes of this division.

(B) A trustee is personally liable for torts committed in the course of administering a trust or for obligations arising from ownership or control of trust property, including liability for violation of environmental law, only if the trustee is personally at fault.

(C) A claim based on a contract entered into by a trustee in the trustee's fiduciary capacity, on an obligation

arising from ownership or control of trust property, or on a tort committed in the course of administering a trust may be asserted in a judicial proceeding against the trustee in the trustee's fiduciary capacity, whether or not the trustee is personally liable for the claim.

Effective Date: 01-01-2007

### **5810.11 Personal liability of trustee on contract as partner.**

(A)(1) Except as otherwise provided in division (C) of this section or unless personal liability is imposed in the contract, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable on a contract entered into by the partnership after the trust's acquisition of the interest if the fiduciary capacity was disclosed. A partnership certificate that is filed pursuant to Chapter 1777, or another chapter of the Revised Code and that indicates that a trustee holds a general partnership interest in a fiduciary capacity by the use following the name or signature of the trustee of the words "as trustee" or other words that indicate the trustee's fiduciary capacity constitutes a sufficient disclosure for purposes of this division.

(2) If a partnership certificate is not required to be filed pursuant to Chapter 1777, or another chapter of the Revised Code, a sufficient disclosure for purposes of division (A) of this section can be made by a trustee if a certificate that is filed with the recorder of the county in which the partnership's principal office or place of business is situated and with the recorder of each county in which the partnership owns real estate satisfies all of the following requirements:

(a) The certificate states in full the names of all persons holding interests in the partnership and their places of residence.

(b) The certificate is signed by all persons who are general partners in the partnership and is acknowledged by a person authorized to take acknowledgements of deeds.

(c) The certificate uses the words "trustee under the (will or trust) of (name of decedent or settlor)," or other words that indicate the trustee's fiduciary capacity, following the trustee's name or signature.

(3) A contract or other written instrument that is delivered to a party that contracts with the partnership in which a trustee holds a general partnership interest in a fiduciary capacity and that indicates that the trustee so holds the interest constitutes a disclosure for purposes of division (A)(1) of this section with respect to transactions between the party and the partnership. If a disclosure has been made by a certificate in accordance with division (A) of this section, a disclosure for purposes of division (A) of this section with respect to such transactions exists regardless of whether a contract or other instrument indicates the trustee holds the general partnership interest in a fiduciary capacity.

(B) Except as otherwise provided in division (C) of this section, a trustee who holds an interest as a general partner in a general or limited partnership is not personally liable for torts committed by the partnership or for obligations arising from ownership or control of the interest unless the trustee is personally at fault.

(C) The immunity provided by this section does not apply if an interest in the partnership is held by the trustee in a capacity other than that of trustee or is held by the trustee's spouse or one or more of the trustee's descendants, siblings, or parents, or the spouse of any of them.

(D) If the trustee of a revocable trust holds an interest as a general partner in a general or limited partnership, the settlor is personally liable for contracts and other obligations of the partnership as if the settlor were a general partner.

Effective Date: 01-01-2007

### **5810.12 Person assisting or dealing with trustee in good faith.**

(A) A person other than a beneficiary who in good faith assists a trustee, or who in good faith and for value deals with a trustee, without knowledge that the trustee is exceeding or improperly exercising the trustee's powers is protected from liability as if the trustee properly exercised the power.

(B) A person other than a beneficiary who in good faith deals with a trustee is not required to inquire into the extent of the trustee's powers or the propriety of their exercise.

(C) A person who in good faith delivers assets to a trustee is not required to ensure their proper application.

(D) A person other than a beneficiary who in good faith assists a former trustee, or who in good faith and for value deals with a former trustee, without knowledge that the trusteeship has terminated is protected from liability as if the former trustee were still a trustee.

(E) Comparable protective provisions of other laws relating to commercial transactions or transfer of securities by fiduciaries prevail over the protection provided by this section.

Effective Date: 01-01-2007

### **5810.13 Certification of trust furnished to person not beneficiary.**

(A) Instead of furnishing a copy of the trust instrument to a person other than a beneficiary, the trustee may furnish to the person a certification of trust containing all of the following information:

- (1) A statement that the trust exists and the date the trust instrument was executed;
- (2) The identity of the settlor;
- (3) The identity and address of the currently acting trustee;
- (4) The powers of the trustee;
- (5) The revocability or irrevocability of the trust and the identity of any person holding a power to revoke the trust;
- (6) The authority of cotrustees to sign or otherwise authenticate and whether all or less than all are required in order to exercise powers of the trustee;
- (7) The trust's taxpayer identification number;
- (8) The manner of taking title to trust property.

(B) Any trustee may sign or otherwise authenticate a certification of trust.

(C) A certification of trust shall state that the trust has not been revoked, modified, or amended in any manner that would cause the representations contained in the certification of trust to be incorrect.

(D) A certification of trust is not required to contain the dispositive terms of a trust.

(E) A recipient of a certification of trust may require the trustee to furnish copies of those excerpts from the original trust instrument and later amendments that designate the trustee and confer upon the trustee the power to act in the pending transaction.

(F) A person who acts in reliance upon a certification of trust without knowledge that the representations contained in the certification are incorrect is not liable to any person for so acting and may assume without inquiry the existence of the facts contained in the certification. Knowledge of the terms of the trust may not be inferred solely from the fact that a copy of all or part of the trust instrument is held by the person relying upon the certification.

(G) A person who in good faith enters into a transaction in reliance upon a certification of trust may enforce the transaction against the trust property as if the representations contained in the certification were correct.

(H) A person making a demand for the trust instrument in addition to a certification of trust or excerpts is liable for damages if the court determines that the person did not act in good faith in demanding the trust instrument.

(I) This section does not limit the right of a person to obtain a copy of the trust instrument in a judicial proceeding concerning the trust.

Effective Date: 01-01-2007

## **CHAPTER 5811: APPLICATION AND CONSTRUCTION OF CODE**

### **5811.01 Promotion of uniformity of law.**

In applying and construing Chapters 5801. to 5811. of the Revised Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of those chapters among states that enact the uniform trust code.

Effective Date: 01-01-2007

### **5811.02 Electronic Signatures in Global and National Commerce Act.**

The provisions of Chapters 5801. to 5811. of the Revised Code governing the legal effect, validity, or enforceability of electronic records or electronic signatures and of contracts formed or performed with the use of electronic records or electronic signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7002, 114 Stat. 467, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

Effective Date: 01-01-2007

### **5811.03 Temporal application of provisions of Code.**

(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.

Effective Date: 01-01-2007

## **CHAPTER 5802: JURISDICTION OF COURT**

### **5802.01 Judicial intervention in trust administration.**

(A) A court may intervene in the administration of a trust to the extent its jurisdiction is invoked by an interested person or as provided by law.

(B) An inter vivos trust is not subject to continuing judicial supervision unless ordered by the court. Trusts created pursuant to a section of the Revised Code or a judgment or decree of a court are subject to continuing judicial supervision to the extent provided by the section, judgment, or decree or by court order.

(C) A judicial proceeding involving a trust may relate to any matter involving the trust's administration, including a request for instructions and an action to declare rights.

Effective Date: 01-01-2007

### **5802.02 Personal jurisdiction over trustee and beneficiaries.**

(A) By accepting the trusteeship of a trust having its principal place of administration in this state or by moving the principal place of administration to this state, the trustee submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(B) With respect to their interests in the trust, the beneficiaries of a trust having its principal place of administration in this state are subject to the jurisdiction of the courts of this state regarding any matter involving the trust. By accepting a distribution from the trust, the recipient submits personally to the jurisdiction of the courts of this state regarding any matter involving the trust.

(C) This section does not preclude other methods of obtaining jurisdiction over a trustee, beneficiary, or other person receiving property from the trust.

Effective Date: 01-01-2007

### **5802.03 Concurrent jurisdiction regarding inter vivos trust.**

The probate division of the court of common pleas has concurrent jurisdiction with, and the same powers at law and in equity as, the general division of the court of common pleas to issue writs and orders and to hear and determine any action that involves an inter vivos trust.

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In applying and construing Chapters 5801. to 5811. of the Revised Code, a court may consider the need to promote uniformity of the law with respect to the subject matter of those chapters among states that enact the uniform trust code.

Effective Date: 01-01-2007

### **5811.02 Electronic Signatures in Global and National Commerce Act.**

The provisions of Chapters 5801. to 5811. of the Revised Code governing the legal effect, validity, or enforceability of electronic records or electronic signatures and of contracts formed or performed with the use of electronic records or electronic signatures conform to the requirements of section 102 of the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. 7002, 114 Stat. 467, and supersede, modify, and limit the requirements of the Electronic Signatures in Global and National Commerce Act.

Effective Date: 01-01-2007

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(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.

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Effective Date: 01-01-2007

### **RULE 4.3 Process: Out-of-State Service**

**(A) When service permitted.** Service of process may be made outside of this state, as provided in this rule, in any action in this state, upon a person who, at the time of service of process, is a nonresident of this state or is a resident of this state who is absent from this state. "Person" includes an individual, an individual's executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim that is the subject of the complaint arose, from the person's:

- (1) Transacting any business in this state;
- (2) Contracting to supply services or goods in this state;
- (3) Causing tortious injury by an act or omission in this state, including, but not limited to, actions arising out of the ownership, operation, or use of a motor vehicle or aircraft in this state;
- (4) Causing tortious injury in this state by an act or omission outside this state if the person regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when the person to be served might reasonably have expected the person who was injured to use, consume, or be affected by the goods in this state, provided that the person to be served also regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;
- (6) Having an interest in, using, or possessing real property in this state;
- (7) Contracting to insure any person, property, or risk located within this state at the time of contracting;
- (8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for spousal support, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;
- (9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when the person to be served might reasonably have expected that some person would be injured by the act in this state;
- (10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, that the person to be served commits or in the commission of which the person to be served is guilty of complicity.

**(B) Methods of service.**

**(1) Service by certified or express mail.** Evidenced by return receipt signed by any person, service of any process shall be by certified or express mail unless otherwise permitted by these rules. The clerk shall place a copy of the process and complaint or other document to be served in an envelope. The clerk shall address the envelope to the person to be served at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk with instructions to forward. The clerk shall affix adequate postage and place the sealed envelope in the United States mail as certified or express mail return receipt requested with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

The clerk shall forthwith enter the fact of mailing on the appearance docket and make a similar entry when the return receipt is received. If the envelope is returned with an endorsement showing failure of delivery, the clerk shall forthwith notify, by mail, the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action. If the envelope is returned with an endorsement showing failure of delivery, service is complete when the attorney or serving party, after notification by the clerk, files with the clerk an affidavit setting forth facts indicating the reasonable diligence utilized to ascertain the whereabouts of the party to be served.

All postage shall be charged to costs. If the parties to be served by certified or express mail are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the postage.

**(2) Personal service.** When ordered by the court, a "person" as defined in division (A) of this rule may be personally served with a copy of the process and complaint or other document to be served. Service under this division may be made by any person not less than eighteen years of age who is not a party and who has been designated by order of the court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person who will make the service.

Proof of service may be made as prescribed by Civ. R. 4.1 (B) or by order of the court.

[Effective: July 1, 1970; amended effective July 1, 1971; July 1, 1980; July 1, 1988; July 1, 1991; July 1, 1997.]

LEXSEE 1995 OHIO APP. LEXIS 1354

STATE OF OHIO, EX REL. LUCIA DELUCA, ET AL., RELATORS, VS. THE  
HONORABLE R. SCOTT KRICHBAUM, RESPONDENT.

CASE NO. 94 C.A. 144

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, MAHON-  
ING COUNTY*1995 Ohio App. LEXIS 1354*

March 29, 1995, Decided

March 29, 1995, FILED

**NOTICE:**

[\*1] THE LEXIS PAGINATION OF THIS DOCUMENT IS SUBJECT TO CHANGE PENDING RELEASE OF THE FINAL PUBLISHED VERSION.

**PRIOR HISTORY:** CHARACTER OF PROCEEDINGS: Complaint in Prohibition.

**DISPOSITION:** MOTIONS FOR SUMMARY JUDGMENT: Respondent's Motion for Summary Judgment Overruled. Relators' Motion for Summary Judgment Granted. Writ of Prohibition Issued.

**COUNSEL:** For Relators: Robert L. Brandfass, P.O. Box 2031, Charleston, WV 25327.

For Judge R. Scott Krichbaum, Respondent: James A. Philomena, Prosecuting Attorney, Kathi McNabb Welsh, Assistant Prosecuting Attorney, Mahoning County Courthouse, 120 Market Street, Youngstown, Ohio 44503.

For Aluminum Color Industries, Inc., Amicus to Respondent: Patrick J. Coady, Charles J. Kay, 1200 Mahoning Bank Building, Youngstown, Ohio 44503.

**JUDGES:** Hon. Joseph E. O'Neill, Hon. Gene Donofrio, Hon. Edward A. Cox.

**OPINION**

OPINION AND JOURNAL ENTRY  
ON MOTIONS FOR SUMMARY JUDGMENT  
PER CURIAM

This is an original action to this court on a complaint for writ of prohibition and subsequent motions for summary judgment by both relators and respondent. The issue here is whether the respondent has personal jurisdiction to hear a civil case against the relators as defendants, [\*2] filed in the Mahoning County Court of Common Pleas.

The facts indicate that during the months of July, August and September of 1992, one Jay Worthington, without the consent of Aluminum Color Industries, Inc., fraudulently issued a series of checks drawn off Aluminum Industries' bank account at Western Reserve Bank located in Lowellville, Ohio. At that time, Mr. Worthington was employed by Aluminum Industries as a comptroller and accountant. Mr. Worthington subsequently pled guilty to fraud in federal court due to the above actions.

A large number of the checks issued by Mr. Worthington were for personal indebtedness, and to various individuals located throughout Connecticut.

On August 3, 1993 the plaintiff, Aluminum Industries, filed a civil action sounding in fraud, conversion and unjust enrichment, against Mr. Worthington and the parties who received the checks from Mr. Worthington, those being: Lucia DeLuca, Anthony Giglio, Fred Petrillo, Frank Pires, Arthur Vercillo, Fred Vitale, the Estate of Anthony Swass, Stanley Lipka, individually and d.b.a. American Home Improvement Company, Robert Rose and Frank Termini.

A summons and complaint was delivered to Lucia DeLuca, Anthony [\*3] Giglio, Fred Petrillo, Frank Pires, the Estate of Anthony Swass, Stanley Lipka, individually and d.b.a. American Home Improvement Company. No delivery occurred to Arthur Vercillo or Fred Vitale. Defendants Estate of Anthony Swass and Stanley Lipka,

individually and d.b.a. American Home Improvement Company, have not yet made an appearance.

On September 2, 1993 relators Lucia DeLuca, Anthony Giglio, Fred Petrillo, Frank Pires, Arthur Vercillo and Fred Vitale filed a motion to dismiss for lack of personal jurisdiction and improper service with the Mahoning County Common Pleas Court. On November 12, 1993 the court denied the motion to dismiss for lack of personal jurisdiction, but granted the motion of defendants Arthur Vercillo and Fred Vitale to dismiss for failure of service.

On August 8, 1994 the defendants Lucia DeLuca, Anthony Giglio, Fred Petrillo, Frank Pires, Estate of Anthony Swass, Stanley Lipka, individually and d.b.a. American Home Improvement, filed this instant complaint for writ of prohibition.

On September 15, 1994 respondent Judge Krichbaum filed an answer to the petition and a motion for summary judgment.

On September 27, 1994 Aluminum Color Industries (plaintiff [\*4] in the civil case below), filed a motion to intervene as a respondent and an answer to relators' writ of prohibition.

On October 3, 1994 relators filed a brief in opposition to respondent's motion for summary judgment and its own motion for summary judgment.

On October 17, 1994 relators filed a brief in opposition to Aluminum's motion to intervene. On October 18, 1994 Aluminum Industries filed a reply to relators' brief in opposition to Aluminum's motion to intervene.

On December 2, 1994 Aluminum Industries filed a memorandum in support of respondent's position.

The matters now before this court are the relators' writ of prohibition and both relators' and respondent's motions for summary judgment. The issue in the above actions is whether Mahoning County Common Pleas Court has personal jurisdiction over the relators.

It is undisputed that the relators have not consented to jurisdiction in the state of Ohio, are not residents of Ohio, have not maintained businesses in Ohio, nor possessed licenses issued by the state of Ohio. All the relators are residents of the state of Connecticut. The underlying issue to personal jurisdiction then becomes whether any of the relators' actions [\*5] caused tortious injury to the Ohio corporation, i.e. Aluminum Industries, within the state of Ohio.

The standard for issuance of the extraordinary writ of prohibition is as follows:

"For a writ of prohibition to issue, a relator must establish (1) that the court or officer against whom the writ is sought is about to exercise judicial or quasi-judicial power, (2) that the exercise of that power is unauthorized by law, and (3) that denying the writ will result in injury for which no other adequate remedy exists in the ordinary course of law." See *State ex rel. Ruessman v. Flanagan* (1992), 65 Ohio St.3d 464, at 465, 605 N.E.2d 31

In the present case, there is no dispute that the Honorable R. Scott Krichbaum is about to exercise judicial authority over relators by allowing the underlying common pleas court case to proceed. Therefore, the issue in this prohibition action becomes whether Judge Krichbaum's actions are unauthorized by law and whether relators possess an adequate remedy in the ordinary course of law.

The rule is firmly established that the court of common pleas is a court of general jurisdiction and, as such, possesses the authority initially to determine [\*6] its own jurisdiction over both the person and subject matter in an action before it. *State ex rel. Ruessman v. Flanagan, supra*. Generally, a party challenging a court's jurisdiction has a remedy at law in the form of an appeal from an adverse holding of a court that it has such jurisdiction, and may not maintain a proceeding in prohibition to prevent the prosecution of such action. *Id.* However, where there is a total want of jurisdiction on the part of the court, a writ of prohibition will be allowed. *Id.* This corollary is applied only in instances where there is a "patent and unambiguous" restriction on the jurisdiction of the court which clearly places the dispute outside the court's jurisdiction. *Id.* Therefore, absent a patent and unambiguous lack of jurisdiction, a court having general jurisdiction of the subject matter of a case possesses authority to determine its own jurisdiction, and a party challenging the court's jurisdiction has an adequate remedy at law by appeal from the court's holding that it has jurisdiction. *Goldstein v. Christiansen* (1994), 70 Ohio St.3d 232, 638 N.E.2d 541, citing *State ex rel Bradford v. Trumbull Cty. Court* (1992), 64 Ohio [\*7] St.3d 502, 597 N.E.2d 116, *State ex rel. Pearson v. Moore* (1990), 48 Ohio St.3d 37, 548 N.E.2d 945.

A two-step analysis is required to determine whether a state court has personal jurisdiction over a nonresident. First, the court must look to the state's "long-arm statute" or applicable civil rule to determine whether, under the facts of the particular case, jurisdiction lies. *Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 532 N.E.2d 117. Second, if it does, the court must decide whether the asser-

tion of jurisdiction deprives the nonresident defendant of due process of law. *Fallang, supra*, citing *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154.

Personal jurisdiction over a nonresident defendant is governed by *Ohio Civ.R. 4.3(A)* and *R.C. 2307.382*. *Section 2307.382(A)(3)* states that personal jurisdiction over a person, causing tortious injury by an act or omission in this state." Similarly, *Civ.R. 4.3(A)(3)* authorizes out of state service of process on a defendant who caused "tortious injury by an act or omission in this state." The complaint in the underlying lawsuit alleges that relators committed tortious injury in Ohio by committing [\*8] acts of fraud and/or conversion against Aluminum Color Industries, Inc. In Aluminum Color's brief in opposition to relator's motion to dismiss the underlying action, Aluminum Color attached copies of the checks which comprised the basis of the complaint. These checks were cashed and charged to Aluminum Color's account at the Western Reserve Bank in Lowellville, Ohio.

The issue then is whether the cashing of the checks in Connecticut by the relators subject those relators to suit in Ohio via the "long-arm statute," since the checks were ultimately charged to Aluminum Color's account at the Western Reserve Bank in Lowellville, Ohio by the bank that cashed these checks in Connecticut. Pursuant to *Gray v. American Radiator and Standard Sanitary Corp.* (1961), 22 Ill. 2d 432, 176 N.E.2d 761, "\*\*\*\* in law the place of a wrong is where the last event takes place which is necessary to render the actor liable."

Respondent alleges that the "last act" in this case is the charging of Aluminum's account at the Western Reserve Bank, while relators feel the last act is the cashing of the check at the Connecticut bank, while not admitting that that act was in fact knowingly criminal or tortious.

[\*9] All of the cases cited by the respondents involve libel, slander or defamation. In these instances clearly the tort/crime takes place upon publication (not mailing/etc.). Thus, those case facts are different from those of the instant case. In the case of *Fallang v. Hickey* (1988), 40 Ohio St.3d 106, 532 N.E.2d 117, which is cited numerous times by the respondent, in headnote one, the court states:

"*Civ.R. 4.3(A)(3)* authorizes assertion of personal jurisdiction over a nonresident defendant in a defamation action when publication of the offending communication occurs in Ohio."

In the case of *Calder v. Jones* (1984), 465 U.S. 783, 79 L. Ed. 2d 804, 104 S. Ct. 1482, the California resident

brought suit in a California court claiming she had been libeled by an article written and edited by the defendants who published a national magazine in Florida. In that case, the court noted that an individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly caused the injury in California. Again, in that case, the libel becomes a wrong when it is published. Hence, clearly from the cases cited by the respondent all [\*10] of them involved the type of tort, criminal act or wrong which takes place upon publication which would happen in the state normally where the person resides who is harmed.

Note, also, the case of *United Liberty Life Ins. Co. v. Ryan* 772 F. Supp. 366 (S.D. Ohio 1991), where that case at page 378, the court stated:

"Second, the locus of the economic loss is irrelevant:

"Because the plaintiff was domiciled in Michigan, to be sure, the claimed injury to its pursue might be said to have suffered there -- but for the locus of such a monetary injury is immaterial, as long as the obligation did not arise from a 'privilege the defendant exercised in [the forum state].'"

Hence the fact that the parties suffered the monetary loss in Ohio is not controlling.

In the case of *Goldstein v. Opolka* (Nov. 13, 1990), Franklin App. No. 90AP-492, unreported, in a case where an Ohio plaintiff had hired an attorney in Florida and mailed him a check and the work supposedly was not completed, the plaintiff sued in Ohio. The court in Franklin County stated:

"\*\*\*\* the test for determining if a defendant has minimum contacts with the forum state has evolved from merely determining [\*11] the 'quality and nature' of the contacts to examining them in light of defendant's reasonable awareness that by those contacts, he has subjected himself to personal jurisdiction in the forum state. \*\*\*\*"

That court went on to state that:

"Applying the foregoing test to the facts of the present case, we conclude that defendant would not reasonably anticipate being haled (*sic.*) into court in Columbus, Ohio. Defendant resides in Miami, Florida; has never been in Columbus, Ohio; has never been in the state of Ohio; has never maintained a business in Ohio; and has never maintained an interest in a business in Ohio. The only contacts that defendant has had with this state were interstate communications with his client, i.e., mail and telephone calls between defendant in Miami, Florida, and plaintiff in Columbus, Ohio. We note that even these contacts appear to have been primarily initiated by the plaintiff. Thus we do not believe that in applying the due process standard, plaintiff has established that defendant has sufficient minimum contacts with Ohio in order to establish personal jurisdiction over him."

In our case, the plaintiff never had any direct contacts with [\*12] the defendants in this case. There was no mail, no telephone calls, only the checks which did not come from the plaintiff in this case but from a third party, being Mr. Worthington.

Hence, for all the above reasons, due process requires that there be more than the contact of the ultimate cashing and charging of the checks to Aluminum's bank in Ohio to establish personal jurisdiction over the Connecticut residents here in Ohio. Hence, summary judgment is denied for the respondent and granted for the relators. The writ of prohibition is issued.

Costs of this proceeding taxed against respondents.

Final order. Clerk to serve notice as provided in *Civ.R. 58(B)*.

Joseph E. O'Neill

Gene Donofrio

Edward A. Cox

JUDGES.

FOCUS - 10 of 25 DOCUMENTS

**C & H DEVELOPMENT CO., a California Corporation; CONSTANTINE CHRISTOPOULOS and JEANNIE B. CHRISTOPOULOS; and TAKEO HIRAHARA and CARLE C. HIRAHARA, Plaintiffs, vs. ROBERT R. McIVOR, et al., Defendants.**

No. C-96-00912 MHP

**UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA**

1996 U.S. Dist. LEXIS 12029

August 6, 1996, Decided

August 6, 1996, FILED; August 7, 1996, ENTERED IN CIVIL DOCKET

**DISPOSITION:** [\*1] Defendant's motion to dismiss for lack of personal jurisdiction GRANTED.

**COUNSEL:** For C & H DEVELOPMENT CO., a California Corporation, CONSTANTINE CHRISTOPOULOS, JEANNIE B. CHRISTOPOULOS, TAKEO HIRAHARA, CARLE C. HIRAHARA, Plaintiffs: Richard C. Jacobs, Howard Rice Nemerovski Canady Falk & Rabin, San Francisco, CA.

For ROBERT R. MCIVOR, Trustee and Beneficiary of the Margaret McIvor Trust, WILLIAM C. MCIVOR, Trustee and Beneficiary of the Margaret McIvor Trust, defendants: Jeffrey M. Hamerling, Steven W. Ritcheson, Steinhart & Falconer, San Francisco, CA.

For MARIAN KING, Beneficiary of the Margaret McIvor Trust, defendant: Steven W. Ritcheson, Steinhart & Falconer, San Francisco, CA.

For ANN GRCEVICH dba Sherman Cleaners, ERNEST GRCEVICH, MICHAEL GRCEVICH dba Sherman Cleaners, LINDA GRCEVICH dba Sherman Cleaners, PATRICIA GRCEVICH dba Sherman Cleaners, SHERMAN CLEANERS, INC., defendants: Julie Jones, Robert Goodman, Feldman Waldman & Kline, San Francisco, CA.

For ROBERT R. MCIVOR, WILLIAM C. MCIVOR, Cross-claimants: Jeffrey M. Hamerling, Steinhart & Falconer, San Francisco, CA.

For ROBERT R. MCIVOR, WILLIAM C. MCIVOR, Counter-claimants: Jeffrey M. Hamerling, Steinhart & Falconer, San Francisco, CA.

For C & H DEVELOPMENT CO, CONSTANTINE CHRISTOPOULOS, JEANNIE B. CHRISTOPOULOS, TAKEO HIRAHARA, CARLE C. HIRAHARA, Counter-defendants: David H. Silverman, Jaffe Trutanich Scatena & Blum, San Francisco, CA.

For ROBERT R. MCIVOR, WILLIAM C. MCIVOR, Third-party Plaintiffs: Jeffrey M. Hamerling, Steinhart & Falconer, San Francisco, CA.

For TERRANCE CLINGAN, GLORIA CLINGAN, C&H/CLINGAN PARTNERSHIP, LAMORINDA DEVELOPMENT AND INVESTMENT, Third-party Defendants: Richard C. Jacobs, Howard Rice Nemerovski Canady Falk & Rabin, San Francisco, CA.

For SAMUEL MCCONNELL, Third-party Defendant: Robert E. Hannon, Alamo, CA.

**JUDGES:** MARILYN HALL PATEL, United States District Judge

**OPINION BY:** MARILYN HALL PATEL

**OPINION**

**MEMORANDUM AND ORDER**

Plaintiff C & H Development Co. ("C & H") and others brought this action against defendants, among them Marian King, for the cost of cleaning contaminated land which plaintiffs are required to remediate. Now before the court is defendant King's motion to dismiss for lack of personal jurisdiction. Having considered the parties' arguments and submissions, and for the reasons set

forth below, the court enters the following memorandum and order.

#### BACKGROUND<sup>1</sup>

1 Unless otherwise indicated, the following facts are taken from the Complaint.

Plaintiffs currently own a piece of contaminated land at 3321-29 Lakeshore Avenue in Oakland, California. The Alameda County Health Care Services Agency has mandated that plaintiffs remediate several chemicals from that land. Plaintiffs brought suit against defendant King and others for [\*2] the cost associated with the required cleanup.

Defendant King is currently a resident of the state of Washington and has been so for the past sixteen years. King does not own any property or conduct any business in the state of California. Although King grew up and attended high school in California, she has only visited the state three times in the last eight years.

King's mother, Margaret R. McIvor, executed an inter vivos trust on January 26, 1978. Approximately ten years later, on June 17, 1988, Ms. McIvor died and the trust became irrevocable. King was designated as one of the beneficiaries of the trust. There is no evidence that aside from being a beneficiary defendant had any other role with respect to the trust. Included among the assets in trust was the piece of property upon which the present law suit is predicated.

Upon their mother's death, King and her two brothers attempted to split the assets from the trust into equal shares. King and her brother Robert each received about a one third share in securities. King's other brother, William, received his share in the contaminated property. Apparently, this arrangement was made during a series of phone calls while King was [\*3] in Seattle and William was in California. King also called her mother's San Francisco stockbroker in order to have her portion of the securities transferred to her stockbroker in Seattle.

Ultimately, the contaminated property was sold to the Grceviches, co-defendants in this action, who then sold it to plaintiffs. On March 11, 1996, plaintiffs filed the complaint in this matter seeking clean-up costs. On May 1, 1996 defendant King filed the present motion to dismiss for lack of personal jurisdiction.

#### LEGAL STANDARD

A motion to dismiss will be denied unless it appears that the plaintiff can prove no set of facts which would entitle him or her to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957); *Fidelity Financial Corp. v. Federal Home Loan Bank of San Francisco*, 792 F.2d 1432, 1435 (9th Cir. 1986), cert.

denied, 479 U.S. 1064, 93 L. Ed. 2d 998, 107 S. Ct. 949 (1987). All material allegations in the complaint will be taken as true and construed in the light most favorable to the plaintiff. *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). Although the court is generally confined to consideration of the allegations in the pleadings, when the complaint is accompanied by attached [\*4] documents, such documents are deemed part of the complaint and may be considered in evaluating the merits of a Rule 12(b)(6) motion. *Durning v. First Boston Corp.*, 815 F.2d 1265, 1267 (9th Cir.), cert. denied sub. nom. *Wyoming Community Dev. Auth. v. Durning*, 484 U.S. 944, 98 L. Ed. 2d 358, 108 S. Ct. 330 (1987).

#### DISCUSSION

Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, an individual defendant may move to dismiss an action if the court lacks personal jurisdiction over that individual.

In a diversity action, the question of whether a federal court can exercise personal jurisdiction over a non-resident defendant "turns on two independent considerations: whether an applicable state rule or statute potentially confers personal jurisdiction over the defendant, and whether assertion of personal jurisdiction accords with constitutional principles of due process." *Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1286 (9th Cir. 1977) (citing *Amba Marketing Systems, Inc. v. Jobar International, Inc.*, 551 F.2d 784, 786 (9th Cir. 1977)).

California's jurisdictional statute provides that a court may exercise jurisdiction on any basis not inconsistent with the California Constitution [\*5] or the Constitution of the United States. *Cal. Civ. Proc. Code § 410.10* (West 1973). The California Constitution imposes no greater restrictions on jurisdiction than does the due process clause of the United States Constitution. *Data Disc*, 557 F.2d at 1286-87 n. 3. Thus, the California jurisdictional statute permits California courts to exercise jurisdiction to the fullest extent authorized by the due process clause of the United States Constitution. *Id.* at 1286 n.3 (citing *Michigan Nat'l Bank v. Superior Court*, 23 Cal. App. 3d 1, 6, 99 Cal. Rptr. 823 (1972)).

The exercise of personal jurisdiction by a federal court over a nonresident defendant does not deny due process where the defendant has minimum contacts with the forum state such that maintenance of the action "does not offend traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945).

For the court to find that minimum contacts exist between the nonresident defendant and the forum state, there must be some act by which the defendant "purpose-

fully avails itself of the privilege of conducting activities" within the state, thus "invoking the benefits and protection" [\*6] of the state's laws. *Hanson v. Denckla*, 357 U.S. 235, 253, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). The defendant's "conduct and connection with the forum State [must be] such that he would reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980).

Defendant King asserts that this court lacks personal jurisdiction over her. The burden of establishing jurisdiction rests on plaintiff, the party seeking to invoke the court's jurisdiction. See *Data Disc*, 557 F.2d at 1285 (citing *KVOS, Inc. v. Associated Press*, 299 U.S. 269, 81 L. Ed. 183, 57 S. Ct. 197 (1936)).

### I. General Jurisdiction

If the nonresident defendant's activities within the forum state are "substantial" or "continuous and systematic," then the defendant is subject to "general jurisdiction". *Data Disc*, 557 F.2d at 1287. This means that the defendant is subject to jurisdiction even if the cause of action is unrelated to the defendant's forum activities. *Id.* There is no contention that this court has general jurisdiction over King.

### II. Specific Jurisdiction

If the defendant is not subject to general jurisdiction, she may still be subject to "specific jurisdiction" if the cause of action is directly [\*7] related to the defendant's forum activities. *Data Disc*, 557 F.2d at 1287.

The Ninth Circuit has articulated a three-part test for determining whether a nonresident defendant is subject to specific jurisdiction: (1) the nonresident defendant must perform some act or consummate some transaction with the forum state by which he purposefully avails himself of the privilege of conducting business in the forum state, thereby invoking the benefits and protection of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. See *Terracom v. Valley National Bank*, 49 F.3d 555, 560 (9th Cir. 1995); see also *Pacific Atlantic Trading Co. v. M/V Main Exp.*, 758 F.2d 1325, 1327 (9th Cir. 1985). Each of these conditions are required for asserting jurisdiction. *Insurance Co. of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1270 (9th Cir. 1981).

With respect to the first prong, plaintiffs argue that defendant purposefully availed herself of the benefits of California law. Specifically, plaintiffs point to the fact that King participated in several phone calls discussing the [\*8] distribution of trust assets with her brother who lives in California. Plaintiffs further contend that this

first prong is met because defendant is the beneficiary of a trust created in California pursuant to the California Probate Code. See *Cal. Prob. Code §§ 15000-805* (West 1991). Plaintiffs reason that defendant King could not accept her share of the trust assets without also accepting the benefits of the law which governs the trust.

King, on the other hand, contends that plaintiffs are unable to demonstrate purposeful availment. Specifically, King argues that being designated as a beneficiary, and simply receiving a benefit under California law, does not constitute purposeful availment. See e.g., *Pacific Atlantic Trading Co.*, 758 F.2d at 1329. King also asserts that her phone conversations with her brother and with her mother's broker were not substantial enough to demonstrate the fulfillment of this initial prong. See e.g., *Floyd J. Harkness Co. v. Amezcua*, 60 Cal. App. 3d 687, 691, 131 Cal. Rptr. 667 (1976).

Plaintiffs are correct that defendant has derived some monetary benefit from a trust created in the state of California. However, as defendant points out, this alone does not establish [\*9] purposeful availment. Defendant King had no relationship to the trust other than the fact that she was named as a beneficiary. Unilateral action on the part of defendant's mother is not enough to meet this first prong. See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1985) ("This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous,' or 'attenuated' contacts, or of the 'unilateral activity' of another party or a third person.") (citations omitted).

Similarly, plaintiff's reliance on *Steego Corp. v. Ravenal*, 830 F. Supp. 42 (D.Mass. 1993), is unpersuasive. In *Steego*, a district court found it had personal jurisdiction over three nonresident beneficiaries of a trust established with a partial interest in a contaminated property. Plaintiffs argue that jurisdiction was premised solely on their interest in the site as beneficiaries. Even on the sparse facts provided, *Steego* is distinguishable. The three beneficiaries not only "owned an interest" in the site and received assets from profits earned on the operation of the site, but two of the beneficiaries were also directors of [\*10] a corporation with its principle place of business in the forum state. *Id.* at 52. This court is not persuaded that the beneficiary of a disseminated trust created under California law with no other contacts with the forum state is in a position comparable to the defendants in *Steego*.

Finally, defendant's few phone conversations with her brother and her mother's broker are far too attenuated. These conversations do not, by themselves, rise to the level of purposeful availment. Therefore, having failed to establish the threshold requirement, plaintiffs

cannot establish specific jurisdiction over defendant King.<sup>2</sup>

<sup>2</sup> Plaintiffs also assert that there is a relationship between King's activities in California and the present cause of action. According to plaintiffs, but for defendant's acceptance of trust benefits, they would not have a claim against her. Plaintiffs contend that this acceptance of benefits creates responsibility under CERCLA and they ask this court to follow other districts and apply the "trust fund" theory here. Under that theory, "a beneficiary is deemed to hold the assets received from a liable party's estate in trust for the benefit of satisfying environmental liabilities of a deceased, responsible person." *State Ex Rel. Howes v. W.R. Peele, Sr. Trust*, 876 F. Supp. 733, 743 (E.D.N.C. 1995). Plaintiffs suggest that this establishes the necessary relationship between the present cause of action and King's California ac-

tivities. Further, plaintiffs argue that the exercise of jurisdiction over the defendant is reasonable. Specifically, defendant contends that six out of the seven factors considered by the Ninth Circuit establish reasonableness here. *See Terracom*, 49 F.3d at 561. However, absent purposeful availment, neither of these prongs need be considered.

[\*11] *CONCLUSION*

For the reasons set forth above, IT IS HEREBY ORDERED that defendant's motion to dismiss for lack of personal jurisdiction is GRANTED.

IT IS SO ORDERED.

Dated: AUG 6 1996

MARILYN HALL PATEL

United States District Judge

LEXSEE 563 N.E.2D 142

**FIRST AMERICAN BANK OF VIRGINIA, N/A, RESIDUARY TRUSTEE U/W OF  
ROBERT C. ANDERSON, DECEASED, Appellant-Respondent, v. ROBYN JO  
REILLY a/k/a ROBYN A. REILLY, Appellee-Petitioner**

No. 49A02-8907-CV-362<sup>1</sup>

1 This case has been diverted from the Second District by direction of the Chief  
Judge.

**Court of Appeals of Indiana, First District**

*563 N.E.2d 142; 1990 Ind. App. LEXIS 1517*

**September 29, 1990, Filed**

**PRIOR HISTORY:** [\*\*1] Appeal from the Marion Superior Court; Probate Division; The Honorable Joseph F. Shikany, Judge Pro Tem; Cause No. E83-1382.

**DISPOSITION:** Interlocutory order reversed.

**COUNSEL:** ATTORNEY FOR APPELLANT: STEPHEN E. ARTHUR, ESQ., MICHAEL A. TRENTADUE, ESQ., BOSE McKINNEY & EVANS, Indianapolis, Indiana.

ATTORNEY FOR APPELLEE: THEODORE R. DANN, ESQ., JEFFREY A. HEARN, ESQ., DANN PECAR NEWMAN TALESNICK & KLEIMAN, Professional Corporation, Indianapolis, Indiana.

**JUDGES:** Robertson, J. Ratliff, C.J., and Shields, P.J., concur.

**OPINION BY: ROBERTSON**

**OPINION**

[\*143] We must decide in this appeal whether the probate of a domiciliary's will through which certain assets have passed into trust and/or the acceptance of those trust assets by a nonresident bank constitutes a sufficient association with the State of Indiana to empower the courts of this state to constitutionally exercise jurisdiction. An Indiana probate court determined that it had the power to enter a decree affecting the trust assets and the nonresident trustee's interest in them. We cannot agree; accordingly, we reverse.

The facts critical to a determination of jurisdiction are not in dispute. Robert C. Anderson executed the will which is the subject of this controversy while [\*\*2] a resident of the Commonwealth of Virginia. Article III of the will, which was prepared by a Virginia attorney, created a trust through which Mr. Anderson's residuary estate would pass. The will provided that the trustee would be granted those powers set forth and conferred by section 64.1-57 of the Code of Virginia, and named the appellant, First American Bank, as trustee.

Mr. Anderson died on August 20, 1983, a resident of Marion County, Indiana. Mr. Anderson's will was admitted to probate on August 25, 1983 in Marion County. The bank declined appointment as executor on September 6, 1983. <sup>2</sup> Thereafter, Mr. Anderson's daughter, appellee Robyn Jo Reilly, became co-administratrix.

2 Ms. Reilly concedes that this contact of itself is constitutionally insignificant. (B. 18).

The co-administratrices transferred the residuary estate of Mr. Anderson consisting of \$ 199,460.25 in cash to the Bank, which had qualified in Virginia as trustee, by three separate transfers, pursuant to the final decree of the probate court entered [\*\*3] December 26, 1984, and Article III of the Anderson will. The transfers occurred between January, 1985 and January, 1986. None of the trust assets have since been [\*144] maintained, located or distributed in Indiana.

Ms. Reilly, the life beneficiary, resides in Eaton Town, New Jersey with her descendant, minor child, Jessica, a potential remainder person.

First American Bank is a state bank organized under the laws of Virginia, with its principal place of business

in McLean, Virginia. First American Bank is not registered to do business in Indiana, and does not transact business in Indiana. The Bank did not appear or participate as a party in the probate proceedings.

Approximately three years after the final transfer of the residuary estate into trust, Ms. Reilly filed a petition with the Marion Superior Court, Probate Division, seeking a declaration that the trust created by Article III of Mr. Anderson's will was null and void because it violated the Indiana statute against perpetuities and the statute against unreasonable accumulations. A similar declaration was sought by Ms. Reilly in an action pending in Virginia in which the Bank sought a determination of the proper termination date of [\*\*4] the trust and Ms. Reilly's rights as life beneficiary. Ms. Reilly did not contest the Virginia court's jurisdiction in that proceeding. The Marion probate court denied the Bank's motion to dismiss which raised the absence of personal and subject matter jurisdiction, and the doctrine of forum non-conveniens.

The parties agree that the Bank as trustee is an indispensable party to this litigation for any judgment affecting the res necessarily affects the interests of persons in the thing, *Shaffer v. Heitner* (1977), 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683, and the trustee holds legal title to the trust assets. Whether based upon the trustee's affiliation with the state through property ownership, or some other type of contact, all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe Co. v. Washington* (1945), 326 U.S. 310, 66 S. Ct. 154, 90 L. Ed. 95, and its progeny. *Id.* at 208, 218. <sup>3</sup> The validity of an assertion of jurisdiction over a non-consenting defendant who is not present in the forum depends upon whether the quality and nature of its activity in relation to the forum renders an exercise of jurisdiction consistent with "traditional notions of fair play and substantial [\*\*5] justice." *Burnham v. Superior Court of California* (1990), 110 S. Ct. 2105, 2114, 109 L. Ed. 2d 631 (citing *International Shoe Co.*, 326 U.S. at 316).

3 Indiana's long arm statute permits the exercise of jurisdiction over non-residents to the extent allowed by the Due Process Clause. *Suyemasa v. Myers* (1981), *Ind.App.*, 420 N.E.2d 1334, 1340.

Hence, a nonresident trustee may not be called upon to defend in this or any other state unless it has had the litigation related "minimal contacts" with the state that are a prerequisite to its exercise of power over it. *Hanson v. Denckla* (1958), 357 U.S. 235, 251, 78 S. Ct. 1228, 2 L. Ed. 2d 1283. A state does not acquire such contacts by being the center of gravity of the controversy or by being the most convenient location for litigation. Rather, jurisdiction is resolved by considering the acts of the

trustee. It is essential that there be some act by which the trustee purposefully avails itself of the privilege of conducting activities within this state, thus invoking the benefits and protections of our laws. *Denckla*, [\*\*6] 357 U.S. at 253 (citing *International Shoe*, 326 U.S. 310, 319, 66 S. Ct. 154). The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely on the basis of random, fortuitous or attenuated contacts or the unilateral activity of another party or a third person who claims some relationship with him. *Burger King v. Rudzewicz* (1985), 471 U.S. 462, 472-73, 105 S. Ct. 2174, 85 L. Ed. 2d 528.

As in *Denckla*, the suit in the present case cannot be said to have arisen either from a privilege the trustee purposefully exercised in Indiana or a transaction consummated in this state. The First American Bank of Virginia transacts no [\*145] business here. It has no offices in Indiana. None of its agents appeared or acquiesced in an exercise of jurisdiction during the probate proceedings. The trust assets have never been held or administered in this state. The trust document itself was not created here.

True, in administering Mr. Anderson's estate, Ms. Reilly solicited the Bank's consent to act as trustee and the Bank agreed to the appointment. But for jurisdictional purposes, the Bank's acceptance is qualitatively no different than the execution of the power of appointment by Mrs. Donner while [\*\*7] domiciled in Florida in *Denckla*, the acceptance of positions as officers or directors in *Shaffer*, or the reception of purchases, training or checks drawn on a Texas bank by Helicol in *Helicopteros Nacionales De Colombia v. Hall* (1984), 466 U.S. 408, 417-18, 104 S. Ct. 1868, 80 L. Ed. 2d 404. The retention of First American as trustee is not at issue. The Bank's agreement to act as trustee, without a showing of any pre-existing involvement or a continuing connection with the state such as administrative oversight of the trust, <sup>4</sup> simply does not evince the kind of deliberate contact required of First American. See *Burger King Corp. v. Rudzewicz* (1985), 471 U.S. 462, 479-80, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (contract with out-of-state party by itself not automatically sufficient "minimum contacts" in other party's home forum).

4 A probate court has continuing jurisdiction to supervise the administration of the trust only if the settlor expressly directs in the terms of the trust that the court is to have jurisdiction. *IND. CODE 30-4-6-2*.

Neither has First American's lack [\*\*8] of personal affiliation with this state been enhanced by the fact Mr. Anderson died in Indiana, leaving assets which eventually passed into the trust. Amenability to suit does not travel with a chattel. *World-Wide Volkswagen Corp. v.*

*Woodson* (1980), 444 U.S. 286, 296, 100 S. Ct. 559, 62 L. Ed. 2d 490. If it did, Ms. Reilly could confer jurisdiction on an Indiana probate court simply by returning to this jurisdiction and bringing her intangible property including the trust obligation in her favor, with her. Yet, such a mechanical rule was abandoned in *Shaffer*, and the Supreme Court refused to adopt an analogous rule in *World-Wide Volkswagen* where the sole contact with Oklahoma, the forum state, was the fortuitous circumstance that a single Audi suffered an accident while passing through Oklahoma.

Ms. Reilly cites *In the Matter of Casey* (1988), 145 A.D.2d 632, 536 N.Y.S.2d 158 in support of her contention that the trial court constitutionally acquired jurisdiction over the Bank. But, as the Bank argues, that case is factually distinguishable in that the trustee's receipt of the trust funds was the basis of a proceeding to recover trust monies the distribution of which had been fraudulently induced and [\*9] actively solicited to facilitate a real estate transaction.

Certainly, Indiana has an interest in ensuring a just distribution of its citizens' assets. But even if this state has a strong interest in applying its law to the controversy, the Due Process Clause, as an instrument of interstate federalism, may act to divest Indiana courts of the power to render a valid judgment. *World-Wide Volkswagen Corp.*, 444 U.S. at 295. The Due Process Clause does not contemplate that a state may make binding a judgment in personam against an individual or corporate defendant with which the state has no contacts, ties, or

relations. *International Shoe*, 326 U.S. at 319; *Woodson*, 444 U.S. at 295.

None of the contacts identified by Ms. Reilly can be said to have proximately resulted from actions of the trustee that create a substantial connection with the state of Indiana. *Burger King*, 471 U.S. at 476. Consequently, First American Bank does not have the sufficient minimum contacts necessary for an exercise of in personam jurisdiction.

At the time the Indiana probate court had jurisdiction over Mr. Anderson's estate, it did not have personal jurisdiction over First Virginia. Title did [\*\*10] not vest in First American as trustee until the trust [\*146] estate was delivered to it in Virginia, *Bailey v. Bailey* (1968), 142 Ind.App. 119, 129, 232 N.E.2d 372, 378; *Snouffer v. People's Trust & Savings Co.* (1966), 140 Ind.App. 491, 498, 212 N.E.2d 165, 171, *trans. denied*, beginning about a month after the final decree of the probate court. A probate decree of the state where a decedent was domiciled cannot have an in rem effect on personalty outside the forum state that could render the decree conclusive on the interests of nonresidents over whom the court has not acquired personal jurisdiction. *Denckla*, 357 U.S. at 250.

For the foregoing reasons, we conclude the trial court erred in its determination that it had the requisite jurisdiction to construe the trust. Accordingly, Ms. Reilly's action should be dismissed.

Interlocutory order reversed.

FOCUS - 4 of 25 DOCUMENTS

## ARTHUR, ROSS &amp; PETERS, Plaintiff-Appellant, v. HOUSING, INC., Defendant-Appellee

No. 74-2049

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

508 F.2d 562; 1975 U.S. App. LEXIS 15982

February 21, 1975

**PRIOR HISTORY:**    [\*\*1] Appeal from the United States District Court for the Southern District of Texas.

**DISPOSITION:**    Accordingly, defendant's motion to dismiss for lack of jurisdiction is granted. This action is hereby dismissed.

**JUDGES:** Gewin, Bell and Clark, Circuit Judges.

**OPINION BY:** PER CURIAM

**OPINION**

[\*563] Upon consideration of the briefs, trial record, and the contentions of the parties advanced upon oral argument, we are fully convinced that the district court reached the correct result and we can discern no valid basis for reversal. The unreported opinion of the district court is attached hereto as an Appendix.

Affirmed.

## APPENDIX

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

ARTHUR, ROSS & PETERS,

A Partnership,

Plaintiff,

V.

HOUSING, INC.,

Defendant.

CIVIL ACTION

NO. 73-H-600

Robert J. King, Liddell, Sapp, Zivley & Brown,  
Houston, Texas, for plaintiff.

J. Clifford Gunter, III, Bracewell & Patterson, Houston, Texas, for defendant.

## MEMORANDUM AND ORDER

In this action, plaintiff seeks to recover damages incurred when the defendant allegedly breached an agreement with the plaintiff that involved the purchase of certain real estate [\*\*2] and the formation of a limited partnership. The action is brought pursuant to 28 U.S.C. § 1332. The case is currently before the Court for consideration of the defendant's motion to dismiss for, *inter alia*, lack of in personam jurisdiction.

The facts presented by both parties are essentially undisputed. Plaintiff is a general partnership with its principal place of business in Houston, Texas. Defendant is a corporation with its principal place of business in Greensboro, North Carolina. It does not maintain a place of business, nor does it have any assets or a designated agent for services of process within the State of Texas.

The agreement that is the subject of this action required the purchase of and development by the defendant of certain land located within North Carolina. This property was to be subsequently transferred to a limited partnership formed between the plaintiff and the defendant on the same date that the agreement was signed. Alleging that the defendant has breached the agreement by failing to secure FHA approval for the project, failing to file the articles of partnership in the North Carolina public records and failing to convey title to the property to [\*\*3] the partnership, plaintiff has filed this suit seeking the return of its initial payment as well as damages for lost profits and incidental expenses incurred [\*564] in the negotiation and drafting of the agreement.

Plaintiff has obtained service of process on the defendant through the Texas Secretary of State pursuant to Article 2031b, Vernon's Ann. Tex. Rev. Civ. Stat. It alleges that substituted service is proper as the defendant can be considered as "doing business" within the state because it has entered into a contract by mail with a Texas resident that is to be performed in part in the State of Texas. See Art. 2031b(4), Tex. Rev. Civ. Stat. The plaintiff bases its allegations upon the fact that certain portions of the contract can be performed only in Texas in that the agreement provided that notice and return payments be mailed to the plaintiff in Texas. The fact that negotiations for the agreements were carried on by mail between the Texas and North Carolina parties and that the contract was mailed to plaintiff's Texas place of business for signing are cited by the plaintiff as evidence of the defendant's purposeful activities within the state. Furthermore, plaintiff claims [\*\*4] that a portion of the contract was actually performed in Texas in that the initial payment was mailed from the state.

In support of its motion to dismiss, the defendant alleges that the subject matter of the contract was real property located in the State of North Carolina, that the partnership was one formed under North Carolina law and domiciled in North Carolina and that the construction of the apartment project involved labor that would be hired and would perform in North Carolina. Thus, the issue for the Court's determination is whether the contact that defendant had with the State of Texas, which was exclusively through the mails, can be considered as partial performance under Article 2031b so as to satisfy the "minimum contacts" test required by the *due process clause of the Fourteenth Amendment*.

In *Hanson v. Denckla*, 357 U.S. 235, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958), the Supreme Court held that a Florida court did not have personal jurisdiction over a Delaware trustee whose only contacts with Florida involved the remittance by mail of trust income to beneficiaries who moved to that state after the trust was formed. The court required

in each case that there [\*\*5] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. *Id.* at 253, 78 S. Ct. at 1240; accord *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1234 (5th Cir. 1973).

The *Hanson* requisite of purposeful activity within the forum state has been embodied within Texas law by the Texas courts. In *Sun-X International Company v. Witt*, 413 S.W.2d 761 (Tex. Civ. App. -- Texarkana, 1967, writ ref'd, n.r.e.), the court recognized three basic factors necessary for jurisdiction over a non-resident defendant:

(1) The non-resident defendant or foreign corporation must purposefully do some act or consummate some transaction in the forum state; (2) the cause of action must arise from, or be connected with, such act or transaction; and (3) the assumption of jurisdiction by the forum state must not offend traditional notions of fair play and substantial justice, consideration being given to the quality, nature and extent of the activity in the forum state, the relative convenience of the parties, the benefits and protection of the laws [\*\*6] of the forum state afforded the respective parties, and the basic equities of the situation. *Id.* at 765; accord, *O'Brien v. Lanpar Co.*, 399 S.W.2d 340 (Tex. 1966).

As evidence of purposeful activity within the state, plaintiff has shown that the defendant originally solicited the contract by mailing a letter to the plaintiff in Texas and that the agreement was sent to Houston for the plaintiff's signature and acceptance. The fact that negotiations were carried on through the mail is not sufficient to confer jurisdiction if the non-resident party or his agent was not physically present within [\*\*6] the state. See *Agrashell, Inc. v. Bernard Sirota Co.*, 344 F.2d 583 (2d Cir. 1965). Furthermore, the Texas legislature has indicated that performance, rather than execution, should govern the determination of jurisdiction. See *Atwood Hatcheries v. Heisdorf & Nelson Farms*, 357 F.2d 847, 852 n. 14 (5th Cir. 1966); *Bodzin v. Regal Accessories, Inc.*, 437 S.W.2d 655 (Tex. Civ. App. -- Dallas 1969, writ ref'd, n.r.e.); Comment, *Jurisdiction Over Foreign Corporations Under Article 2031b*, 39 Tex. L. Rev. 214, 218 (1960). The mere acceptance of a contract in Texas has been [\*\*7] held insufficient to confer jurisdiction absent more substantial contacts with the state. See *Sun-X International Co. v. Witt*, *supra* 413 S.W.2d at 766-767. Therefore, jurisdiction cannot be based upon the initial consummation of the agreement.

Plaintiff further alleges that its mailing the initial payment from its Houston office to North Carolina is evidence of partial performance in the State of Texas. Although there is some dispute on the record as to whether payment was actually mailed from Texas, this

fact is not dispositive of the issue, even if we assume its existence in favor of the plaintiff. "The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. . . ." *Hanson v. Denckla, supra* 357 U.S. at 253, 78 S. Ct. at 1239-1240. It might, of course, be a different matter if payment were to be made in Texas, and this requirement was stated in the contract. This could constitute performance within the state. See *Custom Leasing, Inc. v. Gardner, 307 F. Supp. 161 (N.D. Miss. 1969)*. However, where the contract is silent and payment is simply mailed to the nonresident from the [\*\*8] forum state, this Court cannot hold that the defendant has engaged in business in Texas. Cf. *Trinity Steel Co. v. Modern Gas & Service Co., 392 S.W.2d 861, 866 (Tex. Civ. App. -- Texarkana, 1965, writ ref'd, n.r.e.)*. Nor is it determinative that the contract provided that certain notices and reimbursements be mailed to the plaintiff's Texas address. As in *Hanson*, the receipt of these in Texas cannot constitute an act by which the defendant has purposefully availed itself of the benefits and protection of Texas law.

After considering the facts alleged in the pleadings, memoranda and affidavits filed herein, the quality, nature and extent of the contacts that the defendant has with the State of Texas are not sufficient, individually or together, to satisfy the requirement that the defendant purposefully invoke the benefits or protection of the law of Texas. The defendant has sent no agent into the state, nor has it caused goods to be delivered here. Other than correspondence between the parties, no services were required of either party that were to be supplied in the state. Although the Court has deferred ruling on the motion to dismiss to permit the submission of any further [\*\*9] evidence in support of jurisdiction, none has been forthcoming.

Accordingly, defendant's motion to dismiss for lack of jurisdiction is granted. This action is hereby dismissed.

Done at Houston, Texas, this 27th day of February, 1974.

(s) Carl O. Bue, Jr. /

United States District Judge

## 2 of 2 DOCUMENTS

**LEROY E. FRAZIER, ANNANOISE FRAZIER, FREEMAN PHILLIPS, and BOBBIE PHILLIPS, on behalf of themselves and all other persons similarly situated, Plaintiffs, vs. PREFERRED CREDIT (AKA PREFERRED CREDIT CORPORATION; AKA PREFERRED MORTGAGE CORPORATION; AKA T.A.R. PREFERRED MORTGAGE CORPORATION); IMPAC FUNDING CORPORATION; US BANK N.A.; US BANK, NA, ND; IMPERIAL CREDIT INDUSTRIES, INC.; IMPAC MORTGAGE HOLDINGS, INC.; IMPAC SECURED ASSETS CORPORATION; ICIFC SECURED ASSETS CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-1; ICIFC SECURED ASSETS CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-2; ICIFC SECURED ASSETS CORPORATION, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 1997-3; IMPAC SECURED ASSETS CMN TRUST SERIES 98-1 COLLATERALIZED ASSET-BACKED NOTES, SERIES 1998-1; EMPIRE FUNDING HOME LOAN OWNER TRUST 1998-1; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED MORTGAGE ASSET-BACKED CERTIFICATES, SERIES 1996-2; CREDIT SUISSE FIRST BOSTON MORTGAGE SECURITIES CORPORATION PREFERRED MORTGAGE ASSET-BACKED CERTIFICATES, SERIES 1997-1; BANKERS TRUST COMPANY OF CALIFORNIA, NA; BANKERS TRUST COMPANY; GMAC-RESIDENTIAL FUNDING CORPORATION; LIFE BANK; AND LIFE FINANCIAL HOME LOAN OWNER TRUST 1997-3, Defendants.**

**No. 01-2714 GB**

**UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF  
TENNESSEE, WESTERN DIVISION**

*2002 U.S. Dist. LEXIS 19416*

**July 31, 2002, Decided**

**July 31, 2002, Filed; August 1, 2002, Entered**

**DISPOSITION:** [\*1] Defendants' motion to dismiss granted.

For Impac Funding Corporation, DEFENDANT: Douglas A Black, Robert L Crawford, Esq, Wyatt Tarrant & Combs, Memphis, TN USA.

**COUNSEL:** For Leroy E Frazier, PLAINTIFF: Lee J Bloomfield, Esq, Allen Godwin Morris Laurenzi & Bloomfield, PC, Memphis, TN USA.

For Impac Funding Corporation, DEFENDANT: R Bruce Allensworth, Daniel J Tobin, Sean R Sullivan, Jennifer L Hieb, Kirkpatrick & Lockhart LLP, Washington, DC USA.

For Leroy E Frazier, PLAINTIFF: A Hoyt Rowell, III, Fred Thompson, Daniel O Myers, Kevin L Oufnac, Ness Motley Loadholt Richardson & Poole, Mount Pleasant, SC USA.

**JUDGES:** JULIA SMITH GIBBONS, UNITED STATES DISTRICT JUDGE.

**OPINION BY:** JULIA SMITH GIBBONS

For Leroy E Frazier, PLAINTIFF: Eric G Calhoun, Lawson & Fields, PC, Dallas, TX USA.

**OPINION**

**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS**

On August 2, 2001 plaintiffs Leroy E. Frazier, An-nanoise Frazier, Freeman Phillips, and Bobbie Phillips ("plaintiffs"), on behalf of themselves and all other persons similarly situated, <sup>1</sup> initiated this action in the Circuit Court of Shelby County, Tennessee against defendants <sup>2</sup> Preferred Credit (aka Preferred Credit Corporation; aka Preferred Mortgage [\*2] Corporation; aka T.A.R. Preferred Mortgage Corporation); IMPAC Funding Corporation ("IMPAC Funding"); IMPAC Mortgage Holdings, Inc. ("IMPAC Mortgage"); IMPAC Secured Assets Corporation ("IMPAC Secured"); US Bank N.A.; US Bank, NA, ND; Imperial Credit Industries, Inc.; <sup>3</sup> ICIFC Secured Assets Corporation, Mortgage Pass-Through Certificates, Series 1997-1; ICIFC Secured Assets Corporation, Mortgage Pass-Through Certificates, Series 1997-2; ICIFC Secured Assets Corporation, Mortgage Pass-Through Certificates, Series 1997-3; IMPAC Secured Assets CMN Trust Series 98-1 Collateralized Asset-Backed Notes, Series 1998-1 (collectively "ICIFC Trusts"); Empire Funding Home Loan Owner Trust 1998-1 ("Empire Trust"); Credit Suisse First Boston Mortgage Securities Corporation; <sup>4</sup> Credit Suisse First Boston Mortgage Securities Corporation Preferred Mortgage Asset-Backed Certificates, Series 1996-2; Credit Suisse First Boston Mortgage Securities Corporation Preferred Mortgage Asset-Backed Certificates, Series 1997-1 (collectively "First Boston Trusts"); Bankers Trust Company of California, NA; Bankers Trust Company (collectively "Bankers Trust"); GMAC-Residential Funding Corporation ("GMAC-RFC"); Life [\*3] Bank; and Life Financial Home Loan Owner Trust 1997-3 ("Life Trust") (collectively "defendants"). Plaintiffs allege that defendants are current holders or assignees of certain second mortgage notes between Preferred Credit and plaintiff class members, and the mortgage notes violate the Tennessee statutory limitations on interest, loan origination fees, loan brokerage commissions and/ or other loan charges established in *Tennessee Code Annotated sections 47-14-102, 47-14-103, 47-14-112, 47-14-113, 47-14-117, 47-15-102, 47-15-103, and 47-15-104*, and the Rules of the Tennessee Department of Financial Institutions, chapter 0180-17. Plaintiffs also allege that Preferred Credit violated the Tennessee Consumer Protection Act ("TCPA"), *Tenn. Code Ann. §§ 47-18-101 et seq.*, which prohibits unfair or deceptive acts or practices. Additionally, plaintiffs allege that since Preferred Credit violated the above Tennessee statutory provisions, the loan agreements between plaintiffs and Preferred Credit are void or voidable as an illegal contract against public policy. Plaintiffs assert that defendants, as holders of the notes securing the mortgages, are liable for Preferred Credit's conduct. Plaintiffs [\*4] seek relief in several forms, including injunctive and declaratory relief, compensatory and punitive damages, attorneys' fees,

costs, and pre-and post-judgment interest. (Compl. PP B-K.)

1 Class certification has not yet been requested.

2 Plaintiffs allege that defendants are all current holders or assignees of certain of the second mortgage notes between Preferred Credit and plaintiffs. (Compl. P 28.)

3 Plaintiffs voluntarily dismissed Imperial Credit Industries, Inc. without prejudice on May 23, 2002.

4 Plaintiffs voluntarily dismissed Credit Suisse First Boston Mortgage Securities Corporation without prejudice on April 18, 2002.

On September 24, 2001, defendant Life Bank filed a motion to dismiss the complaint pursuant to *Federal Rule of Civil Procedure 12(b)(6)*. On September 26, 2001, defendant Life Financial Home Loan Owner Trust 1997-3 joined Life Bank's motion to dismiss. On April 1, 2002, defendants U.S. Bank, NA; U.S. Bank, NA ND; Empire Trust; and First Boston Trusts collectively [\*5] filed a motion to dismiss pursuant to *Rule 12(b)(2)* for lack of personal jurisdiction or, in the alternative, pursuant to *Rule 12(b)(6)* for failure to state claims upon which relief can be granted. On that same date, defendants IMPAC Funding, IMPAC Mortgage, IMPAC Secured, ICIFC Trusts, and Bankers Trusts similarly filed a collective motion to dismiss pursuant to *Rule 12(b)(2)* or, in the alternative, *Rule 12(b)(6)*. Also on that same date, defendant GMAC-RFC filed a motion to dismiss pursuant to *Rule 12(b)(6)*. The arguments raised in each of these motions are substantially similar and will be dealt with by the court together; distinctions as to which defendant or defendants an analysis is applicable will be indicated as necessary. The issues raised by defendants are: (1) whether this court has personal jurisdiction over some of the defendants; (2) whether plaintiffs have standing to assert claims against some of the defendants; (3) whether plaintiffs' claims against federal savings banks are preempted by federal law; (4) whether assignees of the loans can be held liable for the actions of the original lenders; and (5) whether certain of plaintiffs' claims are barred by Tennessee statutory [\*6] provisions including statute of limitations, statute of repose, and exclusivity of remedies. The court now considers these motions.

The following factual allegations are included in plaintiffs' complaint and are taken as true for purposes of this order. The Fraziers obtained a second mortgage home equity loan from Preferred Credit on May 14, 1997, which was secured by their residence in Memphis, Tennessee. (Compl. P 29.) The original principal amount of the loan was \$ 33,000. Id. Their loan included the following costs: a 14.25% interest rate, a \$ 3,300 broker

fee, a \$ 395 loan processing fee, a \$ 125 underwriting fee, a \$ 125 document preparation fee, a \$ 190 sub-escrow fee, and a \$ 150 appraisal fee. Id. P 30. The last payment on the loan is scheduled for May 27, 2012. Id. P 31. The Phillips obtained a second mortgage home equity loan from Preferred Credit on May 8, 1997, which was secured by their residence in Memphis, Tennessee. Id. P 34. The original principal amount of the loan was \$ 27,500. Id. Their loan included the following costs: a 14.25% interest rate, a \$ 2,160 broker fee, a \$ 395 loan processing fee, a \$ 125 underwriting fee, a \$ 125 document preparation [\*7] fee, and a \$ 190 sub-escrow fee. Id. P 35. The last payment on the loan is scheduled for May 27, 2012. Id. P 36. Plaintiffs assert that the interest rate and closing costs charged exceed that which is allowed under Tennessee law and that the fees charged were in excess of the costs incurred and for services not provided. Id. PP 32-33, 37-38. Plaintiffs allege that defendants are "upon information and belief ... currently a holder of certain of the second mortgage loan notes made to class members." Id. PP 4-23.

The following facts are relevant to the jurisdiction analysis and are undisputed. Pamela Wieder, Vice President of U.S. Bank, attests that Empire Home Loan Owner Trust 1998-1 ("Empire Trust") was formed and created under the terms of a owner trust agreement, entered into by Financial Asset Securities Corporation, Empire Funding Corp., Wilmington Trust Company, and U.S. Bank NA. (Wieder Aff. VI PP 3-5.) The Empire Trust was formed and created under the terms of trust agreements entered into in 1998, pursuant to which Wilmington Trust Company is the owner trustee and U.S. Bank, NA is the paying agent. Id. P 3. The purpose of the Empire Trust is to hold the [\*8] owner trust estate (which holds second mortgage loans), to receive income from the mortgage loans (which is collected by the loan servicer), and to distribute that income to holders of notes and certificates of beneficial interest in the Trust. Id. P 6. The Empire Trust issues certificates and notes under the terms of the trust agreement and the indenture. Id. P 7, 9.

The Empire Trust is a Delaware Business Trust located and administered in Delaware. Id. P 9. Its only office is that which is maintained as the Corporate Trust Office of Wilmington Trust Company in Delaware. Id. P 10. It has no bank accounts in Tennessee. Id. P 11. It has no employees, pursuant to the terms of the trust agreement. Id. P 12. It has no agent in Tennessee and no representative of the Empire Trust has traveled to Tennessee on its behalf. Id.

The Empire Trust does not own, lease, or use real estate in Tennessee. Id. P 16. It does not engage in any business in Tennessee. Id. P 15. It has not entered into any contracts in Tennessee. Id. P 18. It has not solicited

second mortgage loans in Tennessee, nor has it solicited any of the named plaintiffs or putative class members [\*9] for the purposes of originating second mortgage loans. Id. P 19. It has not entered into second mortgage loans in Tennessee, and it has not loaned money to any of the named plaintiffs or putative class members. Id. P 20. While the Empire Trust holds several thousand second mortgage loans throughout the country, in no case do the loans secured by Tennessee property held by it exceed two percent of all the loans held by the Owner Trusts. Id. P 16.

The Empire Trust does not hold title to any mortgage loans. Id. P 21. Rather, it holds the owner trust estate, which includes the income, payments, and rights to payment from second mortgage loans, title to which remains with U.S. Bank as grantor trustee. Id. Physical custody of the mortgage notes is with U.S. Bank in Minnesota. Id. P. 26. The mortgage notes are serviced by OCWEN Federal Bank, which is located in Florida. Id. P 27. OCWEN has full authority and power, acting alone, to perform all actions that are necessary or desirable in connection with administering the loans, including collecting all payments. Id. OCWEN remits all payments of principal and interest collected on the notes to U.S. Bank at U. [\*10] S. Bank's offices in Minnesota. Id. PP 27-28. The Empire Trust has not directly collected payments from any loan obligors in Tennessee or from plaintiffs, as it does not collect payments on or enforce second mortgage loans. Id. PP 24, 29.

Richard Johnson, treasurer and vice president of IMPAC Mortgage attests that IMPAC Secured is an affiliate of IMPAC Mortgage. (Johnson Aff. PP 1-2.) IMPAC Mortgage is a Maryland corporation with its principal place of business in California. IMPAC Secured is a California corporation with its principal place of business in California. Id. P 2. Neither IMPAC Mortgage nor IMPAC Secured has employees, offices, agents, or operations in Tennessee. Id. P 3. Neither IMPAC Mortgage nor IMPAC Secured owns or leases property in Tennessee, and neither maintains bank accounts in Tennessee. Id. Neither has solicited or negotiated with Tennessee borrowers whose loans were originated by Preferred Credit. Id. P 4. Neither has ever originated loans in Tennessee. Id.

Part of the business of IMPAC Mortgage and its affiliates involves the creation of securitization trusts. Id. P 5. The purpose of such trusts is to hold mortgage loans, [\*11] including second mortgage loans, and distribute payments to persons holding beneficial interests in the trusts. Id. IMPAC Mortgage and its affiliates played a role in creating the following trusts: ICIFC Secured Assets Corporation Mortgage Pass-Through Certificates, Series 1997-1; ICIFC Secured Assets Corporation Mortgage Pass-Through Certificates, Series 1997-2; ICIFC

Secured Assets Corporation Mortgage Pass-Through Certificates, Series 1997-3; and IMPAC Secured Assets CMN Trust Series 1998-1 Collateralized Asset-Backed Notes (collectively "Trusts"). Id. P 6. The Trusts engage in no business in Tennessee. Id. P 7. The Trusts have no employees, agents, or operations in Tennessee. Id. Other than the loans contributed to the trusts, the Trusts neither own nor lease property in Tennessee, and they maintain no bank accounts in Tennessee. Id. The Trusts have never originated loans in Tennessee or elsewhere. Id. P 8. The Trusts never solicited or negotiated with Tennessee borrowers whose loans were originated by Preferred Credit. Id.

Defendants Empire Trust, IMPAC Mortgage, IMPAC Securities, ICIFC Trusts, and First Boston Trusts contend that plaintiffs' action [\*12] against them should be dismissed since this court lacks personal jurisdiction over them. To defeat a motion to dismiss for lack of personal jurisdiction, a plaintiff has the burden of making a prima facie showing of facts sufficient to justify personal jurisdiction. *Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998). The plaintiff may not rely on his pleadings; he must, by affidavit or otherwise, set forth specific facts establishing that the court has jurisdiction. *Theunissen v. Matthews*, 935 F.2d 1454, 1458 (6th Cir. 1991)(citing *Weller v. Cromwell Oil Co.*, 504 F.2d 927, 930 (6th Cir. 1974)). Presented with a properly supported motion to dismiss, the court has three procedural alternatives: "it may decide the motion upon the affidavits alone; it may permit discovery in aid of deciding the motion; or it may conduct an evidentiary hearing to resolve any apparent factual questions." *Theunissen*, 935 F.2d at 1458 (citing *Serras v. First Tenn. Bank Nat'l Ass'n.*, 875 F.2d 1212, 1214 (6th Cir. 1989)). In all cases, the plaintiff bears the burden of establishing that jurisdiction exists. *Theunissen*, 935 F.2d at 1458. [\*13] Here, since the court did not hold an evidentiary hearing,<sup>5</sup> it must consider the pleadings, depositions, and affidavits in the light most favorable to the plaintiff. *Dean*, 134 F.3d at 1272. However, this requirement does not compel the court "to ignore undisputed factual representations of the defendant which are consistent with the representations of the plaintiffs." *Kerry Steel v. Paragon Indus., Inc.*, 106 F.3d 147, 153 (6th Cir. 1997).

5 No party suggests that the court should hold an evidentiary hearing to resolve this motion.

To determine whether the court may exercise personal jurisdiction over a nonresident defendant, the court must first determine whether it has jurisdiction under the long-arm statute of the state in which the court sits. *Dean*, 134 F.3d at 1273; *Serras*, 875 F.2d at 1216. The Tennessee long-arm statute, *Tenn. Code Ann. § 20-2-214(a)(6)*, extends the personal jurisdiction of Tennessee

courts to the limits of the Due Process Clause. [\*14] *Payne v. Motorists' Mut. Ins. Co.*, 4 F.3d 452, 455 (6th Cir. 1993). Therefore, courts in Tennessee only need to determine whether the assertion of personal jurisdiction over a defendant violates federal constitutional due process. Id.

Consistent with the Due Process Clause, courts can exercise personal jurisdiction over a defendant so long as that defendant has "certain minimum contacts" with the forum state such that the exercise of personal jurisdiction "does not offend traditional notions of fair play and substantial justice." *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). Within the minimum contacts doctrine, there is a distinction between general and specific personal jurisdiction. *Aristech Chem. Int'l v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 627-28 (6th Cir. 1998). General jurisdiction exists when a defendant's forum activities are "substantial" or "continuous or systematic," even though they are unrelated to the cause of action. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 446-47, 96 L. Ed. 485, 72 S. Ct. 413, 47 Ohio Op. 216, 63 Ohio L. Abs. 146 (1952); *Helicopteros Nacionales de Colombia S.A. v. Hall*, 466 U.S. 408, 414 n.9, 80 L. Ed. 2d 404, 104 S. Ct. 1868 (1984). [\*15] In general, proving general jurisdiction over a nonresident defendant is difficult, as evidenced by the greater number of cases rejecting such jurisdiction rather than finding it. See *Chase Cavett Servs., Inc. v. Brandon Apparel Group, Inc.*, 1998 Tenn. App. LEXIS 824, No. 02 A01-9803-CH-00055, 1998 WL 846708, at \*7 n.4 (Tenn. Ct. App. 1998) (observing that "the Supreme Court cases following International Shoe have applied the minimum contacts test in a more conservative manner when the issue was one of general jurisdiction").

By contrast, specific jurisdiction exists when a defendant has sufficient minimum contacts that arise from or are related to the cause of action. *Helicopteros*, 466 U.S. at 414 n.8. Specific personal jurisdiction is appropriate when three criteria are satisfied:<sup>6</sup> (1) the defendant purposely avails himself of the privilege of acting in the forum state or intentionally causes a consequence there; (2) the plaintiff's cause of action arises from the defendant's actions in the forum state; and (3) the exercise of personal jurisdiction is reasonable in light of the defendant's acts or the consequences of his acts in the forum state. *Aristech*, 138 F.3d at 628; [\*16] *Payne*, 4 F.3d at 455; *S. Mach. Co. v. Mohasco Indus., Inc.*, 401 F.2d 374, 381 (6th Cir. 1968). The Court of Appeals for the Sixth Circuit has made clear that purposeful availment is "the sine qua non for in personam jurisdiction." *Kerry Steel*, 106 F.3d at 150 (1997)(quoting *Mohasco*, 401 F.2d at 381-82). The significance of purposeful availment is that it "allows potential defendants to structure their primary conduct with some minimum assurance as to where that

conduct will and will not render them liable to suit," *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 62 L. Ed. 2d 490, 100 S. Ct. 559 (1980), and "ensures that a defendant will not be haled into a jurisdiction solely as a result of 'random,' 'fortuitous' or 'attenuated' contacts." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 85 L. Ed. 2d 528, 105 S. Ct. 2174 (1986); *Kerry Steel*, 106 F.3d at 150.

6 In applying these elements, the contacts of each defendant must be assessed individually. *Rush v. Savchuk*, 444 U.S. 320, 332, 62 L. Ed. 2d 516, 100 S. Ct. 571 (1980). Additionally, it is the named class representatives whose claims must satisfy these elements in order for the Court to have personal jurisdiction over defendants in the action. *Barry v. Mortgage Servicing Acquisition Corp.*, 909 F. Supp. 65, 73 (1995).

[\*17] In this case, plaintiffs argue that the following contacts justify the exercise of general personal jurisdiction over defendants: defendants' purchase of at least seventy-four second mortgage loans secured by property held by Tennessee residents (Wieder Aff. VI P 16); defendants' receipt of income from these mortgages, *id.* P 6; and defendants' holding of notes secured by mortgages from Tennessee residents secured by real property located within the state, *id.* P 21. <sup>7</sup>

7 Plaintiffs repeatedly argue in their consolidated response that they have not had an opportunity to develop evidence beyond the documents presented by the assignee defendants with respect to defendants' motion to dismiss for lack of personal jurisdiction. Specifically, plaintiffs contend that they have attempted to conduct discovery regarding factual information which would address this issue, but that defendants have not been responsive to their requests. Plaintiffs also claim that they will file a motion to compel this discovery. In the Rule 16(b) Scheduling Order of March 20, 2002, the court ordered that discovery would be limited to issues raised by or related to motions to remand and motions to dismiss. The deadline for responding to such motions was originally set for May 1, 2002 and was later extended to June 11, 2002 to provide plaintiffs the opportunity to receive responsive information to their discovery requests from defendants. However, as of the date of this order, plaintiffs have not filed a motion to compel; additionally, they did not seek to extend the deadline for responding to the motion to dismiss. Due to these failures, the court finds plaintiffs' assertion that they have not had an opportunity to develop evidence beyond the documents presented by defendants un-

convincing. Thus, the court will proceed with its analysis based upon the evidence that is presently before it.

[\*18] Defendants argue that they have insufficient contacts with the state of Tennessee to justify this court exercising general personal jurisdiction over them. To support this contention, defendants point the court to *Barry v. Mortgage Servicing Acquisition Corp.*, 909 F. Supp. 65 (D.R.I. 1995). In *Barry*, plaintiff asserted that an assignee defendant with no banking operations, offices, or real property in Rhode Island, no personnel that travel regularly to Rhode Island, and no solicitation of business or formation of contracts within Rhode Island, still was subject to the personal jurisdiction of Rhode Island since the defendant was the assignee of 138 mortgages secured by real property in Rhode Island. Without deciding whether an assignment of a mortgage constitutes an ownership interest in the property, the court rejected plaintiff's contention that standing alone, the fact that defendant held 138 mortgages secured by Rhode Island property, is sufficient to confer general personal jurisdiction. *Id.* at 74-75. This court finds the reasoning in *Barry* compelling. <sup>8</sup> When a defendant's forum activities consist solely of holding mortgages secured [\*19] by property in the forum state, the contacts cannot be characterized as continuous or systematic such that an exercise of general personal jurisdiction would be permissible. With this principle in mind, the court examines the contacts of each defendant with the state of Tennessee.

8 Plaintiffs try to convince the court that the reasoning in *Barry* is inapposite. Their logic is that in *Barry*, the issue was whether Rhode Island courts could assert jurisdiction over a dispute between a Massachusetts borrower and a national bank headquartered in Texas, involving a loan secured by Massachusetts property. In contrast, they argue, this is a case dealing with Tennessee courts exercising jurisdiction over disputes between Tennessee borrowers and holders of their notes secured by Tennessee property. However, plaintiffs miss the point. Nowhere in their complaint do plaintiffs allege that their loans, which are secured by Tennessee property, are held by defendants. Instead, plaintiffs argue that an exercise of personal jurisdiction is appropriate only based upon the holding of mortgages secured by Tennessee property unrelated to their own claims.

[\*20] The court first addresses whether it has general jurisdiction over defendant Empire Trust. Plaintiffs argue that the following contacts justify the exercise of general personal jurisdiction over these defendants: defendant's purchase of at least seventy-four second mort-

gage loans secured by property held by Tennessee residents (Wieder Aff. VI P 16); defendant's receipt of income from these mortgages, id. P 6; and defendant's holding of notes secured by mortgages from Tennessee residents secured by real property located within the state, id. P 21. As discussed above, the holding of mortgages secured by property in Tennessee, without more, is insufficient to confer personal jurisdiction over defendants. However, plaintiffs have not alleged that Empire Trust has any other contacts with Tennessee. In addition, plaintiffs do not contest that the Trust has no employees or agents in Tennessee, nor that it has no representatives that have traveled to Tennessee. Id. P 12. Plaintiffs also do not contest that Empire Trust has not entered into any contracts, including second mortgage loans, in Tennessee. Id. PP 18, 20. While the Trust holds several thousand second mortgage loans [\*21] throughout the country, the loans it holds secured by Tennessee property do not exceed two percent of all the loans it holds. Id. P 16. Furthermore, an independent servicer has exclusive power to perform all acts in connection with administering the loans, including collecting payments and enforcing performance of or seeking remedies with respect to the loans. Id. PP 27-29. Since plaintiffs can point to no contacts with Tennessee other than the Trust's holding of mortgages secured by property in Tennessee, the court finds that it cannot exercise general personal jurisdiction over Empire Trust.

The court next addresses whether it has general jurisdiction over defendants First Boston Trusts. Plaintiffs point to no affidavit, deposition, or other testimony to support their contention that these defendants have continuous and systematic contacts with Tennessee; plaintiffs point only to the affidavit of Pamela Wieder, Vice President of U.S. Bank, NA. Plaintiffs do not explain how Wieder's affidavit relates to these defendants. Thus, the court finds that plaintiffs have not met their burden to support their contention that First Boston Trusts have the continuous and systematic contacts [\*22] required to subject them to liability for acts unrelated to their contacts with Tennessee.

Similarly, plaintiffs point to no evidence to show general personal jurisdiction over IMPAC Mortgage, IMPAC Secured, or ICIFC Trusts. Relying upon the uncontested affidavits provided by defendants, the court finds the facts regarding these defendants' contacts with Tennessee substantially similar to that of Empire Funding such that an exercise of general personal jurisdiction over these defendants would be inappropriate. IMPAC Mortgage, IMPAC Secured, and ICIFC Trusts have no employees, offices, or bank accounts in Tennessee. (Johnson Aff. PP 3, 7.) They have not solicited or entered into any second mortgage loans in Tennessee. Id. PP 4, 8. Since plaintiffs can point to no contacts with

Tennessee other than defendants' holding of unrelated mortgages secured by property in Tennessee, the court finds that it cannot exercise general personal jurisdiction over these defendants.

The court now addresses whether plaintiffs have shown that this court has specific jurisdiction over defendants. As discussed above, to establish specific jurisdiction, plaintiffs must demonstrate that their suit arises [\*23] out of or is related to defendants' contacts with Tennessee. Plaintiffs do not allege which, if any, defendants actually hold their second mortgage loans. They merely assert "upon information and belief, [defendants are] currently a holder of certain of the second mortgage loan notes made to class members." (Compl. PP 4-23.) Since named plaintiffs' claims must satisfy the requirements for personal jurisdiction, a general allegation that defendants hold the mortgages made to putative class members is insufficient. This court does not have specific personal jurisdiction over any defendant that does not allegedly hold named plaintiffs' loans.<sup>9</sup> Since plaintiffs fail to meet their burden in showing which defendants hold their loans, this court cannot find personal jurisdiction over any defendant. Thus, the court grants Empire Trust's, First Boston Trusts', IMPAC Mortgage, IMPAC Secured, and ICIFC Trusts' motions to dismiss for lack of personal jurisdiction.

<sup>9</sup> The parties discuss at length the relevance of a case recently decided by the United States District Court for the District of Kansas, *Pilcher v. Direct Equity Lending*, 189 F. Supp. 2d 1198 (D. Kan. 2002). In *Pilcher*, plaintiffs actually alleged which assignee defendants held their loans. In contrast, named plaintiffs in the instant action have specifically avoided informing the court which defendants hold their loans. Thus, it need not be decided at this time whether the actual holding of named plaintiffs' loans would subject an assignee defendant to the specific personal jurisdiction of this court.

[\*24] Next, the court addresses the contention of defendants Life Bank; Life Trust; GMAC-RFC; U.S. Bank, NA; U.S. Bank, NA, ND; Bankers Trust Company of California, NA; Bankers Trust Company; and IMPAC Funding that plaintiffs' action against them should be dismissed pursuant to *Rule 12(b)(6)* due to lack of standing, since no allegation is made that any of defendants hold the loans made to named plaintiffs. Article III of the United State Constitution provides that federal courts may hear only justiciable cases or controversies. U.S. Const. Art. III, § 2; see also *Nat'l Rifle Ass'n of Am. v. Magaw*, 132 F.3d 272, 279 (6th Cir. 1997) (noting that Article III "confines the federal courts to adjudicating actual 'cases' and 'controversies' and that "the threshold

question in every federal case is whether the court has the judicial power to entertain the suit" (internal citations omitted)). In evaluating whether a case is justiciable, a court must determine whether the plaintiff has standing to bring the lawsuit. *Id.* at 279-80. The Supreme Court has "established that the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992). [\*25] First, the plaintiff must have suffered an injury in fact. This injury must be "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* (internal quotations and citations omitted). Second, standing requires a causal connection between the plaintiff's injury and the defendant's action: the injury must be "fairly traceable to the challenged action of the defendant." *Id.* (internal quotations and citations omitted). Third, it must be likely that the requested relief will redress the plaintiff's injury. *Id.* at 561. (internal quotations and citations omitted).

In a class action (or potential class action), the individual standing of each named plaintiff vis-a-vis each defendant is a threshold issue. *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 423 (6th Cir. 1998)(internal citations omitted). Named plaintiffs do not acquire standing by virtue of bringing a class action. *Id.* Rather,

a plaintiff "cannot represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands [\*26] he suffered no injury." This is true even though the plaintiff may have suffered an injury identical to that of the other parties he is representing.

*Thompson v. Bd. of Educ. of the Romeo Cmty. Schs.*, 709 F.2d 1200, 1204 (6th Cir. 1983) (quoting *LaMar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 462 (9th Cir. 1973)). However, there are two exceptions to the general rule that each member of a plaintiff class must have a cause of action against each defendant:

(1) Situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury; and (2) Instances in which all defendants are *juridically related* in a manner that suggests a single resolution of the dispute would be expeditious.

709 F.2d at 1204-05 (emphasis in original)(citing *LaMar*, 489 F.2d at 462).<sup>10</sup> A juridical relationship

among defendants is most often found "where all members of the defendant class are officials of a single state and are charged with enforcing or uniformly acting in accordance with a state statute, or common rule or practice of state-wide application, which [\*27] is alleged to be unconstitutional." 709 F.2d at 1205 (quoting *Mudd v. Busse*, 68 F.R.D. 522, 527-28 (N.D. Ind. 1975)). It is also used in cases in which there is a contractual obligation among all defendants. See, e.g., *United States v. Trucking Employers, Inc.*, 75 F.R.D. 682 (D.D.C. 1977).

10 In *LaMar*, the court discussed the two exceptions within the context of whether plaintiff met Rule 23's requirement that "the representative party will fairly and adequately protect the interests of the class":

We assert that a plaintiff who has no cause of action against the defendant can not "fairly and adequately protect the interests" of those who do have such causes of action. This is true even though the plaintiff may have suffered an identical injury at the hands of a party other than the defendant and even though his attorney is excellent in every material respect. Obviously this position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at show hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.

*LaMar*, 489 F.2d at 466 (internal citations omitted). The court did not first address the issue of standing since it ultimately held that plaintiffs were not entitled to bring a class action against defendants with whom they had no dealing. *Id.* at 464.

[\*28] The only claims that are before this court are those of named plaintiffs. Thus, each named plaintiff must demonstrate that he satisfies the requirements of standing vis-a-vis each defendant. Since named plaintiffs fail to state which defendant actually holds their loans, they fail to meet this test with respect to any of the defendants. Instead, plaintiffs state that they will lack

standing as to those defendants that do not hold the named plaintiffs' loans only if they do not succeed on the issue of class certification. However, even assuming that this court were to certify plaintiffs as a class, this would not cure the fact that named plaintiffs do not have standing against any defendant who does not actually hold their loans. <sup>11</sup>

11 Furthermore, plaintiffs' contention that class certification issues are "logically antecedent" to standing issues is contrary to law. Although the Supreme Court states in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 144 L. Ed. 2d 715, 119 S. Ct. 2295 (1999), that the "class certification issues are, as they were in [*Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 138 L. Ed. 2d 689, 117 S. Ct. 2231 (1997)], 'logically antecedent' to Article III concerns, and themselves pertain to statutory standing, which may properly be treated before Article III standing," it prefaced this statement by saying, "ordinarily, of course, this or any other Article III court must be sure of its own jurisdiction before getting to the merits." *Ortiz*, 527 U.S. at 831. Moreover, the Court determined that class certification was improper and never specifically addressed whether standing existed. Therefore, this court sees no reason why it should address class certification issues, which are not even presently before it, before addressing whether plaintiffs have standing against defendants.

[\*29] Furthermore, plaintiffs do not fall within the "juridical link" exception. The types of cases that fall within this exception are those that have either a contractual obligation among all defendants or a state or local statute which requires common action by defendants. Neither of these situations exists in the present action. Despite this failing, plaintiffs rely on *Moore v. Comfed Savings Bank*, 908 F.2d 834, 838-39 (11th Cir. 1990), to support their position that defendants are juridically linked. <sup>12</sup> In *Moore*, however, although the Eleventh Circuit discussed the juridical link exception, it did not expressly resolve the standing question, but rather found that defendants were properly joined pursuant to *Federal Rule of Civil Procedure 20*. Thus, *Moore* does not support plaintiffs' position that defendants are juridically linked when plaintiffs' loans are originated by a common lender and subsequently assigned to unrelated defendants.

12 In *Moore*, the plaintiffs' loans were originated by a common lender who subsequently sold them to savings and loans companies throughout the country. *Moore*, 908 F.2d at 836.

[\*30] Plaintiffs' reliance upon the joinder rules similarly does not cure named plaintiffs' lack of standing. Plaintiffs argue that joinder of the assignee defendants that do not hold named plaintiffs' loans is required since these defendants are necessary parties under *Federal Rule of Civil Procedure 19(a)*. <sup>13</sup> They assert that without the presence of the assignee defendants in this action, complete relief cannot be accorded to the class members. However, this assumes that class members are parties to this action. Since class certification has not yet been ordered, or even requested, joinder of additional parties related to unnamed class members would be inappropriate at this time. Moreover, procedural rules, such as the joinder rules, cannot expand the jurisdiction of the federal courts, and thus, cannot confer standing where a case or controversy otherwise would not exist. See, e.g., *Christiansen v. Beneficial Nat'l Bank*, 972 F. Supp. 681, 683 (S.D. Ga. 1997); *United States ex rel. Tenn. Valley Authority v. Easement and Right of Way*, 204 F. Supp. 837, 840 (E.D. Tenn. 1962).

13 *Rule 19(a)* states, in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties ...

Fed. R. Civ. Pro 19(a).

[\*31] Finally, plaintiffs attempt to convince the court that they have standing pursuant to the Home Ownership and Equity Protection Act of 1994 ("HOEPA"), Pub. L. No. 103-325, 108 Stat. 2190 (codified as amended at 15 U.S.C. §§ 1602(aa), 1639, and 1641(d)), which amended the Truth in Lending Act ("TILA"), 15 U.S.C. §§ 1601 et seq. The crux of their argument is based on the following logic: Plaintiffs first assert that the injuries of which they complain are based upon the second mortgage loans entered into by themselves and the originating lender such that plaintiffs have standing to sue the original lender. Second, they point to HOEPA which states that "any person who purchases or is otherwise assigned a mortgage referred to in section 1602(aa) of this title shall be subject to all claims and defenses with respect to that mortgage that the consumer could assert against the creditor of the mortgage ..." 15 U.S.C. § 1641(d)(1). Finally, plaintiffs reason that under HOEPA's assignee liability provisions, the assignee defendants do not possess any defense, including standing,

distinct from the defenses that would be [\*32] available to the lender. However, plaintiffs logic is flawed as they mistakenly focus on the language regarding "all claims and defenses." Since standing is a threshold jurisdictional question, the proper focus of the standing inquiry deals with the following clauses: "any person who purchases or is otherwise assigned a mortgage" and "with respect to that mortgage that the consumer could assert against the creditor of the mortgage." As stated above, named plaintiffs do not have standing to sue someone who does not actually hold their loans. HOEPA does nothing to alter the requirements of Article III standing; rather, it merely eliminates holder in due course defenses for assignees of certain high cost mortgages when the assignee holds the plaintiffs' loans. See, e.g., *In re Rodrigues*, 278 B.R. 683, 688 (Bankr. D.R.I. 2002); *Vandenbroeck v. Continmortgage Corp. and Greentree Fin. Servicing Corp.*, 53 F. Supp. 2d 965, 968 (W.D. Mich. 1999); *In re Murray*, 239 B.R. 728, 733, 2239 B.R. 728 (Bankr. E.D. Penn. 1999)).

Pursuant to the above analysis, plaintiffs do not have standing against any defendant that does not hold plaintiffs' loans. However, plaintiffs [\*33] fail to specify which defendants, if any, actually hold their loans. Thus, the court grants Life Bank's, Life Trust's, GMAC-RFC's, U.S. Bank, NA's, U.S. Bank, NA, ND's, Bankers Trust

Company of California, NA's, Bankers Trust Company's, and IMPAC Funding's motions to dismiss.

In accordance with the above discussion, the court concludes that it does not have personal jurisdiction over IMPAC Mortgage, IMPAC Secured, ICIFC Trusts, Empire Funding, and First Boston Trusts. Thus, these defendants' motions to dismiss are granted. Additionally, the court finds that, based on the facts presently before the court, plaintiffs do not have standing to assert claims against U.S. Bank, NA; U.S. Bank, NA, ND; Bankers Trust Company of California, NA; Bankers Trust Company; GMAC-FRC; Life Bank; Life Trust; or IMPAC Funding. Thus, their motions to dismiss are granted. The dismissal is without prejudice as to any defendant that may actually hold plaintiffs' loans.

IT IS SO ORDERED.

JULIA SMITH GIBBONS

UNITED STATES DISTRICT JUDGE

July 31, 2002

DATE

LEXSEE 56 N.C. APP. 599

WARREN B. WHITENER v. OLLIE VEE WHITENER

No. 8129DC381

COURT OF APPEALS OF NORTH CAROLINA

56 N.C. App. 599; 289 S.E.2d 887; 1982 N.C. App. LEXIS 2467

November 19, 1981, Heard in the Court of Appeals  
April 6, 1982, Filed

**PRIOR HISTORY:** [\*\*\*1] Appeal by plaintiff from *Greenlee, Judge*. Judgment entered 17 February 1981 in District Court, Henderson County.

**DISPOSITION:** Affirmed.

#### HEADNOTES

**1. Process § 9 -- action for an accounting -- no in rem or quasi in rem jurisdiction**

In an action in which plaintiff asked for an accounting from the defendant for money which she received in Florida, the action was neither *in rem* nor *quasi in rem* since the action did not affect the debt which was owed by the persons in North Carolina to the parties to the suit nor did the plaintiff garnish the debt in this State as an ancillary proceeding to the action.

**2. Process § 9 -- interest in note secured by deed of trust -- no minimum contact -- no in personam jurisdiction**

The district court properly dismissed an action by plaintiff for an accounting by defendant of monies she had received in Florida as payments on a purchase money note secured by a deed of trust on property in North Carolina due to lack of *in personam* jurisdiction. Defendant sold the property in North Carolina in 1968; she has not been in North Carolina since that time; and *G.S. 1-75.4(6)(b)* does not give the North Carolina court jurisdiction for a [\*\*\*2] suit against the defendant for an accounting of money she received on the note.

#### SYLLABUS

The plaintiff has appealed from an order dismissing this action on the ground the court did not have *in personam* jurisdiction over the defendant. The pleadings establish that the parties to this action were married in 1926 and divorced in 1973. The parties were residing in Florida in 1968 at which time they sold a parcel of real

estate in Henderson County and took for it a purchase money note secured by a deed of trust. The defendant has been domiciled in Florida since the property in Henderson County was sold. The plaintiff, who is now domiciled in North Carolina, brought this action for an accounting by the defendant of monies she has received in Florida as payments on the purchase money note. In his complaint the plaintiff alleged that on 2 August 1977 an action identical in substance to the instant case was filed in which an order had been issued to the payors of the note to deliver all payments to the Clerk of Superior Court of Henderson County. A voluntary dismissal has been taken in that action. In his prayer for relief the plaintiff asked for an accounting, a money judgment for [\*\*\*3] any sum due, and that the Clerk of Superior Court of Henderson County be ordered to continue holding the money paid to him pursuant to the order in the previous action.

The defendant was served process by mailing a copy of the complaint to her by certified mail.

**COUNSEL:** *Lee Atkins for plaintiff appellant.*

*Prince, Youngblood, Massagee and Creekman, by James E. Creekman, for defendant appellee.*

**JUDGES:** Webb, Judge. Judges Vaughn and Hill concur.

**OPINION BY:** WEBB

#### OPINION

[\*600] [\*\*888] The plaintiff first contends that the district court has jurisdiction because this is an *in rem* or *quasi in rem* action. Plaintiff argues this is so because there is a debt owed by persons in North Carolina to the parties to this suit. We do not believe this is an action *in rem* or *quasi in rem*. An *in rem* action deals with a proceeding regarding a thing. An action is *quasi in rem* if a

56 N.C. App. 599, \*; 289 S.E.2d 887, \*\*;  
1982 N.C. App. LEXIS 2467, \*\*\*

thing which is not the subject of an action is attached or garnished in an ancillary proceeding in order to make it subject to the judgment against the defendant. See *Holt v. Holt*, 41 N.C. App. 344, 255 S.E. 2d 407 (1979); *Balcon, Inc. v. Sadler*, 36 N.C. App. 322, 244 S.E. 2d 164 [\*\*\*4] (1978); *Allen and O'Hara, Inc. v. Weingart*, 23 N.C. App. 676, 209 S.E. 2d 839 (1974). In this case the plaintiff has asked for an accounting from the defendant for money which she received in Florida. This does not affect the debt which is owed by the persons in North Carolina to the parties to this suit. This is not an *in rem* action. The plaintiff has not garnished the debt in this state as an ancillary proceeding to this action. This is not a *quasi in rem* action.

The plaintiff also contends the court has *in personam* jurisdiction of the defendant. The parties agree that the defendant was in form properly served so that the court has jurisdiction if this is an action in which the defendant may be served with process outside the state. If the court has *in personam* jurisdiction, it is under G.S. 1-75.4 which provides:

[\*\*889] "A Court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) of the Rules of Civil Procedure under any of the following circumstances:

[\*601] \* \* \*

(6) Local Property. -- In any action which arises out of:

\* \* \*

b. A claim to recover [\*\*\*5] for any benefit derived by the defendant through the use, ownership, control or possession by the defendant of tangible property situated within this State either at the time of the first use, ownership, control or possession or at the time the action is commenced . . ."

The plaintiff contends this action involves a claim to recover for a benefit the defendant derived by the ownership of real estate in North Carolina, which was sold in 1968 and now is the security for the payment of a note,

and this brings defendant within the purview of G.S. 1-75.4(6)(b).

In interpreting G.S. 1-75.4(6)(b) as applied to the facts of this case we have to be mindful of the due process requirements of the *Fourteenth Amendment to the United States Constitution*. The due process clause requires that in order for a court to have personal jurisdiction over a person not domiciled in the state and not served with process in the state that the person must have certain minimum contacts with the state. See *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed. 2d 683 (1977) and *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95, 161 A.L.R. 1057 (1945). In [\*\*\*6] *Shaffer*, the United States Supreme Court held that the fact that a person held stock in a Delaware corporation was not a sufficient contact to give the Delaware courts jurisdiction over that person. The subject matter of the action did not involve the defendant's rights as a stockholder although it did involve his action as an officer of the corporation. In *Balcon v. Sadler*, *supra*, this Court held there was not a sufficient minimum contact to support jurisdiction over a Maryland resident who owned real estate in this state when the plaintiff, also a Maryland resident, brought an action in this state on a claim that arose in Maryland and was unrelated to the North Carolina real estate. In *Holt v. Holt*, *supra*, this Court held that the district court had jurisdiction over a resident of another state who owned real estate in North Carolina. In that case the plaintiff sued on a Missouri alimony judgment. The court in that case held [\*602] there were several factors which showed there was a relationship between the defendant's North Carolina property and the controversy between the parties. The defendant bought the property shortly after the entry of the Missouri decree [\*\*\*7] which led the court to conclude that he was spending part of his income on the North Carolina property rather than making his alimony payments in Missouri. The parties in a separation agreement had divided property they owned in North Carolina. This Court held that these factors showed that the North Carolina property was a part of the source of the underlying controversy between the plaintiff and the defendant and the court had jurisdiction in a *quasi in rem* action.

In the instant case the record discloses that the defendant sold property in North Carolina in 1968. So far as we can tell from the record she has not been in North Carolina since that time. She does own an interest in a note secured by a deed of trust on property in this state. There is no dispute between the parties as to whether the note should be paid. The only dispute is what has the defendant done with the payments. In *Shaffer v. Heitner*, *supra*, the fact that the defendants relied on Delaware law to protect their interests as stockholders did not give

56 N.C. App. 599, \*; 289 S.E.2d 887, \*\*;  
1982 N.C. App. LEXIS 2467, \*\*\*

the Delaware court jurisdiction of the defendants in an action unrelated to their rights as stockholders. We believe that if we read *G.S. 1-75.4(6)(b)* [\*\*\*8] to give the North Carolina court jurisdiction for a suit against the defendant for an accounting of money she received on the note it would violate the rule of *Shaffer*. This case is distinguishable from *Holt* in that in *Holt* the defendant had [\*\*890] invested his money in property in this state rather than pay alimony as ordered by a Missouri decree. The defendant in the instant case had sold her property

five years prior to the Florida divorce decree. There is no indication the sale was connected with the Florida action.

In light of the serious constitutional problems that would arise were we to hold otherwise, we hold that *G.S. 1-75.4(6)(b)* does not give the District Court of Henderson County *in personam* jurisdiction in this case. The action was properly dismissed.

[\*603] Affirmed.

## FOCUS - 25 of 36 DOCUMENTS



Positive

As of: Feb 04, 2008

BARBARA ANN SALER, Individually and as Personal Representative of the Estate of Ruth R. Saler, and NANCY BLUE STONE, Appellants-Plaintiffs, vs. GENE A. IRICK, DAVID P. IRICK, and NICHOLAS A. JONES, Appellees-Defendants.

No. 49A02-0304-CV-280

COURT OF APPEALS OF INDIANA, SECOND DISTRICT

800 N.E.2d 960; 2003 Ind. App. LEXIS 2404

December 30, 2003, Filed

**PRIOR HISTORY:** **[\*\*1]** APPEAL FROM THE MARION SUPERIOR COURT. Cause No. 49D08-0206-PL-1488. PROBATE DIVISION The Honorable Charles J. Deiter, Judge.

**DISPOSITION:** Affirmed in part and reversed in part; remanded for further proceedings.

LexisNexis(R) Headnotes

*Estate, Gift & Trust Law > Estate Administration > Claims Against Estates > General Overview*  
*Estate, Gift & Trust Law > Probate > General Overview*  
 [HN1] See Ind. Code § 32-4-1.5-7.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

*Governments > Courts > Authority to Adjudicate*  
 [HN2] Personal jurisdiction is a court's power to bring a person into its adjudicative process and render a valid judgment over a person.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > Constitutional Limits*

[HN3] The existence of personal jurisdiction over a defendant is a constitutional requirement in rendering a valid judgment, mandated by the due process clause of the Fourteenth Amendment.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

[HN4] Personal jurisdiction is a question of law. As such, either it does exist or it does not exist. The question of its existence is not entrusted to a trial court's discretion.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

*Civil Procedure > Appeals > Standards of Review > De Novo Review*

[HN5] A de novo standard is employed by appellate courts when reviewing questions of whether personal jurisdiction exists.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

[HN6] In determining whether an Indiana court has personal jurisdiction, a court must proceed with a two-step analysis. First, the court must determine if the defendant's contacts with Indiana fall under the "long-arm statute," Ind. R. Trial P. 4.4. If the contacts fall under Rule 4.4, the court must then determine whether the defendant's contacts satisfy federal due process analysis.

***Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview***

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview***

[HN7] Ind. R. Trial P. 4.4 enumerates eight acts which will render an individual to have submitted to the personal jurisdiction of Indiana. One of the eight listed factors, Rule 4.4(A)(1), is doing any business in this state.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview***

***Insurance Law > Property Insurance > Homeowners Insurance > Business Activities***

[HN8] "Business," for the purpose of applying Ind. R. Trial P. 4.4(A)(1), concerning finding personal jurisdiction over one doing any business in Indiana, is not limited to a continuous or regular activity for the purpose of earning a livelihood or employment, occupation, profession, or commercial activity engaged in for gain or livelihood. Rather, a more expansive definition of "business" is required when interpreting Rule 4.4.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts***

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment***

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Substantial Contacts***

[HN9] After finding a basis for long-arm jurisdiction, courts must examine whether asserting jurisdiction violates the Due Process Clause of the Fourteenth Amendment. This means that a person must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. Contacts are sufficient to establish personal jurisdiction only if there is some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. Only the acts of the defendant, and not the acts of a third party or plaintiff, satisfy this requirement.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts***

[HN10] Courts apply a two-part test to determine whether jurisdiction exists consistent with the due proc-

ess clause. First, courts must look at the contacts between a defendant and the forum state to determine if they are sufficient to establish that the defendant could reasonably anticipate being haled into court there. Contacts are any acts physically performed in the forum state or acts performed outside the forum state which have an effect within the forum state. There are two types of contacts which may be sufficient to establish jurisdiction: (1) the defendant's contacts with the forum state which are unrelated to the basis of the lawsuit, and (2) the defendant's contacts which are related to the subject matter of the lawsuit. Those contacts will confer general and specific personal jurisdiction, respectively. If the contacts are sufficient, then the court must evaluate whether the exercise of personal jurisdiction offends traditional notions of fair play and substantial justice by weighing a variety of interests.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Minimum Contacts***

[HN11] A single contact with a forum state may be enough to establish specific personal jurisdiction if it creates a substantial connection with the forum state and the suit is based upon that connection. However, the act must be purposeful, not random, fortuitous, or attenuated, nor may it be the unilateral activity of another party or a third person. The analysis of contacts for specific personal jurisdiction is fact-specific and determined on a case-by-case basis. Factors to consider when evaluating a defendant's contacts with the forum state are: (1) whether the claim arises from the defendant's forum contacts, (2) the overall contacts of the defendant or its agent with the forum state, (3) the foreseeability of being haled into court in that state, (4) who initiated the contacts, and (5) whether the defendant expected or encouraged contacts with the state.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview***

[HN12] A state does not acquire contacts with an individual or corporation by being the center of gravity of a controversy or being the most convenient location for litigation.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview***

[HN13] Lack of a defendant's personal affiliation with a forum state is not enhanced by the fact that an individual

dies in a state and leaves assets which eventually pass to the defendant.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview*

[HN14] Once contacts sufficient to establish personal jurisdiction are found, a court must then decide whether asserting personal jurisdiction over a defendant offends traditional notions of fair play and substantial justice. A court balances a number of factors to determine whether the assertion of jurisdiction is reasonable and fair. The factors are: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive policies. The defendant carries the burden of establishing that asserting jurisdiction is unfair and unreasonable. To determine if the exercise of personal jurisdiction is reasonable in a particular case, a court may examine the relationship among the defendant, the forum, and the litigation, the principles of interstate federalism, and the existence of an alternative forum to hear the dispute.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > General Overview  
Estate, Gift & Trust Law > Probate > Procedures in Probate > General Overview  
Governments > State & Territorial Governments > Boundaries*

[HN15] The necessity of courts in states where an estate is being administered to ensure that property which may appropriately be part of an estate is not removed from the estate and taken across state lines where it cannot be reached cannot be ignored.

*Civil Procedure > Judgments > Relief From Judgment > General Overview*

*Civil Procedure > Appeals > Reviewability > General Overview*

*Evidence > Procedural Considerations > Preliminary Questions > Admissibility of Evidence > General Overview*

[HN16] New evidence may not be submitted to the court for the first time upon appeal.

*Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview*

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions*

*Estate, Gift & Trust Law > Probate > Procedures in Probate > Jurisdiction & Venue > Domicile*

[HN17] Whatever the efficacy of a so-called "in rem" jurisdiction over assets admittedly passing under a local will, a state acquires no in rem jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with which neither the state nor the decedent could claim any affiliation.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions*

*Estate, Gift & Trust Law > Probate > Procedures in Probate > Jurisdiction & Venue > Domicile*

[HN18] For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. The maxim is no less suspect when the domicile is that of a decedent.

*Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Rem Actions > True in Rem Actions*

*Estate, Gift & Trust Law > Probate > Procedures in Probate > Jurisdiction & Venue > Domicile*

[HN19] The probate decree of a state where a decedent was domiciled does not have an in rem effect on personalty outside the forum state that could render it conclusive on the interests of nonresidents over whom there was no personal jurisdiction. The fact that the owner is or was domiciled within the forum state is not a sufficient affiliation with the property upon which to base jurisdiction in rem.

COUNSEL: ATTORNEY FOR APPELLANTS: CURTIS E. SHIRLEY, Indianapolis, Indiana.

ATTORNEY FOR APPELLEES: J. LAMONT HARRIS, Henthorn, Harris & Weliever, Crawfordsville, Indiana.

JUDGES: SULLIVAN, Judge. FRIEDLANDER, J., and RILEY, J., concur.

OPINION BY: SULLIVAN

OPINION

[\*963]

**SULLIVAN, Judge**

Barbara Ann Saler Brennan, individually and as the personal representative of the Estate of Ruth Saler, and Nancy Blue Stone appeal following the dismissal of their claim against Gene Irick, David Irick, and Nicholas Jones (collectively "Appellees"). The issue they present for our review is whether the probate court erred in determining that Indiana courts do not have jurisdiction of the matters in issue.

We reverse in part and affirm in part.

Ruth Saler was married to Bruce Saler. He was her third husband and she was his second wife. On March 12, 1993, they executed a joint and mutual last will and testament. The residuary clause of the will stated that the "rest, residue and remainder of the estate and property" would be distributed to their respective children or their children's [\*\*2] descendants in equal shares. Appendix at 16. Bruce had two children, Barbara and Nancy. Ruth had three children: Gene, David, and Jo Ann, who was survived in death by her son Nicholas. During her lifetime, but after Bruce had passed away, Ruth designated her bank accounts to be payable-on-death to either Gene or to Gene, David, and Nicholas.<sup>1</sup> Further, they were named as [\*964] beneficiaries on several annuity contracts.<sup>2</sup> None of the children lived in Indiana at the time of Ruth's death, nor have they moved here. Gene resides in Illinois, David in Maryland, and Nicholas in Virginia. Barbara lives in Colorado and Nancy in Washington.

1 There were three such accounts, a money market savings account and two certificates of deposit.

2 There were three separate annuities issued by Lincoln Benefit Life and one by Paine Webber.

Following Ruth's death, Gene went to her home at the Marquette Manor retirement home in Indianapolis and removed her personal belongings. Additionally, he met with Joyce Gross, a representative [\*\*3] of First Indiana Bank, in regard to his mother's bank accounts. He provided Ms. Gross with a copy of his mother's death certificate and Ms. Gross gave him copies of Form IH-14, an Application for Consent to Transfer Securities or Personal Property. Gene, David, and Nicholas each completed and signed a single copy of the form, and Gene mailed it to First Indiana Bank. First Indiana Bank subsequently mailed checks to Gene, made out to Gene, David, and Nicholas, for their payable-on-death benefits. Gene also sent claim forms to the different annuity companies. Consequently, Gene, David, and Nicholas collected on the annuity contracts. The total they collected

from all of the sources combined is approximately \$ 326,000.

Upon appeal, Barbara and Nancy assert that the probate court erred in determining that Indiana courts do not have jurisdiction over this cause. They present three arguments to support their claim. First, they assert that Indiana Code § 32-4-1.5-7 (Burns Code Ed. Repl. 1995) authorizes the personal representative of the estate to initiate a proceeding to impose liability upon the transferee of nonprobate property from the estate. Their second [\*\*4] argument is that the probate court had personal jurisdiction over Appellees because of the Appellees' contacts with Indiana. The final argument they present is that Indiana courts have *in rem* jurisdiction over the property which was owned by Ruth at the time of her death.

Nancy, as personal representative, asserts that she may initiate this action under the auspices of I.C. § 32-4-1.5-7.<sup>3</sup> Appellees contend that she may not do so because I.C. § 32-4-1.5-7 authorizes a proceeding only if the personal representative has received a written demand for the proceeding from the surviving spouse, a dependent child, or a creditor. Nancy counters by asserting that such a reading of the statute would render part of it meaningless. However, we are bound to agree with Appellees that the statute prevents Nancy, as personal representative, from initiating an action under I.C. § 32-4-1.5-7.

3 Since the time that this suit was initiated, Article 4 of Title 32 has been repealed. The current statutory embodiment of the principle announced in I.C. § 32-4-1.5-7 is now found in *Ind. Code 32-17-13* (Burns Code Ed. Repl. 2002).

[\*\*5] Indiana Code § 32-4-1.5-7 states, [HN1] "No proceeding to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a dependent child of the decedent . . ." It is clear that Ruth had no surviving spouse or dependent child at her death. More importantly, there is no indication that any creditor of the estate requested that Nancy initiate this action. In fact, by her own argument, Nancy implies that no creditor filed such a written request. Consequently, this action cannot proceed with I.C. § 32-4-1.5-7 as its authority. See *Shourek v. Stirling*, 607 N.E.2d 402, 405 [\*965] (*Ind. Ct. App.* 1993) (holding that a written demand by a surviving spouse, surviving child, or creditor must be made to place an action within the province of I.C. § 32-4-1.5-7), overruled on other grounds 621 N.E.2d 1107 (*Ind.* 1993). Therefore, we turn to the issue of personal jurisdiction.

[HN2] "Personal jurisdiction is 'a court's power to bring a person into its adjudicative process' and render a valid judgment [\*\*6] over a person." *Anthem Ins. Cos., Inc. v. Tenet Healthcare Corp.*, 730 N.E.2d 1227, 1231 (Ind. 2000) (quoting Black's Law Dictionary 857 (7th ed. 1999)). [HN3] The existence of personal jurisdiction over a defendant is a constitutional requirement in rendering a valid judgment, mandated by the Due Process Clause of the *Fourteenth Amendment*. *Id.* at 1237. [HN4] Personal jurisdiction is a question of law. *Id.* As such, either it does exist or it does not exist. *Id.* The question of its existence is not entrusted to a trial court's discretion. *Id.* [HN5] A de novo standard is employed by appellate courts when reviewing questions of whether personal jurisdiction exists. *Id.*

[HN6] In determining whether an Indiana court has personal jurisdiction, a court must proceed with a two-step analysis. *Id.* at 1232; *Brockman v. Kravic*, 779 N.E.2d 1250, 1255 (Ind. Ct. App. 2002). First, the court must determine if the defendant's contacts with Indiana fall under the "long-arm statute," *Ind. Trial Rule 4.4. Anthem*, 730 N.E.2d at 1231-32. If the contacts fall under *Rule 4.4*, the court must then determine whether the defendant's [\*\*7] contacts satisfy federal due process analysis. *Id.* at 1232.

[HN7] *Indiana Trial Rule 4.4* enumerates eight acts which will render an individual to have submitted to the jurisdiction of Indiana. Of the eight listed factors, the only one which may be applicable here is (A)(1)--"doing any business in this state." Additionally, as amended on July 19, 2002, and effective January 1, 2003, *Rule 4.4* contains a provision which states, "a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitutions of this state or the United States." This new provision does not apply in this case because this case was initiated prior to the announcement of the new rule. See *Sneed v. Associated Group Ins.*, 663 N.E.2d 789, 795 (Ind. Ct. App. 1996) (new rules announced through a rulemaking process will only be applied to cases which arise after the new rule has been announced). Consequently, our sole concern is whether Appellees were "doing any business in this state" when they attempted to collect on the payable-on-death accounts.

Appellees argue that they were not doing any "business" in Indiana because their actions do not meet the definition [\*\*8] of business. In their brief, they define business as "'a continuous or regular activity for the purpose of earning a livelihood.'" Appellees' Brief at 12 (quoting *Asbury v. Indiana Union Mut. Ins. Co.*, 441 N.E.2d 232, 237 (Ind. Ct. App. 1982)).<sup>4</sup> Further, they cite to Black's Law Dictionary 198 (6th ed. 1990), which defines "business" as "'employment, occupation, profession, or commercial activity engaged in for gain or live-

lihood.'" While we agree that "business" may be defined as such, we do not agree that [HN8] "business" for the purpose of *Rule 4.4* is limited to these definitions. Rather, we believe that a more expansive definition of "business" is required when interpreting *Rule 4.4*. Therefore, we turn to other sources to inform our decision.

4 In *Asbury*, this definition was used in the context of a "business pursuit" when discussing a homeowner's exemption to an insurance policy.

[\*966] A common meaning attributed to "business" is that of an "affair" or "matter." E.g., Webster's Third New [\*\*9] International Dictionary 302 (1976). A similar definition is that of "a special task, duty, or function." Webster's New World Dictionary 192 (2nd College ed. 1982). Reading *Rule 4.4* with this view of "business," we conclude that Appellees have maintained contacts such that they fall within the long-arm jurisdiction of Indiana.<sup>5</sup>

5 We recognize two cases cited by Appellees in which this court determined that the defendants' actions did not support personal jurisdiction on the basis of "doing business." In *Bryan Mfg. Co. v. Harris*, 459 N.E.2d 1199, 1204 (Ind. Ct. App. 1984), this court stated the proposition that doing business is related to conducting an "ongoing business" and was to further a "business interest." As is evident from our resolution of this issue in this case, we disagree with the assessment of that panel of this court. Further, the analysis of the "doing business" issue in *Bryan Mfg.* is best described as dicta because the court had already determined that personal jurisdiction existed on a separate ground. In *D'Iorio v. D'Iorio*, 694 N.E.2d 775 (Ind. Ct. App. 1998), this court reviewed a situation which is distinguishable upon its facts from the case at hand. Therefore, the conclusion of the court in that case is not controlling. Finally, we make one other point in regard to these two cases and all other relevant cases decided pre-*Anthem*. As pointed out by Appellees, the analysis used in determining whether personal jurisdiction existed changed significantly in *Anthem*. While our Supreme Court recognized that the result of many of the pre-*Anthem* jurisdiction cases would not change when applying the *Anthem* analysis, the possibility does exist that the result obtained in pre-*Anthem* cases may be different than that reached under an *Anthem* analysis.

[\*\*10] [HN9] After finding a basis for long-arm jurisdiction, courts must examine whether asserting jurisdiction violates the Due Process Clause of the *Fourteenth Amendment*. *Anthem*, 730 N.E.2d at 1233. The United

States Supreme Court has explained this to mean that a person must have certain minimum contacts with the forum such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). Contacts are sufficient to establish personal jurisdiction only if there is some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Anthem*, 730 N.E.2d at 1233-34; *Brockman*, 779 N.E.2d at 1256. Only the acts of the defendant, and not the acts of a third party or plaintiff, satisfy this requirement. *Brockman*, 779 N.E.2d at 1256.

Thus, [HN10] courts apply a two-part test to determine whether jurisdiction exists consistent with the *Due Process Clause*. Id. First, courts must look at the contacts [\*\*11] between the defendant and the forum state to determine if they are sufficient to establish that the defendant could reasonably anticipate being haled into court there. *Anthem*, 730 N.E.2d at 1234; *Brockman*, 779 N.E.2d at 1256. Contacts are any acts physically performed in the forum state or acts performed outside the forum state which have an effect within the forum state. *Brockman*, 779 N.E.2d at 1256. There are two types of contacts which may be sufficient to establish jurisdiction: (1) the defendant's contacts with the forum state which are unrelated to the basis of the lawsuit, and (2) the defendant's contacts which are related to the subject matter of the lawsuit. *Anthem*, 730 N.E.2d at 1234; *Brockman*, 779 N.E.2d at 1256. Those contacts will confer general and specific personal jurisdiction, respectively. *Brockman*, 779 N.E.2d at 1256. If the contacts are sufficient, then the court must evaluate whether the exercise of personal jurisdiction offends traditional [\*967] notions of fair play and substantial justice by weighing a variety of interests. *Anthem*, 730 N.E.2d at 1234; [\*\*12] *Brockman*, 779 N.E.2d at 1256.

There is no claim that Indiana courts have general personal jurisdiction over Appellees. Rather, the contention of Barbara and Nancy is that Indiana courts have specific personal jurisdiction over Appellees with regard to their collection of the payable-on-death benefits. Therefore, we analyze the issue of specific personal jurisdiction in this case.

[HN11] A single contact with a forum state may be enough to establish specific personal jurisdiction if it creates a substantial connection with the forum state and the suit is based upon that connection. *Anthem*, 730 N.E.2d at 1235. However, the act must be purposeful, not random, fortuitous, or attenuated, nor may it be the unilateral activity of another party or a third person. Id. The analysis of contacts for specific personal jurisdiction is fact-specific and determined on a case-by-case basis.

*Brockman*, 779 N.E.2d at 1257. Factors to consider when evaluating the defendant's contacts with the forum state are: (1) whether the claim arises from the defendant's forum contacts, (2) the overall contacts of the defendant or its agent with the forum state, (3) [\*\*13] the foreseeability of being haled into court in that state, (4) who initiated the contacts, and (5) whether the defendant expected or encouraged contacts with the state. *Anthem*, 730 N.E.2d at 1236.

Appellees, in asserting that their minimum contacts with Indiana are insufficient to establish that they could foresee being haled into court here, argue that their contacts with Indiana were random, attenuated, and fortuitous. Further, they assert that the bank acted unilaterally in issuing the checks for the payable-on-death benefits. They distinguish between the actions of Gene from those of David and Nicholas; nonetheless, they argue that none of them have sufficient contacts with Indiana to support jurisdiction. Finally, they rely upon the similarities between this case and *First American Bank of Virginia v. Reilly*, 563 N.E.2d 142 (Ind. Ct. App. 1990) in asserting that Indiana courts lack jurisdiction.<sup>6</sup>

6 In their brief, Appellees assert that First American Bank stands for the proposition that receipt of an inheritance does not constitute "doing any business" for the purpose of establishing long-arm jurisdiction. However, First American Bank is more appropriately discussed during consideration of whether the Due Process requirements are met.

[\*\*14] We begin with a review of First American Bank. In that case, this court was faced with the question of whether personal jurisdiction could be established over a bank in Virginia which was trustee of an estate probated in Indiana. This court noted that [HN12] a state does not acquire contacts with an individual or corporation by being the center of gravity of the controversy or being the most convenient location for litigation. *Id.* at 144. Additionally, this court stated that [HN13] lack of a defendant's personal affiliation with a forum state is not enhanced by the fact that an individual dies in a state and leaves assets which eventually pass to the defendant. *Id.* at 145. Finally, this court reviewed the contacts between First American Bank and Indiana to determine whether the requirements of the *Due Process Clause* were met.

The pertinent facts in First American Bank established that Robert Anderson executed a will before his death. In the will he named First American Bank as the trustee of a trust through which his residuary estate would pass. After the will was admitted to probate, the bank declined [\*968] appointment as executor of the estate. The bank took [\*\*15] no part in the probate of the estate. Further, title to the trust assets did not vest in

First American Bank until approximately one month after the final decree of the probate court. The court also duly noted that First American Bank was not registered to do business in Indiana and did not transact any business in Indiana. Upon these facts, this court determined that Indiana's contacts with the bank could not have been said to have proximately resulted from actions of the trustee which created a substantial connection with the State. *Id.* Consequently, First American Bank did not have sufficient contacts necessary for the exercise of personal jurisdiction by Indiana courts. *Id.*

Appellees attempt to cast their situation in the same light as in *First American Bank*. Were that the case, we may be inclined to agree with their assertion that Indiana courts do not have jurisdiction. However, unlike the situation in *First American Bank*, Appellees initiated the contacts with Indiana and did more than just receive inheritance benefits. Rather, Gene came to Indiana to collect his mother's personal belongings. He went to the First Indiana Bank branch at Marquette Manor where his [\*\*16] mother had lived and presented a copy of his mother's death certificate. He received a copy of the consent to transfer funds form and provided the copy to David and Nicholas. All three of them completed and signed the form which authorized the bank to release the money from the payable-on-death accounts to Appellees.

Appellees have claimed that they never requested that the money be sent to Gene and that the act of issuing the checks was unilateral on the part of First Indiana Bank. To the extent that Appellees are asserting that they never requested that the money be paid to them, the evidence does not support such an assertion. The consent to transfer form stated that no administration of the estate was pending in any court and that Appellees did not contemplate that there would be any such proceedings. It further stated that the accounts owned by Ruth were payable-on-death to Gene, David, and Nicholas and that the property would be transferred to them. There is nothing on the face of the form which indicates anything other than that the bank was supposed to send the money to them. That the bank sent checks for David and Nicholas to Gene because it had dealt with Gene in the past [\*\*17] does not negate the fact that David and Nicholas requested that First Indiana Bank pay them the money they believed they were owed. Further, following their request for payment through the use of the form, the only additional step needed for the money to be transferred was for the Inheritance Tax Division of the Indiana Department of Revenue to consent to the transfer. Under these facts, it cannot be said that Appellees did not request that the money be sent to them.

Appellees also assert that the claim does not arise from their contacts with Indiana but with Ruth's decision to designate them as beneficiaries of her accounts. While

Ruth's action may have set in motion the chain of events leading to the claim, Appellees' actions in requesting the transfer of money, which Barbara and Nancy believe should remain in the estate, is the actual cause of the claim.

Appellees' claim that they could not expect to be haled into court in Indiana is a factor which does not weigh heavily in favor of Indiana courts asserting jurisdiction. Clearly, none of the five individuals involved in this lawsuit are residents of Indiana. However, that concern is weighted against Appellees' actions in initiating [\*\*18] [\*969] and pursuing contacts with an Indiana bank and their apparent desire to quickly resolve the dealings with Ruth's personal effects and accounts. Under these facts, we cannot say that it was unforeseeable that Appellees could be haled into an Indiana court to account for their actions.

Finally, Appellees claim that their actions were random, fortuitous, and attenuated. To support their claim, they cite to *Richards & O'Neil, LLP v. Conk*, 774 N.E.2d 540 (Ind. Ct. App. 2002). However, the facts in *Richards & O'Neill* are clearly distinguishable from those at issue here. In that case, attorneys from New York had some dealings with individuals in Indiana in furtherance of their representation of a New York client. Those attorneys even traveled to Indiana to gather information for a proposed purchase of a privately owned company for their New York client. However, this court noted that none of the contacts with Indiana were initiated by the attorneys at *Richards & O'Neill* and that those contacts were only to gather information, an act which did not directly result in the plaintiff's claim involving the accuracy of a financial statement. *Id.* at 546-47. [\*\*19] Consequently, this court held that Indiana courts had no personal jurisdiction over *Richards & O'Neill* or the attorney named in the suit. *Id.* at 547. The facts before us are much different. Appellees did not make contacts in Indiana just to gather information, nor were those contacts initiated at the urging of someone other than Gene, David, or Nicholas. Instead, they were a consequence of the deliberate acts of Gene, and in some instances, by Appellees as a group. This is sufficient to alleviate any concern about whether the contacts may have been random, fortuitous, or attenuated.

To this point, we have said little about the varying degrees of contacts with Indiana among the Appellees. The parties each have made lengthy arguments concerning whether Gene was the agent of David and Nicholas in his dealings with First Indiana Bank. We do not formally address the issue of agency law in this decision. Suffice it to say that while Nicholas and David were less involved in pursuing contacts in Indiana, they each performed a crucial action--signing the consent to transfer form which requested the bank to transfer the money. To

the extent that they do not view [\*\*20] that as sufficient, we note that they acted in concert with Gene at all times in his efforts to obtain the payable-on-death benefits. They cannot now benefit by not having to represent themselves in an Indiana court because Gene maintained the most contacts while they waited to receive the benefits.

[HN14] Once contacts sufficient to establish personal jurisdiction are found, the court must then decide whether asserting personal jurisdiction over the defendant offends traditional notions of fair play and substantial justice. *Brockman*, 779 N.E.2d at 1257. We balance a number of factors to determine whether the assertion of jurisdiction is reasonable and fair. *Id.* The factors are: (1) the burden on the defendant; (2) the forum state's interest in adjudicating the dispute; (3) the plaintiff's interest in obtaining convenient and effective relief; (4) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (5) the shared interest of the several states in furthering fundamental substantive policies. *Id.* The defendant carries the burden of establishing that asserting jurisdiction is unfair and unreasonable. *Id.* To [\*\*21] determine if the exercise of personal jurisdiction is reasonable in a particular case, we may examine the relationship among the defendant, the forum, and the litigation, the [\*970] principles of interstate federalism, and the existence of an alternative forum to hear the dispute. *Id.*

We must admit that a burden will be placed upon Appellees for having to defend against this action in Indiana. Each will have to travel to Indiana from another state. Although, we acknowledge that with the advancements in travel and communication technology, defending oneself in another state than where one resides is not as severe a burden as it once was. Further, we disagree with Appellees' claim that Indiana has no interest in adjudicating this matter. While it is true that none of the parties reside in Indiana, the assets originated in Indiana, and according to the complaint filed by Barbara and Nancy, were transferred to Appellees in violation of Ruth and Bruce's joint will which is being administered through Ruth's estate in Indiana. Consequently, we cannot say that Indiana has no interest in determining whether the payable-on-death accounts were established in violation of the will.

Barbara and [\*\*22] Nancy's interest in obtaining effective and convenient relief in Indiana is compelling. Neither Barbara nor Nancy reside in Indiana, but Barbara is the personal representative of Ruth's estate, requiring that she have contact with the court system in Indiana. Further, were we to say that Indiana courts do not have personal jurisdiction, Barbara and Nancy could be forced to litigate this action in three separate states as the Appellees desire, effectively ending all financial viability of

the action. Moreover, the specter of three different jurisdictions litigating this action is concerning. Not only would three different courts in three different states hear this action, each would pass judgment which could lead to inconsistent results. Finally, we cannot ignore [HN15] the necessity of courts in states where an estate is being administered to ensure that property which may appropriately be part of an estate is not removed from the estate and taken across state lines where it cannot be reached.

Based upon the fact that Appellees were "doing any business" in Indiana when they made an effort to collect the payable-on-death benefits, the extent of their contacts which dealt with the transfer [\*\*23] of funds under the watchful eye of the State of Indiana, and that the exercise of personal jurisdiction does not offend traditional notions of fair play and substantial justice, we are bound to conclude that Indiana courts have personal jurisdiction over Appellees. However, personal jurisdiction is limited to matters relating to the payable-on-death benefits from bank accounts which were paid by First Indiana Bank. The entire analysis which we have done to determine that specific personal jurisdiction exists is not applicable for acquiring personal jurisdiction in regard to the annuities issued by Lincoln Benefit Life and Paine Webber. The contacts which were made in Indiana that invoked application of the long-arm statute do not exist in relation to the annuities. There is no evidence that Appellees did any acts within or connected to Indiana which were also related to the annuities.<sup>7</sup> Consequently, [\*971] the prerequisite for an Indiana court obtaining specific personal jurisdiction under *Trial Rule 4.4* does not exist. Therefore, no cause of action may be held in Indiana against Appellees concerning the payments from the annuities because of Appellees' actions directed toward Indiana. [\*\*24]

7 In their reply brief, Barbara and Nancy assert that evidence does exist which shows Appellees performed actions within Indiana related to the annuities which are sufficient to obtain specific personal jurisdiction. In their reply brief, they attached a copy of the application for consent to transfer securities which was submitted to Lincoln Benefit Life Co. This evidence was not before the trial court and is admittedly being presented as new evidence upon appeal. As Appellees correctly assert in their motion to strike the reply brief, [HN16] new evidence may not be submitted to the court for the first time upon appeal. See *Porter v. Bankers Trust Co. of California*, 773 N.E.2d 901, 904 n.4 (*Ind. Ct. App.* 2002); *Kiskowski v. O'Hara*, 622 N.E.2d 991, 992 (*Ind. Ct. App.* 1993), trans. denied. Further, as Appellees note, the reply brief fails to comply

with the requirements of *Ind. Appellate Rule 46(C)* because it does not contain a table of contents, table of authorities, and summary of the argument. Upon these grounds, Appellees have requested that we strike the entire reply brief of Barbara and Nancy. While we recognize the shortcomings in the reply brief, we strike only the offensive parts, most notably, that relating to the evidence surrounding the claims on the annuities.

As an aside, we note that the claim made by Barbara and Nancy that Appellees have attempted to commit a fraud in Indiana by denying in the application for consent to transfer securities that an estate was opened or would be opened is not supported by the evidence admitted. While it is clear that the application was file stamped at a date after the estate was opened, there is no evidence that at the time Appellees filled out the form that the estate was open or that they were aware that Barbara planned to open an estate.

[\*\*25] Nonetheless, one final argument for the assertion of jurisdiction by Indiana courts has been made by Barbara and Nancy. In their brief, they claim that Indiana courts maintain *in rem* jurisdiction over a decedent's property. They then cite to various cases for the proposition that Indiana probate courts have *in rem* jurisdiction over estates and trusts. Further, they conclude that a probate court may place a constructive trust over the assets of a decedent even though those assets may no longer be in Indiana.

Our analysis of this issue is controlled by the decision of the United States Supreme Court in *Hanson v. Denckla*, 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958). In that case, the Supreme Court answered the question of whether a state court could maintain *in rem* jurisdiction over trust assets which were located in another state. Specifically, the Florida Supreme Court had held that the presence of subject property in the state was not essential to its jurisdiction. Rather, as stated by the United States Supreme Court, authority over the probate and construction of Florida's domiciliary's will was thought to be sufficient. However, the United States Supreme [\*\*26] Court determined that jurisdiction could not be predicated upon the contingent role of the Florida will. *Id.* at 247-48. The Court stated:

[HN17] "Whatever the efficacy of a so-called 'in rem' jurisdiction over assets admittedly passing under a local will, a State acquires no *in rem* jurisdiction to adjudicate the validity of inter vivos dispositions simply because its decision might augment an estate passing under a will probated in its courts. If such a basis of jurisdiction were sustained, probate courts would enjoy nationwide service of process to adjudicate interests in property with

which neither the State nor the decedent could claim any affiliation. The settlor-decedent's Florida domicile is equally unavailing as a basis for jurisdiction over the trust assets. [HN18] For the purpose of jurisdiction in rem the maxim that personalty has its situs at the domicile of its owner is a fiction of limited utility. The maxim is no less suspect when the domicile is that of a decedent. In analogous cases, this Court has rejected the suggestion that [HN19] the probate decree of the State where the decedent was domiciled has an *in rem* effect on personalty outside the forum State that could render [\*\*27] it conclusive on the interests of nonresidents over whom there [\*972] was no personal jurisdiction. The fact that the owner is or was domiciled within the forum State is not a sufficient affiliation with the property upon which to base jurisdiction in rem." *Id.* at 248-49 (citations omitted) (footnotes omitted).

In this case, there is no question that the annuities were not present in Indiana. Therefore, per the holding in *Hanson*, Indiana may not maintain *in rem* jurisdiction over the annuities. Further, while it may be true that decedent received income from the annuities while she was in Indiana, that too will not establish jurisdiction in Indiana. Consequently, Indiana courts are without *in rem* jurisdiction over the annuities which were paid to Appellees. <sup>8</sup>

8 Barbara and Nancy have expressed their concern that if a State may not exercise *in rem* jurisdiction over a decedent's property which has been taken out of the State, unscrupulous characters may take assets and flee the jurisdiction. We do not foresee that to be a major concern under the analysis we have used in this case. Were the assets in Indiana at the time of the decedent's passing and subsequently removed from Indiana, Indiana courts should be able to maintain personal jurisdiction over those individuals just as we have in this case. To the extent that a decedent may remove the assets from Indiana by placing them in a trust or disposing of them in some other way, the United States Supreme Court has clearly stated that our courts have no *in rem* jurisdiction over that property.

[\*\*28] The order of the probate court in dismissing this cause of action for lack of personal jurisdiction is reversed as to the issue of the Indiana bank accounts and affirmed with regard to the annuities. We remand to the probate court for further proceedings. <sup>9</sup>

9 This decision does not address the merits of the claim against Appellees, as that issue is not before us.

FRIEDLANDER, J., and RILEY, J., concur.

LEXSEE 1991 U.S. DIST. LEXIS 19073

Herbert W. Hoover, III et al., Plaintiffs, vs. Society Bank of Eastern Ohio N.A. etc. et al., Defendants.

CASE NO. 5:90 CV 1245

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO, EASTERN DIVISION

1991 U.S. Dist. LEXIS 19073

April 12, 1991, Filed

JUDGES: [\*1] Dowd, Jr.

OPINION BY: DAVID D. DOWD, JR.

OPINION

DOWD, J.

MEMORANDUM OPINION

## I. INTRODUCTION

The Court has before it in the above-captioned case the Rule 12 motion to dismiss of defendants The Bank of New York, Peter Bingenheimer, Walter W. Johnson, Jr., William M. Caddey, James G. Beaulieu, Hoover Invesco, Inc., Andres J. Iriondo, William A. Pincoe and Herbert W. Hoover, Jr. ("moving defendants"), (Docket No. 37), and their memorandum in support, (Docket No. 38). The Court also has before it the moving defendants' supplemental memorandum to their motion to dismiss, (Docket No. 68), plaintiffs' memorandum in opposition to defendants' motion to dismiss, (Docket No. 79), and moving defendants' reply memorandum, (Docket No. 81).

## A. Facts.

A summary of the complex fact pattern giving rise to the present suit is as follows. Plaintiff Herbert W. Hoover, III is the sole income beneficiary of an irrevocable trust established in Stark County, Ohio on November 5, 1959 by his father, defendant Herbert W. Hoover, Jr. ("defendant Hoover"). Plaintiff Herbert W. Hoover, III holds a general power of appointment over the corpus of the trust. Plaintiffs Herbert W. Hoover, IV and Maximilian S. Hoover<sup>1</sup> are [\*2] designated remaindermen of the trust. Their interests are, however, subject to potential divestment upon exercise of the general power of ap-

pointment by their father, plaintiff Herbert W. Hoover, III.

1 Herbert W. Hoover, IV and Maximilian S. Hoover were added as plaintiffs in plaintiffs' amended complaint, (Docket No. 65).

At the same time that defendant Hoover created the trust which is the subject of the present suit, he created a second trust for the benefit of his daughter, Elizabeth L. Hoover, and her lineal descendants. Each of the trusts created by defendant Hoover was funded with 4,275 shares of the nonvoting common stock of Hoover Invesco, Inc., ("Hoover Invesco"), an Ohio corporation formed as an investment/holding company. Together, the shares funding the trusts represented 95% of the issued and outstanding stock of Hoover Invesco. Defendant Hoover retained the remaining 5% of the issued and outstanding common stock of Hoover Invesco. The 5% retained by defendant Hoover constituted the only voting stock [\*3] in Hoover Invesco.

The trust for the benefit of plaintiffs provides that it is at all times to be administered by a corporate trustee and two individual trustees and that the trustees should employ Scudder, Stevens & Clark, Inc. or its successor as investment counsel. The trust provides, as well, that the Harter Bank & Trust Company, later acquired by defendant Society Bank of Eastern Ohio N.A., ("Society Bank"), should serve as corporate trustee.

Society Bank retained the position of corporate trustee from the date of the creation of the trust until on or about February 3, 1987 when it was removed as corporate trustee by the then individual trustees. Plaintiffs allege that Society Bank retained control of the trust corpus until at least June 15, 1987. Defendant James Kamerer was the Vice President of Society Bank throughout the times when Society Bank was corporate trustee and plaintiffs allege that Mr. Kamerer was per-

sonally involved in the administration of the trust during those times.

The Bank of New York was appointed corporate trustee by the two individual trustees serving at the time on February 13, 1987. Defendant Peter Bingenheimer was the Vice President of The Bank of New [\*4] York during the time that that institution served as corporate trustee and, plaintiffs allege, in such a capacity, was personally involved in the administration of the trust.

Defendant William M. Caddey served as an individual trustee from about July 15, 1974 until January 28, 1987. Defendant Walter W. Johnson has acted as an individual trustee from approximately January 28, 1987 until the present. Defendant James G. Beaulieu has acted as an individual trustee from some unknown time after February 13, 1987 until the present.

Plaintiffs assert in their amended complaint that the assets of Hoover Invesco initially consisted solely of stock in another Ohio corporation, the Hoover Company. In 1979, however, the Hoover Company redeemed the Hoover Company stock retained by Hoover Invesco. Hoover Invesco got several million dollars in cash for the sale of the Hoover stock. Plaintiffs allege that prior to the redemption of the Hoover Company stock in 1979, substantial dividends had regularly been paid by Hoover Invesco to its shareholders and had been forwarded by defendant Society Bank to plaintiff Herbert W. Hoover, III, the income beneficiary of the subject trust. Plaintiffs further allege [\*5] that, following the 1979 redemption, Hoover Invesco ceased paying dividends upon the non-voting stock held by the trust and made no distribution of assets.

Plaintiffs assert that defendant Andres Iriundo is and was at all relevant times a director and/or the President of Hoover Invesco and as such was involved on a daily basis with the corporate management of Hoover Invesco. In addition, plaintiffs assert that William A. Pincoe is and was at all material times a member of the Board of Directors of Hoover Invesco and in such a capacity was involved in the business of that company. Plaintiffs contend that defendant Hoover, at all material times, dominated and controlled the business activities of Hoover Invesco.

In their amended complaint, plaintiffs state that the trust has not received any cash or stock dividends nor distribution of assets of Hoover Invesco since approximately 1980. Plaintiffs additionally assert that from about 1982 until the present, the net worth of Hoover Invesco has approached or exceeded \$ 4 million, and the claimed operating expenses during that time frame have been approximately \$ 300,000 per year.

Plaintiffs assert that the defendant individual trustees maintained [\*6] "continuing and regular trust-related contact with the corporate trustee, defendant Society Bank, in Ohio . . ." which included telephone conversations, telephonic communications, and mail and other correspondence. Amended Complaint for Legal and Equitable Relief, Docket No. 65 at 12. Plaintiffs assert that from time to time, defendant Society Bank would, at the insistence of plaintiff Herbert W. Hoover, III, request financial information from Hoover Invesco and the acting individual trustees, and that such requests required defendants Hoover Invesco, Iriundo and the individual trustees to have contact with Society Bank in Ohio. Plaintiffs contend that despite the requests, the defendants failed to supply Society Bank with adequate financial information as was requested. Plaintiffs contend further that it was the repeated requests for financial information which ultimately lead to defendant Society Bank's being replaced as corporate trustee on February 3, 1987 by the then serving individual trustees, including defendant Johnson.

Society Bank relinquished control over the trust corpus to defendant The Bank of New York on or about June 15, 1987. Sometime in 1987, Society Bank made a [\*7] claim against the trust for trustee's fees. A figure of \$ 14,000 was finally established by agreement among the acting trustees and Society Bank was then ultimately paid \$ 14,000 in trustee's fees.

Plaintiffs assert that sometime prior to July 28, 1987, defendant Johnson requested that an Ohio accounting firm, Cohen & Company, perform an estimated valuation of the Hoover Invesco stock held by the trust. The request was made to and responded to in Cleveland, Ohio by the Cleveland, Ohio office of Cohen & Company. The requested valuation was provided on July 28, 1987. Cohen & Company valued the stock at between \$ 52.63 to \$ 87.72 per share, or \$ 224,993 to \$ 375,003 for the 4,275 shares held by the trust.

Plaintiffs assert that in August of 1987, defendant Johnson advised plaintiff Herbert W. Hoover, III that it would be necessary to sell all the Hoover Invesco stock held by the trust in order to pay trust administration expenses, and that the trustees planned to sell the shares to an alleged Panamanian corporation named Royal Lake Investment Corporation for \$ 230,000. In the alternative, defendant Johnson informed plaintiff Herbert W. Hoover, III that plaintiff's father, Herbert W. [\*8] Hoover, Jr., would match the \$ 230,000 offer for the stock and would additionally fund the education of the remaindermen of the trust up to an amount not exceeding \$ 170,000 if Herbert W. Hoover, III would sign a hold harmless agreement with respect to the sale of the stock by the trust.

Plaintiff Herbert W. Hoover, III strongly objected in writing to any sale of the Hoover Invesco stock. However, on or about August 26, 1987, plaintiffs allege that defendants Johnson, Beaulieu and The Bank of New York sold the Hoover Invesco stock held by the trust to the Panamanian corporation for \$ 230,000.

Plaintiffs contend that the defendant trustees each owed plaintiffs a fiduciary duty and that each of the defendant trustees acted negligently, recklessly, intentionally, wantonly, and/or willfully, and accordingly, failed to satisfy the fiduciary duty each owed the plaintiffs. Plaintiffs further assert that each of the trustees was involved in self-dealing and/or conflicts of interest, and that one or more or all of the trustees were improperly influenced or directed by defendant Herbert W. Hoover, Jr. which resulted in each defendant breaching the fiduciary duty owed plaintiffs. Plaintiffs contend [\*9] that as a result of the failure of the defendant trustees to fulfill their fiduciary duties, the trust corpus has ceased to be productive and has been diminished in value to the detriment of the trust beneficiaries.

#### B. Causes of Action.

Plaintiffs set forth ten causes of action in their amended complaint, (Docket No. 65). Plaintiffs first assert a cause of action against defendants William W. Caddey ("Caddey") and Society Bank for failure to make the trust corpus productive. Second, plaintiffs assert a cause of action against defendants Caddey and Society Bank for failure to assert claims belonging to the trust. Next plaintiffs assert a cause of action against defendants Caddey, Walter W. Johnson ("Johnson"), Society Bank, James G. Beaulieu ("Beaulieu") and Bank of New York for failure to secure a judicial determination as to the amount and source of the trustee's compensation.

In their fourth cause of action, plaintiffs assert that the actions of defendants Johnson, Beaulieu, Herbert W. Hoover, Jr., and Bank of New York as well as agents such as defendant Peter Bingenheimer ("Bingenheimer"), in performing, authorizing, directing, permitting and/or acquiescing in the forced [\*10] sale of the Hoover Invesco stock constituted distinct acts of dominion wrongfully exercised over the corpus of the trust and, accordingly, constituted conversion.

Plaintiffs next assert a cause of action against defendants Bank of New York and Bingenheimer for negligently and recklessly breaching their fiduciary duties to plaintiffs.

In their sixth cause of action plaintiffs contend that defendants Herbert W. Hoover, Jr., Andres Iriundo ("Iriundo"), William A. Pincoe ("Pincoe") and Hoover Invesco breached the fiduciary duties that they owed to plaintiffs as holders of nonvoting shares in Hoover In-

vesco by excluding plaintiffs from pecuniary benefits of the business from 1980 through at least May of 1987.

Plaintiffs' seventh cause of action is brought against defendants Bank of New York, Beaulieu, Johnson, Hoover Invesco and Herbert W. Hoover, Jr. for violation of Section 10(b) of the Securities Exchange Act of 1934 and *Rule 10b-5* promulgated thereunder. And, in their eighth cause of action, plaintiffs assert a claim for common law fraud against defendants Caddey, Johnson, Beaulieu, Bank of New York, Bingenheimer, Hoover Invesco, Iriundo, Pincoe and Herbert W. Hoover, Jr.

Finally, plaintiffs [\*11] assert a claim for punitive damages against all defendants in their ninth cause of action and seek removal of the present trustees in their tenth cause of action.

#### C. Grounds for Motion to Dismiss.

The moving defendants set forth several grounds in support of their motion to dismiss. First, defendants argue that plaintiffs are precluded by principles of res judicata from relitigating the issue of personal jurisdiction over the defendants who are non-residents of Ohio since the issue was finally determined in a prior state court order of dismissal. That is, defendants argue that plaintiff Herbert W. Hoover, III brought suit in May of 1988 against the moving defendants other than Herbert W. Hoover, Jr. in the Court of Common Pleas, Stark County, State of Ohio, which case was voluntarily dismissed by plaintiff Herbert W. Hoover, III in March of 1990. On October 16, 1989, Judge Gwin, the Judge in the prior state court action, granted a motion to dismiss by the moving defendants other than defendant Hoover finding, *inter alia*, that Ohio did not have personal jurisdiction over defendants The Bank of New York, Bingenheimer, Johnson, Caddey, Beaulieu and Iriundo, all non-residents [\*12] of the State of Ohio. Moving defendants argue that this Court is bound by the state court's determination of the personal jurisdiction issue.

Moving defendants next argue that plaintiffs' sixth cause of action against defendants Herbert W. Hoover, Jr., Iriundo, Pincoe and Hoover Invesco for breach of fiduciary duties should be dismissed for failure to state a claim upon which relief can be granted. In this regard, moving defendants contend, specifically, that plaintiffs lack standing to assert their claim. First, moving defendants argue that, under Ohio law, a shareholder cannot sue third parties individually for wrongful acts impairing the capital position of a corporation; rather, the cause of action belongs to the corporation. Next, moving defendants contend that plaintiffs do not have standing to sue Hoover Invesco and its officers and directors since both *Rule 23.1 of the Federal Rules of Civil Procedure* and *Rule 23.1 of the Ohio Rules of Civil Procedure* preclude

a suit premised upon stock ownership which is brought after the stockholder's stock is transferred. In addition, moving defendants assert that neither Hoover Invesco nor its officers or directors owed plaintiffs any [\*13] fiduciary duties or obligations to see that the trustees of the subject trust performed their fiduciary duties:

The moving defendants next argue that even if principles of *res judicata* do not apply to bar relitigation of the issue of personal jurisdiction, this Court should dismiss the plaintiffs' claims against the non-resident defendants since this Court cannot obtain personal jurisdiction over the non-resident defendants under Ohio's long arm statute. In the alternative, moving defendants argue that, even if this Court finds that it has personal jurisdiction over the defendants, it should dismiss the case pursuant to the doctrine of *forum non conveniens*. In particular, in their supplemental memorandum, moving defendants argue that Herbert W. Hoover, Jr.'s extremely poor health, which prevents him from leaving the state of Florida, argues strongly in favor of a change of forum.

Finally, moving defendants argue that plaintiffs' claim founded upon the Securities Exchange Act is time-barred.

The Court will consider the various arguments of the moving defendants out of the order presented since the resolution of certain of the arguments will be dispositive of others.

## II. ANALYSIS

[\*14] A. *Plaintiffs' Claim Under Section 10(b) of the Securities Exchange Act of 1934.*

### 1. Statute of Limitations.

Moving defendants argue that plaintiffs' claim under Section 10(b) of the Securities Exchange Act of 1934 must be dismissed as the statute of limitations on the claim has run. Moving defendants argue that this Court should follow the reasoning in a recent opinion of the United States Court of Appeals for the Second Circuit, *Ceres Partners v. GEL Associates*, 918 F.2d 349 (2d Cir. 1990), in which the Second Circuit found that federal securities law claims should be governed by a uniform federal lityary period. *Id.* at 364. Moving defendants acknowledge that the law in the Sixth Circuit as set forth in *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985) is that Ohio's four-year general statute of limitations for fraud actions is applied to claims for violations of Section 10(b) of the Securities Exchange Act of 1934. *Id.* at 1551. However, moving defendants argue that this Court should follow the reasoning in *Ceres*, *supra*, [\*15] and apply a uniform federal lityary period, since, moving defendants assert, the Sixth Circuit, if faced with the issue, would probably do the same.

Plaintiffs contend, on the other hand, that this Court is bound to apply the rule set forth in *Marx*, *supra*, unless and until the Supreme Court and/or the Sixth Circuit direct otherwise. And, plaintiffs further contend that under the rule set forth in *Marx*, their securities fraud claim is not time-barred. The Court finds plaintiffs correct on this point and finds, accordingly, that plaintiffs' seventh cause of action is not time-barred.

The Court notes that the question of which statute of limitations to apply to implied causes of action under the federal securities laws is not free from debate; rather, the issue is currently a controversial one. The Supreme Court granted certiorari and recently heard oral arguments in *Lampf Pleva Lipkind Prupis & Petigrow v. Gilbertson*, U.S. , 111 S. Ct. 242 (1990), a case in which the Ninth Circuit Court of Appeals addressed the practice of applying state limitations periods to private actions under the antifraud provisions of Section 10(b) of the [\*16] 1934 Securities Exchange Act and *Rule 10b-5* thereunder.

It is evident that at some point in the near future the Supreme Court will speak to the issue which this Court now faces. However, as of this date, the Supreme Court has not resolved the issue, and, an outstanding Sixth Circuit case exists which has. Accordingly, this Court, whatever its beliefs might be about the virtues of adopting a uniform federal lityary period for securities fraud cases, is bound by Sixth Circuit precedent and the principles of *stare decisis*, to follow the Sixth Circuit rule set forth in the *Marx* case.

In *Nickels v. Koehler Management Corp.*, 541 F.2d 611 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977), the Sixth Circuit noted that since Section 10(b) does not contain a statute of limitations, and, since no general federal statute of limitations exists, "the Federal Courts must choose among the several state statutes of limitations and apply the one which best effectuates the federal policy at issue." *Id.* at 613 (quoting *IDS Progressive Fund, Inc. v. First of Michigan Corp.*, 533 F.2d 340, 342 (6th Cir. 1976)). [\*17] In *Marx v. Centran Corp.*, 747 F.2d 1536 (6th Cir. 1984), the Sixth Circuit stated that "this circuit has repeatedly applied Ohio's four-year general statute of limitations for fraud actions" to suits charging fraud in the sale and/or purchase of securities. *Id.* at 1551 (citations omitted).

The court in *Marx*, *supra*, further explained that "although state law provides the statute of limitations, the date on which the statute begins to run is a matter of federal law. . . ." and "the period of limitations commences when the 'fraud is or should have been discovered.'" *Id.* (citations omitted). In determining whether the fraud was or should have been discovered, "an investor is charged with being 'at least a person of ordinary intelligence . . .'" *Id.*

The Court finds that plaintiffs' claim is not barred by the applicable statute of limitations since the alleged fraudulent acts occurred in August of 1987, and, even if plaintiffs discovered the fraud at that time, plaintiffs had until August of 1991 to file the present suit within the applicable statute of limitations.

The Court notes, however, that it reserves the right to [\*18] reconsider its position on this issue if the Supreme Court issues an opinion which mandates a different result.

## 2. Personal Jurisdiction Over Non-Resident Defendants Named in Plaintiffs' Securities Fraud Claim.

### a. Securities Fraud Claim.

Several of the defendants named in plaintiffs' 10(b) claim, The Bank of New York,<sup>2</sup> Johnson,<sup>3</sup> Beaulieu,<sup>4</sup> and Herbert W. Hoover, Jr.<sup>5</sup> are non-residents of the State of Ohio. Each of these persons was served with process pursuant to both Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, and pursuant to Ohio's long arm statute. Plaintiffs assert, accordingly, that each of the defendants named in plaintiffs' Section 10(b) claim is subject to the jurisdiction of this Court pursuant to Section 27 of the Securities Exchange Act of 1934. Presumably, plaintiffs assert that these defendants are subject to the jurisdiction of this Court for all of the claims asserted against them.<sup>6</sup>

2 The Bank of New York is a financial institution located in the State of New York.

3 Defendant Walter W. Johnson, Jr. is a resident of the State of Florida.

[\*19]

4 Defendant James G. Beaulieu is a resident of the State of California.

5 Defendant Herbert W. Hoover, Jr. is a resident of the State of Florida.

6 The Court notes that moving defendants raised this very issue in an objection to plaintiffs' motion to file an amended complaint. That is, moving defendants argued that the addition of a claim under Section 10(b) of the Securities Exchange Act of 1934 would significantly broaden this Court's jurisdiction.

Section 27 of the Securities Exchange Act of 1934, 15 U.S.C. § 78aa, provides, in pertinent part, that:

any suit or action to enforce any liability or duty created by this chapter or the rules and regulations thereunder, or to enjoin a violation of such chapter or rules and regulations, may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business, and process in such cases may be

served in any other district of which the defendant is an inhabitant or wherever the defendant may be found . . .

15 U.S.C. § 78aa (1988). This statutory provision authorizes nationwide service [\*20] of process. *Securities Investor Protection Corp. v. Vigman*, 764 F.2d 1309, 1315 (9th Cir. 1985); see also, *Fitzsimmons v. Barton*, 589 F.2d 330 (7th Cir. 1979); *Mariash v. Morrill*, 496 F.2d 1138, 1140 (2d Cir. 1974); *Obee v. Teleshare, Inc.*, 725 F. Supp. 913, 915 (E.D. Mich. 1989).

When a statute authorizes nationwide service of process, a federal district court has personal jurisdiction over a defendant properly served pursuant to the statute, if the defendant has minimum contacts with the United States as a whole. *Obee*, 725 F. Supp. at 915 (court stating that "under nationwide service statutes, a defendant need only maintain minimum contacts with the United States as a whole, rather than any particular state, for a federal court to exercise personal jurisdiction consistent with the due process clause").

The moving defendants do not contest the fact that each has minimum contacts with the United States as a whole. Accordingly, the Court finds that it has personal jurisdiction over the defendants named in plaintiffs' seventh cause of action who have been served with process pursuant to [\*21] Section 27 and who each have minimum contacts with the United States as a whole with respect to the securities fraud claim.

### b. Pendent State Claims.

#### i. Subject Matter Jurisdiction.

In addition to their federal securities fraud claim, plaintiffs assert various other state law claims against the defendants named in their securities fraud claim. The Court must decide two issues with regard to the additional state claims against The Bank of New York, Beaulieu, Johnson and Herbert W. Hoover, Jr. First, the Court must decide whether it can and should assume jurisdiction over these pendent state claims. Second, the Court must decide whether it has personal jurisdiction over these defendants with respect to the pendent state claims.

In *United Mine Workers v. Gibbs*, 383 U.S. 715 (1966), the Supreme Court stated that:

pendent jurisdiction, in the sense of judicial power, exists whenever there is a claim arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . . and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises [\*22] but one constitutional 'case.' The federal claim must have substance sufficient to confer sub-

ject matter jurisdiction on the court. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is power in federal courts to hear the whole case.

*Id.* at 725.

Whether to hear pendent state claims even if the federal court has the power to hear them, is a matter left to the sound discretion of the federal court. *Id.* at 726 (court stating that "it has consistently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right"). A federal court should be guided in making a decision as to whether it should exercise pendent jurisdiction by considerations of "judicial economy, convenience and fairness to litigants. . . ." *Id.* Likewise, if "state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness [\*23] of the remedy sought, the state claims should be dismissed without prejudice and left for resolution to state tribunals." *Id.* at 726-27.

The Court has examined the various claims against defendants The Bank of New York, Beaulieu, Johnson, and Herbert W. Hoover, Jr. and finds that the claims derive from a common nucleus of operative fact such that this Court can, if it so chooses, hear the pendent claims. The causes of action all arise out of actions taken by the various defendants with respect to the trust which is the subject of the present suit. <sup>7</sup>

<sup>7</sup> The Court notes that it has some concern about the substantiality of the federal claim in the present suit. The Supreme Court emphasized in *Gibbs, supra*, that the federal claim must have sufficient substance to confer subject matter jurisdiction upon a federal court in order for a federal court to have the power to hear pendent state claims.

Defendants, however, have not questioned the substantiality of the federal claim. And the Court, after examining the claim, as well as other factors, finds that the claim is of sufficient substance to support jurisdiction.

[\*24] Although the Court finds that it has the power to hear the pendent claims, it is troubled by the issue of whether to exercise its discretion in favor of hearing the claims. The Supreme Court in *Gibbs, supra*, indicated that if state claims predominate in a lawsuit, then a federal court should probably not exercise its discretion in favor of hearing the pendent claims, but rather, should dismiss the pendent state claims so that such

claims can be resolved by a state tribunal. *Gibbs*, 383 U.S. at 726-27. Arguably, state claims predominate in the present suit. Indeed, the majority of the claims in the suit have to do with breaches of the duties of trustees of a trust and other alleged wrongful actions with regard to the trust. Such claims are clearly creatures of state law.

In light of the fact that this Court has exclusive jurisdiction over the federal securities fraud claim, and in light of the fact that the Court has the power to hear other of plaintiffs' claims under the doctrine of diversity of citizenship, and, in order to foster judicial economy by trying all related claims in one proceeding, the Court finds that it will hear plaintiffs' pendent [\*25] state law claims against The Bank of New York, Johnson, Beaulieu, and Herbert W. Hoover, Jr. However, the Court notes that a federal court has the power at any time during a proceeding, to dismiss pendent state claims if it finds, through the exercise of its sound discretion, that such a dismissal is warranted. 13B Wright, Miller & Cooper, *Federal Practice and Procedure* § 3567.1 (2d ed. 1984).

#### ii. Personal Jurisdiction.

Several cases have found that "the venue provisions of the securities laws providing extraterritorial service of process are sufficient to support *in personam* and subject matter jurisdiction over defendants on pendent state claims . . ." see e.g., *Abeloff v. Barth*, 119 F.R.D. 315, 330 (D. Mass. 1988) and cases cited therein; *International Controls Corp. v. Vesco*, 593 F.2d 166 (2d Cir. 1979), cert. denied, 442 U.S. 941 (1979); see also, 2 Moore, Lucas, Fink & Thompson, *Moore's Federal Practice* Par. 4.42[2.--1] (2d ed. 1990)(stating that "once a court has properly acquired jurisdiction over a person under . . . [a] statute . . . [providing for service beyond the territorial limits of the state [\*26] in which the federal court is situated,] issues which are ancillary or pendent to the claim which provided the statutory basis for service should be heard").

The Court follows the precedent set forth above which provides that, once a defendant is properly served under a statute providing for service of process outside of the state within which the district court sits, a federal court has personal jurisdiction over that defendant with respect to all of the claims which a plaintiff asserts against that particular defendant. Accordingly, the Court finds that it has personal jurisdiction over defendants The Bank of New York, Beaulieu, Johnson and Herbert W. Hoover, Jr. on all of plaintiffs' claims against them, and their motion to dismiss for lack of personal jurisdiction is denied.

B. *Personal Jurisdiction Over Defendants Peter Bingenheimer, William M. Caddey and Andres J. Iriondo.* <sup>8</sup>

8 The Court notes at this point that it is unsure whether plaintiffs' theory upon which they premise this Court's jurisdiction over the claims other than their securities fraud cause of action is pendent jurisdiction or diversity of citizenship. The Court finds, however, that if plaintiffs are relying on the doctrine of pendent party jurisdiction, for the reasons expressed above in the section of the Court's opinion addressing pendent jurisdiction generally, that the Court will exercise its discretion to hear such claims. Likewise, complete diversity exists between the parties and the jurisdictional amount is satisfied.

The test for whether or not personal jurisdiction exists over the respective defendants will be the same whether subject matter jurisdiction is premised on pendent party jurisdiction or diversity of citizenship.

[\*27] The Court next must address the issue of whether it has personal jurisdiction over these three defendants who are non-residents of the State of Ohio and are not named in plaintiffs' securities fraud claim. In their motion to dismiss, moving defendants raise two arguments in this regard. First, moving defendants contend that the state court has already finally decided the issue of personal jurisdiction over these non-resident defendants and that under principles of res judicata this Court is bound by the State court's determination and must, accordingly, grant these defendants' motion to dismiss. In addition, moving defendants contend that, even if this Court is not bound by the prior state court determination with regard to personal jurisdiction, this Court must dismiss these defendants from the present suit since this Court, which is bound to apply the same analysis of personal jurisdiction as did the state court, lacks personal jurisdiction over the non-resident defendants.

1. Argument That This Court is Bound by the Prior Ohio State Court Order of Dismissal Finding No Personal Jurisdiction Over Defendants Peter Bingenheimer, William M. Caddey and Andres J. Iriondo.

Moving defendants [\*28] first argue that this Court is bound under principles of res judicata by Judge Gwin's Order of Dismissal in the prior state court proceeding in which Judge Gwin found that Ohio does not have jurisdiction over the non-resident defendants in the present case. In an Order dated October 1, 1989, Judge James S. Gwin of the Court of Common Pleas for Stark County, Ohio, dismissed the claims brought by plaintiff Herbert W. Hoover, III against The Bank of New York, Peter Bingenheimer, Walter W. Johnson, Jr., William Caddey, James G. Beaulieu, and Andres J. Iriondo, finding that the Ohio court did not have personal jurisdiction over

these non-resident defendants under any of the provisions of Ohio's long-arm statute.

Plaintiffs argue in response that principles of res judicata do not bar relitigation of the issue of jurisdiction since plaintiff Herbert W. Hoover, III voluntarily dismissed the previously instituted state court proceeding pursuant to Ohio Rule of Civil Procedure 41(A)(1)(a), and a voluntary dismissal without prejudice under Rule 41(A)(1)(a) dissolves all orders rendered by the court while the action was pending. The Court finds plaintiffs' position on this point well taken.

In [\*29] deciding what, if any, preclusive effect to give to the prior state court order of dismissal, this Court must look to Ohio law on res judicata. *Migra v. Warren City School District Board of Education*, 465 U.S. 75, 81 (1984) (court stating that "a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered"). The rule in Ohio is that:

'an existing final judgment upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction . . .'

*Norwood v. McDonald*, 142 O.S. 299, 305 (1943). Likewise,

'a point or fact which was actually and directly in issue in a former action and was there passed upon and determined by a court of competent jurisdiction cannot be drawn into question in any future action between the same parties or privies, whether the cause of action in the two actions be identical or different . . .'

*Id.* at 306.

[\*30] The Supreme Court of Ohio stated in *DeVillie Photography Inc. v. Bowers*, 169 O.S. 267 (1959), that "'where an action or proceeding is dismissed without prejudice, rulings preceding the final judgment or decree of dismissal are, as a general proposition, not capable of becoming res judicata.'" *Id.* at 272 (citations omitted); *Central Mutual Insurance Co. v. Bradford-White Co.*, 35 Ohio App.3d 26 (1987) (court stating that in Ohio "the dismissal of an action without prejudice, whether voluntary or involuntary, dissolves all orders rendered by the trial court during the pendency of the action") (citations omitted). Under Ohio law, an order of voluntary dismissal, otherwise than on the merits, leaves the parties in the same position as if the action had never been commenced. *Central Mutual*, 35 Ohio App.3d at 28.

Plaintiff Herbert W. Hoover, III voluntarily dismissed his prior state court action against the defendants pursuant to Ohio Rule of Civil Procedure 41(A)(1)(a). Such a dismissal operated to dissolve the prior order of Judge Gwin dismissing the non-resident defendants for want of personal jurisdiction. [\*31] The dismissal order having been dissolved by the subsequent order of voluntary dismissal, this Court is not now bound by principles of res judicata to follow the state court's resolution of the issue of personal jurisdiction.

The Court notes that moving defendants rely on the Sixth Circuit opinion of *Employees Own Federal Credit Union v. City of Defiance, Ohio*, 752 F.2d 243 (6th Cir. 1985), for the proposition that this Court should give Judge Gwin's prior order of dismissal for want of personal jurisdiction res judicata effect. This Court finds, however, that the *Employees Own* case is distinguishable from the present case and does not alter this Court's resolution of the res judicata issue.

In *Employees Own*, the plaintiff brought a Section 1983 suit in federal court and the defendants moved for summary judgment on the basis of res judicata. The District Court granted the defendants' motion. The Sixth Circuit found that the District Court properly granted the defendants' motion for summary judgment on the basis of res judicata since the plaintiff had previously filed a state court suit against the same defendants and had, after the state trial court had [\*32] granted the defendants' motion to dismiss for failure to state a claim upon which relief could be granted, and, right before the entry of judgment, voluntarily dismissed the state court suit. *Id. at 245*.

The *Employees Own* case is distinguishable from the present case since, arguably, the state trial court in *Employees Own* had addressed the merits of the action and was just awaiting entry of judgment. In the present case, the state court had merely decided a jurisdictional issue and had not even yet gotten to the merits of plaintiff Herbert W. Hoover, III's complaint when plaintiff voluntarily dismissed his suit. That voluntary dismissal, as was emphasized above, wiped out the prior order of dismissal and this Court must now examine anew the non-resident defendants' motion for dismissal for lack of personal jurisdiction.

2. Argument That this Court Does Not Have Personal Jurisdiction Over Defendants Peter Bingenheimer, William M. Caddey and Andres J. Iriondo.

The Court will now examine the contacts which each of the respective defendants have had with the State of Ohio to determine whether this Court has jurisdiction over the particular non-resident defendant. [\*33] To determine whether it has in personam jurisdiction over these three non-resident defendants, this Court must look

to Ohio's long arm statute, *Ohio Revised Code Section 2307.382* (Anderson Supp. 1989). *American Greetings Corp. v. Cohn*, 839 F.2d 1164, 1167 (6th Cir. 1988) (court stating that "the law of the forum state determines the extent of the *in personam* jurisdiction of a federal court sitting in a diversity case").

Ohio's long arm statute has been construed to extend jurisdiction to the constitutional limits. *In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 225 (6th Cir. 1972). Accordingly, in determining whether it has jurisdiction over the non-resident defendants, this Court will construe Ohio's long arm statute in line with Supreme Court precedent regarding the constitutional limits of in personam jurisdiction.

When a plaintiff seeks to bring a foreign defendant into a distant forum, the plaintiff bears the initial burden of pleading jurisdiction. *Baltimore & Ohio Railroad Co. v. Mobile Tank Car Services*, 673 F.Supp. 1437, 1439 (N.D. Ohio 1987). When the plaintiff seeks to bring a defendant in pursuant [\*34] to a long arm statute, "he must state sufficient facts in the complaint to support a reasonable inference that such defendant can be subjected to jurisdiction within the state." *Id.* (citation omitted). In addition, if the pleadings are challenged, the plaintiff must support the allegation that the court has jurisdiction by "competent proof." *Id.* That is, in such a case, the "defendant, by introduction of evidence controverting jurisdiction, shifts the burden of going forward back to the plaintiff . . . [and,] . . . plaintiff is . . . required to produce some creditable evidence pointing toward the existence of jurisdiction." *Id.*

Plaintiffs assert in their amended complaint that the non-resident defendants, along with the resident defendants,

have caused an event or events to occur, out of which the plaintiffs' claims for relief arise, from their transacting business in the State of Ohio and/or causing tortious injury by an act or omission in this state and/or causing tortious injury in this state by an act or omission outside this state and/or causing tortious injury in this state by an act outside this state committed with the purpose of injuring persons, where [\*35] they might reasonably have expected that some person would be injured thereby in this state and/or causing tortious injury to any person by a criminal act, any element of which takes place in this state, which they committed or in the commission of which they were guilty of complicity.

Plaintiffs' Amended Complaint, Docket No. 65 at 5.

The relevant provisions of Ohio's long arm statute are as follows:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state . . .

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state . . .

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing [\*36] tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity . . .

*Ohio Rev. Code Ann. § 2307.382* (Anderson Supp. 1989).

The Court finds, from a review of the evidence before it, that plaintiffs have not sustained their burden of providing some credible evidence to support the inference that this Court has jurisdiction over defendants Bingenheimer and Iriondo, but that plaintiffs have sustained their burden with regard to defendant Caddey.

The Court notes first, that plaintiffs place heavy emphasis upon the fact that the trust which is the subject of the present suit was created in Ohio and that the sole asset of the trust for a number of years was stock in an Ohio corporation. However, the mere creation of the trust in Ohio is not sufficient to invest this Court with personal jurisdiction over the non-resident defendants. Plaintiffs must demonstrate specific actions which fall within the parameters of Ohio's long arm statute sufficient to make the assertion of personal jurisdiction over the non-resident defendants constitutional.

Plaintiffs first make the allegation that [\*37] the defendants were transacting business in Ohio such that this Court can exercise jurisdiction over each non-resident defendant under *Section 2307.382(A)(1)*. Peter Bingenheimer is a resident of New York and was and is the Vice President of defendant The Bank of New York. Plaintiffs contend that Bingenheimer was involved with the trust when The Bank of New York was the corporate trustee for the trust. However, plaintiffs have provided no evidence to support the contention that Bingenheimer had any significant contact with Ohio, let alone evidence to support the contention that Bingenheimer conducted

activity in the State of Ohio which can be said to rise to the level of transacting business in this State. The Court finds, accordingly, that it does not have personal jurisdiction over Bingenheimer under *Section 2307.382(A)(1)*.

Defendant Caddey is a resident of Florida and was the individual trustee for the trust from approximately 1974 until January of 1987. Although it would seem to the Court that Caddey may have had contact with Ohio during the years that he was an individual trustee since defendant Society Bank was the corporate trustee during that time frame, plaintiffs have not [\*38] provided proof to suggest that Caddey was transacting business in Ohio during the years complained of. Accordingly, the Court finds that it does not have personal jurisdiction over defendant Caddey under *Section 2307.382(A)(1)*.

Defendant Iriondo is a resident of Florida and was and is an officer/director of defendant Hoover Invesco. Although Hoover Invesco is incorporated in Ohio, since 1966, its only offices have been located in Florida. Plaintiffs do not set forth evidence to support the assertion that defendant Iriondo transacted business in Ohio. The Court finds that it does not properly have jurisdiction over defendant Bingenheimer, Caddey or Iriondo under *Ohio Revised Code Section 2307.382(A)(1)* since plaintiffs have not sufficiently supported with evidence their blanket assertion that each of the defendants transacted business in Ohio and that the plaintiffs' claims arose out of that transaction of business.

Plaintiffs also contend that this Court has jurisdiction over the defendants under *Section 2307.382(A)(3)* since the defendants caused a tortious injury by acts or omissions in Ohio. Plaintiffs have, however, set forth no evidence to suggest that Peter Bingenheimer acted [\*39] or failed to act in Ohio and that such an act or omission resulted in tortious injuries to plaintiffs. Bingenheimer is located in New York. Any action he took was presumably taken there since plaintiffs have not introduced evidence connecting Bingenheimer with Ohio. Likewise, plaintiffs have not demonstrated that defendant Iriondo took any action in Ohio which caused them tortious injury. Iriondo was located in Florida at all relevant times.

The Court finds the most substance to the contention that some of the alleged actions and/or inaction of defendant Caddey took place in Ohio and resulted in tortious injury to the plaintiffs. Plaintiffs assert causes of action against defendant Caddey for failure to make the trust assets productive, failure to assert claims belonging to the trust, failure to secure a judicial determination as to the amount and source of the trustee's compensation and common law fraud.

During the time in which he was an individual trustee, the corporate trustee of the trust was located in Ohio and transacted business in Ohio. Arguably, defendant

Caddey's failure to act with the Ohio corporate trustee was tortious and resulted in injury to plaintiffs. The fact that [\*40] the corporate trustee was an Ohio corporation located in Canton, Ohio and that the trust was established in Ohio indicates that Caddey would have been on notice that he might be hailed into court in Ohio and suggests that an assertion of in personam jurisdiction by this Court over defendant Caddey is constitutionally permissible.

Plaintiffs next attempt to assert jurisdiction over the defendants under *Section 2307.382(A)(4)*. The Court finds that it does not have jurisdiction over either defendant Bingenheimer or Iriondo under this provision for two reasons. First, there is no evidence to suggest that either defendant regularly does or solicits business in this state, engages in a persistent course of conduct in this state, or derives substantial revenue from goods used or consumed or services rendered in this state. In addition, the Court believes that the injury complained of in this suit is really an injury to the beneficiaries of the subject trust. Plaintiffs persistently argue that the trust itself has been injured. This Court finds, however, that the tortious injury alleged to have occurred in the present case resulted in injury to the beneficiaries of the trust who are residents [\*41] of the State of Wyoming.

Assertion of personal jurisdiction over defendants Bingenheimer and Iriondo under *Section 2307.382(A)(6)* fails as well. Again, it is the Court's opinion that any tortious injury was felt in Wyoming and not in Ohio. Likewise, there is no evidence to suggest that defendants Iriondo and Bingenheimer might reasonably have expected that an individual in Ohio would be injured by their actions.

Finally, the Court finds that plaintiffs have not introduced evidence to support the allegation that this Court has jurisdiction over defendants under *Section 2307.382(A)(7)*. Plaintiffs have introduced no evidence to suggest that either defendant Bingenheimer or Iriondo caused tortious injury through the commission of, or complicity to, a criminal act and that any element of that criminal act took place in Ohio. Plaintiffs offer no elaboration on this assertion and the Court does not understand precisely what the "criminal" act alleged to have occurred is.

For the reasons set forth above, the Court finds that it has personal jurisdiction over defendant Caddey but that it does not have personal jurisdiction over defendants Peter Bingenheimer or Andres Iriondo. Accordingly, [\*42] the Court grants the motion to dismiss of defendants Bingenheimer and Iriondo for want of personal jurisdiction and denies defendant Caddey's motion to dismiss for lack of personal jurisdiction.

*C. Moving Defendants' Argument That the Case Should Be Dismissed Under the Doctrine of Forum Non Conveniens.*

The moving defendants next argue that even if the Court finds that it has personal jurisdiction over the non-resident defendants, it should dismiss plaintiffs' complaint under the doctrine of *forum non conveniens* since plaintiffs' choice of forum impedes and frustrates the defense of the action, and there is no compelling reason why the case should be in Ohio. In addition, in their supplemental memorandum, moving defendants state that defendant Herbert W. Hoover, Jr. is critically ill in Florida and cannot leave that state and that Hoover's illness supports their assertion of *forum non conveniens*.

The Court notes at the outset that moving defendants' reliance on the doctrine of *forum non conveniens* in the present case is misplaced. In federal courts, "the doctrine of *forum non conveniens* has only a limited continuing vitality . . ." after the passage of the venue transfer [\*43] statute, *28 U.S.C. § 1404(a)*. 15 Wright, Miller & Cooper, *Federal Practice and Procedure* § 3828 (2d ed. 1986). The rule has been since 1948, that "if the more convenient forum is another federal court . . . the case can be transferred there under *§ 1404(a)* and there is no need for dismissal. It is only when the more convenient forum is in a foreign country --or perhaps, under rare circumstances, in a state court or territorial court --that a suit brought in a proper federal venue can be dismissed on the grounds of *forum non conveniens*." *Id.*

Thus, to the extent the moving defendants have asked the Court to dismiss plaintiffs' complaint on the grounds of *forum non conveniens*, the motion is denied. The Court notes however, that in their supplemental brief moving defendants make a request for a "removal" of this case to a federal court in Florida where defendant Hoover is located. *28 U.S.C. § 1404(a)* provides that:

for the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

*28 U.S.C. § 1404(a)*. In deciding whether to transfer a case pursuant [\*44] to *Section 1404(a)*, a federal court can consider factors such as those relevant to a determination of dismissal on the grounds of *forum non conveniens*. *Id.* at § 3647. It has been stated, however, that whether to grant a transfer turns "on the particular facts of the case and . . . the trial court must consider all relevant factors to determine whether or not on balance the litigation would more conveniently proceed and the interests of justice be better served by transfer to a different forum." *Id.*

Moving defendants have not made a formal motion to transfer this case to another federal forum pursuant to § 1404(a). The Court has examined the issue, however, and believes that such a transfer may be warranted in the instant case. Accordingly, the Court grants the parties to this case leave until May 1, 1991 to file briefs on the issue of whether the above-captioned case should be transferred to another federal forum pursuant to 28 U.S.C. § 1404(a). Any party in favor of such a transfer is directed, specifically, to indicate in the brief to which federal district court the case should be transferred and to set forth facts establishing that this case could have originally been [\*45] brought in the forum to which such party desires the case to be transferred. Any party not in favor of such a transfer should clearly indicate why the case should remain in this Court.

A hearing will be held on the matter of transfer of venue at 12:00 noon on May 9, 1991. Following said hearing, the Court will decide whether the case should be transferred.

*D. Moving Defendants' Argument That Plaintiffs' Sixth Cause of Action Should Be Dismissed Since Plaintiffs Do Not have Standing to Assert a Claim Against Hoover Invesco, Inc. and its Officers and/or Directors.*

The Court will delay ruling on that portion of moving defendants' motion to dismiss which states that the plaintiffs' sixth cause of action should be dismissed for failure to set forth a cause of action upon which relief can be granted pending resolution of the transfer of venue issue.

### III. CONCLUSION

In sum, for the reasons set forth above, the Court grants the motion to dismiss for lack of personal jurisdiction of defendants Peter Bingenheimer and Andres J. Iriondo. Further, the Court finds that plaintiffs' claim under Section 10(b) of the Securities Exchange Act of 1934 is not time-barred. The Court denies the [\*46] motion to dismiss for lack of personal jurisdiction of defendants The Bank of New York, Walter W. Johnson, Jr., William M. Caddey, and James G. Beaulieu. Likewise, the Court denies moving defendants' motion to dismiss on the grounds of *forum non conveniens*.

The Court grants the parties leave until May 1, 1991 to file briefs on the issue of whether this case should be transferred to another federal forum. Further, the Court orders that a hearing will be held on the issue of transfer of venue at 12:00 noon on May 9, 1991.

Finally, the Court will delay ruling on moving defendants' motion to dismiss plaintiffs' sixth cause of action for failure to state a claim upon which relief can be granted pending resolution of the venue issue.

IT IS SO ORDERED.

David D. Dowd, Jr.

U.S. District Judge

JUDGMENT ENTRY - April 12, 1991, Filed

For the reasons set forth in the Memorandum Opinion filed contemporaneously with this Judgment Entry, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Court grants the motion to dismiss for lack of personal jurisdiction of defendants Peter Bingenheimer and Andres J. Iriondo. Further, the Court finds that plaintiffs' claim under Section 10(b) of the Securities [\*47] Exchange Act of 1934 is not time-barred. The Court denies the motion to dismiss for lack of personal jurisdiction of defendants The Bank of New York, Walter W. Johnson, Jr., William M. Caddey, and James G. Beaulieu. Likewise, the Court denies moving defendants' motion to dismiss on the grounds of *forum non conveniens*.

The Court grants the parties leave until May 1, 1991 to file briefs on the issue of whether this case should be transferred to another federal forum. Further, the Court orders that a hearing will be held on the issue of transfer of venue at 12:00 noon on May 9, 1991.

Finally, the Court will delay ruling on moving defendants' motion to dismiss plaintiffs' sixth cause of action for failure to state a claim upon which relief can be granted pending resolution of the venue issue.

David D. Dowd, Jr.

U.S. District Judge