

In the  
**Supreme Court of Ohio**

T. RYAN LEGG  
IRREVOCABLE TRUST,

Appellant/Cross-Appellee,

v.

JOSEPH W. TESTA,  
TAX COMMISSIONER OF OHIO

Appellee/Cross-Appellant.

:  
: Case No. 2015-917  
:

:  
: Appeal from Ohio Board of Tax Appeals  
:

:  
: BTA Case No. 2013-A-1469  
:

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**APPENDIX TO REPLY BRIEF OF APPELLEE/CROSS-APPELLANT, JOSEPH W.  
TESTA, TAX COMMISSIONER OF OHIO**

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## CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appendix to Merit Brief of Appellee/Cross Appellant was served upon the following by email on this 30th day of December, 2015:

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Baldwin's Ohio Revised Code Annotated  
Title LVII. Taxation (Refs & Annos)  
Chapter 5717. Appeals (Refs & Annos)

R.C. § 5717.02

5717.02 Appeals from final determination of the tax commissioner; procedure; hearing

Effective: March 22, 2012

Currentness

(A) Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by that decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by that decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner or county auditor concerning an application for a property tax exemption may be taken to the board of tax appeals by the applicant or by a school district that filed a statement concerning that application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

(B) The appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the county auditor if the county auditor's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner, property tax exemption determination by the commissioner or the county auditor, or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached to it and incorporated in it by reference a true copy of the notice sent by the commissioner, county auditor, or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of that notice and to incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) Upon the filing of a notice of appeal, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings. Those appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct the hearings and to report to it their findings for affirmation or rejection.

**5717.02 Appeals from final determination of the tax commissioner;..., R.C. § 5717.02**

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(D) The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, county auditor, or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make an investigation concerning the appeal that it considers proper.

**Credits**

(2011 H 225, eff. 3-22-12; 2002 S 200, eff. 9-6-02; 2000 S 287, eff. 12-21-00; 2000 H 612, eff. 9-29-00; 1994 S 19, eff. 7-22-94; 1985 H 321, eff. 10-17-85; 1985 S 124; 1983 H 260; 1981 H 351; 1977 H 634; 1976 H 920; 1973 S 174; 1953 H 1; GC 5611)

**UNCODIFIED LAW**

2011 H 225, § 4: See Uncodified Law under RC 5713.07.

**HISTORICAL AND STATUTORY NOTES**

**Pre-1953 H 1 Amendments:** 119 v 34; 118 v 344, § 15; 106 v 260, § 54; 103 v 794, § 32

**CROSS REFERENCES**

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**LIBRARY REFERENCES**

Taxation ¶¶2667 to 2682.  
Westlaw Topic No. 371.

Baldwin's Ohio Revised Code Annotated  
Title LVII. Taxation (Refs & Annos)  
Chapter 5747. Income Tax (Refs & Annos)  
Practice and Procedure

R.C. § 5747.13

5747.13 Failure to file return or pay tax; assessment; notice;  
hearing; appeal; judgment; payment pending review

Effective: September 29, 2013

Currentness

(A) If any employer collects the tax imposed by section 5747.02 or under Chapter 5748. of the Revised Code and fails to remit the tax as required by law, or fails to collect the tax, the employer is personally liable for any amount collected that the employer fails to remit, or any amount that the employer fails to collect. If any taxpayer fails to file a return or fails to pay the tax imposed by section 5747.02 or under Chapter 5748. of the Revised Code, the taxpayer is personally liable for the amount of the tax.

If any employer, taxpayer, or qualifying entity required to file a return under this chapter fails to file the return within the time prescribed, files an incorrect return, fails to remit the full amount of the taxes due for the period covered by the return, or fails to remit any additional tax due as a result of a reduction in the amount of the credit allowed under division (B) of section 5747.05 of the Revised Code together with interest on the additional tax within the time prescribed by that division, the tax commissioner may make an assessment against any person liable for any deficiency for the period for which the return is or taxes are due, based upon any information in the commissioner's possession.

An assessment issued against either the employer or the taxpayer pursuant to this section shall not be considered an election of remedies or a bar to an assessment against the other for failure to report or pay the same tax. No assessment shall be issued against any person if the tax actually has been paid by another.

No assessment shall be made or issued against an employer, taxpayer, or qualifying entity more than four years after the final date the return subject to assessment was required to be filed or the date the return was filed, whichever is later. However, the commissioner may assess any balance due as the result of a reduction in the credit allowed under division (B) of section 5747.05 of the Revised Code, including applicable penalty and interest, within four years of the date on which the taxpayer reports a change in either the portion of the taxpayer's adjusted gross income subjected to an income tax or tax measured by income in another state or the District of Columbia, or the amount of liability for an income tax or tax measured by income to another state or the District of Columbia, as required by division (B)(3) of section 5747.05 of the Revised Code. Such time limits may be extended if both the employer, taxpayer, or qualifying entity and the commissioner consent in writing to the extension or if an agreement waiving or extending the time limits has been entered into pursuant to section 122.171 of the Revised Code. Any such extension shall extend the four-year time limit in division (B) of section 5747.11 of the Revised Code for the same period of time. There shall be no bar or limit to an assessment against an employer for taxes withheld from employees and not remitted to the state, against an employer, taxpayer, or qualifying entity that fails to file a return subject to assessment as required by this chapter, or against an employer, taxpayer, or qualifying entity that files a fraudulent return.

The commissioner shall give the party assessed written notice of the assessment in the manner provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition.

(B) Unless the party assessed files with the tax commissioner within sixty days after service of the notice of assessment, either personally or by certified mail, a written petition for reassessment, signed by the party assessed or that party's authorized agent having knowledge of the facts, the assessment becomes final, and the amount of the assessment is due and payable from the party assessed to the commissioner with remittance made payable to the treasurer of state. The petition shall indicate the objections of the party assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination. If the petition has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C) After an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the employer's, taxpayer's, or qualifying entity's place of business is located or the county in which the party assessed resides. If the party assessed is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

Immediately upon the filing of the entry, the clerk shall enter a judgment against the party assessed in the amount shown on the entry. The judgment shall be filed by the clerk in one of two loose-leaf books, one entitled "special judgments for state and school district income taxes," and the other entitled "special judgments for qualifying entity taxes." The judgment shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

If the assessment is not paid in its entirety within sixty days after the assessment was issued, the portion of the assessment consisting of tax due shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax commissioner issues the assessment until it is paid or until it is certified to the attorney general for collection under section 131.02 of the Revised Code, whichever comes first. If the unpaid portion of the assessment is certified to the attorney general for collection, the entire unpaid portion of the assessment shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of certification until the date it is paid in its entirety. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) All money collected under this section shall be considered as revenue arising from the taxes imposed by this chapter or Chapter 5733. or 5748. of the Revised Code, as appropriate.

(E) If the party assessed files a petition for reassessment under division (B) of this section, the person, on or before the last day the petition may be filed, shall pay the assessed amount, including assessed interest and assessed penalties, if any of the following conditions exists:

(1) The person files a tax return reporting Ohio adjusted gross income, less the exemptions allowed by section 5747.025 of the Revised Code, in an amount less than one cent, and the reported amount is not based on the computations required under division (A) of section 5747.01 or section 5747.025 of the Revised Code.

(2) The person files a tax return that the tax commissioner determines to be incomplete, false, fraudulent, or frivolous.

(3) The person fails to file a tax return, and the basis for this failure is not either of the following:

(a) An assertion that the person has no nexus with this state;

(b) The computations required under division (A) of section 5747.01 of the Revised Code or the application of credits allowed under this chapter has the result that the person's tax liability is less than one dollar and one cent.

(F) Notwithstanding the fact that a petition for reassessment is pending, the petitioner may pay all or a portion of the assessment that is the subject of the petition. The acceptance of a payment by the treasurer of state does not prejudice any claim for refund upon final determination of the petition.

If upon final determination of the petition an error in the assessment is corrected by the tax commissioner, upon petition so filed or pursuant to a decision of the board of tax appeals or any court to which the determination or decision has been appealed, so that the amount due from the party assessed under the corrected assessment is less than the portion paid, there shall be issued to the petitioner or to the petitioner's assigns or legal representative a refund in the amount of the overpayment as provided by section 5747.11 of the Revised Code, with interest on that amount as provided by such section, subject to section 5747.12 of the Revised Code.

**CREDIT(S)**

(2013 H 59, eff. 9-29-13; 2009 H 1, eff. 10-16-09; 2002 S 200, eff. 9-6-02; 2001 H 405, eff. 12-13-01; 2000 H 612, eff. 9-29-00; 1997 H 215, eff. 9-29-97; 1993 H 152, eff. 7-1-93; 1992 S 358; 1990 H 956; 1989 H 111; 1987 H 231; 1983 H 291; 1982 H 366; 1981 H 694; 1971 H 475)

Notes of Decisions (81)

R.C. § 5747.13, OH ST § 5747.13

Current through 2015 Files 1 to 31 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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- Section 5717.04 Appeal from decision of board of tax appeals to supreme court; parties who may appeal.
- 5717.05 Appeal from decision of county board of revision to court of common pleas; notice; transcript; judgment.

§ 5717.01 Appeal from county board of revision to board of tax appeals; procedure; hearing.

CASE NOTES

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Generally

An appeal from a county board of revision decision may be taken to a court of common pleas or to the Ohio Board of Tax Appeals (BTA). Therefore, a common pleas court and the BTA fulfill the same function when reviewing a decision of a board of revision, and BTA case law may be applied to the common pleas court proceedings in such appeals. *Beechwood II, L.P. v. Clermont County Bd. of Revision*, — Ohio App. 3d —, — N.E. 2d —, 2011 Ohio App. LEXIS 4464, 2011 Ohio 5449, (Oct. 24, 2011).

Big-box stores

In valuing a newly constructed big-box store, the school board appraiser's use of a range of properties that included build-to-suit properties that, unlike the property at issue, were not owned by the business that operated on the premises was properly accepted by the BTA. The proponent of external obsolescence has the burden of establishing the obsolescence: *Mejfer Stores L.P. v. Franklin County Bd. of Revision*, 122 Ohio St. 3d 447, 912 N.E.2d 560, 2009 Ohio 3479, (2009).

Bulk sales

BTA reasonably and lawfully determined that the record before it did not document the existence of a bulk sale, with the result that the owner incurred no burden of demonstrating the propriety of allocating a bulk sale price: *HK New Plan Exch. Prop. Owner II, LLC v. Hamilton County Bd. of Revision*, 122 Ohio St. 3d 438, 912 N.E.2d 95, 2009 Ohio 3546, (2009).

Certification

Board of revision has the duty to preserve the evidence presented to it pursuant to R.C. 5715.08, and the board should certify an appraisal report as part of the record pursuant to R.C. 5717.01. *Vandalia-Butler City Schs. Bd. of Educ. v. Montgomery County Bd. of Revision*, 130 Ohio St. 3d 291, 958 N.E.2d 131, 2011 Ohio 5078, (2011).

Board of revision has jurisdiction to perform a second certification of its decision pursuant to R.C. 5715.20, provided it does so within the 30-day appeal period established by its first certification and provided no appeal has yet been taken from the first certification. When valid, a second certification starts a new 30-day appeal period under R.C. 5717.01. A board of revision properly certifies its decision under R.C. 5715.20 when it mails the decision by certified mail to any

address that is reasonably calculated to give notice of the decision to the owner: *Meadows Dev., L.L.C. v. Champaign County Bd. of Revision*, 124 Ohio St. 3d 349, 922 N.E.2d 209, 2010 Ohio 249, (2010).

Dismissal of complaint

Dismissal of the taxpayer's 2009 complaint was proper, because the taxpayer did not demonstrate that a change in occupancy had occurred after the tax lien date applicable to the 2008 complaint, so as to justify the filing of another complaint within the interim period under R.C. 5715.19(A)(2); the board of education had appealed to the board of tax appeals arguing that the 2009 complaint should have been dismissed since it was the second complaint filed within a single interim period and failed to satisfy the statutory requirements for filing a successive complaint. *Bd. of Educ. v. Montgomery County Bd. of Revision*, — Ohio App. 3d —, — N.E. 2d —, 2012 Ohio App. LEXIS 159, 2012 Ohio 193, (Jan. 20, 2012).

Jurisdiction

Language of R.C. 5717.01 demonstrated that the board of revision's formal notification to parties than an appeal has been filed is not a jurisdictional requirement. *Berea City Sch. Dist. Bd. of Educ. v. Cuyahoga County Bd. of Revision*, — Ohio App. 3d —, — N.E. 2d —, 2012 Ohio App. LEXIS 4051, 2012 Ohio 4605, (Oct. 4, 2012).

When a school district filed its appeal with the Board of Tax Appeals (BTA) under R.C. 5717.01 and the property owner filed its appeal with a trial court under R.C. 5717.05, the BTA did not err in refusing to entertain an appeal by the owner and in allowing the district to dismiss its appeal. The BTA had jurisdiction only over the district's appeal. *Berea City Sch. Dist. Bd. of Educ. v. Cuyahoga County Bd. of Revision*, — Ohio App. 3d —, — N.E. 2d —, 2012 Ohio App. LEXIS 4051, 2012 Ohio 4605, (Oct. 4, 2012).

Tax lien date

Where the tax lien date was January 1, 2002, an appraisal report addressing the value of the property on January 1, 2003 did not constitute a lawful basis for the BTAs finding of value for the 2002 tax year. However, the BTA properly performed an independent determination based on the evidence in the record and adopted a reduced valuation: *AP Hotels of Ill., Inc. v. Franklin County Bd. of Revision*, 118 Ohio St. 3d 343, 889 N.E.2d 115, 2008 Ohio 2565, (2008).

Valuation of property

In a tax dispute, a trial court did not abuse its discretion by adopting a magistrate's conclusion that a taxpayer failed to satisfy its burden of proving its entitlement to a taxable value reduction; the trial court did not improperly defer to a board of revision's decision since it carefully considered the evidence presented by the parties, including the supplemented evidence. The trial court simply found that the taxpayer's appraisal was not adequately supported by what it considered to be competent, probative evidence; the trial court looked to the reliance on residential comparisons and an assertion in the taxpayer's appraisal that there was inadequate demand for office-use. *Eastbrook Farms, Inc. v. Warren County Bd. of Revision*, 194 Ohio App. 3d 193, 955 N.E.2d 418, 2011 Ohio 2103, (2011).

§ 5717.02 Appeals from final determinations; procedure; hearing.

(A) Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments,

reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by that decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by that decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner or county auditor concerning an application for a property tax exemption may be taken to the board of tax appeals by the applicant or by a school district that filed a statement concerning that application under division (C) of section 5715.27 of the Revised Code. Appeals from a redetermination by the director of job and family services under section 5733.42 of the Revised Code may be taken by the person to which the notice of the redetermination is required by law to be given under that section.

(B) The appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal, with the county auditor if the county auditor's action is the subject of the appeal, with the director of development if that director's action is the subject of the appeal, or with the director of job and family services if that director's action is the subject of the appeal. The notice of appeal shall be filed within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner, property tax exemption determination by the commissioner or the county auditor, or redetermination by the director has been given as provided in section 5703.37, 5709.64, 5709.66, or 5733.42 of the Revised Code. The notice of appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached to it and incorporated in it by reference a true copy of the notice sent by the commissioner, county auditor, or director to the taxpayer, enterprise, or other person of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of that notice and to incorporate it by reference in the notice of appeal does not invalidate the appeal.

(C) Upon the filing of a notice of appeal, the tax commissioner, county auditor, or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner, auditor, or director, together with all evidence considered by the commissioner, auditor, or director in connection with the proceedings. Those appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct the hearings and to report to it their findings for affirmation or rejection.

(D) The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner, county auditor, or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make an investigation concerning the appeal that it considers proper.

**HISTORY:** GC § 5611; 106 v 246(260), § 54; 118 v 344; 119 v 34(49); Bureau of Code Revision, 10-1-53; 135 v S 174 (Eff 12-4-73); 136 v H 920 (Eff 10-11-76); 137 v H 634 (Eff 8-15-77); 139 v H 351 (Eff 3-17-82); 140 v H 260 (Eff 9-27-83); 141 v S 124 (Eff 9-25-85); 141 v H 321 (Eff 10-17-85); 145 v S 19 (Eff 7-22-94); 148 v H 612 (Eff 9-29-2000); 148 v S 257 (Eff 12-21-2000); 149 v S 200. Eff 9-6-2002; 2011 HB 225, § 1, eff. Mar. 22, 2012.

**Editor's notes**

Acts 2011, HB 225, § 5 provides: "The amendments by this act to sections 5713.07, 5713.08, 5713.081, 5713.082, 5715.27, and 5717.02 of the Revised Code apply to applications for exemptions filed for tax year 2011 or thereafter."

**Effect of amendments**

The 2011 amendment added the (A) through (D) designations; in the third sentence of (A), inserted "or county auditor" and "by the applicant or"; in (B), inserted "with the county auditor if the county auditor's action is the subject of the appeal" in the first sentence and "property tax exemption determination by the commissioner or the county auditor" in the second sentence; inserted "county auditor" in the last sentence of (B), the first sentence of (C), and in (D); in the first sentence of (C), inserted "auditor" following "commissioner" twice and substituted "with the proceedings" for "therewith" at the end; and made stylistic changes.

**CASE NOTES**

**INDEX**

- Exhaustion of remedies
- Intervention
- Notice of appeal

**Exhaustion of remedies**

County treasurer's foreclosure complaint was not the appropriate vehicle to challenge the tax assessment determinations of the county auditor and the Tax Commissioner of Ohio, neither of which were parties to the action, on the taxation of the taxpayer's property improvements as the taxpayer failed to exhaust all of its administrative remedies under R.C. 5717.02 as to the tax assessment by the Tax Commissioner, and R.C. 5715.19(A)(1), as to the tax assessment by the county auditor. *Hamilton v. Mansfield Motorsports Speedway, LLC.* — Ohio App. 3d —, — N.E. 2d —, 2012 Ohio App. LEXIS 2172, 2012 Ohio 2446, (May 31, 2012).

 KeyCite Yellow Flag - Negative Treatment  
Proposed Legislation

Baldwin's Ohio Revised Code Annotated  
Title LVII. Taxation (Refs & Annos)  
Chapter 5717. Appeals (Refs & Annos)

R.C. § 5717.04

5717.04 Appeal from decision of board of tax appeals to supreme court

Effective: October 11, 2013

Currentness

This section does not apply to any decision and order of the board made pursuant to section 5703.021 of the Revised Code. Any such decision and order shall be conclusive upon all parties and may not be appealed.

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be sent, by the director of budget and management if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be sent, or by any other person to whom the board sent the decision appealed from, as authorized by section 5717.03 of the Revised Code.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten

days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the commissioner or all persons to whom the decision of the board appealed from is required by such section to be sent, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

**CREDIT(S)**

(2013 H 138, eff. 10-11-13; 2009 H 1, eff. 10-16-09; 1987 H 231, eff. 10-5-87; 1983 H 260; 1977 H 634; 1973 S 174; 125 v 250; 1953 H 1; GC 5611-2)

Notes of Decisions (231)

R.C. § 5717.04, OH ST § 5717.04

Current through 2015 Files 1 to 31 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

Baldwin's Ohio Revised Code Annotated  
Title LVII. Taxation (Refs & Annos)  
Chapter 5703. Department of Taxation (Refs & Annos)  
Practice and Procedure

R.C. § 5703.37

5703.37 Service

Effective: September 29, 2013

Currentness

(A)(1) Except as provided in division (B) of this section, whenever service of a notice or order is required in the manner provided in this section, a copy of the notice or order shall be served upon the person affected thereby either by personal service, by certified mail, or by a delivery service authorized under section 5703.056 of the Revised Code that notifies the tax commissioner of the date of delivery.

(2) In lieu of serving a copy of a notice or order through one of the means provided in division (A)(1) of this section, the commissioner may serve a notice or order upon the person affected thereby through alternative means as provided in this section, including, but not limited to, delivery by secure electronic mail as provided in division (F) of this section. Delivery by such means satisfies the requirements for delivery under this section.

(B)(1)(a) If certified mail is returned because of an undeliverable address, the commissioner shall first utilize reasonable means to ascertain a new last known address, including the use of a change of address service offered by the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code. If, after using reasonable means, the commissioner is unable to ascertain a new last known address, the assessment is final for purposes of section 131.02 of the Revised Code sixty days after the notice or order sent by certified mail is first returned to the commissioner, and the commissioner shall certify the notice or order, if applicable, to the attorney general for collection under section 131.02 of the Revised Code.

(b) Notwithstanding certification to the attorney general under division (B)(1)(a) of this section, once the commissioner or attorney general, or the designee of either, makes an initial contact with the person to whom the notice or order is directed, the person may protest an assessment by filing a petition for reassessment within sixty days after the initial contact. The certification of an assessment under division (B)(1)(a) of this section is prima-facie evidence that delivery is complete and that the notice or order is served.

(2) If mailing of a notice or order by certified mail is returned for some cause other than an undeliverable address or if a person does not access an electronic notice or order within the time provided in division (F) of this section, the commissioner shall resend the notice or order by ordinary mail. The notice or order shall show the date the commissioner sends the notice or order and include the following statement:

“This notice or order is deemed to be served on the addressee under applicable law ten days from the date this notice or order was mailed by the commissioner as shown on the notice or order, and all periods within which an appeal may be filed apply from and after that date.”

Unless the mailing is returned because of an undeliverable address, the mailing of that information is prima-facie evidence that delivery of the notice or order was completed ten days after the commissioner sent the notice or order by ordinary mail and that the notice or order was served.

If the ordinary mail is subsequently returned because of an undeliverable address, the commissioner shall proceed under division (B)(1)(a) of this section. A person may challenge the presumption of delivery and service under this division in accordance with division (C) of this section.

(C)(1) A person disputing the presumption of delivery and service under division (B) of this section bears the burden of proving by a preponderance of the evidence that the address to which the notice or order was sent was not an address with which the person was associated at the time the commissioner originally mailed the notice or order by certified mail. For the purposes of this section, a person is associated with an address at the time the commissioner originally mailed the notice or order if, at that time, the person was residing, receiving legal documents, or conducting business at the address; or if, before that time, the person had conducted business at the address and, when the notice or order was mailed, the person's agent or the person's affiliate was conducting business at the address. For the purposes of this section, a person's affiliate is any other person that, at the time the notice or order was mailed, owned or controlled at least twenty per cent, as determined by voting rights, of the addressee's business.

(2) If the person elects to protest an assessment certified to the attorney general for collection, the person must do so within sixty days after the attorney general's initial contact with the person. The attorney general may enter into a compromise with the person under sections 131.02 and 5703.06 of the Revised Code if the person does not file a petition for reassessment with the commissioner.

(D) Nothing in this section prohibits the commissioner or the commissioner's designee from delivering a notice or order by personal service.

(E) Collection actions taken pursuant to section 131.02 of the Revised Code upon any assessment being challenged under division (B)(1)(b) of this section shall be stayed upon the pendency of an appeal under this section. If a petition for reassessment is filed pursuant to this section on a claim that has been certified to the attorney general for collection, the claim shall be uncertified.

(F) The commissioner may serve a notice or order upon the person affected by the notice or order through secure electronic means only with the person's consent. The commissioner must inform the recipient, electronically or by mail, that a notice or order is available for electronic review and provide instructions to access and print the notice or order. The recipient's electronic access of the notice or order satisfies the requirements for delivery under this section. If the recipient fails to access the notice or order electronically within ten business days, then the commissioner shall inform the recipient a second time, electronically or by mail, that a notice or order is available for electronic review and provide instructions to access and print the notice or order. If the recipient fails to access the notice or order electronically within ten business days of the second notification, the notice or order shall be served upon the person through the means provided in division (B)(2) of this section.

(G) As used in this section:

(1) “Last known address” means the address the department has at the time the document is originally sent by certified mail, or any address the department can ascertain using reasonable means such as the use of a change of address service offered by the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code.

(2) “Undeliverable address” means an address to which the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code is not able to deliver a notice or order, except when the reason for nondelivery is because the addressee fails to acknowledge or accept the notice or order.

**CREDIT(S)**

(2013 H 59, eff. 9-29-13; 2012 H 508, eff. 9-6-12; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 10-16-09; 2002 S 200, eff. 9-6-02; 2000 H 612, eff. 9-29-00; 1953 H 1, eff. 10-1-53; GC 1465-30)

Notes of Decisions (5)

R.C. § 5703.37, OH ST § 5703.37

Current through 2015 Files 1 to 31 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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Baldwin's Ohio Revised Code Annotated  
Title LVIII. Trusts (Refs & Annos)  
Chapter 5808. Powers and Duties of Trustee

R.C. § 5808.16

5808.16 Specific powers of trustee

Effective: September 12, 2008

[Currentness](#)

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) Guarantee loans made by others to the settlor of a revocable trust and, if the settlor so directs, guarantee loans made by others to a third party and mortgage, pledge, or grant a security interest in the property of a revocable trust to secure the payment of loans made by others to the settlor of the revocable trust and, if the settlor so directs, 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;

(AA) Employ agents, attorneys, accountants, investment advisors, and other professionals.

**CREDIT(S)**

(2008 H 499, eff. 9-12-08; 2006 H 416, eff. 1-1-07)

**OFFICIAL COMMENT**

Uniform Trust Code (2006)

This section enumerates specific powers commonly included in trust instruments and in trustee powers legislation. All the powers listed are subject to alteration in the terms of the trust. *See* Section 105. The powers listed are also subsumed under the general authority granted in Section 815(a)(2) to exercise all powers over the trust property which an unmarried competent owner has over individually owned property, and any other powers appropriate to achieve the proper management, investment, and distribution of the trust property. The powers listed add little of substance not already granted by Section 815 and powers conferred elsewhere in the Code, which are listed in the Comment to Section 815. While the Committee drafting this Code discussed dropping the list of specific powers, it concluded that the demand of third parties to see language expressly authorizing specific transactions justified retention of a detailed list.

As provided in Section 815(b), the exercise of a power is subject to fiduciary duties except as modified in the terms of the trust. The fact that the trustee has a power does not imply a duty that the power must be exercised.

Many of the powers listed in this section are similar to the powers listed in [Section 3 of the Uniform Trustees' Powers Act](#) (1964). Several are new, however, and other powers drawn from that Act have been updated. The powers enumerated in this section may be divided into categories. Certain powers, such as the powers to acquire or sell property, borrow money, and deal with real estate, securities, and business interests, are powers that any individual can exercise. Other powers, such as the power to collect trust property, are by their very nature only applicable to trustees. Other specific powers, particularly those listed in other sections of the Uniform Trust Code, modify a trustee duty that would otherwise apply. *See, e.g.*, Sections 802(h) (exceptions to duty of loyalty) and 810(d) (joint investments as exception to earmarking requirement).

Paragraph (1) authorizes a trustee to collect trust property and collect or decline additions to the trust property. The power to collect trust property is an incident of the trustee's duty to administer the trust as provided in Section 801. The trustee has a duty to enforce claims as provided in Section 811, the successful prosecution of which can result in collection of trust property. Pursuant to Section 812, the trustee also has a duty to collect trust property from a former trustee or other person holding trust property. For an application of the power to reject additions to the trust property, see Section 816(13) (power to decline property with possible environmental liability).

Paragraph (2) authorizes a trustee to sell trust property, for cash or on credit, at public or private sale. Under the Restatement, a power of sale is implied unless limited in the terms of the trust. [Restatement \(Third\) of Trusts: Prudent Investor Rule Section](#)

[190 \(1992\)](#). In arranging a sale, a trustee must comply with the duty to act prudently as provided in Section 804. This duty may dictate that the sale be made with security.

Paragraph (4) authorizes a trustee to deposit funds in an account in a regulated financial-service institution. This includes the right of a financial institution trustee to deposit funds in its own banking department as authorized by Section 802(h)(4).

Paragraph (5) authorizes a trustee to borrow money. Under the Restatement, the sole limitation on such borrowing is the general obligation to invest prudently. *See* Restatement (Third) of Trusts: Prudent Investor Rule Section 191 (1992). Language clarifying that the loan may extend beyond the duration of the trust was added to negate an older view that the trustee only had power to encumber the trust property for the period that the trust was in existence.

Paragraph (6) authorizes the trustee to continue, contribute additional capital to, or change the form of a business. Any such decision by the trustee must be made in light of the standards of prudent investment stated in Article 9.

Paragraph (7), regarding powers with respect to securities, codifies and amplifies the principles of [Restatement \(Second\) of Trusts Section 193 \(1959\)](#).

Paragraph (9), authorizing the leasing of property, negates the older view, reflected in [Restatement \(Second\) of Trusts Section 189 cmt. c \(1959\)](#), that a trustee could not lease property beyond the duration of the trust. Whether a longer term lease is appropriate is judged by the standards of prudence applicable to all investments.

Paragraph (10), authorizing a trustee to grant options with respect to sales, leases or other dispositions of property, negates the older view, reflected in [Restatement \(Second\) of Trusts Section 190 cmt. k \(1959\)](#), that a trustee could not grant another person an option to purchase trust property. Like any other investment decision, whether the granting of an option is appropriate is a question of prudence under the standards of Article 9.

Paragraph (11), authorizing a trustee to purchase insurance, empowers a trustee to implement the duty to protect trust property. *See* Section 809. The trustee may also insure beneficiaries, agents, and the trustee against liability, including liability for breach of trust.

Paragraph (13) is one of several provisions in the Uniform Trust Code designed to address trustee concerns about possible liability for violations of environmental law. This paragraph collects all the powers relating to environmental concerns in one place even though some of the powers, such as the powers to pay expenses, compromise claims, and decline property, overlap with other paragraphs of this section (decline property, paragraph (1); compromise claims, paragraph (14); pay expenses, paragraph (15)). Numerous States have legislated on the subject of environmental liability of fiduciaries. For a representative state statute, see [Tex. Prop. Code Ann. Section 113.025](#). *See also* Sections 701(c)(2) (designated trustee may inspect property to determine potential violation of environmental or other law or for any purpose) and 1010(b) (trustee not personally liable for violation of environmental law arising from ownership or control of trust property).

Paragraph (14) authorizes a trustee to pay, contest, settle, or release claims. Section 811 requires that a trustee need take only “reasonable” steps to enforce claims, meaning that a trustee may release a claim not only when it is uncollectible, but also when collection would be uneconomic. *See* [Restatement \(Second\) of Trusts Section 192 \(1959\)](#) (power to compromise, arbitrate and abandon claims).

Paragraph (15), among other things, authorizes a trustee to pay compensation to the trustee and agents without prior approval of court. Regarding the standard for setting trustee compensation, see Section 708. *See also* Section 709 (repayment of trustee expenditures). While prior court approval is not required, Section 813(b)(4) requires the trustee to inform the qualified beneficiaries in advance of a change in the method or rate of compensation.

Paragraph (16) authorizes a trustee to make elections with respect to taxes. The Uniform Trust Code leaves to other law the issue of whether the trustee, in making such elections, must make compensating adjustments in the beneficiaries' interests.

Paragraph (17) authorizes a trustee to take action with respect to employee benefit or retirement plans, or annuities or life insurance payable to the trustee. Typically, these will be beneficiary designations which the settlor has made payable to the trustee, but this Code also allows the trustee to acquire ownership of annuities or life insurance.

Paragraphs (18) and (19) allow a trustee to make loans to a beneficiary or to guarantee loans of a beneficiary upon such terms and conditions as the trustee considers fair and reasonable. The determination of what is fair and reasonable must be made in light of the fiduciary duties of the trustee and the purposes of the trust. Frequently, a trustee will make loans to a beneficiary which might be considered less than prudent in an ordinary commercial sense although of great benefit to the beneficiary and which help carry out the trust purposes. If the trustee requires security for the loan to the beneficiary, adequate security under this paragraph may consist of a charge on the beneficiary's interest in the trust. *See* Restatement (Second) of Trusts Section 255 (1959). However, the interest of a beneficiary subject to a spendthrift restraint may not be pledged as security for a loan. *See* Section 502.

Paragraph (20) authorizes the appointment of ancillary trustees in jurisdictions in which the regularly appointed trustee is unable or unwilling to act. Normally, an ancillary trustee will be appointed only when there is a need to manage real estate located in another jurisdiction. This paragraph allows the regularly appointed trustee to select the ancillary trustee and to confer on the ancillary trustee such powers and duties as may be necessary. The appointment of ancillary trustees is a topic which a settlor may wish to address in the terms of the trust.

Paragraph (21) authorizes a trustee to make payments to another person for the use or benefit of a beneficiary who is under a legal disability or who the trustee reasonably believes is incapacitated. Although an adult relative or other person receiving funds is required to spend it on the beneficiary's behalf, it is preferable that the trustee make the distribution to a person having more formal fiduciary responsibilities. For this reason, payment may be made to an adult relative only if the trustee does not know of a conservator, guardian, custodian, or custodial trustee capable of acting for the beneficiary.

Paragraph (22) authorizes a trustee to make non-pro-rata distributions and allocate particular assets in proportionate or disproportionate shares. This power provides needed flexibility and lessens the risk that a non-pro-rata distribution will be treated as a taxable sale.

Paragraph (23) authorizes a trustee to resolve disputes through mediation, arbitration or other methods of alternate dispute resolution. The drafters of this Code encourage the use of such alternate methods for resolving disputes. Arbitration is a form of nonjudicial settlement agreement authorized by Section 111. In representing beneficiaries and others in connection with arbitration or in approving settlements obtained through mediation or other methods of ADR, the representation principles of Article 3 may be applied. Settlor's wishing to encourage use of alternate dispute resolution may draft to provide it. For sample language, see American Arbitration Association, Arbitration Rules for Wills and Trusts (1995).

Paragraph (24) authorizes a trustee to prosecute or defend an action. As to the propriety of reimbursement for attorney's fees and other expenses of an action or judicial proceeding, see Section 709 and Comment. *See also* Section 811 (duty to defend actions).

Paragraph (26), which is similar to Section 344 of the Restatement (Second) of Trusts (1959), clarifies that even though the trust has terminated, the trustee retains the powers needed to wind up the administration of the trust and distribute the remaining trust property.

[Notes of Decisions \(122\)](#)

**5808.16 Specific powers of trustee, OH ST § 5808.16**

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R.C. § 5808.16, OH ST § 5808.16

Current through 2015 Files 1 to 31 of the 131st General Assembly (2015-2016) and 2015 State Issues 1 and 2.

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Baldwin's Ohio Revised Code Annotated  
Rules of Civil Procedure (Refs & Annos)  
Title IV. Parties

Civ. R. Rule 17

Civ R 17 Parties plaintiff and defendant; capacity

Currentness

**(A) Real party in interest**

Every action shall be prosecuted in the name of the real party in interest. An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his name as such representative without joining with him the party for whose benefit the action is brought. When a statute of this state so provides, an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

**(B) Minors or incompetent persons**

Whenever a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person. If a minor or incompetent person does not have a duly appointed representative the minor may sue by a next friend or defend by a guardian ad litem. When a minor or incompetent person is not otherwise represented in an action the court shall appoint a guardian ad litem or shall make such other order as it deems proper for the protection of such minor or incompetent person.

**CREDIT(S)**

(Adopted eff. 7-1-70; amended eff. 7-1-75, 7-1-85)

**STAFF NOTES**

**1. Real party in interest**

**2. Minors or incompetent persons**

**3. Minors: commencing or defending an action for divorce, annulment or alimony**

1. Real party in interest

**1970:**

The first three sentences of Rule 17(A) (based upon Federal Rule 17(a) set forth the principles included in §§ 2307.05, R.C. and 2307.08, R.C. In short, the real party in interest principles of Rule 17(A) borrow directly the real party in interest principles of the Field Code.

In an action at common law an assignee, for example, could not sue in his own name. The Field Code, with the procedural merger of law and equity changed that, the equitable principle that the party entitled to the benefits of the suit (an assignee), as distinguished from the party with the empty legal title (the assignor), being the proper party to sue, i.e., being the “real party in interest.” Of course, the Field Code and Rule 17(A) provide that a party, such as a trustee, who sues for the benefit of another is a real party in interest. Quite logically under the code and the rule if there is a partial assignment or partial subrogation, then the partial assignor and the partial assignee or the partial subrogor and the partial subrogee, both having a beneficial interest in the suit, are the real parties in interest.

The real party in interest principle does not refer to “capacity to sue.” Assume that a minor is negligently injured. The minor is a real party in interest, but he does not have the capacity to sue. The minor sues under Rule 17(B) by his next friend, an adult, who does have the capacity to sue.

The fourth sentence of Rule 17(A) is borrowed directly from a 1966 amendment of Federal Rule 17(a). Assume that an administrator under a void appointment sues in good faith. Under Rule 17(A) the action is not dismissed; instead a reasonable time is permitted until the proper administrator can be substituted in order that justice might be done. The 1966 amendment of Federal Rule 17(a) “codifies” the principle enunciated in *Levinson v. Deupree*, 345 U.S. 648 (1953) and *Link Aviation, Inc., v. Downs*, 325 F. 2d 613 (D.D.C. 1963). A similar result might be accomplished under § 2309.58, R.C., the general amendment statute ( *Taylor v. Scott*, 168 Ohio St. 391 (1959)); however, Rule 17(A) simply states clearly that a proper real party in interest may be substituted without the action's being dismissed.

## 2. Minors or incompetent persons

### 1970:

Rule 17(B) (quite similar to Federal Rule 17(c)) deals with suits by and against minors and incompetent persons. In effect, the rule enunciates the principles covered by §§ 2307.11, through 2307.17, R.C.

Rule 4.2(1) permits service of process upon an individual sixteen years of age or older and dispenses with additional parent or guardian service. But Rule 4.2(1) does not dispense with parent or guardian protection afforded by Rule 17(B). Hence, if a defendant is sixteen years old, he alone may be served under Rule 4.2(1). But for purposes of trial he would receive the full parent or guardian protection of Rule 17(B). In addition, Rule 55(A) provides that a default judgment may not be taken against a minor or incompetent person unless he has been represented properly by a guardian or other such representative who has appeared in the action.

## 3. Minors: commencing or defending an action for divorce, annulment or alimony

### 1975:

The amendment, effective July 1, 1975, removed Civ. R. 17(C) from the Civil Rules. It provided, as did predecessor statutes, that persons eighteen years of age or older could commence or defend actions for divorce, annulment, or alimony in their own names without the intervention of a guardian or a next friend. Am. Sub. S. B. 1, 110th General Assembly, effective January 1, 1974, lowered the age of majority from twenty-one years to eighteen years for most, but not all, purposes. Bringing or defending actions in divorce, annulment or alimony were procedures not within any of the exceptions. RC 3109.10, the general provision on majority “... of full age for all purposes...” made the provision of Civ. R. 17(C) obsolete. For that reason it was deleted by amendment.

### 1970:

Rule 17(C) is simply a combination of and restatement of §§ 2307.111 and 2307.161, R.C., which have permitted a person over eighteen years of age to sue or defend in his own name in an action for divorce, annulment or alimony. Rule 17(C) is an exception to the principle that a person under twenty-one years of age must be represented in an action by an adult.

Notes of Decisions (270)

Rules Civ. Proc., Rule 17, OH ST RCP Rule 17  
Current with amendments received through August 15, 2015

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Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Evidence (Refs & Annos)  
Article VIII. Hearsay

**Evid. R. Rule 801**

**Evid R 801 Definitions**

Currentness

The following definitions apply under this article:

**(A) Statement.** A “statement” is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.

**(B) Declarant.** A “declarant” is a person who makes a statement.

**(C) Hearsay.** “Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

**(D) Statements which are not hearsay.** A statement is not hearsay if:

(1) *Prior statement by witness.* The declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and the statement is (a) inconsistent with declarant's testimony, and was given under oath subject to cross-examination by the party against whom the statement is offered and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (b) consistent with declarant's testimony and is offered to rebut an express or implied charge against declarant of recent fabrication or improper influence or motive, or (c) one of identification of a person soon after perceiving the person, if the circumstances demonstrate the reliability of the prior identification.

(2) *Admission by party-opponent.* The statement is offered against a party and is (a) the party's own statement, in either an individual or a representative capacity, or (b) a statement of which the party has manifested an adoption or belief in its truth, or (c) a statement by a person authorized by the party to make a statement concerning the subject, or (d) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (e) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy upon independent proof of the conspiracy.

**CREDIT(S)**

(Adopted eff. 7-1-80; amended eff. 7-1-07)

**STAFF NOTES**

**1980:**

The ultimate determination of whether statements or conduct are admissible or not for hearsay purposes is substantially the same as prior Ohio law, with two notable exceptions. There are in this rule significant departures as to definition and characterization of statements and conduct as hearsay. There are also important departures from Federal Evidence Rule 801 upon which the Ohio rule is based.

#### Rule 801(A) Statement

This subdivision defines a “statement” for hearsay purposes as either (1) oral or written assertions or (2) conduct intended as assertive. This definition characterizes the traditional written or oral assertion as subject to hearsay risk. However, not all statements falling within the two enumerated categories are hearsay, or even if hearsay, such statements are not necessarily inadmissible. Whether a statement falling within the purview of 801(A) is hearsay is governed in part by the remaining subdivisions of Rule 801, and whether a statement is admissible, even if hearsay, is governed by Rules 803 and 804.

The second category of assertions falling within the definition of a “statement” is conduct intended as assertive. This definition resolves many difficult problems as to how to characterize conduct having qualities which induce suspicions characteristic of hearsay. The time honored hypothetical serves as an example. Is the fact that the captain of a vessel made X a lookout under a policy that only men of good eyesight are made lookouts evidence that X had good eyesight? Since the relevancy of the captain's conduct depends upon the accuracy of his information, the conduct ends up being no more than the captain stating “X has good eyesight.” Is such conduct hearsay? A good many cases found this type of conduct to be hearsay as involving an “implied assertion.” The classic case of *Wright v. Doe D'Tatham* (1837), 112 Eng. Rep. 488, is an early example and there are many others. McCormick § 250 (2d ed. 1972). Yet, the courts have not hesitated to classify similar instances of conduct though involving the same implied assertions as nonhearsay. For example, a person fleeing from the scene of a crime is deemed merely relevant evidence tending to establish guilt without consideration of the implied assertion “I am guilty” clearly inherent in the act of fleeing.

The rule solves the difficult problem of drawing lines in such cases by merely rendering conduct not intended by the actor as assertive as not a hearsay statement. If there is not [*sic*] intention to communicate by the act, it is not a “statement” for hearsay purposes. The ship captain's conduct would, if otherwise relevant and competent, be admissible as circumstantial evidence of X's eyesight without hearsay risks. The intent of the actor is critical in making the determination as to whether the conduct is assertive.

#### Rule 801(B) Declarant

This subdivision defines “declarant” as a person who makes a statement defined in Rule 801(A). The definition permits reference to a person who makes statements defined in Rule 801(A) by an identifiable term. The “declarant” is a person who has made such a statement and is used as part of the definition of hearsay in Rule 801(C) and in Rules 803 and 804 relating to hearsay exceptions. The meaning is common to hearsay analysis and represents no departure from prior Ohio law.

#### Rule 801(C) Hearsay

This subdivision defines hearsay. It is not a departure from prior Ohio law. See 21 OJur 2d Evidence §§283 and 287. Hearsay is limited to statements offered into evidence to prove the truth of the assertion by the declarant not on the witness stand at the time of the declaration. The definition discloses its relative nature. If a statement is not offered to prove its truth but is offered for some other reason such as simply to prove the statement was made, if such fact is relevant, it is not hearsay. Words constituting conduct are not hearsay, e.g., words of a contract, libel, slander, threats and the like.

The terms “statement” and “declarant” as used in this subdivision are defined in subdivisions 801(A) and 801(B) respectively.

#### Rule 801(D) Statements which are not Hearsay

This subdivision creates new categories of declarations which while constituting “statements” as defined in Rule 801(A), and while falling within the definition of hearsay in Rule 801(C), are not excluded as evidence under the hearsay rule. Such statements as qualify under this subdivision are admissible independent of the hearsay exceptions enumerated in Rule 803 and Rule 804, and are properly characterized as non-hearsay rather than as exceptions to the rule.

There are two categories of statements under this subdivision: first, statements by a witness made at a time prior to his taking the stand and, second, statements by a party opponent or one deemed to be speaking in behalf of a party opponent. The first category includes particular types of declarations by a witness which were characterized as hearsay exceptions or as prior statements subject to use for impeachment or rehabilitative purposes under former Ohio law. The second category constituted admissions under prior Ohio law. The provisions of this subdivision represent some departure from prior Ohio law and from Federal Evidence Rule 801(d) as indicated in the notes following the particular subsections.

#### Rule 801(D)(1) Prior Statement by Witness

This subsection deals with prior statements of a witness. There are three types of statements by a witness which may qualify as non-hearsay under this subdivision and may be admissible as non-hearsay to prove the matters asserted in such prior statements. The rule does not limit the use of such statements either for impeachment or rehabilitative purposes. The statements may be used as substantive evidence of the matters asserted. The three categories are (a) prior inconsistent statements of a witness if made under oath subject to cross-examination, (b) prior consistent statements offered to rebut charges of recent fabrication or improper motive, and (c) prior identification by a witness.

#### Rule 801(D)(1)(a) Prior Inconsistent Statements

Under prior Ohio law a prior inconsistent statement, whether or not under oath, was admissible only for impeachment purposes and not for substantive proof of the matter asserted. See Staff Note to Rule 613. Under the Rules, a prior inconsistent statement, whether or not under oath, is still admissible for such impeachment purposes. See Rule 613(B).

Under this subdivision, the prior inconsistent statement of a witness if made under oath at a prior hearing subject to cross-examination, or deposition, and subject to perjury charges is admissible as substantive evidence of the matter asserted. Two aspects of such statements justify the rule. First, there is a high circumstantial guaranty of trustworthiness in that the witness is now on the stand subject to oath, cross-examination and demeanor evaluation and the prior inconsistent statement was also made under oath and was subject to cross-examination. Second, such statement was and continues to be admissible for impeachment purposes under Rule 613, and it is unrealistic to ask the jury to consider such statement to assess the credibility of the witness but not to treat the prior statement as substantive evidence.

The Ohio Rule differs from the Federal counterpart in requiring the added element that the prior inconsistent statement under oath may be admitted under the provision only if it were subject to cross-examination by the party against whom the statement is now offered. Therefore, prior inconsistent statements made, for example, in grand jury proceedings can not be offered as substantive evidence against the criminal defendant under this provision since the grand jury testimony was not subject to cross-examination.

#### Rule 801(D)(1)(b) Prior Consistent Statements

In this subsection a prior consistent statement, whether or not under oath, may be used as substantive evidence if such prior consistent statement is introduced to refute charges of improper motive or recent fabrication. Under prior Ohio law such evidence was admissible to rehabilitate a witness whose credibility was attacked by such charges. *Miller v. Piqua Transfer and Storage Co.* (1950), 57 Ohio Law Abs. 325.

Rule 613 governs the use of prior inconsistent statements for impeachment purposes but does not govern methods of rehabilitation. Rule 801(D)(1)(b) makes it clear that prior consistent statements may be used to rehabilitate a witness under circumstances authorized under prior Ohio law. Unlike the requirements under Rule 801(D)(1)(a) respecting prior inconsistent statements, if the circumstances arise under which a prior consistent statement may be used to rehabilitate the witness, such statement may be used as substantive proof of the matter asserted without regard to whether the statement was made under oath.

Rule 801(D)(1)(c)

This rule extends the principle recognized in Ohio in *State v. Lancaster* (1971), 25 Ohio St.2d 83. It is identical to Federal Evidence Rule 801(d)(1)(C) except for an added provision for exclusion if the prior identification were made under unreliable circumstances. If a witness has made an identification prior to appearing in court to testify and such identification is the result of the witness having actually perceived the person identified, evidence of such identification is admissible regardless of whether or not the witness can now make an identification. 4 Weinstein's Evidence § 801(d)(1)(C) [01] (1977). The rationale for the rule is that the perception made nearer the event is at least as likely, if not more likely, to be accurate than a subsequent identification in the court room. The added provision requires the trial judge to determine whether the circumstances under which the identification was made demonstrates reliability of the prior identification. This grant of discretion tightens the use of this basis of evidence of identification consistent with constitutional requirements. However, nothing in this rule obviates constitutional requirements relating to lineups and the like under *Kirby v. Illinois* (1972), 406 U.S. 682.

Rule 801(D)(2) Admission by Party Opponent

This subsection governs statements by a party opponent or by others identified with a party opponent in enumerated relationships. Under prior Ohio law, an admission was characterized as an exception to the hearsay [*sic.*] rule. Some confusion existed as to the proper characterization for statements made by agents, sometimes being characterized as falling within the ubiquitous *res gestae* exception. See *Kimbark v. Timken Roller Bearing Co.* (1926), 115 Ohio St. 161. Also see *Werk v. Martin* (1934), 18 Ohio Law Abs. 81. Aside from the differences in characterization, the determination of admissibility of statements covered by the rule is substantially the same as under prior Ohio law.

Rule 801(D)(2)(a) His Own Statement; Individual or Representative Capacity

This rule is similar to prior Ohio law. *Goz v. Tenney* (1922), 104 Ohio St. 500. It covers statements by a party opponent. The statement need not be against the interest of the declarant at the time made. It is sufficient that the statement be that of a party and that it is offered by the opposing party. A party may not introduce his own statement under this rule. Problems of trustworthiness are not critical in this class of admission since the opposing party controls the decision to introduce the statement and the party declarant will be in court to refute any unfavorable impact of the statement.

Rule 801(D)(2)(b) Adoptive Admissions

This rule is consistent with prior Ohio law. An adoptive admission, or an admission by acquiescence, consists of a statement by a non-party which may be deemed to be that of a party by virtue of the failure of the party to deny the statement. There are obvious risks in attributing a statement of a third person to be that of a party and, in applying the rule, courts have been careful to consider the circumstances under which the utterance is made to insure that the party understood the utterance, that he was free to make a response, and that a reasonable person would have denied the statement. Absent these determinations, a statement of a third person cannot be an admission by acquiescence of a party opponent. See generally McCormick §161 (2d ed. 1972). For a case of adoptive admission applying even in a criminal case see *United States v. Alker* (1958), 255 F. 2d 851.

Rule 801(D)(2)(c) Authorized Statements

A statement authorized by a party is in effect a statement of that party. The rule reflects prior Ohio law. *Garret v. Hanshue* (1895), 53 Ohio St. 482.

Rule 801(D)(2)(d) Vicarious Statements

The statement of a party's agent or employee made in the course of employment concerning matters relating to such employment is admissible against such party. This represents no departure from prior Ohio law although occasionally prior Ohio cases treated the question of admissibility of an agent's statement under principles of *res gestae*. *Western Insurance Co. v. Tobin* (1877), 32 Ohio St. 77, *Cincinnati, H & Ohio Dec. R. Co. v. Klure* (1905), 8 Ohio C.C.(n.s.) 409.

Rule 801(D)(2)(c) Statement of Co-Conspirator

This subsection provides for the admission of a co-conspirator's statement against an accused charged with conspiracy. (Editor's Note: The last statement is misleading. The co-conspirator rule does *not* require the accused to be "charged with conspiracy.") Such statement must be made during the course and in furtherance of the conspiracy. The rule reflects prior Ohio law. *State v. Carver* (1972), 30 Ohio St.2d 280.

Before a statement of a co-conspirator may be introduced against an accused, the court must first find some independent evidence of a conspiracy. This requirement is specifically mandated by the wording of the rule. Under the Federal Rule, the requirement of independent proof is implicit but not specifically mandated. How much extrinsic evidence is required before a co-conspirator's statement is admitted as an admission by the accused has been subject to differing standards in federal and state treatment of the subject.

Notes of Decisions (903)

Rules of Evid., Rule 801, OH ST REV Rule 801

Current with amendments received through August 15, 2015

Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Evidence (Refs & Annos)  
Article VIII. Hearsay

**Evid. R. Rule 804**

**Evid R 804 Hearsay exceptions; declarant unavailable**

**Currentness**

**(A) Definition of unavailability**

“Unavailability as a witness” includes any of the following situations in which the declarant:

- (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;
- (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;
- (3) testifies to a lack of memory of the subject matter of the declarant's statement;
- (4) is unable to be present or to testify at the hearing because of death or then-existing physical or mental illness or infirmity;
- (5) is absent from the hearing and the proponent of the declarant's statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under division (B)(2), (3), or (4) of this rule, the declarant's attendance or testimony) by process or other reasonable means.

A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of the declarant's statement for the purpose of preventing the witness from attending or testifying.

**(B) Hearsay exceptions**

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

- (1) *Former testimony.* Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. Testimony given at a preliminary hearing must satisfy the right to confrontation and exhibit indicia of reliability.

(2) *Statement under belief of impending death.* In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant, while believing that his or her death was imminent, concerning the cause or circumstances of what the declarant believed to be his or her impending death.

(3) *Statement against interest.* A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless the declarant believed it to be true. A statement tending to expose the declarant to criminal liability, whether offered to exculpate or inculpate the accused, is not admissible unless corroborating circumstances clearly indicate the truthworthiness of the statement.

(4) *Statement of personal or family history.* (a) A statement concerning the declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though the declarant had no means of acquiring personal knowledge of the matter stated; or (b) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(5) *Statement by a deceased or incompetent person.* The statement was made by a decedent or a mentally incompetent person, where all of the following apply:

(a) the estate or personal representative of the decedent's estate or the guardian or trustee of the incompetent person is a party;

(b) the statement was made before the death or the development of the incompetency;

(c) the statement is offered to rebut testimony by an adverse party on a matter within the knowledge of the decedent or incompetent person.

(6) *Forfeiture by wrongdoing.* A statement offered against a party if the unavailability of the witness is due to the wrongdoing of the party for the purpose of preventing the witness from attending or testifying. However, a statement is not admissible under this rule unless the proponent has given to each adverse party advance written notice of an intention to introduce the statement sufficient to provide the adverse party a fair opportunity to contest the admissibility of the statement.

**CREDIT(S)**

(Adopted eff. 7-1-80; amended eff. 7-1-81 (Clause exempting preliminary hearing testimony deleted), 7-1-93, 7-1-01)

**STAFF NOTES**

**2001:**

**Rule 804(A) Definition of unavailability**

The amendment to division (A) of the rule involved clarifying changes in language. In addition, the amendment placed in a separate paragraph what had been in the last sentence of division (A)(5) in order to clarify that the final sentence of the division applies to all of the rule's definitions of "unavailability." No substantive change is intended by these amendments.

### **Rule 804(B)(6) Forfeiture by wrongdoing**

The 2001 amendment added division (B)(6), forfeiture by wrongdoing. This division recognizes a forfeiture rule for hearsay statements that would have been admissible as testimony had the witness been present at trial. It is patterned on the federal rule, which was adopted in 1997. It codifies a principle that has been recognized at common-law in Ohio.

**Rationale.** The U.S. Supreme Court has recognized the forfeiture doctrine in the context of the right of confrontation. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that while the defendant has the right to be present at his or her trial, the right may be lost where defendant is so disorderly that the trial cannot be continued with his or her presence. Similarly, the Court held in *Taylor v. United States*, 414 U.S. 17 (1973), that defendant's voluntary absence from the courtroom can be construed as a waiver of the defendant's right to confrontation, without a warning from the court. In *Reynolds v. United States*, 98 U.S. 145 (1878), the Court upheld the admissibility of hearsay because the defendant had refused to reveal the declarant's location.

The term "forfeiture" was chosen over alternatives such as "waiver," "waiver by conduct," or "implied" or "constructive waiver" because the rule applies even if the party is not aware of the right of confrontation or the hearsay rule. In other words, the intentional relinquishment of a known right is *not* the standard.

Only a few Ohio cases have addressed the issue, but all have recognized that Ohio's common-law of evidence incorporates a rule of forfeiture similar to the federal rule. See *State v. Kilbane*, 1979 Ohio App. Lexis 10550, Nos. 38428, 38383, 38433 (8th Dist. Ct. App., 4/3/79), at \*19; *State v. Liberatore*, 1983 Ohio App. Lexis 13808, No. 46784 (8th Dist. Ct. App. 12/3/83), at \*13 ("[T]he evidence in *Steele* clearly indicated that the defendants had procured the witness' unavailability. The evidence in the instant case is far from clear that defendant procured Mata's 'unavailability'."); *State v. Brown*, 1986 Ohio App. Lexis 6567, No. 50505 (8th Dist. Ct. App. 4/24/86), at \*11-12 ("[T]he victim expressed concern that the defendant's brother had threatened her mother and her children. An accused cannot rely on the confrontation clause to preclude extrajudicial evidence from a source which he obstructs.") See also *Steele v. Taylor*, 684 F.2d 1193, 1200-04 (6th Cir. 1982)(federal habeas corpus review of the conviction in *Kilbane*), cert. denied, 460 U.S. 1053 (1983).

**Standard.** The offering party must show (1) that the party engaged in wrongdoing that resulted in the witness's unavailability, and (2) that one purpose was to cause the witness to be unavailable at trial. See *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) ("waiver by homicide") ("[I]t is sufficient in this regard to show that the evildoer was motivated *in part* by a desire to silence the witness; the intent to deprive the prosecution of testimony need not be the actor's *sole* motivation."), cert. denied, 519 U.S. 1118 (1997).

**Coverage.** As the federal drafters note, "[t]he wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government. It applies to actions taken after the event to prevent a witness from testifying." Fed.R.Evid. 804 advisory committee's note. Thus, the rule does not apply to statements of the victim in a homicide prosecution concerning the homicide, including a felony-murder case.

The Ohio rule does not adopt the word "acquiesce" that is used in the federal rule. This departure from the federal model is intended to exclude from the rule's coverage situations in which, under federal practice, a party's mere inaction has been held to effect a forfeiture. See, e.g. *United States v. Masrangelo*, 693 F.2d 269, 273-74 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984)("Bare knowledge of a plot to kill Bennett and a failure to give warning to appropriate authorities is sufficient to constitute a waiver.") Encouraging a witness to invoke a valid privilege, such as the Fifth Amendment, or the spousal competency rule, Evid. R. 601, does not trigger this rule because such conduct is not wrongdoing. Encouraging a witness to leave the state is wrongdoing in this context because no one has the legal right to refuse to provide testimony in the absence of a privilege or other rule of evidence. The prosecution, however, should not be able to cause a potential defense witness to assert the Fifth Amendment for the sole purpose of making that witness unavailable to the defense and then refuse to immunize that witness's testimony.

The rule extends to potential witnesses. See *United States v. Houlihan*, 92 F.3d 1271, 1279 (1st Cir. 1996) (“Although the reported cases all appear to involve actual witnesses, we can discern no principled reason why the waiver-by-misconduct doctrine should not apply with equal force if a defendant intentionally silences a *potential* witness.”) (citation omitted), cert. denied, 519 U.S. 1118 (1997).

The rule governs only the hearsay aspect; the trial court retains authority under Evid. R. 403 to exclude unreliable statements. This is probably also a due process requirement. See generally Comment, *The Admission of Hearsay Evidence Where Defendant Misconduct Causes the Unavailability of a Prosecution Witness*, 43 Am. U. L. Rev. 995, 1014 (1994) (“The procuring defendant actually acknowledges the reliability of the absent witness’ information when he or she endeavors to derail the witness’ court appearance—an act the defendant would be less likely to commit if the witness’s information is false or untrustworthy.”)

The rule does not cover the admissibility of evidence regarding the wrongful act of procuring a witness’s unavailability when the evidence is offered as an “implied” admission. Evidence of that character is not hearsay and is governed by the relevance rules. 1 Giannelli, *Baldwin’s Ohio Practice, Evidence Section 401.9* (1996) (admissions by conduct).

Procedures. The trial court decides admissibility under Evid. R. 104(A); the traditional burden of persuasion (preponderance of evidence) rests with the party offering the evidence once an objection is raised. If the evidence is admitted, the court does not explain the basis of its ruling to the jury. This is similar to the procedure used in admitting a co-conspirator statement under Evid. R. 801(D)(2)(c), where the trial judge must decide the existence of a conspiracy as a condition of admissibility but would not inform the jury of this preliminary finding.

The opposing party would, however, have the opportunity to attack the reliability of the statement before the jury, Evid. R. 104(E), and impeach the declarant under Evid. R. 806.

The notice requirement, which is based on Evid. R. 609(B), may trigger an objection by a motion *in limine* and the opportunity for determining admissibility at a hearing outside the jury’s presence. See *United States v. Thai*, 29 F.3d 785 (2d Cir. 1994) (unsworn statements made to detective prior to declarant’s murder by defendant). (“Prior to admitting such testimony, the district court must hold a hearing in which the government has the burden of proving by a preponderance of the evidence that the defendant was responsible for the witness’s absence.”)

**1993:**

Rule 804(A) Definition of unavailability.

The only changes to division (A) are the use of gender neutral language; no substantive change is intended.

Rule 804(B) Hearsay exceptions.

The substantive amendment to this division is in division (B)(5). The amendment to division (B)(5) removes references to “deaf-mutes” as a separate category of incompetent persons whose statements are admissible on behalf of an estate, guardian, or personal representative to rebut certain testimony by adverse parties.

The hearsay exception established by Evid. R. 804(B)(5) is designed to account for the effective abolition of the “Dead Man’s Statute” (R.C. 2317.04) by the provisions of Evid. R. 601. The statute prohibited a party from testifying when the adverse party was, among others, “the guardian or trustee of either a deaf and dumb or an insane person.” R.C. 2317.04. Under Evid. R. 601, there is no competency bar to a party’s testimony in those cases, but if the party does testify, Evid. R. 804(B)(5) permits the guardian or trustee to introduce the statements of the ward in rebuttal.

As originally drafted, Evid.R. 804(B)(5) referred to the same categories of persons subject to guardianship as were referred to in the statute, albeit with some modernization in terminology. In particular, the rule identified “a deaf-mute who is now unable to testify” as a category of declarant-ward distinct from “a mentally incompetent person.” As employed in the statute, however, that distinction appears to be no more than a remnant of nineteenth century guardianship laws, which at one time provided for the guardianship of the “deaf and dumb” separately from provisions for guardians of “idiots” or the “insane.” See Act of March 9, 1838, Section 17, 36 Ohio Laws 40. To a large extent, provisions of that kind reflected the nineteenth century view that a person who was “deaf and dumb” was probably, if not certainly, mentally incompetent.

The nineteenth century's assumptions about the mental faculties of those with hearing or speech impairments are certainly inaccurate as an empirical matter. In any event, under modern law, the appointment of a guardian for an adult requires a determination that the person is mentally incompetent, and there is no separate provision for the guardianship of incompetent “deaf-mutes.” See R.C. 2111.02. That being the case, the “deaf-mute” declarants referred to in the rule are necessarily included within the rule's class of “mentally incompetent person [s]”: an adult subject to a guardianship is by definition mentally incompetent, without regard to the existence of a “deaf-mute condition.”

The identification of a separate class of “deaf-mute” declarants is thus redundant, and it likewise rests on archaic and mistaken views of the effect of hearing and speech impairments on one's mental capacities. The amendment deletes the rule's references to “deaf-mute” declarants in order to eliminate both of these difficulties, and in order to clarify that the rule applies only to statements by declarants who are deceased or mentally incompetent.

#### 1980:

Rule 804 is similar to Federal Evidence Rule 804 with some significant modification in Rule 804(B)(1), Former testimony and Rule 804(B)(3) Statement against interest. The rule eliminates Federal Rule 804(B)(5), Other exceptions. The rule adds a new subsection, Rule 804(B)(5), Statement by a deceased, deaf-mute or incompetent person.

#### Rule 804(A) Definition of Unavailability

Rule 804(A) provides that certain out-of-court statements may be admitted into evidence as an exception to the hearsay rule if the declarant is “unavailable.” The requirement that the declarant be “unavailable” simply indicates, in light of the kind of hearsay exception involved in the rule, that it would be preferable if the declarant would testify and be subject to cross-examination. If the declarant is unavailable, however, then his statement is admitted into evidence on the ground that it is better to admit the evidence as sufficiently trustworthy than not to have any evidence on the issue at all. In short, the hearsay exceptions covered by Rule 804 are “second class” exceptions seemingly less trustworthy than the hearsay exceptions governed by Rule 803. Rule 804 represents the prevailing view in American courts as to “unavailability” of the declarant and the kind of hearsay exceptions governed by the rule. See McCormick § 253 (2d ed. 1972).

Rule 804(A) defines the conditions under which a declarant is deemed to be “unavailable.” It becomes readily apparent that unavailability under the rule does not mean that the declarant need be physically absent from the trial; hence under several definitions, although the declarant is present, it is his *testimony* which is “unavailable.” There are five conditions set forth in Rule 804(A) under which declarant is deemed to be unavailable.

Pursuant to Rule 804(A)(1) a witness may invoke a privilege--such as the privilege against self-incrimination or the husband-wife privilege--and in that event, the witness is considered unavailable. The court, having ruled that the privilege has been asserted and that the witness is unavailable, may then permit the introduction of that evidence which, pursuant to Rule 804(B), is deemed to be an exception to the hearsay rule. See McCormick § 253 (2d ed. 1972).

Rule 804(A)(2) provides that when a witness refuses to testify, despite all efforts by the court to compel him to do so, he is considered unavailable. The provision extends the earlier rules governing unavailability, but the provision conforms to the modern weight of authority. See McCormick § 253 (2d ed. 1972).

Rule 804(A)(3) states that a witness is unavailable if he suffers from lack of memory. Just as senility or incompetency may cause a loss of memory, so too may a lapse in time between the event and the trial. The provision is less restrictive than some former court holdings. See McCormick § 253 (2d ed. 1972).

Rule 804(A)(4), providing that death, physical infirmity or mental illness renders a witness unavailable, follows long-established tradition. Death presents no problem, but a court will have to use its discretion in deciding that the mental or physical infirmity prohibits testifying. See McCormick § 253 (2d ed. 1972).

Under Rule 804(A)(5) if a witness cannot be compelled to appear or if his residence or existence is unknown, he is unavailable. Reasonable diligence must be exercised to find him or have him appear. Attendance in criminal cases will require stricter compliance. See *Barber v. Page* (1968), 390 U.S. 719; *New York Central RR v. Stevens* (1933), 126 Ohio St. 395; *Bauer v. Pullman Co.* (1968), 15 Ohio App.2d 69. Note that the provision requires--before a witness is deemed to be unavailable because of absence--that an attempt be made to depose him. In short, the witness is unavailable if his attendance *or* "testimony" could not be procured by reasonable means. A deposition is "testimony."

The final sentence of Rule 804(A) provides that a witness will not be deemed unavailable if the proponent of his statement engaged in wrong-doing to prevent the witness from testifying.

#### Rule 804(B)(1) Former Testimony

Under Rule 804(B)(1) the former testimony of a witness, the witness now being unavailable, may be introduced in evidence as an exception to the hearsay rule. The "testimony" offered in evidence may be testimony given by the witness at another hearing other than at a preliminary hearing in a criminal case, of the same or a different proceeding, or in a deposition. Under the exception, the testimony may be offered either against the party *against* whom it was previously offered or against the party *by* whom it was previously offered, provided that the party against whom the testimony is offered in the trial at hand "had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination." In short, the testimony is trustworthy because there was an opportunity to examine the witness, and cross-examine the witness, in a former proceeding conducted in a context similar to the litigation at hand. This exception specifically excludes testimony at a preliminary hearing because the motives for cross-examination by a defendant may not be coextensive with that at the trial on the merits. [Author's Note: The provision excluding preliminary hearing testimony from the former testimony exception was deleted in 1981.] The rule supersedes R.C. 2317.06 and R.C. 2945.49. The rule is similar to the "former testimony" exception extant in the general law of evidence. See McCormick §254 (2d ed. 1972).

Cf. *State v. Roberts* (1978), 55 Ohio St.2d 191, *rev'd. Ohio v. Roberts*, (1980), [56] U.S. [448], 48 Law Week 4874.

#### Rule 804(B)(2) Statement Under Belief of Impending Death

Rule 804(B)(2) governs the "dying declaration" exception to the hearsay rule. The traditional exception of the dying declaration has been limited to homicide cases in the criminal area apparently because dying declarations are not among the most reliable forms of hearsay. Homicide is that situation where exceptional need for the evidence is present. See McCormick § 283 (2d ed. 1972). In Ohio the exception had been limited to homicide cases. See 21 OJur 2d Evidence § 341. Rule 804(B)(2) permits the use of the dying declaration in homicide cases in the criminal area *and* permits such use in civil cases as well.

Under the rule, the dying declaration of the deceased victim in criminal homicide cases will continue to be admitted into evidence as an exception to the hearsay rule under the standards set by case holdings. See 27 OJur 2d Homicide §§ 143-148.

Rule 804(B)(2) supersedes such case holdings as *Mitchell v. New York Life Ins. Co.* (1939), 62 Ohio App. 54.

Rule 804(B)(3) Statement Against Interest

Rule 804(B)(3) provides that a declaration against interest may be admitted into evidence as an exception to the hearsay rule. The declarant must of course be unavailable.

The declaration against interest applies to statements of persons other than parties to the action and should be distinguished from statements of parties to the action. The out-of-court statement of a party opponent in the action is an admission, not a declaration against interest. An admission of a party opponent is governed by Rule 801(D)(2) as non-hearsay and does not require the admission to be against the party's "interest" and does not require that the party be "unavailable" before the statement may be admitted.

The rule governing declarations against interest includes declarations against declarant's pecuniary or proprietary interest and also declarations which would subject declarant to civil or criminal liability. The exceptions to the hearsay rule subjecting declarant to civil or criminal liability broaden the traditional law governing declarations against interest and broaden Ohio law as well, the Ohio law having been limited to declarations against pecuniary interest. See *G.M. McKelvey Co. v. General Cas. Co.* (1957), 166 Ohio St. 401. See also McCormick §§276-280 (2d ed 1972).

The admission of evidence involving a declaration against pecuniary interest is illustrated by *Truelsch v. Northwestern Mut. Life Ins. Co.* (1925), 186 Wisc. 239, 202 N.W. 352. Husband, now dead because of suicide, embezzled money from Employer and used some of the money to pay premiums on a life policy, his Wife being beneficiary on the policy. At the suicide scene a letter, addressed to Wife, was found on Husband's body. Among other things the letter said that Husband had used some of the funds embezzled from Employer to pay premiums on the life policy. Wife sued Insurance Company to collect on the policy. Employer sued Insurance Company to collect that amount of embezzled money used to pay premiums. The actions were consolidated. At trial deceased husband's letter was admitted into evidence under the declaration against interest exception to the hearsay rule. Husband was obviously "unavailable" to testify, and his letter, a non-party out-of-court statement, was a declaration against Husband's pecuniary interest and hence admissible as an exception to the hearsay rule.

Rule 804(B)(3), as noted, includes the admissibility of statements which subject the non-party declarant to criminal liability. The rule, in effect, provides that the non-party statement which criminally implicates the non-party may be admitted into evidence *against* a criminal defendant or to *exculpate* a criminal defendant. However, if the non-party statement tends to expose the declarant to criminal liability, whether it is offered to exculpate or inculpate the accused, the statement must be supported by "corroborating circumstances" to "clearly indicate the trustworthiness of the statement." The rule may be made understandable by the following illustrations.

In *People v. Spriggs* (1964), 60 Cal. 2d 868, 389 P. 2d 377, defendant was on trial for possession of heroin. At the time of arrest, defendant's female accomplice, an addict, apparently told a police officer that *she* was the one who possessed the heroin. At trial, the police officer on the stand, would be required--assuming declarant was "unavailable"--to answer the question, "What did she say?" Under the rule, the statement of the unavailable declarant (which would implicate declarant) would have to be supported by "corroborating circumstances." Note that the language is "corroborating circumstances" not "corroborating evidence." Some kind of corroborating circumstances should exist as a condition to admissibility when the statement of the declarant which exposes the declarant to criminal liability is deemed not to be very "trustworthy." Under this rule this is so whether or not the statement tends to inculpate or exculpate the accused. For an excellent analysis of the meaning of "corroborating circumstances" under Federal Evidence Rule 804(b)(3), see *Lowery v. State of Maryland* (1975), 401 F. Supp. 604.

In *Bruton v. United States* (1968), 389 U.S. 818, the Supreme Court held that an out-of-court confession (declaration against penal interest) which implicated the declarant (a co-defendant) could not be used to implicate defendant criminally. One reason

for the *Bruton* doctrine is this: a statement (confession) admitting guilt and implicating another person in the same crime, and *made while in custody*, might will be motivated by a desire to curry favor with the authorities and, hence, fail to qualify as being against interest.

Rule 804(B)(4) Statement of Personal or Family History

Rule 804(B)(4) provides that the statement of an unavailable declarant concerning his own family history is admissible as an exception to the hearsay rule even though the declarant had no means of acquiring personal knowledge of the matters stated. The rule also makes admissible declarant's statement concerning another person's family history if the declarant is closely associated with the other person's family. The rule broadens the common law but conforms to the more modern tradition. See McCormick § 322 (2d ed. 1972). The rule is a variation of Rule 803(19), but, as noted above, Rule 804(B)(4) requires that declarant be unavailable.

Rule 804(B)(5) Statement by a Deceased, Deaf-mute, or Incompetent Person

In effect, Rule 601, governing competency of witnesses to testify, supersedes the Dead Man's statute, R.C. 2317.03, which heretofore had prevented an adverse party from testifying against a deceased person, deaf-mute or person now insane who was a "party" to the action by virtue of a representative such as an administrator. Under Rule 601 an adverse party may testify against a deceased person, or deaf-mute or person now insane, provided that such person is a party by representation of an administrator or guardian and provided that in the discretion of the court unfair prejudice would not result pursuant to Rule 403. See the Staff Note for Rule 601.

Because of the modification of the Dead Man's statute by Rule 601, Rule 804(B)(5) permits as an exception to the hearsay rule, testimony on behalf of the deceased person, or deaf-mute, or now insane person to "rebut testimony by an adverse party on a matter which was within the knowledge of the decedent, deaf-mute, or incompetent person." The new exception to the hearsay rule is a fair and necessary adjunct responsive to the modification of the Dead Man's statute. In those jurisdictions in which the Dead Man's statute has been modified or repealed, a rule similar to Rule 804(B)(5) exists. See McCormick § 65 (2d ed. 1972), and Ray, *Dead Man's Statutes*, 24 Ohio St. L. J. 89 (1963).

The Federal Rules of Evidence, not having addressed the Dead Man's statute problem, do not have a rule equivalent to Rule 804(B)(5).

Notes of Decisions (283)

Rules of Evid., Rule 804, OH ST REV Rule 804  
Current with amendments received through August 15, 2015

Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Professional Conduct  
Client-Lawyer Relationship

Rules of Prof. Cond., Rule 1.2

Rule 1.2 Scope of representation and allocation of authority between client and lawyer

Currentness

(a) Subject to divisions (c), (d), and (e) of this rule, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer does not violate this rule by acceding to requests of opposing counsel that do not prejudice the rights of the client, being punctual in fulfilling all professional commitments, avoiding offensive tactics, and treating with courtesy and consideration all persons involved in the legal process. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision as to a plea to be entered, whether to waive a jury trial, and whether the client will testify.

(b) [RESERVED]

(c) A lawyer may limit the scope of a new or existing representation if the limitation is *reasonable* under the circumstances and communicated to the client, preferably in *writing*.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is *illegal* or *fraudulent*. A lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client in making a good faith effort to determine the validity, scope, meaning, or application of the law.

(e) Unless otherwise required by law, a lawyer shall not present, participate in presenting, or threaten to present criminal charges or professional misconduct allegations solely to obtain an advantage in a civil matter.

**CREDIT(S)**

(Adopted eff. 2-1-07)

**OFFICIAL COMMENT**

Allocation of Authority between Client and Lawyer

[1] Division (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in division (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish

their objectives, particularly with respect to technical, legal, and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

[4] In a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is guided by reference to Rule 1.14.

[4A] Division (a) makes it clear that regardless of the nature of the representation the lawyer does not breach a duty owed to the client by maintaining a professional and civil attitude toward all persons involved in the legal process. Specifically, punctuality, the avoidance of offensive tactics, and the treating of all persons with courtesy are viewed as essential components of professionalism and civility, and their breach may not be required by the client as part of the representation.

#### Independence from Client's Views or Activities

[5] A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities. Legal representation should not be denied to people who are unable to afford legal services or whose cause is controversial or the subject of popular disapproval. By the same token, representing a client does not constitute approval of the client's views or activities.

#### Agreements Limiting Scope of Representation

[6] [RESERVED]

[7] Although division (c) affords the lawyer and client substantial latitude in defining the scope of the representation, any limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law that the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation. See Rule 1.1.

[7A] Written confirmation of a limitation of a new or existing representation is preferred and may be any writing that is presented to the client that reflects the limitation, such as a letter or electronic transmission addressed to the client or a court order. A lawyer may create a form or checklist that specifies the scope of the client-lawyer relationship and the fees to be charged. An order of a court appointing a lawyer to represent a client is sufficient to confirm the scope of that representation.

[8] All agreements concerning a lawyer's representation of a client must accord with the Ohio Rules of Professional Conduct and other law. See, *e.g.*, Rules 1.1, 1.8 and 5.6.

#### Illegal, Fraudulent and Prohibited Transactions

[9] Division (d) prohibits a lawyer from knowingly counseling or assisting a client to commit an illegal act or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is illegal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which an illegal act or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally permissible but then discovers is improper. See Rules 3.3(b) and 4.1(b).

[11] Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary.

[12] Division (d) applies whether or not the defrauded party is a party to the transaction. Hence, a lawyer must not participate in a transaction to effectuate illegal or fraudulent avoidance of tax liability. Division (d) does not preclude undertaking a criminal defense incident to a general retainer for legal services to a lawful enterprise. The last clause of division (d) recognizes that determining the validity or interpretation of a statute or regulation may require a course of action involving disobedience of the statute or regulation or of the interpretation placed upon it by governmental authorities.

[13] If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client's instructions, the lawyer must consult with the client regarding the limitations on the lawyer's conduct. See Rule 1.4(a)(5).

#### Comparison to former Ohio Code of Professional Responsibility

Rule 1.2 replaces several provisions within Canon 7 of the Code of Professional Responsibility.

The first sentence of Rule 1.2(a) generally corresponds to EC 7-7 and makes what previously was advisory into a rule. The second sentence of Rule 1.2(a) states explicitly what is implied by EC 7-7. The third sentence of Rule 1.2(a) corresponds generally to DR 7-101(A)(1) and EC 7-10. Rule 1.2(a)(1) and (2) correspond to several sentences in EC 7-7.

Rule 1.2(c) does not correspond to any Disciplinary Rule or Ethical Consideration.

The first sentence of Rule 1.2(d) corresponds to DR 7-102(A)(7). The second sentence of Rule 1.2(d) is similar to EC 7-4.

Rule 1.2(e) is the same as DR 7-105 except for the addition of the prohibition against threatening "professional misconduct allegations."

#### Comparison to ABA Model Rules of Professional Conduct

Rule 1.2(a) is modified slightly from the Model Rule 1.2(a) by the inclusion of the third sentence, which does not exist in the Model Rules.

**Rule 1.2 Scope of representation and allocation of authority..., OH ST RPC Rule 1.2**

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Model Rule 1.2(b) has been moved to Comment [5] of Rule 1.2 because the provision is more appropriately addressed in a comment rather than a black-letter rule.

Rule 1.2(c) differs from Model Rule 1.2(c) in that it requires only that the limitation be communicated to the client, preferably in writing. The Model Rule requires that the client give informed consent to the limitation.

Rule 1.2(d) is similar to Model Rule 1.2(d) but differs in two aspects. The Model Rule language “criminal” was changed to “illegal” in Rule 1.2(d), and Model Rule 1.2(d) was split into two sentences in Rule 1.2(d).

Rule 1.2(e) does not exist in the Model Rules.

Notes of Decisions (509)

**Rules of Prof. Cond., Rule 1.2, OH ST RPC Rule 1.2**  
Current with amendments received through August 15, 2015

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Baldwin's Ohio Revised Code Annotated  
Ohio Rules of Professional Conduct  
Client-Lawyer Relationship

Rules of Prof. Cond., Rule 1.4

Rule 1.4 Communication

Currentness

(a) A lawyer shall do all of the following:

- (1) promptly inform the client of any decision or circumstance with respect to which the client's *informed consent* is required by these rules;
- (2) *reasonably* consult with the client about the means by which the client's objectives are to be accomplished;
- (3) keep the client *reasonably* informed about the status of the matter;
- (4) comply as soon as practicable with *reasonable* requests for information from the client;
- (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer *knows* that the client expects assistance not permitted by the Ohio Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent *reasonably* necessary to permit the client to make informed decisions regarding the representation.

(c) A lawyer shall inform a client at the time of the client's engagement of the lawyer or at any time subsequent to the engagement if the lawyer does not maintain professional liability insurance in the amounts of at least one hundred thousand dollars per occurrence and three hundred thousand dollars in the aggregate or if the lawyer's professional liability insurance is terminated. The notice shall be provided to the client on a separate form set forth following this rule and shall be signed by the client.

(1) A lawyer shall maintain a copy of the notice signed by the client for five years after termination of representation of the client.

(2) A lawyer who is involved in the division of fees pursuant to Rule 1.5(e) shall inform the client as required by division (c) of this rule before the client is asked to agree to the division of fees.

(3) The notice required by division (c) of this rule shall not apply to either of the following:

(i) A lawyer who is employed by a governmental entity and renders services pursuant to that employment;

(ii) A lawyer who renders legal services to an entity that employs the lawyer as in-house counsel.

NOTICE TO CLIENT

Pursuant to Rule 1.4 of the Ohio Rules of Professional Conduct, I am required to notify you that I do not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

.....  
Attorney's Signature

CLIENT ACKNOWLEDGEMENT

I acknowledge receipt of the notice required by Rule 1.4 of the Ohio Rules of Professional Conduct that [insert attorney's name] does not maintain professional liability (malpractice) insurance of at least \$100,000 per occurrence and \$300,000 in the aggregate.

.....  
Client's Signature

.....  
Date

**CREDIT(S)**

(Adopted eff. 2-1-07; amended eff. 1-1-12)

**OFFICIAL COMMENT**

[1] Reasonable communication between the lawyer and the client is necessary for the client to participate effectively in the representation.

Communicating with Client

[2] If these rules require that a particular decision about the representation be made by the client, division (a)(1) requires that the lawyer promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take. For example, a lawyer who receives from opposing counsel an offer of settlement in a civil controversy or a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer. See Rule 1.2(a).

[3] Division (a)(2) requires the lawyer to reasonably consult with the client about the means to be used to accomplish the client's objectives. In some situations, depending on both the importance of the action under consideration and the feasibility of consulting with the client, this duty will require consultation prior to taking action. In other circumstances, such as during a trial when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation. In such cases the lawyer must nonetheless act reasonably to inform the client of actions the lawyer has taken on the client's behalf. Additionally, division (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation and the fees and costs incurred to date.

[4] A lawyer's regular communication with clients will minimize the occasions on which a client will need to request information concerning the representation. When a client makes a reasonable request for information, however, division (a)(4) requires prompt compliance with the request, or if a prompt response is not feasible, that the lawyer, or a member of the lawyer's staff, acknowledge receipt of the request and advise the client when a response may be expected. A lawyer should promptly respond to or acknowledge client communications.

#### Explaining Matters

[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others. On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interests, and the client's overall requirements as to the character of representation.

[6] Ordinarily, the information to be provided is that appropriate for a client who is a comprehending and responsible adult. However, fully informing the client according to this standard may be impracticable, for example, where the client is a child or suffers from diminished capacity. See Rule 1.14. When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13. Where many routine matters are involved, a system of limited or occasional reporting may be arranged with the client.

#### Withholding Information

[7] In some circumstances, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication. Thus, a lawyer might withhold a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client. A lawyer may not withhold information to serve the lawyer's own interest or convenience or the interests or convenience of another person. Rules or court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. Rule 3.4(c) directs compliance with such rules or orders.

#### Professional Liability Insurance

[8] Although it is in the best interest of the lawyer and the client that the lawyer maintain professional liability insurance or another form of adequate financial responsibility, it is not required in any circumstance other than when the lawyer practices as part of a legal professional association, corporation, legal clinic, limited liability company, or limited liability partnership.

[9] The client may not be aware that maintaining professional liability insurance is not mandatory and may well assume that the practice of law requires that some minimum financial responsibility be carried in the event of malpractice. Therefore, a lawyer who does not maintain certain minimum professional liability insurance shall promptly inform a prospective client or client.

#### Comparison to former Ohio Code of Professional Responsibility

Rule 1.4(a) states the minimum required communication between attorney and client. This is a change from the aspirational nature of EC 7-8. Rule 1.4(a)(1) corresponds to several sentences in EC 7-8 and EC 9-2. Rules 1.4(a)(2) and (3) correspond

## Rule 1.4 Communication, OH ST RPC Rule 1.4

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to several sentences in EC 7-8. Rule 1.4(a)(4) explicitly states what is implied in EC 7-8 and EC 9-2. Rule 1.4(a)(5) states a new requirement that does not correspond to any DR or EC.

Rule 1.4(b) corresponds to several sentences in EC 7-8 and EC 9-2.

Rule 1.4(c) adopts the existing language in DR 1-104.

### Comparison to ABA Model Rules of Professional Conduct

Rules 1.4(a)(1) through (a)(5) are the same as the Model Rule provisions except for division (a)(4), which is altered to require compliance with client requests “as soon as practicable” rather than “promptly.”

Rule 1.4(b) is the same as the Model Rule provision.

Rule 1.4(c) does not have a counterpart in the Model Rules. The provision mirrors DR 1-104, adopted effective July 1, 2001. DR 1-104 provides the public with additional information and protection from attorneys who do not carry malpractice insurance. Ohio is one of only a few states that have adopted a similar provision, and this requirement is retained in the rules.

Notes of Decisions (263)

Rules of Prof. Cond., Rule 1.4, OH ST RPC Rule 1.4  
Current with amendments received through August 15, 2015

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**OHIO BOARD OF TAX APPEALS**

NASCAR HOLDINGS, INC., (et. al.),

CASE NO(S). 2015-263

Appellant(s),

( COMMERCIAL ACTIVITY TAX )

vs.

DECISION AND ORDER

JOSEPH W. TESTA, TAX COMMISSIONER OF  
OHIO, (et. al.),

Appellee(s).

**APPEARANCES:**

For the Appellant(s)

- NASCAR HOLDINGS, INC.  
Represented by:  
MICHAEL J. BOWEN  
AKERMAN, LLP  
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JACKSONVILLE, FL 32202

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO  
Represented by:  
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ASSISTANT ATTORNEY GENERAL  
OFFICE OF OHIO ATTORNEY GENERAL  
30 EAST BROAD STREET, 25TH FLOOR  
COLUMBUS, OH 43215-3428

Entered Monday, June 15, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This matter is now considered upon the appellee Tax Commissioner's motion to dismiss. The commissioner argues that the notice of appeal in this matter was filed by an attorney who was not admitted to practice in Ohio and therefore committed the unauthorized practice of law, depriving this board of jurisdiction over the appeal. We proceed to consider the matter upon the notice of appeal, the motion, and the parties' respective responses.

On February 24, 2015, Michael J. Bowen filed a notice of appeal to this board on behalf of NASCAR Holdings, Inc., indicating his title as "POA," from a final determination of the Tax Commissioner. The commissioner argues in his motion that "Mr. Bowen is not personally a party to this action, nor is he an attorney at law authorized to practice law in the State of Ohio, nor has he sought permission to appear *pro hac vice* with the Supreme Court." Motion at 2. In NASCAR's response, it does not dispute that Mr. Bowen was neither admitted to practice in Ohio nor registered for *pro hac vice* with the Supreme Court. Instead, it argues that Mr. Bowen's action in filing the appeal does not deprive this board of jurisdiction, citing the court's decision in *Jemo Assoc., Inc. v. Lindley* (1980), 64 Ohio St.2d 365.

R.C. 4705.01 states that "[n]o person shall be permitted to practice as an attorney and counselor at law, or to commence, conduct, or defend any action or proceeding in which the person is not a party concerned,

either by using or subscribing the person's own name, or the name of another person, unless the person has been admitted to the bar by order of the supreme court in compliance with its prescribed and published rules." See, also, Ohio Adm. Code 5717-1-02. The commissioner points to two decisions of the Supreme Court in which it has found that the filing of a notice of appeal with this board constitutes the practice of law that may not be carried out by a non-Ohio attorney. In *Cleveland Bar Assn. v. Misch* (1998), 82 Ohio St.3d 256, the court held that a non-Ohio attorney (registered in Illinois) engaged in the unauthorized practice of law by, among other things, filing a notice of appeal with this board. More recently, in *Ohio State Bar Assn. v. Ryan, L.L.C.*, 138 Ohio St.3d 67, 2013-Ohio-5500, the court approved a consent decree which determined that Ryan, L.L.C.'s representation of a party before this board, i.e., preparing and filing a notice of appeal, constituted the unauthorized practice of law.

Upon the record before us, we can come to no other conclusion than that Mr. Bowen, a non-Ohio attorney, engaged in the unauthorized practice of law by preparing and filing a notice of appeal with this board. NASCAR argues, however, that even if this is the case, such violation is not fatal to its appeal, relying on *Jemo*, supra. In that case, which was decided by only a plurality of the justices, the court found that a notice of appeal filed with this board by a corporate accountant was jurisdictionally sufficient. This board has previously relied on the court's decision in *Jemo* in declining to dismiss appeals filed by a corporate taxpayer's officer or other non-attorney agent. See, e.g., *Zalben v. Tracy* (May 11, 2001), BTA No. 1998-T-1303, unreported (notice of appeal filed by CPA); *Ricci v. Geauga Cty. Bd. of Revision* (Interim Order, Aug. 20, 2009), BTA No. 2008-A-546, unreported (notice of appeal filed by owner's brother); *West Chester Village Mall v. Butler Cty. Bd. of Revision* (Interim Order, Mar. 26, 1999), BTA No. 1998-S-1102, unreported (notice of appeal filed by property manager); *Tranor Co., Ltd. v. Cuyahoga Cty. Bd. of Revision* (Interim Order, Mar. 20, 1998), BTA No. 1997-N-712, unreported (notice of appeal filed by member of owner LLC); *Metric Institutional Apt. Fund II LP v. Cuyahoga Cty. Bd. of Revision* (May 5, 1995), BTA No. 1994-T-1253, unreported. See, also, *Richman Props., L.L.C. v. Medina Cty. Bd. of Revision*, 139 Ohio St.3d 549, 2014-Ohio-2439, ¶24. But, see, *Metric Institutional Apt. Fund II LP v. Cuyahoga Cty. Bd. of Revision* (Interim Order, May 5, 1995), BTA No. 1994-T-1253, unreported.

Here, we are faced not with a corporate officer or accountant, but an attorney licensed to practice in another state who failed to abide by the Supreme Court Rules for the Government of the Bar of Ohio by seeking admission to practice in Ohio prior to filing the instant appeal. As the commissioner notes in his motion, other appellate courts facing this factual scenario have found such a notice of appeal to be void ab initio. See *State ex rel. Hadley v. Pike*, Columbiana App. No. 14 CO 14, 2014-Ohio-3310, ¶17 ("Clearly, Attorney Lucas was not admitted to practice in Ohio when he filed the complaint [in common pleas court]. Therefore, the complaint \*\*\* was void ab initio."); *State ex rel. Safety Natl. Cas. Corp. v. Cook*, Lucas App. No. L-05-1363, 2005-Ohio-7005; *Williams v. Global Constr. Co., Ltd.*, 26 Ohio App.3d 119, 121 (10th Dist. 1985) ("Where it appears that one not licensed to practice law has instituted legal proceedings on behalf of another in a court of record, such suit should be dismissed \*\*\*." citing *Leanord v. Walsh* (Ill. App. 1966), 220 N.E.2d 57). We find appellant's arguments distinguishing proceedings before this board from proceedings in a court unpersuasive. Compare *Columbus City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 134 Ohio St.3d 529, 2012-Ohio-5680; *Richman*, supra; *Dayton Supply & Tool Co., Inc. v. Montgomery Cty. Bd. of Revision.*, 111 Ohio St.3d 367, 2006-Ohio-5852.

Based upon the foregoing, the commissioner's motion is well taken and we find that this board lacks jurisdiction over the appeal. Accordingly, this matter must be, and hereby is, dismissed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
Mr. Harbarger		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Kathleen M. Crowley, Board Secretary

2010 WL 571981

CHECK OHIO SUPREME COURT RULES FOR  
REPORTING OF OPINIONS AND WEIGHT OF LEGAL  
AUTHORITY.

Court of Appeals of Ohio,  
First District, Hamilton County.

BANK OF NEW YORK, as Trustee for the  
Certificate Holders Cwalt, Inc., Alternative Loan  
Trust 2006-40T1, Mortgage Pass-Through  
Certificates, Series 2006-40T1, Plaintiff-Appellee,

v.

Jamie L. GINDELE

and

Gary Gindele, Defendants-Appellants.

No. C-090251. | Feb. 19, 2010.

**Synopsis**

**Background:** Mortgagee brought foreclosure action against mortgagors. The Court of Common Pleas, Hamilton County, entered summary judgment in favor of mortgagee. Mortgagors appealed.

**Holdings:** The Court of Appeals, William L. Mallory, J., held that:

[1] mortgagee lacked standing to bring foreclosure action against mortgagors, and

[2] joinder by mortgagors of real party in interest when suit was filed by mortgagee did not cure mortgagee's lack of standing.

Reversed and remanded.

West Headnotes (3)

[1] **Mortgages**  
↪ Plaintiffs

Mortgagee lacked standing to bring foreclosure action against mortgagors, where mortgagee acquired its sole interest as mortgagee in an

assignment which occurred after the suit was filed.

Cases that cite this headnote

[2] **Mortgages**  
↪ Presentation and reservation in lower court of grounds of review

Court of Appeals would not consider on appeal mortgagee's argument, that it had acted as an agent, and that its predecessor in interest had later ratified its foreclosure complaint, so that mortgagee would have standing to bring foreclosure action; at the time suit was filed, neither agency nor ratification had been alleged or documented.

1 Cases that cite this headnote

[3] **Mortgages**  
↪ Joinder

Joinder by mortgagors of real party in interest when suit was filed by mortgagee did not cure mortgagee's lack of standing to bring foreclosure action; record did not reflect any understandable mistake by mortgagee as to selection of parties in whose name action should be brought, there was no indication that the identity of the proper party was difficult to ascertain; and there was no documentary proof that mortgagee owned an enforceable interest when it filed its foreclosure complaint. Rules Civ.Proc., Rule 17.

1 Cases that cite this headnote

Civil Appeal from Hamilton County Common Pleas Court.

**Attorneys and Law Firms**

James S. Wertheim, Rose Marie L. Fiore, and McGlinchey Stafford, PLLC, for plaintiff-appellee.

James J. Slattery, Jr., for defendants-appellants.

**Opinion**

WILLIAM L. MALLORY, Judge.

\*1 [1] ¶ 1} Defendants-appellants Jamie and Gary Gindele appeal the summary judgment entered for plaintiff-appellee Bank of New York on its foreclosure complaint. On appeal, the Gindeles argue that Bank of New York did not acquire its interest until after the foreclosure complaint had been filed, and that under our holding in *Wells Fargo Bank, N.A. v. Byrd*,<sup>1</sup> Bank of New York's complaint should have been dismissed without prejudice. We agree.

¶ 2} In *Byrd*, we held that “in a foreclosure action, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage.”<sup>2</sup> At oral argument in this case, Bank of New York has repeated its assertion that it had an existing interest in the property at issue when it filed suit, but the record does not support this assertion.

[2] ¶ 3} A thorough review of the record reveals that the sole indication of its interest as mortgagee is an after-acquired assignment; and the bank failed to produce any evidence in the trial court affirmatively establishing a preexisting interest. Bank of New York has also asserted both that it had acted as an agent, and that its predecessor in interest had later ratified its foreclosure complaint. But because at the time of filing neither agency nor ratification had been alleged or documented, we will not entertain this argument on appeal.

[3] ¶ 4} We likewise reject Bank of New York's argument that the real party in interest when the lawsuit was filed was later joined by the Gindeles. We are convinced that the later joinder of the real party in interest could not have cured the Bank of New York's lack of standing when it filed its foreclosure complaint. This narrow reading of Civ.R. 17 comports with the intent of the rule. As other state and federal courts have noted, Civ.R. 17 generally allows ratification, joinder, and substitution of parties “to avoid forfeiture and injustice when an understandable mistake has been made in selecting the parties in whose name the action should be brought.”<sup>3</sup> “While a literal interpretation of \* \* \* Rule 17(a) would make it applicable to every case in which an inappropriate plaintiff was named, the Advisory Committee's Notes make it clear that this provision is intended to prevent forfeiture when determination of the proper party to sue is

difficult or when an understandable mistake has been made. When determination of the correct party to bring the action was not difficult and when no excusable mistake was made, the last sentence of Rule 17(a) is inapplicable and the action should be dismissed.”<sup>4</sup>

¶ 5} In this case, the record does not reflect any understandable mistake by Bank of New York; there is no indication that the identity of the proper party was difficult to ascertain; and there is no documentary proof that Bank of New York owned an enforceable interest when it filed its foreclosure complaint.

\*2 ¶ 6} In a foreclosure action, absent understandable mistake or circumstances where the identity of a party is difficult or impossible to ascertain, a bank that was not the mortgagee when suit was filed cannot cure its lack of standing by subsequently obtaining an interest in the mortgage. Bank of New York failed to establish an enforceable interest that existed at the time it filed suit, and it has not alleged or proved understandable mistake or that the identity of the proper party was not readily ascertainable. Bank of New York's complaint in foreclosure should have been dismissed without prejudice under *Byrd*.

¶ 7} The Gindeles' assignment of error is sustained, the judgment favoring Bank of New York is reversed, and this cause is remanded for further proceedings in accordance with this decision.

Judgment reversed and cause remanded.

CUNNINGHAM, P.J., and DINKELACKER J., concur.

*Please Note:*

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

#### All Citations

Not Reported in N.E.2d, 2010 WL 571981, 2010 -Ohio- 542

#### Footnotes

1 178 Ohio App.3d 285, 2008–Ohio–4603, 897 N.E.2d 722.

2 *Id.* at ¶ 16, 897 N.E.2d 722.

**Bank of New York v. Gindele, Not Reported in N.E.2d (2010)**

**2010 -Ohio- 542**

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- 3     *Ohio Central RR. Sys. v. Mason Law Firm Co., LPA*, 182 Ohio App.3d 814, 2009–Ohio–3238, 915 N.E.2d 397, quoting  
   *Agri-Mark, Inc. v. Niro, Inc.* (D.Mass.2000), 190 F.R.D. 293; **see, also**, Fed.R.Civ.P. 17 **Advisory Committee Note**.
- 4     *Id.*

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2000 WL 977440 (Ohio Bd.Tax.App.)

Board of Tax Appeals

State of Ohio

DONAUSCHWABEN'S GERMAN-AMERICAN CULTURAL CENTER, INC., APPELLANT

v.

CUYAHOGA COUNTY BOARD OF REVISION, THE CUYAHOGA COUNTY  
AUDITOR AND THE OLMSTED FALLS BOARD OF EDUCATION, APPELLEES

CASE NOS. 97-M-1309, 97-M-1340

July 14, 2000

**\*1 (Real Property Tax)**

ORDER

(Denying Motion to Dismiss and Ordering Remand)

APPEARANCES:

For the Appellant

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By: Marilyn Cassidy  
Assistant Prosecuting Attorney  
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For the Olmsted Falls Board of Education

Thomas A. Kondzer  
Kimberly A. Aldrich  
Kolick & Kondzer  
24500 Center Ridge Road  
Suite 175

Westlake, Ohio 44145-5697

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is before us upon consideration of a motion filed by appellees the Olmsted Falls Board of Education ("BOE") on October 1, 1999. The body of the motion reads as follows:

"Now comes the Appellee, the Olmsted Falls Board of Education, by and through counsel, and moves this Board to dismiss the appeal filed by Donauschwabens's German-American Cultural Center, Inc., or, in the alternative, affirm the decision of the Cuyahoga County Board of Revision dismissing the complaint for lack of jurisdiction."

The matter was submitted to the Board of Tax Appeals upon the motion to dismiss and the response to said motion filed by the Appellant. Also included in the record are the affidavit of Josef Holzer, submitted by counsel for the Appellant and the depositions of George Keipert and Carl A. Murway, submitted by the BOE. Based upon the record before us, we find that the operative facts of the matter are not in dispute and no opportunity to provide additional factual evidence is necessary for the ultimate determination herein. Therefore, the Board does not find need for further evidentiary hearing.

The appeal which is the basis for this motion was filed by Donauschwabens's German-American Cultural Center, Inc. ("Donauschwabens's") from a determination of the Cuyahoga County Board of Revision ("BOR"), wherein that body dismissed a complaint filed before it. The complaint addressed the valuation of certain property owned by Donauschwabens's and located in the Olmsted Township taxing district. The tax year in issue is 1992, although Donauschwabens's also has pending before this Board an appeal from a complaint contesting value for the same real property for the following triennial period beginning with tax year 1995.

Donauschwabens's, a not-for-profit corporation, owns a 16.54-acre plat of land improved by a 48,946 square foot building used as a cultural center. The building houses a small bar, a larger dining area, kitchen, library and meeting rooms. An indoor soccer facility and a two-lane bowling alley are also present. Other property improvements include a parking area, pond, picnic pavilion and gazebo, soccer fields and two tennis courts. The improvements were constructed with volunteer labor over the course of a number of years.

\*2 Donauschwabens's applied for exemption from real property taxation for tax year 1988. Exemption was granted on May 8, 1992. Thereafter, the BOE challenged the exemption previously granted. The Supreme Court agreed with the BOE and held that Donauschwabens's was not entitled to exemption for tax years 1992 and thereafter. *Olmsted Falls Bd. of Edn. v. Tracy* (1997), 77 Ohio St.3d 393.

While the exemption appeal was pending, Donauschwabens's filed the complaint which is the subject of this Order. The BOR originally dismissed on the grounds that the complaint was not executed and filed by a "person" authorized to make such a complaint. (S.T., Exh. "H") The BOR's determination relied upon *Sharon Village Ltd. v. Licking Cty. Bd. of Revision* (1997), 78 Ohio St.3d 479. The original complaint was signed by a George Keipert, who identified himself as the "Vice President" of Donauschwabens's. However, the face of the complaint also indicated that Carl A. Murway, an attorney with the law firm of Kelley, McCann & Livingstone, served as the corporation's "agent" for purposes of the valuation complaint. Mr. Murway has represented by way of deposition that he was responsible for both the preparation and the filing of the complaint with the BOR.

In *Worthington City School Dist. Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1999), 85 Ohio St.3d 156, the Supreme Court held that the filing of a complaint executed by a corporate officer but prepared and filed by an attorney vested jurisdiction with a board of revision. As the facts of this matter were substantially similar to the facts of *Worthington City School Dist. Bd. of Edn.*, the attorney-examiner responsible for the instant appeal sought response from the parties as to why the subject appeal should not be considered jurisdictionally sufficient. As the underlying complaint was dismissed, a finding by this Board that

the complaint met jurisdictional requirements would necessitate a remand to the BOR so that a determination of value could be made by that body.

Appellee Olmsted Falls Board of Education ("BOE") requested additional time in which to review the matter. Now the BOE seeks dismissal of this appeal, claiming that its additional research indicates that the attorney and the officers who participated in the preparation, execution and filing of the valuation complaint lacked the requisite authority to make such a filing. The BOE has submitted certain depositions which it asserts supports such claim and seeks an evidentiary hearing before this Board. The BOE asserts that the testimony produced through hearing will support a finding that the complaint filed by Donauschwaben's was not jurisdictionally sufficient because the persons executing and filing said complaint were not authorized by Donauschwaben's board of trustees or its executive committee to make such a filing.

At the time the 1992 complaint was filed, R.C. 5715.13 provided:

"The county board of revision shall not decrease any valuation complained of unless the party affected thereby or his agent makes and files with the board a written application therefor, verified by oath, showing the facts upon which it is claimed such decrease should be made."

\*3 In *Sharon Village, supra*, the Supreme Court addressed the issue of who may act on behalf of a corporation owning real property. Therein, the Court held:

We interpret the term "agent" as used in R.C. 5715.13 to include the affected party's attorney and, in the case of a corporation, a regularly connected agent who is an attorney authorized by the corporation and possessing sufficient knowledge to verify the facts averred in the complaint."

In *Worthington City School Dist., supra*, the Court focused more specifically on the present situation. Therein the Court held as a general proposition that an attorney or an individual who owns property must file valuation complaints. Because a corporation is an artificial person, the Court concluded that it may only maintain litigation through legal counsel.

Keeping to the forefront that the true vice considered in *Sharon Village* was the unauthorized practice of law, however, the Court concluded that the execution of a valuation complaint under the direction of legal counsel was not tantamount to the practice of law. As such act was not the practice of law, the Court concluded that a complaint verified by an officer of a corporation, but prepared and filed by an attorney was sufficient to vest jurisdiction in a board of revision.

In the present matter, there is no challenge to the fact that Mr. Murway is an attorney, and that he prepared and filed the complaint that was executed by an officer of Donauschwaben's. Therefore, the Board finds that the complaint satisfies the requirements of both *Sharon Village* and *Worthington Bd. of Edn.* The BOE now asks this Board to delve more deeply into the authority of the attorney preparing and filing a real property valuation complaint. The BOE claims that "pursuant to *Sharon Village* as well as basic corporate law, the attorney filing the complaint on behalf of the corporation must be duly authorized by the corporation to file the complaint." (Appellee's Motion to Dismiss, p. 11)

This Board does not find it necessary to inquire into the authority of counsel representing authority to act on behalf of a client. We agree with Donauschwaben's that the BOE has no standing to press the challenge it attempts to make. A complaint before a board of revision commences a quasi-judicial proceeding. *Sharon Village, supra*; *Swetland v. Evatt* (1941), 139 Ohio St. 6. An opposing party has no standing to question the authority of an attorney to initiate legal action on behalf of his or her client. *Bd. of Edn. v. Ohio Edn. Assoc.* (1967) 13 Ohio Misc. 308.

The BOE also challenges the authority of the corporate officers, claiming that neither the president, Joe Holzer, nor the vice-president, George Keipert,<sup>1</sup> were authorized by Donauschwaben's board of directors to file valuation complaints. However, this Board does not find that such an inquiry is necessary in order to satisfy the requirements of R.C. 5715.13.

Under R.C. 5715.13, the necessary inquiry is into who is the "owner" of the property under challenge. *Soc. Natl. Bank v. Wood Cty. Bd. of Revision* (1998), 81 Ohio St.3d 401. BOE does not assert that Donauschwaben's was not the owner of the property as of tax lien date. Instead, the BOE asserts that the corporation's board of directors did not authorize the person who executed the complaint on behalf of Donauschwaben's.

\*4 While the BOE couches its claim as a challenge against the officers of a corporation to act on behalf of the corporation, in essence, the real challenge is to the authority of a corporation to take a specific actions (*i.e.*, file a valuation complaint). However, the BOE has no standing to make such a challenge. Pursuant to R.C. 1701.12(1)(1), a claim of lack of, or limitation upon, the authority of a corporation can be asserted only by the following:

"(a) By the state in an action by it against the corporation;

"(b) By or on behalf of the corporation against a trustee, an officer, or a member as such;

"(c) By a member as such or by or on behalf of the members against the corporation, a trustee, an officer or a member as such."

The BOE is not included in the classes of persons who may challenge the authority of Donauschwaben's officers to act on behalf of the corporation. See *Columbia Real Estate Title Ins. v. Columbia Title Agency, Inc.* (1983), 11 Ohio App.3d 284; *Thom's Inc. v. Rezzano* (Nov. 10, 1988), Cuyahoga County App. Nos. 54541, 54671, 54691, unreported. Therefore, the BOE is without authority to challenge to the filing of a complaint with the BOR.

Even if we were to consider the BOE's claim that the president and vice-president of Donauschwaben's had no actual or apparent authority to file the valuation complaint, we would note that a valuation complaint was filed for the following triennial period. Such a filing is presumed to be made with necessary corporate authority. The filing of continuous valuation complaints would serve as a ratification of the actions taken in filing the earlier complaint. See *Campbell v. Hospitality Motor Inns, Inc.* (1986), 24 Ohio St.3d 54.

The BOE also challenges the valuation complaint based on form, arguing that the notary was not present when Mr. Keipert signed the complaint. However, the requirement that a complaint be verified by oath is procedural, not jurisdictional. *Trebmal Constr., Inc. v. Cuyahoga Cty. Bd. of Revision* (1986), 29 Ohio App.3d 312. Only jurisdictional requirements are necessary to vest jurisdiction with a board of revision. *Cleveland Elec. Illum. Co. v. Lake Cty. Bd. of Revision* (1998), 80 Ohio St.3d 591; *Stanjim Co. v. Bd. of Revision* (1974), 38 Ohio St.2d 233.

Considering the foregoing, the Board of Tax Appeals finds that the BOE has no standing to challenge the actions of legal counsel representing Donauschwaben's, nor does it have standing to challenge the actions of the officers authorizing the filing of a real property valuation complaint. Finally, we find that the verification requirement is not critical to the vesting of jurisdiction. Therefore, the Board does not find the BOE's motion to dismiss well taken.

As the BOR has not been accorded an opportunity to consider the value of the subject property, the Board concludes that the appropriate avenue is a remand. Therefore, these matters shall be remanded to the Cuyahoga County BOR for a determination of value.

#### Footnotes

The depositions of both Mr. Keipert and Mr. Holzer reveal that Mr. Holzer was absent from the state at the time the complaints were presented for signature. Mr. Keipert, as Donauschwaben's vice president, was asked to execute the complaint in the president's absence.

2000 WL 977440 (Ohio Bd.Tax.App.)

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2000 WL 1207742 (Ohio Bd.Tax.App.)

Board of Tax Appeals

State of Ohio

DONAUSCHWABEN'S GERMAN-AMERICAN CULTURAL CENTER, INC., APPELLANT

v.

CUYAHOGA COUNTY BOARD OF REVISION, THE CUYAHOGA COUNTY  
AUDITOR AND THE OLMSTED FALLS BOARD OF EDUCATION, APPELLEES

Case Nos. 97-M-1309, 97-M-1340

August 11, 2000

**\*1 (Real Property Tax)**

ORDER

(Vacating July 14, 2000 Decision)

APPEARANCES:

For the Appellant

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Cuyahoga County Prosecuting Attorney  
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For the Olmsted Falls Board of Education

Thomas A. Kondzer  
Kimberly A. Aldrich  
Kolick & Kondzer  
24500 Center Ridge Road, Suite 175  
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Ms. Jackson and Mr. Manoranjan concur, Mr. Johnson not participating.

On July 14, 2000, this Board issued an Order, wherein we found that the Cuyahoga County Board of Revision erred in refusing to hear certain complaints filed before it. On August 9, 2000, the parties to the appeal, by and through their counsel, requested that this Board reconsider our previous decision, not on any substantive ground, but to facilitate settlement of the above captioned appeals as well as companion appeals spanning a nine year period.

While the parties have not raised any issue which would cause us to question our earlier determination, we hereby vacate our earlier decision in order to adequately consider the request made by the parties.

2000 WL 1207742 (Ohio Bd.Tax.App.)

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13 Ohio Misc. 308  
Court of Common Pleas of Ohio, Belmont County.

BD. OF EDUCATION OF the MARTINS  
FERRY CITY SCHOOL DISTRICT  
v.  
OHIO EDUCATION ASSOCIATION et al.

No. 23841. | Nov. 30, 1967.

Suit by school board against teachers and teachers' organizations. The Court of Common Pleas, Matz, J., held that the teachers had no right to strike, but that one paragraph of the restraining order was probably too broad.

Motion to dismiss order overruled; order modified and, as modified, continued.

West Headnotes (6)

[1] **Pretrial Procedure**

☞ Capacity

Opposite party could not question authority of attorney to bring suit on behalf of his client, and alleged want of such authority was not proper ground for dismissal.

1 Cases that cite this headnote

[2] **Education**

☞ Powers and functions in general

**Education**

☞ Duties and liabilities in general

School board is public body and arm of state, and can neither contract away its duties nor delegate them to other people.

2 Cases that cite this headnote

[3] **Labor and Employment**

☞ Wages, hours, and working conditions

**Labor and Employment**

☞ Restraining orders in general

School board's petition for injunction, alleging in effect, inter alia, that teachers absented

themselves from their positions to induce or coerce change in conditions of employment, in violation of specified statutes, and that officer and certain members of defendant teachers' organization interfered with operation of school district by urging students not to attend school and urging parents not to permit students to attend school on threat they might be injured authorized temporary restraining order against teachers and certain teachers' organizations. R.C. §§ 4117.01–4117.05, 4117.02, 4117.04.

Cases that cite this headnote

[4] **Labor and Employment**

☞ Particular employees

Teachers of Martins Ferry City School District did not have right to strike. R.C. §§ 4117.01–4117.05, 4117.02, 4117.04.

1 Cases that cite this headnote

[5] **Constitutional Law**

☞ Right of Assembly

**Constitutional Law**

☞ Employee associations; collective bargaining activities

Order temporarily restraining teachers from unlawfully interfering with school board or its agents in discharge of duties, failing to perform terms and provisions of teaching contracts, inducing cessation of employment or of performance of contracts, boycotting and picketing school district and its board, aiding or abetting, and for making any statements oral or written or taking part in or inciting demonstrations or other action calculated to induce or persuade, coerce or intimidate board and agents from discharge of duties was not violative of rights of free speech and assembly as guaranteed by state and federal constitutions. R.C. §§ 4117.01–4117.05, 4117.02, 4117.04; U.S.C.A.Const. Amend. 1; Const. art. I, §§ 3, 11.

2 Cases that cite this headnote

[6] **Labor and Employment**

☞ Grounds

In school board's action against striking teachers and teachers' organizations, provision of order restraining individual defendants from unlawfully failing to perform contracts was too broad and was modified to restrain them from acting in concert. R.C. §§ 4117.01-4117.05, 4117.02, 4117.04.

Cases that cite this headnote

#### Attorneys and Law Firms

**\*308 \*\*539** Thomas J. Jones, Bridgeport, for plaintiff.

Robert L. Drury, Columbus, and Hyman Stern, Steubenville, for defendant.

#### Opinion

**\*309** MATZ, Judge.

On November 2, 1967, the Board of Education of the Martins Ferry City School District filed an action against the Ohio Education Association, the Martins Ferry Classroom Teachers Association and several teachers, some of whom were sued individually and as officers of the Martins Ferry Classroom Teachers Association.

The petition alleges that the individual defendants have continuing teaching contracts with the plaintiff and have been engaged in the teaching of students in the Martins Ferry City School District. It is further alleged:

'that on or about the first day of May, 1967, and at various dates subsequent thereto, the remaining individual defendants have executed teaching contracts with the plaintiff and have been engaged in the teaching of the students of said school district during the 1967-68 school sessions; that on the 25th day of October, 1967, and continuing to the present time, all of the individual defendants, without the approval of the plaintiff, unlawfully failed to report for duty, absented themselves from their positions, and abstained from full, faithful, and proper performance of their positions for the purpose of inducing, influencing or coercing a change in the conditions, as compensation, rights, privileges, or obligations of employment; that said conduct is in violation of Sections 4117.01 to 4117.05, Revised Code;'

It is further alleged:

'That beginning on the 25th day of October, 1967, and continuing to the present date, said individual defendants have failed, refused and neglected to perform the terms and conditions of their contracts with the plaintiff; that they have failed, during said period, to teach in the public schools of the Martins Ferry City School District and have failed to abide by the rules and regulations adopted by the plaintiff for the government of the schools of said district;'

It is then further alleged:

'that the president and certain members of the defendant MFCTA, by radio, television, **\*\*540** newspapers and personal telephone calls, have further interfered with the **\*310** operation of said school district by the plaintiff in that they have urged the students not to attend school and have urged the parents of said students not to permit the students to attend school on the threat that they might be injured;

'That by their unauthorized work stoppage, the defendants have attempted to force, coerce and control the adoption of a salary schedule contrary to the salary schedule adopted by plaintiff; that they have attempted to coerce the re-employment of Boyd Engle and Jack Boston as principals of two of the elementary schools in said school district; that they have attempted to coerce the board into recognizing the MFCTA as the collective bargaining agency for the teachers of the Martins Ferry City School District; that said individual defendants were prompted, induced, aided and abetted in these efforts by the defendant OEA and the defendant MFCTA;'

On this petition, which is properly verified, the court granted a temporary restraining order as follows:

'1. From unlawfully interfering with and obstructing the plaintiff or any and all of its agents, employees and representatives in the discharge of their duties in the operation of the Martins Ferry City School District.

'2. From unlawfully failing, refusing and neglecting by the individual defendants to perform the terms and provisions of their respective contracts with the plaintiff, and from violating Sections 4117.01 to 4117.05, Revised Code.

'3. From unlawfully interfering with and obstructing the plaintiff in the discharge of its governmental function of operating the public school system of the Martins Ferry City School District in any manner whatsoever, and from

attempting to boycott and picket the said Martins Ferry City School District and its Board of Education.

'4. From doing any act calculated to cause any employee of plaintiff to cease his or her employment, or to fail to perform the terms and conditions of his or her contract.

'5. From making any statements either orally or written, or by taking part in or inciting demonstrations or taking any other action calculated to induce or persuade, \*311 coerce or intimidate the plaintiff and its employes, and others, from performing their duties or carrying on their business with or for the plaintiff in the usual and customary manner.

'6. From suggesting, directing, inciting, abetting or aiding any person or persons in committing or causing any person or persons to commit any of the acts aforesaid.'

Hearing for preliminary injunction was set for November 13, 1967, and was continued to November 16, 1967. In the meantime, the defendants filed a motion to dismiss the temporary restraining order, and both matters were heard on November 16, 1967.

[1] Several grounds are set forth in the motion to dismiss. The first ground is that the plaintiff, 'the Board of Education of the Martins Ferry School District, filed its action \* \* \* without a legal meeting of the Board of Education \* \* \* authorizing suit to be filed.' The only authority that could have raised this question would be the Board of Education or possibly some taxpayer. The court knows of no rule of law or any cases which hold that the opposite party could question the authority of an attorney to bring suit on behalf of his client; and in the opinion of the court, that branch of the motion is without merit.

The court construes the second and third branches of the motion as being an allegation that the facts stated in the petition are not sufficient to authorize the granting of a temporary restraining order, and these allegations form the real issue in this case.

**\*\*541** The fourth, fifth and sixth branches raise a constitutional question that the restraining order violates the free speech Amendments to the United States Constitution and the Constitution of the state of Ohio.

It appears from the evidence that, by resolution duly adopted, the school board withheld payment of an increase in salary which had been recently granted and placed it in escrow pending a decision from the Attorney General of Ohio as

to whether the board could legally pay this increased salary without incurring personal liability.

The teachers had gone out on strike during the Spring \*312 of last year which brought into play the provisions of the so-called Ferguson Act, Sections 4117.01 to 4117.05, inclusive, Revised Code.

Section 4117.02, Revised Code, provides as follows:

'No public employee shall strike.

'No person exercising any authority, supervision, or direction over any public employee shall have the power to authorize, approve, or consent to a strike by one or more public employees, and such person shall not authorize, approve, or consent to such strike.'

Section 4117.04, Revised Code, defines a 'strike' within the meaning of the act as follows:

'Any public employee who, without the approval of his superior, unlawfully fails to report for duty, absents himself from his position, or abstains in whole or in part from full, faithful, and proper performance of his position for the purpose of inducing, influencing, or coercing a change in the conditions, as compensation, rights, privileges, or obligations of employment or of intimidating, coercing, or unlawfully influencing others from remaining in or from assuming such public employment is on strike, provided that notice that he is on strike shall be sent to such employee by his superior by mail addressed to his residence as set forth in his employment record. Such employee, upon request, shall be entitled to establish that he did not violate Sections 4117.01 to 4117.05, inclusive, Revised Code. Such request must be filed in writing, with the officer or body having power to remove such employee within ten days after regular compensation of such employee has ceased. In the event of such request such officer or body shall within ten days commence a proceeding for the determination of whether such sections have been violated by such public employee, in accordance with the law and regulations appropriate to a proceeding to remove such public employee. Such proceedings shall be undertaken without unnecessary delay.'

The first strike was settled on May 4, 1967, and an agreement was entered into between the Board of Education and the Classroom Teachers Association which attempted \*313 to prevent the imposition of the penalty provided for in the above-quoted section. However, in the opinion of the court, counsel for the Board of Education was justified, before

advising the school board to pay the increased salary, to obtain an opinion from the Attorney General with respect thereto in order to protect the members of the board from personal liability if it should later be determined that, under the above act, payment of the increase in salary would be illegal.

[2] It goes without saying that a school board is a public body and an arm of the state. It can neither contract away its duties nor delegate them to other people.

[3] [4] The following cases hold that a public body could not legally enter into collective bargaining agreements with public employees: *City of Cleveland v. Division 268*, 84 Ohio App. 43, 81 N.E.2d 310; *Hagerman v. City of Dayton*, 147 Ohio St. 313, 71 N.E.2d 246, 170 A.L.R. 199; *Mugford v. Mayor and City Council*, 185 Md. 266, 44 A.2d 745, 162 A.L.R. 1101; **\*\*542** *City of Springfield v. Clouse*, 356 Mo. 1239, 206 S.W.2d 539.

On the other hand, the following cases take the opposite view: *Norwalk Teachers Assn. v. Bd. of Education*, 138 Conn. 269, 83 A.2d 482, 31 A.L.R.2d 1133; *Christie v. Port of Olympia*, 27 Wash.2d 534, 179 P.2d 294.

However, in the *Norwalk Teachers Association* case, *supra*, it is held as stated in the 5th headnote as follows:

'Teachers' association, a voluntary association of public school teachers and an independent labor union could not engage in concerted action such as a strike, work stoppage, or collective refusal to enter upon teaching duties.'

The specific issue in this case, however, is the right of the teachers of the Martins Ferry City School District to strike. Before the adoption of the so-called Ferguson Act, it had been universally held by the Ohio courts that public employees do not have the right to strike.

The very well reasoned opinion of Judge Artl. in the *City of Cleveland v. Division 268*, Common Pleas Court of Cuyahoga County, 90 N.E.2d 711, 57 Ohio Law Abst. 173, expresses:

'This section of the General Code that I just read is merely expressive of the common law. The Legislature of **\*314** Ohio, like the United States Congress and legislatures of many other states \* \* \* has enacted legislation spelling out the common law as it is and has been known. And why? I think it is clear that in our system of government, the government is a servant of all of the people. And a strike against the

public, a strike of public employees, has been denominated in the decisions cited above, as a rebellion against government. The right to strike, if accorded to public employees, I say, is one means of destroying government. And if they destroy government, we have anarchy, we have chaos.'

'I must point out also, the power of the court to enjoin an unlawful act does not stem alone from the so-called Ferguson Act. There is an inherent right in the Court of Equity at all times to enjoin any wrong-doing where there is no adequate remedy at law.'

There is a long annotation on the various phases of the subject in 31 A.L.R.2d, commencing on page 1145 and the following quotation is taken from page 1159:

'Although there have been many strikes by public employees, very few of them have reached the courts, or at least, very few have been reported. Usually, temporary restraining orders are granted by the courts, the strikers' demands are met and the strike settled. However, in every case that has been reported, the right of public employees to strike is emphatically denied. In this connection, attention is called to the statutes forbidding strikes by public employees, \* \* \*'

Public executive officials have long taken positions that there is no right of public employees to strike. In 1919, Calvin Coolidge, then Governor of the State of Massachusetts, at the time of the celebrated strike of policemen in Boston, issued a statement that 'there is no right to strike against the public safety of anybody, anywhere, at any time.' President Wilson characterized that strike as 'an intolerable crime against civilization.' In 1937, President Franklin D. Roosevelt, who was a great champion of organized labor, stated in a letter to the National Federation of Federal Employees:

**\*315** 'All government employees should realize that the process of collective bargaining, as usually understood, cannot be transplanted into public service \* \* \* Administrative officials and employees are governed and guided, and in many instances restricted, by laws which establish policies, procedures, or rules in personal matters.

**\*\*543** 'Particularly, I want to emphasize my conviction that militant tactics have no place in the functions of any organization of government employees. Upon employees in the Federal service rests the obligation to serve the whole people, whose interests and welfare require orderliness and continuity in the conduct of government activities. This obligation is paramount. Since their own services have to do with the functioning of the government, a strike of public

employees manifests nothing less than an intent on their part to prevent or obstruct the operations of government until their demands are satisfied. Such action, looking toward the paralysis of government by those who have sworn to support it is unthinkable and intolerable.'

[5] The defendants also claim that the injunction violates the right of Free Speech and Assemblage guaranteed by the amendments to the Federal Constitution and the Constitution of the state of Ohio.

'The right of freedom of speech and of the press is not an absolute or unqualified right. It is not license to speak, publish, or distribute where, when, and how one chooses. First of all, the right does not carry immunity for its abuse. It is subject to reasonable restriction in the exercise of the police power and is limited by the equal rights of others.

'The right of free speech is predicated on the lawful exercise of such right. Truth, good motives, and publication for justifiable ends are bound up with the definition of freedom of the press, and liberty of press does not extend to the privilege of publishing and disseminating baneful and harmful matter, or of inciting the people to violate laws.' (10 Ohio Jurisprudence 2d 541, Section 468.)

'Like other aspects of free speech the right to picket is not unlimited. If peaceful picketing lacks some rational connection with the dispute, or if the object or manner of picketing is unlawful, its prohibition or restraint, depending upon the necessities of the situation, does not constitute an unconstitutional infringement of the freedom of speech or of the press. Thus, there is no violation of constitutional rights in the restraint of picketing employed solely to induce a breach of contract or to aid or bring about a secondary boycott. Picketing accompanied by false statements or misrepresentation is not protected by the constitutional guaranty of freedom of speech. Picketing carried on with force, violence, and intimidation may be enjoined notwithstanding the freedom of speech guaranty. Moreover, the constitutional right to peacefully picket may be forfeited, and all picketing restrained, by resort to such

violence as would excite fear that violence would be resumed and thereby give to picketing a coercive quality beyond its legitimate persuasive force.' (10 Ohio Jurisprudence 2d 546, Section 474.)

Under the evidence before the court, the defendant teachers were plainly on strike and had absented themselves by concerted action from their positions as teachers in the Martins Ferry schools in violation of their contracts with the school board. The officers of the Ohio Education Association and their representatives, under the evidence produced, were present at most of the meetings of the Classroom Teachers Association and were likewise present and participated in the strike and proceedings which preceded it last Spring. In fact, at a conference of the attorneys with the court which was held in chambers a few days prior to the present strike, representatives of the Ohio Education Association asked the court for the right to participate or, at least, sit in on said conferences.

[6] The motion to dismiss the temporary restraining order will be overruled and the temporary restraining order, issued on November 2, 1967, will be continued. However, the second paragraph of that restraining order is probably a little too broad and will be modified to read as follows:

\*317 '2. From unlawfully failing, refusing and neglecting by the individual defendants acting in concert to perform the terms and provisions of their respective contracts with the plaintiff, and from violating Sections 4117.01 to 4117.05, Revised Code.'

The entry:

Motion of the defendants to dismiss the temporary restraining order granted November 2, 1967, is overruled. Temporary restraining order issued November 2, 1967, is modified and as modified is continued.

#### All Citations

13 Ohio Misc. 308, 235 N.E.2d 538, 42 O.O.2d 383

**OHIO BOARD OF TAX APPEALS**

Ohio Apartment Association	)	
	)	CASE NO. 2006-A-861
and	)	
	)	(RULE REVIEW)
Greenwich Apartments, Ltd.	)	
	)	ORDER
and	)	
	)	(Granting Appellants' Motions)
D & S Properties, <sup>1</sup>	)	
	)	
Appellants,	)	
	)	
v.	)	
	)	
William W. Wilkins, Tax Commissioner	)	
of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellants - Calfee, Halter & Griswold LLP  
Laura C. McBride  
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Cleveland, Ohio 44114

For the Appellee - Marc Dann  
Attorney General of Ohio  
Alan P. Schwepe  
Assistant Attorney General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215

Entered February 1, 2008

This cause and matter came on to be considered by the Board of Tax Appeals upon two motions filed by the appellants. Specifically, appellants seek “to substitute D&S Properties \*\*\* for F&W Properties, because D&S is the real party in interest in this proceeding, and to clarify Appellants’ bases for their claim that the

<sup>1</sup> This party has been substituted as the real party in interest.

applicable tax rules are unreasonable as a violation of the equal protection clause of the Ohio Constitution.” Motion at 1. The matter was submitted to the Board of Tax Appeals upon the motion and memorandum in support of said motion and a response thereto filed by the appellee Tax Commissioner.

As support for the first motion to substitute D&S Properties for F&W Properties, appellants cite Civ.R 17(A) which provides that:

“Every action shall be prosecuted in the name of the real party in interest. \*\*\* No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest. Such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.”

Appellants indicate in the memorandum in support of the motion that F&W was named on the application because it was believed that F&W was an owner of rental properties. However, since the filing of the application, it was determined that F&W was the property manager for D&S Properties, the record owner of the rental properties in question. Memorandum at 4-5.

In further support of the motion, appellants indicate that the substitution of parties “will not cause prejudice or undue delay” because “[c]ounsel for Appellants informed counsel for Appellee, during the course of discovery, of the need to substitute D&S in place of F&W Properties and provided Appellee with responses to \*\*\* discovery requests from D&S.” Memorandum at 5. In the response to the foregoing motion, the Tax Commissioner indicated that he “does not object to the

substitution of the D&S Properties for F&W Properties.” Response at 4.

As we consider the foregoing, we are not persuaded solely by appellants’ references to the civil rules, since the Ohio Rules of Civil Procedure are not expressly applicable to proceedings before an administrative tribunal. See, e.g., *Midwest Enterprises v. Cuyahoga Cty. Bd. of Revision* (Feb. 6, 1995), Cuyahoga App. Nos. 67230 and 67565, unreported. See, also, *OCLC Online Computer Library Center v. Kinney* (Dec. 11, 1981), BTA No. 1981-D-602, unreported, affirmed, (1982), 11 Ohio St.3d 198 (holding that, since the BTA is an administrative agency, not a court, the Ohio Rules of Civil Procedure do not apply to it). While the Board of Tax Appeals may have adopted one or more of the civil rules as procedural guidelines, there is no statutory provision making the civil rules expressly applicable to all administrative proceedings.

The relevant code section regarding filing applications for rule review, R.C. 5703.14(C), provides, in part, as follows:

“Applications for review of any rule adopted and promulgated by the commissioner may be filed with the board by any person who has been or may be injured by the operation of the rule. The appeal may be taken at any time after the rule is filed with the secretary of state, the director of the legislative service commission, and, if applicable, the joint committee on agency rule review. Failure to file an appeal does not preclude any person from seeking any other remedy against the application of the rule to the person.”

It is acknowledged that in many real property valuation cases, motions to substitute a real party in interest have been denied by this board when parties seek such substitution in order to correct a jurisdictional defect after the time for amending an

appeal or an underlying complaint has expired. See, e.g., *Sovran Self Service Assoc. v. Cuyahoga Cty. Bd. of Revision* (May 29, 1998), BTA No. 1996-N-477, unreported, affirmed, (Nov. 15, 1999), Cuyahoga App. Nos. 74777, et seq., unreported. However, in the instant rule review matter, although they are few, all prerequisites for establishing jurisdiction have been met with the filing of the application under consideration. Therefore, in accordance with prior board decisions, the real party in interest will be substituted in the caption. See, e.g., *Zum Properties, LLC v. Cuyahoga Cty. Bd. of Revision* (June 1, 2007), BTA No. 2006-M-68, unreported; *Upper Arlington City Schools v. Franklin Cty. Bd. of Revision* (Interim Order, May 17, 2002), BTA No. 2001-N-1356, unreported.

By their second motion, appellants attempt to amend the content of their application for review. Specifically, they seek to remove the following statements from their application:

“Further, Rental properties containing four or more units provide a disproportionate amount of housing to low-income tenants. As a result, the Commissioner’s application of the Rules, eliminating the Rollback for Appellants, will result in a ten percent (10%) increase in real property tax for rental properties containing four or more units and is, thus, a discriminatory application of the Rollback and unconstitutional under Article I, Section 2.” Application at 3-4.

They seek to replace the foregoing with the following:

“As a result of the impermissible categorization, the owners of rental properties containing four or more units shoulder a disproportionate and unreasonable burden in the form of significantly higher taxes than owners of rental properties containing fewer than four units. The Commissioner’s application of the Rules, eliminating the

Rollback for Appellants, will result in a ten percent (10%) increase in real property tax for rental properties containing four or more units and is, thus, a discriminatory application of the Rollback and unconstitutional under Article I, Section 2.” Motion at Ex. 1, pages 3-4.

As support for permitting the amendment, appellants cite Civ.R. 15(A) claiming that “[l]eave of court [to amend] shall be freely given when justice so requires.” However, as stated earlier, the board is not specifically bound by the Ohio Rules of Civil Procedure in making a determination herein.

While there is no statutory provision that permits an applicant to amend an application for rule review once the application is filed, there is also no prohibition against doing so either. In some cases, principles of administrative efficiency and economy may dictate that it would not be prudent to permit the substantive amendment of an application for rule review when the timely progression of the case could be negatively affected. However, in the instant matter, appellants’ characterization of the proposed amendment as simply a “clarification” appears to be accurate. Thus, in consideration of the foregoing, appellants’ motion to amend their application for review is hereby granted.

Accordingly, it is the order of the Board of Tax Appeals that appellants’ motions be granted.

ohiosearchkeybta

2012 WL 6005756

Only the Westlaw citation is currently available.  
United States District Court,  
D. Nevada.

Matt P. JACOBSEN, Plaintiff,  
v.

HSBC BANK USA, N.A., et al., Defendants.

No. 3:12-cv-00486-MMD-  
WGC. | Nov. 30, 2012.

#### Attorneys and Law Firms

Matt P. Jacobsen, Carson City, NV, pro se.

Erica J. Stutman, Snell & Wilmer L.L.P., Phoenix, AZ, Laura E. Browning, Snell & Wilmer, LLP, Christopher M. Hunter, Kristin A. Schuler-Hintz, McCarthy & Holthus, Las Vegas, NV, for Defendants.

#### ORDER

**(Defs.' Motion to Dismiss—dkt. no. 6; Plf.'s Motion for Leave to File Response—dkt. no. 11; Plf.'s Cross-Motion for Summary Judgment—dkt. no. 13; Plf.'s Motion for Temporary Restraining Order—dkt. no. 24)**

MIRANDA M. DU, District Judge.

#### I. SUMMARY

\*1 Before the Court is Defendants HSBC Bank and HSBC Mortgage Corporation's (collectively "HSBC") Motion to Dismiss (dkt. no. 6), as well as Plaintiff Matt P. Jacobsen's Motions for Leave to File Response (dkt. no. 11), Conditional Cross-Motion for Summary Judgment (dkt. no. 13), and Motion for a Temporary Restraining Order (dkt. no. 24).

#### II. BACKGROUND

Jacobsen acquired the property located at 1311 La Loma Drive, Carson City, NV 89701 ("the Property") on June 23, 2005. In order to purchase the property, Jacobsen obtained a loan from Countrywide Bank for \$239,920, which was secured by a Deed of Trust dated June 20, 2005. (Dkt. no. 7-1.)

Jacobsen acquired a second loan from HSBC Mortgage Corporation for \$246,000, which was secured by a second Deed of Trust ("Second Deed of Trust"). (Dkt. no. 7-2.) The Second Deed of Trust names HSBC Mortgage Corporation as the lender, First American Title Insurance Company ("First American") as trustee, and Mortgage Electronic Registration Systems ("MERS") as beneficiary and nominee. (*Id.*) The facts giving rise to this litigation arise under the Second Deed of Trust.

On July 27, 2010, MERS assigned all beneficial interest on the Second Deed of Trust to HSBC Mortgage Corporation. (Dkt. no. 7-4.) The assignment was recorded on August 6, 2010.

Also on July 27, 2010, Housekey Financial Corporation ("Housekey") executed and recorded a Notice of Breach and Default and of Election to Sell Under Deed of Trust ("Notice of Default"). (Dkt. no. 23-F.)

On August 6, 2010, HSBC recorded a Substitution of Trustee removing First American and substituting Housekey as the trustee on the loan. (Dkt. no. 7-E.) The Substitution shows an effective date of July 27, 2010 on the document. (*Id.*)

On December 9, 2010, the State of Nevada Foreclosure Mediation Program issued a Certificate stating that no request for mediation was made or the grantor (i.e. Jacobsen) waived mediation. (Dkt. no. 7-G.)

On April 23, 2012, HSBC Mortgage Corporation executed a second Substitution of Trustee designating Quality Loan as the new trustee. (Dkt. no. 7-H.) The Second Substitution of Trustee was recorded on April 27, 2012. (*Id.*)

On July 24, 2012, Quality Loan issued a Notice of Trustee's Sale informing Jacobsen that he was in default of the Second Deed of Trust, and setting the date of sale to August 23, 2012. (Dkt. no. 7-I.) This sale was postponed and rescheduled to December 6, 2012, because Jacobsen filed for bankruptcy. On August 2, 2012, HSBC Mortgage Corporation assigned its rights under the Second Deed of Trust to HSBC Bank. (Dkt. no. 7-J.) This second assignment was recorded on August 13, 2012. (*Id.*)

Jacobsen filed this action on August 20, 2012, in the First Judicial District Court in Carson City, Nevada, alleging that HSBC and Quality Loan Service Corporation ("Quality Loan"), as the lender and purported trustee, improperly

initiated foreclosure proceedings on his property. (*Seedkt.* no. 1–1.) Jacobsen alleged violations of the Real Estate Settlement Procedures Act (“RESPA”), Fair Debt Collection Practices Act (“FDCPA”), and civil RICO statutes, and sought declaratory relief and quiet title. The foreclosure sale previously set for August 23, 2012, was subsequently postponed.

\*2 On September 11, 2012, HSBC removed the action to this Court. On September 18, 2012, HSBC filed a Motion to Dismiss seeking dismissal of all counts. (Dkt. no. 6.)

On November 27, 2012, Jacobsen filed this Motion for Temporary Restraining Order (“TRO”), seeking a court order enjoining Quality Loan from conducting the foreclosure sale of his property as scheduled for December 6, 2012. (Dkt. no. 24.)

### III. DISCUSSION

#### A. HSBC's Motion to Dismiss (dkt. no. 6.)

##### 1. Legal Standard

A court may dismiss a plaintiff's complaint for “failure to state a claim upon which relief can be granted.” Fed.R.Civ.P. 12(b) (6). A properly pled complaint must provide “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). While Rule 8 does not require detailed factual allegations, it demands more than “labels and conclusions” or a “formulaic recitation of the elements of a cause of action.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)). “Factual allegations must be enough to rise above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that is plausible on its face.” *Iqbal*, 556 U.S. at 678 (internal citation omitted).

In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to apply when considering motions to dismiss. First, a district court must accept as true all well-pled factual allegations in the complaint; however, legal conclusions are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 679. Mere recitals of the elements of a cause of action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a district court must consider

whether the factual allegations in the complaint allege a plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's complaint alleges facts that allow a court to draw a reasonable inference that the defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not permit the court to infer more than the mere possibility of misconduct, the complaint has “alleged—but not shown—that the pleader is entitled to relief.” *Id.* at 679 (internal quotation marks omitted). When the claims in a complaint have not crossed the line from conceivable to plausible, the complaint must be dismissed. *Twombly*, 550 U.S. at 570.

A complaint must contain either direct or inferential allegations concerning “all the material elements necessary to sustain recovery under *some* viable legal theory.” *Twombly*, 550 U.S. at 562 (quoting *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir.1989) (emphasis in original)).

On a motion to dismiss, the Court takes judicial notice of attached copies of relevant publicly recorded documents. See *Disabled Rights Action Comm. v. Las Vegas Events, Inc.*, 375 F.3d 861, 866 n. 1 (9th Cir.2004) (the court may take judicial notice of the records of state agencies and other undisputed matters of public record under Fed.R.Evid. 201).

##### 2. Analysis

\*3 The Court addresses each count brought by Jacobsen in order, and considers Jacobsen's late-filed response. Accordingly, Jacobsen's Motion for Leave (dkt. no. 11) to file a late response to HSBC's Motion to Dismiss is granted.

##### a. Quiet Title

In Nevada, a quiet title action may be brought “by any person against another who claims an estate or interest in real property, adverse to the person bringing the action, for the purpose of determining such adverse claim.” NRS § 40.010. “In a quiet title action, the burden of proof rests with the plaintiff to prove good title in himself.” *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 918 P.2d 314, 318 (Nev.1996). “Additionally, an action to quiet title requires a plaintiff to allege that she has paid any debt owed on the property.” *Lalwani v. Wells Fargo Bank, N.A.*, No. 2–11–cv–84, 2011 WL 4574388, at \*3 (D.Nev. Sep. 30, 2011) (citing *Ferguson v. Avelo Mortg., LLC*, No. B223447, 2011 WL 2139143, at \*2 (Cal.App.2d June 1, 2011).

Jacobsen alleges that he tendered full payment via private registered setoff bond, and tendered \$291,000 via electronic funds transfer to HSBC Bank. He alleges that these instruments were accepted because they were not returned to Jacobsen, and cites UCC § 3-603 which discusses tender of payment. This “bill of exchange” theory “has been rejected in foreclosure cases by district courts across the country, as well as in the District of Nevada.” *West v. ReconTrust Co.*, No. 2:10-cv-1950, 2011 WL 3847174, at \*4 (D.Nev. Aug.30, 2011). In light of the documentary record produced by HSBC, Jacobsen has not pled sufficient facts to demonstrate his ability to cure the default. Instead, he pleads in a conclusory manner that he attempted to cure the default with payment in full, without providing documentary evidence or a meaningful description of his attempts to tender this payment. In light of his apparent inability to provide such full tender to prevent foreclosure, the Court does not view his pleading as providing enough facts to demonstrate a plausible cause of action for quiet title. Accordingly, Jacobsen’s quiet title claim is dismissed with prejudice.

#### b. Real Estate Settlement Procedures Act (“RESPA”)

Jacobsen also alleges a violation of RESPA, 12 U.S.C. § 2601 *et seq.*, relating to a written request he allegedly sent to HSBC Mortgage Corporation on January 15, 2011. HSBC never responded.

Section 2605(e) governs the “[d]uty of [a] loan servicer to respond to borrower inquiries.” 12 U.S.C. § 2605(e). Generally, “[i]f any servicer of a federally related mortgage loan receives a qualified written request ... for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days ... unless the action requested is taken within such period.” *Id.* § 2605(e)(1)(A). A “qualified written request” is:

a written correspondence ... that ... includes, or otherwise enables the servicer to identify, the name and account of the borrower; and ... includes a statement of the reasons for the belief of the borrower, to the extent applicable, that the account is in error or provides sufficient detail to the servicer regarding other information sought by the borrower.

\*4 *Id.* § 2605(e)(1)(B), (B)(i)-(ii).

Jacobsen fails to allege that his letter constitutes a “qualified written request.” The extracted portions of his letter appear to demand only biographical data concerning the loan’s history, rather than provide any statement of reasons why Jacobsen believed that his account is in error. Under similar circumstances, Nevada district courts have dismissed RESPA claims for precisely this fault. *See, e.g., Coleman v. Am. Home Mortg. Servicing, Inc.*, No. 2-11-cv-178, 2011 WL 6131309, at \*4 (D.Nev. Dec.8, 2011).

Further, Jacobsen does not allege that he suffered pecuniary loss arising out of an alleged failure to respond to this letter, as required by RESPA. *See Moon v. Countrywide Home Loans, Inc.*, No. 3:09-cv-298, 2010 WL 522753, at \*5 (D.Nev. Feb.9, 2010).

Accordingly, Jacobsen’s RESPA claim is dismissed without prejudice.

#### c. Fair Debt Collection Practices Act (“FDCPA”)

Jacobsen’s fourth cause of action for debt collection fails to state a claim because none of the Defendants are debt collectors as required by statute. For a defendant to be liable for a violation of the FDCPA, the defendant must be classified as a “debt collector” within the meaning of the Act. *Heintz v. Jenkins*, 514 U.S. 291, 294, 115 S.Ct. 1489, 131 L.Ed.2d 395 (1995); *McCurdy v. Wells Fargo Bank, N.A.*, No. 2:10-cv-880, 2010 WL 4102943, at \*3 (D.Nev. Oct.18, 2010). The FDCPA defines a “debt collector” as a person “who regularly collects or attempts to collect, directly or indirectly, debts owed or due or asserted to be owed or due another.” 15 U.S.C. § 1692a(6). “Foreclosure pursuant to a deed of trust does not constitute debt collection under the FDCPA.” *Smith v. Wachovia Mortg. Corp.*, No. 3:12-cv-26, 2012 WL 3222144, at \*2 (D.Nev. Aug.3, 2012) (citing *Camacho-Villa v. Great W. Home Loans*, No. 3:10-cv-210, 2011 WL 1103681, at \*4 (D.Nev. Mar.23, 2011)). “[T]he FDCPA’s definition of ‘debt collector’ does not ‘include the consumer’s creditors, a mortgage servicing company, or any assignee of the debt, so long as the debt was not in default at the time it was assigned.’” *Smith*, 2012 WL 3222144, at \*2. Since HSBC and Quality Loan are foreclosing on the Property pursuant to a deed of trust, they do not qualify as “debt collectors” within the meaning of the FDCPA. Jacobsen’s FDCPA claim is dismissed with prejudice.

**d. Racketeer Influenced and Corrupt Organizations (“RICO”)**

Jacobsen also lodges a RICO cause of action against Defendants for acts of mail fraud in connection with a scheme to defraud homeowners and rental property owners. “To state a civil RICO claim, plaintiffs must allege (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity (5) causing injury to plaintiffs’ ‘business or property.’” *Ove v. Gwinn*, 264 F.3d 817, 825 (9th Cir.2001) (citing 18 U.S.C. § 1964(c)). In addition, Jacobsen must do so consistent with Fed. R. Civ. P. 9(b)’s heightened pleading requirements for allegations of fraud. Based on the documents before the Court, and Jacobsen’s bare allegations of fraud, Jacobsen fails to allege a plausible civil RICO claim. His claims that Defendants conspired to send out fraudulent foreclosure documents are belied by the record and by his inability to claim a plausible defective foreclosure claim. Accordingly, this claim is dismissed with prejudice.

**e. Statutory defective foreclosure**

\*5 In light of the Court’s obligation to construe *pro se* plaintiff’s pleadings liberally, the Court understands the Jacobsen’s Complaint as an attack on the foreclosure proceedings under NRS § 107.080. Consequently, the Court reviews, and dismisses, whatever claim Jacobsen seeks to pursue under a statutory defective foreclosure theory.

Nevada law provides that a Deed of Trust is an instrument that may be used to “secure the performance of an obligation or the payment of any debt.” NRS § 107.020. Upon default, the beneficiary, the successor in interest of the beneficiary, or the trustee may foreclose on the property through a trustee’s sale to satisfy the obligation. NRS § 107.080(2)(c).

The procedures for conducting a trustee’s foreclosure sale are set forth in NRS § 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the beneficiary, or the trustee must execute and record a notice of default and election to sell. NRS § 107.080(2)(c). A copy of the notice of default and election to sell must be mailed by registered mail or certified mail with return receipt requested. *Id.* at § 107.080(3). The trustee or other person authorized to make the sale must wait at least three months after recording the notice of default and election to sell before the sale may proceed. *Id.* at § 107.080(2)(d). After the three month period, the trustee must give notice of the time and place of the sale to each trustor by personal service or by mailing the notice by registered or certified mail to the last known address of

the trustor. *Id.* at § 107.080(4)(a). Under NRS § 107.080(5), a “sale made pursuant to this section may be declared void by any court of competent jurisdiction in the county where the sale took place if ... [t]he trustee or other person authorized to make the sale does not substantially comply with the provisions of this section.” *Id.* at § 107.080(5)(a). A nominee on a Deed of Trust has the authority, as an agent, to act on behalf of the holder of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide Bank, FSB*, 2009 WL 3617650, at \*1 (D.Nev. Oct. 26, 2009). As long as the note is in default and the foreclosing trustee is either the original trustee or has been substituted by the holder of the note or the holder’s nominee, there is no defect in the Nevada foreclosure. *Id.* at \*2. In the absence of substantial compliance with NRS § 107.080, a borrower may state a defective foreclosure claim. In response, the non-judicial foreclosure process must begin anew in compliance with state law.

Jacobsen first challenges MERS’ authority to effectuate the July 27, 2010, assignment of the beneficial interest on the Second Deed of Trust to HSBC Mortgage Corporation. (Dkt. no. 7–4.) This argument fails. As nominee, MERS was provided the authority to act on behalf of the holder of the note when executing the assignments. *See Gomez*, 2009 WL 3617650, at \*1–2. Accordingly, HSBC properly inherited the rights under the note.

\*6 Jacobsen also appears to challenge the Housekey’s authority to issue the Notice of Default, in light of the later-recorded Substitution of Trustee purporting to substitute First American for Housekey. This argument also fails. First, the Substitution shows an effective date of July 27, 2010, on the document, and as such could have occurred prior to Housekey’s issuance of the Notice of Default. Jacobsen presents no facts to demonstrate that the effective date on the document was fraudulent. But even were that not the case, a later-filed substitution of trustee serves to ratify the prior act of the new trustee. “NRS 107.080 does not require that a particular party—trustee, beneficiary, or their assigns—record notices of default or trustee sale.” *Berilo v. HSBC Mortg. Corp., USA*, No. 2:09–CV–2353, 2010 WL 2667218, at \*4 (D.Nev. June 29, 2010). “Nor does Nevada law require a substitution of trustee be recorded prior to a notice of default.” *Id.* The law only requires that a party filing a notice of default be an agent of the beneficiary. *Nev. ex rel. Bates v. Mortgage Elec. Registration Sys., Inc.*, No. 3:10–CV–00407, 2011 WL 1582945, at \*5 (D.Nev. Apr. 25, 2011) (“[A]ny party [the beneficiary] commands to file a

notice of default is by that fact alone a proper party as the beneficiary's agent.”). Assuming Housekey acted without the knowledge of the lender in issuing the Notice of Default—an assumption that Jacobsen fails to demonstrate is warranted—Housekey's later-recorded Substitution validates the Notice of Default. That is, even assuming “a rogue title company file[d] a notice of default without the knowledge of the beneficiary—the Court has not yet seen such a case—the filing becomes proper if the beneficiary later ratifies the act after discovering what has occurred.”*Bates*, 2011 WL 1582945, at \*5 (citing *Edwards v. Carson Water Co.*, 21 Nev. 469, 34 P. 381, 386–89 (Nev.1893)). Here, the fact that Housekey was later substituted as a trustee “is practically insurmountable evidence of ratification,” the agency doctrine that allows for a principal to retroactively authorize an actor's prior conduct. *Id.*; see Restatement (Third) of Agency § 4.03.

Similarly, the substitution of Quality Loan, and Quality Loan's Notice of Sale was also statutorily valid. So long as the Notices were issued in the proper order, and Jacobsen was afforded sufficient notice pursuant to NRS 107.080, Jacobsen's challenge to the Notice of Default must fail. Jacobsen has thus failed to allege a plausible defective foreclosure claim, and the claim must be dismissed with prejudice.

#### **B. Jacobsen's Conditional Cross–Motion for Summary Judgment (dkt. no. 13)**

As Jacobsen's claims have been dismissed, his Conditional Cross–Motion is denied as moot. Jacobsen brought this Cross–Motion in the event the Court construed Defendants' Motion to Dismiss as a summary judgment request. As the Court does not do so, Jacobsen's Cross–Motion is denied.

#### **C. Jacobsen's Motion for Temporary Restraining Order (dkt. no. 24)**

##### **1. Legal Standard**

\*7 Federal Rule of Civil Procedure 65 governs preliminary injunctions and temporary restraining orders, and requires that a motion for temporary restraining order include “specific facts in an affidavit or a verified complaint [that] clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition,” as well as written certification from the movant's attorney stating “any efforts made to give notice and the reasons why it should not be required.” Fed.R.Civ.P. 65(b).

Temporary restraining orders are governed by the same standard applicable to preliminary injunctions. See *Cal. Indep. Sys. Operator Corp. v. Reliant Energy Servs., Inc.*, 181 F.Supp.2d 1111, 1126 (E.D.Cal.2001). Furthermore, a temporary restraining order “should be restricted to serving [its] underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer.” *Granny Goose Foods, Inc. v. Bhd. of Teamsters & Auto Truck Drivers Local No. 70*, 415 U.S. 423, 439, 94 S.Ct. 1113, 39 L.Ed.2d 435 (1974).

A preliminary injunction may be issued if a plaintiff establishes: (1) likelihood of success on the merits; (2) likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in his favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). “Injunctive relief [is] an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Id.* at 22. The Ninth Circuit has held that “ ‘serious questions going to the merits’ and a hardship balance that tips sharply toward the plaintiff can support issuance of an injunction, assuming the other two elements of the *Winter* test are also met.” *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1132 (9th Cir.2011).

##### **2. Analysis**

Since the Court has dismissed all of Jacobsen's claims, his Motion for a TRO must be denied because no outstanding claims survive to form the basis for injunctive relief. But even were the Court to address the substance of Jacobsen's Motion, a restraining order would be inappropriate for the reasons discussed above. Jacobsen has not demonstrated a likelihood of success on the merits of any of his claims. While he no doubt faces irreparable harm in the absence of preliminary relief, his inability to demonstrate any likelihood of success is fatal to his request for a TRO. Consequently, his Motion is denied.

#### **IV. CONCLUSION**

IT IS HEREBY ORDERED that Defendant's Motion to Dismiss (dkt. no. 6) is GRANTED consistent with the reasoning set forth above.

IT IS FURTHER ORDERED that Plaintiff's Motion for Leave to File Response (dkt. no. 11) is GRANTED.

IT IS FURTHER ORDERED that Plaintiff's Conditional Cross-Motion for Summary Judgment (dkt. no. 13) is DENIED.

**All Citations**

Not Reported in F.Supp.2d, 2012 WL 6005756

IT IS FURTHER ORDERED that Plaintiff's Motion for Temporary Restraining Order (dkt. no. 24) is DENIED.