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### Client Alert: Appellate Win Provides Significant Guidance on the Ohio Uniform Fiduciaries Act

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The United States Court of Appeals for the Sixth Circuit recently clarified the operation of the Ohio Uniform Fiduciaries Act (UFA) when it affirmed the dismissal of a complaint alleging multiple claims against a banking client. The Complaint arose out of the misappropriation of funds by the authorized fiduciary of trust and estate accounts held at the bank. Vorys litigators Lisa Babish Forbes and Elizabeth Davis Conway represented PNC Bank, National Association (PNC) in the Northern District of Ohio and on appeal. The Sixth Circuit's decision provides rare guidance on the application of the Ohio Uniform Fiduciaries Act, Ohio Revised Code § 5815.04, *et seq.*, which "modifies the common law" and "provides a defense . . . for those who knowingly deal in good faith with an authorized fiduciary." *See Master Chem. Corp. v. Inkrott*, 563 N.E.2d 26, 29 (Ohio 1990).

In its decision in *Estate of William R. Barney v. PNC Bank, Nat'l Ass'n*, No. 12-3540, 2013 U.S. App. LEXIS 8691, the Sixth Circuit held that the UFA is an affirmative defense, but once a defendant has made a threshold showing it is entitled to the defense, a plaintiff must come forward with factual allegations that give rise to an inference that the defendant had actual knowledge of an ongoing breach of fiduciary duty or acted with knowledge of such facts that its actions constituted bad faith. The court agreed with PNC that the district court could dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) even though the UFA is an affirmative defense. The court also held that "it is highly doubtful" that Ohio recognizes a claim for civil aiding and abetting tortious conduct in light of recent authority, and affirmed the dismissal of that claim.

#### Case Background

Charles Manning served as the Executor of the Estate of William R. Barney, Jr. and Trustee of his Trust. After Mr. Barney died, Charles Manning set up accounts at PNC's predecessor, National City Bank, to house the Trust and Estate funds. Charles Manning presented National City Bank with documentation establishing that he was the Executor and Trustee, and established that he was the authorized signatory for

both accounts.

Plaintiffs Caroline Barney (William R. Barney, Jr.'s widow), the Trust, through its Successor Trustee, and the Estate brought an action against PNC, as successor to National City Bank. As alleged in Plaintiffs' Amended Complaint, Charles Manning withdrew the Estate and Trust funds to make unauthorized investments in a business called Manning & Banks, Inc. When Manning & Banks, Inc. failed, the Estate and Trust had been completely depleted.

The United States District Court for the Northern District of Ohio dismissed the Amended Complaint in its entirety. Plaintiffs appealed dismissal of their negligence/recklessness/bad faith, civil aiding and abetting, and negligent supervision and training claims.

### **The UFA is An Affirmative Defense, but Once Invoked, Plaintiffs Must Establish Its Protections Do Not Apply**

The court held that "there is no doubt that the Ohio Uniform Fiduciaries Act is an affirmative defense." *Barney*, 2013 U.S. App. LEXIS 8691, at \*10. Although the *Barney* court characterized the UFA as an affirmative defense, the court placed only the initial burden of demonstrating the applicability of the UFA on defendants, then shifted the burden to plaintiffs. Thus, a defendant must prove by a preponderance of the evidence that the bank had knowledge of the existence of a fiduciary relationship and that the fiduciary was empowered to withdraw funds. *Barney*, 2013 U.S. App. LEXIS 8691, at \*13-14. After the defendant demonstrates these elements, the burden falls to the plaintiff to "plead facts allowing the district court to draw a reasonable inference that the Bank acted with actual knowledge of [the fiduciary's] breach of his fiduciary duties or with knowledge of such facts surrounding his behavior that its actions in paying the checks constituted bad faith." *Id.* at \*17.

Whether the UFA constitutes an affirmative defense under Ohio law was murkier than it might otherwise appear. The Ohio statute itself does not expressly allocate the burden of proof and states that a "bank may pay the check without being liable to the principal, unless the bank pays the check with actual knowledge that the fiduciary is committing a breach of the obligation as fiduciary in drawing the check or with knowledge of such facts that its action in paying the check amounts to bad faith." Ohio Rev. Code. § 5815.07. Concluding that the UFA is an affirmative defense, the Sixth Circuit principally relied on the Supreme Court of Ohio's decision in *Master Chem. Corp. v. Inkrott*, where the court stated that the UFA "provides a defense, when asserted under [Ohio] Civ. R. 8(C)," a rule that concerns affirmative defenses. *Id.* (citing *Inkrott*, 563 N. E.2d 23, 26 (Ohio 1990)). When the Supreme Court of Ohio took up the UFA issues in *Inkrott*, it did so *sua sponte* because the parties failed to address the statute. Whether or not the UFA was an affirmative defense was not directly at issue in the case. Moreover, earlier cases in at least three other UFA jurisdictions allocated the burden of proof to the plaintiff. See *O'Neal v. Southwest Mo. Bank (In re Broadview Lumber Co.)*, 118 F.3d 1246, 1251 (8th Cir. 1997) (applying Missouri law); *Commercial Sav. Bank v. Baum*, 327 P.2d 743, 745 (Colo. 1958); *Union Bank & Trust Co. v. Girard Trust Co.*, 161 A. 865, 868 (Pa. 1932).

### **The UFA and Other Affirmative Defenses Can Be Resolved on a Motion to Dismiss**

The court further held that the district court properly dismissed the complaint, even though the UFA was an affirmative defense. The complaint established on its face that the bank was aware of the existence of a fiduciary relationship and that the fiduciary was empowered to withdraw funds, but did not set forth any

factual allegations demonstrating the bank had actual knowledge of the fiduciary's wrongdoing or that the bank acted in bad faith. None of the facts pleaded in the complaint "allow[ed] the inference that the Bank had unambiguous factual information, at the moment that Manning requested the wire transfers, that Manning was using the funds for his own purposes in violation of the fiduciary relationship." *Id.* at \*18.

### Aiding and Abetting Claims Are "Highly Doubtful" Under Ohio Law

Finally, the court held that in light of a recent Supreme Court of Ohio decision, *DeVries Dairy, LLC v. White Eagle Coop Association, Inc.*, "it is highly doubtful" that Ohio recognizes a tort for civil aiding and abetting tortious conduct. *Id.* at \*20 (citing *DeVries*, 974 N.E.2d 1194 (Ohio 2012)). Earlier Sixth Circuit authority predicted that Ohio courts would recognize such a claim. See *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 533 (6th Cir. 2000).

### Implications

This decision provides rare guidance on the Ohio Uniform Fiduciaries Act and the burden of proof. The Uniform Fiduciaries Act has been adopted in 24 states, the District of Columbia, and the Virgin Islands, so the decision may provide practical guidance for jurisdictions outside of Ohio. Few courts have applied the UFA in the context of a motion to dismiss, but the statute's protective function is best served by raising it at the earliest opportunity. *Barney* demonstrates that plaintiffs need to come forward with more than bare allegations of bad faith in order to overcome the UFA's protections.

**Case information:** *Estate of William R. Barney, Jr. v. PNC Bank, National Association*, No. 12-3540, 2013 U.S. App. LEXIS 8690 (6th Cir. Apr. 30, 2013).

**Date of decision:** April 30, 2013.