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The Bankers' Statement – Spring 2013

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A recent trial victory on behalf of a major banking client clarifies three key points of law in Ohio fiduciary litigation. A Vorys trial team successfully defended a bank trustee against numerous breach of fiduciary duty claims brought by successor trustees and beneficiaries, resulting in a defense verdict on all 13 claims. The decision provides critical interpretation of the Ohio Trust Code on issues of the applicable standard of proof, the enforceability of trust language that limits the liability of trustees, and statutes of limitations applicable to breach of fiduciary duty claims.

Case Background

National City Bank, which is now a part of PNC Bank, National Association, had been the trustee of an irrevocable trust for over 50 years. The primary beneficiary of the trust was a wealthy man who rarely drew funds from the trust and consistently advised the trustees of his intention that trust funds be invested in equities for the long term. The beneficiary's three adult children (who eventually became the primary beneficiaries after his death) and two successor trustees alleged, among other things, that the trustee should have foreseen the market collapse of 2008 and should have liquidated the entire portfolio and invested in 10-year treasury bonds in 1999. Plaintiffs claimed that the bank should have known that the primary beneficiary was incompetent to serve as the sole member of the Advisory Committee, despite consistent apparently cogent communications with the bank, no notice from family members of incapacity issues, and no court findings of incompetence during his lifetime.

High Standard of Proof: Clear and Convincing Evidence

The trial court ruled that the burden of proof for breach of fiduciary duty claims is "clear and convincing" evidence. Plaintiffs ultimately were unable to meet this burden, which requires "more than a mere preponderance of evidence" and will produce in the mind of the trier of facts a "firm belief or conviction as to the facts sought to be established."[1]

Exculpatory Clause Upheld

The trial court also upheld the exculpatory clause contained in the trust. Many trusts contain exculpatory clauses designed to limit the liability of the trustee to acts of "bad faith," "willful default," or other egregious behavior. The Ohio Trust Code provides that language in a trust that purports to relieve a trustee of liability is "unenforceable to the extent it relieves the trustee of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or interests of a beneficiary or was inserted as the result of abuse by the trustee of a fiduciary or confidential relationship to the settlor."[2] The language of the exculpatory clause in this trust relieved the trustee of liability for all acts done in "good faith, or for any mistake or error of judgment, or otherwise, except for bad faith or willful default." Plaintiffs argued that reckless indifference was different from willful default and that the exculpatory clause was unenforceable because it sought to exculpate the trustee for acts of reckless indifference to the purposes of the trust or interest of a beneficiary.

The court disagreed – it held that the exculpatory clause was enforceable and that the terms in the Ohio Trust Code were "remarkably similar" to the trust language. The court explained that the term "willful default" in the trust language incorporates the concept of "reckless indifference" from the Ohio Trust Code because "both require wanton misconduct."

Plaintiffs testified at trial about a series of acts that they argued could be aggregated to show reckless indifference, even if none was reckless in isolation. The court held that "the cumulative effect of a series of acts, even when they involved poor judgment or even negligence" do not translate into a claim of bad faith.[3] In the absence of an exculpatory clause, a corporate trustee is held to a higher professional standard under O.R.C. § 5808.06 in light of its "special skills." Here, however, the court found that the bank's trust department had not acted in bad faith or willful default of its duties so the bank was not liable.

Pre-Trust Code Statutes of Limitations Barred Claims Against Trustee

In addition to holding in the bank's favor on the merits, the court also ruled that most of the plaintiffs' claims were barred by statutes of limitations. This question is not as straightforward as one might expect.

Notwithstanding the update to the Ohio Trust Code in 2007 and its provision of a specific statute of limitations for breach of trust claims, the court did not apply the Trust Code statute of limitations (O.R.C. § 5810.05) because another provision of the Trust Code properly applied. The Trust Code's "application" provision (O.R.C. §5811.03), which is tucked away under the innocuous heading of "Miscellaneous Provisions, " provides that if a statute of limitations has commenced to run under an earlier statute, that statute continues to apply even if it has been repealed or superseded. This provision absolutely barred most of plaintiffs' claims, without the need for proof concerning discovery of the alleged breach or, in the language of the Trust Code, when the beneficiary "knew or should have known of the breach of trust."[4] Prior to January 1, 2007, claims that alleged breach of fiduciary duty were governed by O.R.C. § 2305.09, which is the general four-year "other tort" statute of limitations. The court held that this statute's discovery rule (for fraud) did not apply to toll the statute for breaches of fiduciary duty.[5] Thus, this pre-Trust Code statute of limitations barred all of plaintiffs' claims that accrued more than four years before the case was filed—

without any question of when the alleged breach was or should have been discovered.

Another pre-Trust Code statute of limitation (O.R.C. § 1339.69) provided that beneficiaries must challenge matters disclosed in written reports from trustees within two years of receiving the report. The bank in this case provided detailed reports that satisfied those statutory requirements. The court held that all claims concerning matters disclosed in those reports two years before the filing of the complaint were barred.

Implications

We believe that this decision is a significant win not only for the bank but also for bank trust departments throughout Ohio. The clear articulation of the heightened burden of proof for breach of fiduciary duty claims will make it more challenging for plaintiffs to win, and their decision whether to bring suit more difficult. Plaintiffs may not aggregate conduct over many years to establish bad faith and, thus, a breach of fiduciary duty. And, finally, the application of pre-Trust Code statutes of limitations — without a discovery rule — may provide an increased measure of peace to trustees and former trustees.

Note – the plaintiffs have appealed this decision to the Ohio Sixth District Court of Appeals. Please contact your Vorys attorney for further information or updates as this matter proceeds.

Case information: *Newcomer v. National City Bank*, Williams County, Ohio Probate Court, Case No. 074003 (Judge Daniel Gershutz, presiding).

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[1]1 *Lansdowne v. Beacon Journal Pub. Co.*, 32 Ohio St.3d 176, 180-181, 512 N.E.2d 979 (1987).

[2] 2 O.R.C. § 5810.08.

[3] Citing *Griffith v. Buckeye Union Ins. Co.*, 10th Dist. No. 86 AP-1063, 1987 Ohio App. LEXIS 8971 (Sept. 29, 1987).

[4] See O.R.C. § 5810.05(C).

[5] Citing *Stokes v. Berick*, 11th Dist. No. 98-L-094, 1999 Ohio App. LEXIS 6264 (Dec. 23, 1999).