

## Publications

### *Client Alert: Dueck v. The Clifton Club Company, et al. – Ohio’s Eighth District Court of Appeals Recognizes Fiduciary Exception to the Attorney-Client Privilege*

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The Eighth District Court of Appeals surprised many Ohio practitioners this month by applying a fiduciary exception to the attorney-client privilege in *Dueck v. The Clifton Club Company* (2017-Ohio-7161).

#### Analysis:

The Eighth District concluded that trustees had violated the R.C. 5808.13 duty to inform and report to beneficiaries of a trust when they refused to share requested information with certain trust beneficiaries prior to litigation and during discovery in a pending lawsuit with those beneficiaries. The trustees claimed that the information was subject to the attorney-client privilege between the trustees and their attorney.

With no mention of R.C. 5815.16—the Ohio statute that provides that an attorney for a fiduciary owes no duties to anyone other than the fiduciary—the Eighth District applied a fiduciary exception to the attorney-client privilege. The court found that the beneficiaries of the trust were “the real client” whose entitlement to information regarding the administration of the trust included communications between the trustees and their attorney. No other Ohio court has taken this position since the adoption of R.C. 5815.16 in 1999. The Eighth District cited *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 131 S.Ct. 2313 (2011) in support of its decision, a federal ERISA case that has not previously been applied in this manner in Ohio. This decision appears to be in conflict with R.C. 5815.16. It remains to be seen whether this decision will be appealed or if legislative action will be taken to clarify the statute.

#### Factual Background:

This case concerned the access rights of hundreds of trust beneficiaries to a private beach in the Clifton Park Allotment of Lakewood, Ohio. The case was filed by various lot owners in the Clifton Park Allotment against the Clifton Park Trust trustees and the Clifton Club Company as a result of overcrowding at the private Clifton Park beach. The private beach was placed in a trust in 1912 for the use and benefit of the Clifton

Park lot owners. The Clifton Club Company is a members-only social club that owns several Clifton Park lots and offers limited access to the private beach. The individual Clifton Park lot owners requested a declaration from the court that the Clifton Club Company members who were not Clifton Park lot owners were not beneficiaries of the trust and did not have the same legal rights as the lot owners to access the private beach. The trial court granted summary judgment to the trustees holding that the nonresident club members had the same rights as the resident lot owners; the Eighth District reversed this decision and found that the trustees had breached their duties to inform and report to the Clifton Park lot owners who brought the suit.

Whether you are a beneficiary of a trust with questions on the obligations and duties of a trustee or a trustee of a trust who has questions about your duties and obligations to trust beneficiaries, or are an attorney with questions about what this decision means for your practice and your clients, contact a Vorys attorney for assistance.