Civil Liability and Remedies in Ohio Securities Transactions

Keith A. Rowley

University of Nevada, Las Vegas – William S. Boyd School of Law

Follow this and additional works at: https://scholars.law.unlv.edu/facpub

Part of the Contracts Commons, Other Law Commons, Secured Transactions Commons, and the Securities Law Commons

Recommended Citation
https://scholars.law.unlv.edu/facpub/556

This Article is brought to you by the Scholarly Commons @ UNLV Boyd Law, an institutional repository administered by the Wiener-Rogers Law Library at the William S. Boyd School of Law. For more information, please contact youngwoo.ban@unlv.edu.
CIVIL LIABILITY AND REMEDIES IN OHIO SECURITIES TRANSACTIONS†

Thomas E. Geyer∗
Michael P. Miglet∥
Keith A. Rowley***

Whatever prohibition there is, is a means to the same purpose, made necessary, it may be supposed, by the persistence of evil and its insidious forms and the experience of the inadequacy of penalties or other repressive measures. The name that is given to the law indicates the evil at which it is aimed, that is, to use the language of a cited case, "speculative schemes which have no more basis than so many feet of ‘blue sky’"; or, as stated by counsel in another case, "to stop the sale of stock in fly-by-night concerns, visionary oil wells, distant gold mines, and other like fraudulent exploitations." Even if the descriptions be regarded as rhetorical, the existence of evil is indicated, and a belief of its detriment; and we shall not pause to do more than state that the prevention of deception is within the competency of government.

I. INTRODUCTION

The Ohio Securities Act ("OSA")² was enacted in 1913 to "guard[ ] investors against fraudulent enterprises, to prevent sales of securities based only on schemes purely speculative in character, and to protect the public from swindling peddlers of worthless stocks in mere paper corporations."³ The OSA, which is administered by the Ohio Division

† We would like to thank Catherine Cordial Geyer and Jane Stempel Arata for their insights and comments and Gayle Berne and Beth Parlette-Bolyard for their research assistance. Professor Rowley would also like to thank James E. Rogers for his ongoing support of faculty scholarship at the William S. Boyd School of Law. The views expressed in this Article are our own.

∗ Assistant Director, Ohio Department of Commerce. Adjunct Professor, Capital University Law School. Commissioner, Ohio Division of Securities, 1996-2000. J.D., with honors, The Ohio State University College of Law; B.A., University of Notre Dame.

∥ Control Bid Attorney, Ohio Division of Securities. Securities Registration Supervisor, Ohio Division of Securities 1988-1996. J.D., Capital University Law School; B.A., Otterbein College.

*** Associate Professor of Law, William S. Boyd School of Law, University of Nevada Las Vegas. J.D., University of Texas School of Law; M.P.P., Harvard University, John F. Kennedy School of Government; B.A., Baylor University.

3. Groby v. State, 143 N.E. 126, 128 (Ohio 1924). To put it somewhat more cynically: "The purpose behind R.C. Chapter 1707 is ‘to protect the public from its own stupidity, gullibility and avariciousness’ by preventing securities from being sold without first subjecting both the securities and the securities dealers to reasonable licensing and registration requirements." Crater v. Int'l Res., Inc., 633
of Securities ("Division") and enforced by both the Division and private litigants, regulates the sale and purchase of securities in Ohio. The OSA and the rules and regulations promulgated pursuant to it by the Division are designed both to encourage compliance by those who might otherwise (intentionally or not) violate the OSA and to provide recourse for those persons who are, despite the Division's efforts at ensuring compliance, injured by violations of the OSA. The OSA is a remedial law; and, therefore, Ohio courts are bound to construe it in favor of protecting injured buyers and sellers of securities. The protections afforded to purchasers and sellers of securities by the OSA and its companion rules and regulations are supplemented by Ohio common law.

State law liabilities and remedies for securities violations have gained increasing importance in light of recent judicial and legislative limitations on federal securities liabilities and remedies. The confluence of the U.S. Supreme Court's decisions in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.* and *Gustafson v. Alloy Co.*, and the U.S. Congress's enactment of the Private Securities Litigation Reform Act,

---

4. The OSA also empowers the Division to regulate investment advisors. See *Ohio Rev. Code Ann.* §§1707.01(N), (II), (J) & (KK), 1707.141 & 1707.42(B). For a discussion of investment adviser regulation under the OSA, see Thomas E. Geyer, *An Overview of Amended Substitute House Bill 695's Amendments to the Ohio Securities Act and a Guide to Ohio's New Investment Adviser Provisions*, 28 C. U. L. Rev. 359 (2000). The various investment adviser provisions were added to the OSA in 1999. See id. at 359. Given the dearth of reported cases and the lack of substantive analysis of these provisions in reported decisions of the Division, this Article will focus on those provisions of the OSA governing the sale and purchase of securities.

5. See, e.g., *Baker v. Conlan*, 383 N.E.2d 343, 347-48 (Ohio Ct. App. 1978) ("The Ohio Securities Act, being a remedial law, should be construed liberally to provide relief to the victims of fraud it is designed to protect.").

6. 311 U.S. 164 (1944) (eliminating the implied private cause of action for aiding and abetting securities fraud).


For a short period of time, the OSA contained similar standards for private securities litigation. See *Ohio Rev. Code Ann.* § 1707.432 (West Supp. 1997) (standards for securities class actions); id. § 1707.433 (notice of action and lead plaintiff); id. § 1707.434 (sanctions); id. § 1707.435 (stay of discovery); id. § 1707.436 (required allegations regarding misleading statements and material state and burden of proof); id. § 1707.437 (immunity from liability based on forward-looking statements); id. § 1707.438 (damages limits). The 121st Ohio General Assembly's H.B. 350, also known as the "Tort Reform Bill," added the provisions to the OSA in 1996. However, in 1999, the Ohio Supreme Court invalidated the Tort Reform Bill in *toto*, see *State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1096-97 (Ohio 1999), resulting in the invalidation of the Ohio securities litigation standards, see Thomas E. Geyer, *Tort Reform Decision Invalidates Securities Litigation Standards*, OHIO SEC. BULL. 99:3 (1999); Hansen v. Landaker, Nos. 99AP-1191 & 99AP-1192, 2000 WL 1803958, at *2 (Ohio Ct. App. Dec. 7, 2000) ["In [Sheward], the Ohio
the National Securities Market Improvement Act,\(^9\) and the Securities Litigation Uniform Standards Act,\(^{10}\) collectively,

reduced the number of avenues by which plaintiffs relying on federal law may pursue alleged wrongdoers for securities fraud, imposed significant additional requirements on plaintiffs suing under federal securities law, preempted state registration requirements for several classes of securities, and curbed the availability of state courts as an alternative forum in which plaintiffs may pursue securities fraud claims.\(^{11}\)

Consequently, Ohio statutory and common law may yet present attractive alternatives to aggrieved securities purchasers and sellers.

This Article explores the civil liabilities, remedies, and defenses provided by the OSA and by Ohio common law. Part II discusses the applicability of the OSA. Part III addresses the liabilities and remedies for the sale of unregistered securities. Part IV describes the liabilities and remedies for the unlicensed sale of securities. Part V examines common law and statutory liabilities and remedies for misrepresentations, omissions, and breach of duty in the purchase and sale of securities. Part VI considers statutory and common law secondary liability for securities violations.

II. APPLICABILITY OF THE OHIO SECURITIES ACT

Before seeking a remedy under the OSA, a plaintiff must establish that it applies. The OSA restricts the sale of securities in Ohio.\(^{12}\)

---


\(^{13}\) The OSA also prohibits fraud by purchasers of securities. See OHIO REV. CODE ANN. § 1707.44(G) (West Supp. 2002) ("No person in purchasing or selling securities shall knowingly engage in any act or practice that is, in this chapter, declared illegal, defined as fraudulent, or prohibited."). However,
A. "Sale"

The OSA defines "sale" to include (1) "every disposition, or attempt to dispose, of a security or of an interest in a security",\(^{13}\) (2) "a contract to sell, an exchange, an attempt to sell, an option of sale, a solicitation of a sale, a solicitation of an offer to buy, a subscription, or an offer to sell, directly or indirectly, by agent, circular, pamphlet, advertisement, or otherwise";\(^{14}\) (3) "any act by which a sale is made";\(^{15}\) and (4) any other "meaning of 'sale'... applied by or accepted in courts of law or equity."\(^{16}\) Because the OSA's definition of sale explicitly includes offering and soliciting activities,\(^{17}\) there is no need to distinguish between "offers" or "solicitations" and "sales." However, the use of certain advertising and other written materials, under certain circumstances, does not constitute a "sale" under the OSA.\(^{18}\)

The OSA's definition of "sale" does not contain a "for value" requirement.\(^{19}\) Thus a gift, whether in isolation or in connection with the OSA does not afford an injured seller a statutory cause of action for fraud by the purchaser of securities. See id. § 1707.41 (West 1994) (establishing a cause of action for purchasers based on the use of certain false sales materials); id. § 1707.43 (entitling purchasers to rescind any sale in violation of the OSA). A defrauded seller may, however, bring a common law fraud claim. See, e.g., Baker v. Pfeifer, 940 F. Supp. 1168, 1182 (S.D. Ohio 1996) (applying Ohio law).

Section 1707.44(G) has only prohibited fraud by a purchaser since September 13, 1999, compare OHIO REV. CODE ANN. § 1707.44(G) ("No person in selling securities shall knowingly engage in any act or practice which is, in sections 1707.01 to 1707.43 of the Revised Code, declared illegal, defined as fraudulent, or prohibited." (emphasis added)) with id. § 1707.44(G) (West Supp. 2002) (as amended by 1999 H.B. 6, effective Sept. 13, 1999), and neither section 1707.41 nor section 1707.43 has been amended since then. Therefore, unless an Ohio court can read section 1707.41 or section 1707.43 to encompass fraud by a purchaser, no statutory private right of action will exist for defrauded sellers until the Ohio Legislature creates one. See id. § 1707.40 (West 1994) ("Sections 1707.01 to 1707.43 of the Revised Code create no new civil liabilities... for deception or fraud other than as specified in sections... 1707.41... and 1707.43... .")

13. Id. § 1707.01(C)(1) (West Supp. 2002).
14. Id.
15. Id. § 1707.01(C)(2).
16. Id. § 1707.01(C)(1). The OSA's definition of "purchase" mirrors its definition of "sale." See id. § 1707.01(M)(1)(2).
17. See id. § 1707.01(C)(1); Crone v. Courtright, 206 N.E.2d 913, 916 (Ohio Ct. App. 1964) ("A 'sale' includes a solicitation of a sale, a solicitation of an offer to buy, or an offer to sell, and whether any of these are done directly or indirectly."); see, e.g., Chiles v. M.C. Capital Corp., 642 N.E.2d 1115, 1120 (Ohio Ct. App. 1994) ("Given such an expansive definition of 'sale,' the trial court was correct in concluding that the sales in this case occurred when defendants solicited a buyer ...."); State v. Walsh, 420 N.E.2d 1013, 1017 (Ohio Ct. App. 1979) (holding that a defendant who "made overtures to three of the eventual purchasers of the securities of a sufficient nature that it could be found that he directly or indirectly solicited these investors to purchase shares, even though he referred them to [a third party] for the actual sales" satisfied the statutory definition of "sale").
18. See OHIO REV. CODE ANN. § 1707.01(C)(3) & (4).
19. Compare 15 U.S.C. § 77b(3) (2000) ("The term 'sale' or 'sell' shall include every contract of sale or disposition of a security or interest in a security, for value.") with UNIF. SEC. ACT (1936) § 40(1)(j)(1), 7C
some other transaction, constitutes a “sale” under the OSA. Any security given with, or as a bonus on account of, any purchase of securities is conclusively presumed to constitute a part of the subject of that purchase and to have been “sold.” Further, a sale “by an owner, pledgee, or mortgagee, or by a person acting in a representative capacity,” includes a “sale on behalf of such party by an agent, including a licensed dealer or salesperson.”

B. “Securities”

The OSA defines “security” to mean:

any certificate or instrument that represents title to or interest in, or is secured by any lien or charge upon, the capital, assets, profits, property, or credit of any person or of any public or governmental body, subdivision, or agency. It includes shares of stock, certificates for shares of stock, membership interests in limited liability companies, voting-trust certificates warrants and options to purchase securities, subscription rights, interim receipts, interim certificates, promissory notes, all forms of commercial paper, evidences of indebtedness, bonds, debentures, land trust certificates, fee certificates, leasehold certificates, syndicate certificates, endowment certificates, certificates or written instruments in or under profit-sharing or participation agreements or in or under oil, gas, or mining leases, or certificates or written instruments of any interest in or under the same, receipts evidencing preorganization or reorganization subscriptions, preorganization certificates, reorganization certificates, certificates evidencing an interest in any trust or pretended trust, any investment contract, any life settlement interest, any instrument evidencing a promise or an agreement to pay money, warehouse receipts for intoxicating liquor, and the currency of any government other than those of the United States and Canada . . . .

---


20. See, e.g., State ex rel. Celebrezze v. Venture Out Resorts, Inc., No. 87-C-210, 43-1416, 1988 WL 877630, at *3 (Ohio Com. Pl. Feb. 24, 1988) (“Defendants’ act or practice of giving the ‘Certificate for one S5,000 Municipal Securities Bond’ or the ‘Certificate of Beneficial Interest’ to consumers as a promotion constitutes a ‘sale’ as defined in R.C. 1707.01(2).”).

21. OHIO REV. CODE ANN. § 1707.01(C)(5).

22. Id. § 1707.01(C)(6).

23. Id. § 1707.01(B). The OSA does not apply to the sale of real estate. Id.
In addition to traditional devices such as stocks, bonds promissory notes, and participations in oil and gas wells or leases, Ohio courts have found that the definition of security also includes such non-traditional opportunities as a cosmetic sales and distribution plan, an 8-track tape assembly and distribution plan, a program to manufacture and re-sell styrofoam wall plaques, and recreational vehicle park memberships.

Ohio courts have made it clear that limited partnership interests constitute securities. Membership interests in limited liability companies are, by definition, securities. A general partnership interest is typically not a security, although the Division has taken enforcement action where an opportunity was nominally a general partnership interest but, in fact, exhibited the characteristics of a limited partnership interest or investment contract.

While a thorough discussion of what constitutes a "security" under Ohio law is beyond the scope of this Article, it is important to note that Ohio case law supplements the foregoing statutory definition with judicial constructions of the phrase "investment contract." As demonstrated by the leading case of State v. George, Ohio courts use the "risk capital"

33. See OHIO REV. CODE ANN. § 1707.01(B) (West Supp. 2002); supra text accompanying note 23.
36. For a thorough discussion, see HOWARD M. FRIEDMAN, OHIO SECURITIES LAW & PRACTICE §§ 3.01-3.08 (2d ed. 1996).
test, rather than the more widely used “modified Howey” test,\(^{38}\) to determine whether a device or transaction is an investment contract.

Specifically, under Ohio law an investment contract exists where:

(1) an offeree furnishes initial value to an offeror, and (2) a portion of this initial value is subjected to the risks of the enterprise, and (3) the furnishing of the initial value is induced by the offeror’s promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value, will accrue to the offeree as a result of the operation of the enterprise, and

---

(4) the offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise.\(^{39}\)

Courts applying the \textit{George} test generally have construed the fourth prong narrowly, holding it will not be met if the investor had the right to exercise management control, notwithstanding that the investor did not exercise such control.\(^{40}\) If an instrument fails the fourth prong of the \textit{George} test, "it is not a security under Ohio law regardless of its satisfaction of the first three prongs of the test."\(^{41}\)

\section{C. \textit{In Ohio}}

Unlike the Uniform Securities Acts,\(^{42}\) the OSA does not define its own scope.\(^{43}\) However, Ohio courts have applied the OSA both where the offeror is outside Ohio and the offeree is an Ohio resident,\(^{44}\) and where the offeror resides in Ohio and the offeree is located outside Ohio.\(^{45}\) In \textit{Federated Management Co. v. Coopers \\& Lybrand},\(^{56}\) an Ohio appellate court

\begin{flushright}
39. \textit{George}, 362 N.E.2d at 1227-28 (quoting State v. Haw. Mkt. Cir., Inc., 485 P.2d 105, 109 (Haw. 1971)). In adopting the risk capital test, the \textit{George} court rejected the reasoning of \textit{Emery v. So-Soft of Ohio, Inc.}, 199 N.E.2d 120 (Ohio Ct. App. 1964), which had applied the \textit{Heaney} test to determine what constituted an investment contract, and thus a security, under Ohio law. In explaining its adoption of the risk capital test, rather than the \textit{Heaney} test, the \textit{George} court recognized the current necessities of the business world, and the basic purposes of the enactment of the securities laws, and concluded that there were more reasonable, modern and practicable tests for the judicial determination of whether the facts and circumstances of a certain offering, scheme or operation constitute a "security" under the statutes. \textit{George}, 362 N.E.2d at 1227.


42. \textit{See UNIF. SEC. ACT (1936) § 414(a)-(d), 7C U.L.A. 316 (2000); see also UNIF. SEC. ACT (1983) § 801, 7C U.L.A. 96-97.}

43. \textit{See FRIEDMAN, supra note 36, § 3.04.}


held that the OSA applied where neither the plaintiff purchaser, the defendant bank, nor the defendant underwriter were Ohio residents, and no sales or marketing activities took place in Ohio, but the issuer of securities was an Ohio resident and pre-offering activities took place in Ohio.47

Ohio's general "long-arm" statute48 empowers Ohio courts to exercise personal jurisdiction over a defendant "who acts directly or by an agent, as to a cause of action arising from," inter alia, (1) transacting business in Ohio;49 (2) causing tortious injury, in Ohio or elsewhere, by an act or omission committed in Ohio;50 or (3) causing tortious injury in Ohio by an act or omission committed elsewhere, as long as the defendant "regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in [Ohio]."51

An Ohio court may exercise personal jurisdiction over a non-Ohio resident defendant who sells securities to an Ohio resident.52 An Ohio court may, likewise, exercise personal jurisdiction over a non-Ohio resident underwriting firm where the underwriter participated in a series of meetings in Ohio and prepared a private placement memorandum that was distributed to prospective investors in Ohio.53 However, a non-Ohio resident underwriter may, without triggering applicability of the OSA, include its name in an advertisement, provided that the

47. Id. at 856-58; see also Corporate Partners, L.P. v. Nat'l Westminster Bank PLC, 710 N.E.2d 1144, 1149-50 (Ohio Ct. App. 1998) (holding, in a case involving a non-resident plaintiff-investor, a non-resident defendant-underwriter, and a resident issuer, that the OSA applied where the defendant-underwriter repeatedly sent its representatives to Ohio, prepared offering documents in Ohio, and distributed offering materials to potential investors in Ohio).


49. Id. § 2307.382(A)(1).

50. Id. § 2307.382(A)(3).

51. Id. § 2307.382(A)(4).

52. See, e.g., Berniec v. Waterfront Ltd. Dividend Hous. Ass'n, 614 F. Supp. 651, 653 (S.D. Ohio 1985) ("Defendants, whether directly or through their agent, Continental, mailed a subscription agreement to Plainif in Ohio for his signature, thus freely and intentionally encouraging and allowing an Ohio resident to make a substantial investment in [their venture].").

To determine that the non-resident defendants had sufficient contact with Ohio to warrant subjecting them to personal jurisdiction in Ohio, the Bernie court applied a three-part test developed by the Sixth Circuit in Welsh v. Gibbs, 631 F.2d 436 (6th Cir. 1980):

First, the defendant must purposefully avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences caused by the defendant must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

Id. at 440; see Bernie, 614 F. Supp. at 653-54.

advertisement also contains the name of at least one Ohio licensed securities dealer, and provided further that the non-Ohio resident underwriter does not otherwise attempt to sell securities in Ohio.34

D. Consequences of Applicability of the Ohio Securities Act

If a device or transaction constitutes a security under Ohio law, it cannot be sold in Ohio without first registering it with the Division or properly exempting it from registration. Additionally, persons who carry out the sale of securities in Ohio must be licensed by the Division or properly exempted from such licensure. Those who are licensed to sell securities are subject to a series of business practice standards. Fraud in the sale of securities is prohibited without exemptions.

The balance of this Article discusses the liabilities and the remedies resulting from these standards, from common law theories, and from certain other Ohio statutes.

III. LIABILITIES AND REMEDIES FOR THE SALE OF UNREGISTERED SECURITIES35

A. Overview of Securities Registration, Exemption, and Notice Filing Requirements

1. Securities Registration

The OSA provides for registration by description,36 qualification,37 and coordination.38 Each registration requires a filing with the Division, including fees, exhibits, and an offering circular.39

34. OHIO REV. CODE ANN. § 1707.01(C)(4) (West Supp. 2002) ("The offering of securities by any person in conjunction with a licensed dealer by use of advertisement, circular, or pamphlet is not a sale if that person does not otherwise attempt to sell securities in this state.").
35. As used in this Article, the phrase "unregistered securities" includes both securities that are not properly registered and securities that are not properly exempted from registration.
36. See OHIO REV. CODE ANN. §§ 1707.06 & 1707.08; see also OHIO ADMIN. CODE §§ 1301:6-3-06 & -08 (2002).
37. See OHIO REV. CODE ANN. § 1707.09; see also OHIO ADMIN. CODE § 1301:6-3-09.
38. See OHIO REV. CODE ANN. § 1707.091; see also OHIO ADMIN. CODE § 1301:6-3-091.
39. The Division accepts the Form U-7, Small Company Offering Registration, in lieu of an offering circular in a registration by qualification. OHIO ADMIN. CODE § 1301:6-3-09(D). Although not recognized in the administrative rules, the Division also accepts the Form U-7 in lieu of an offering circular in a registration by description because it includes all of the items required for an offering circular under OHIO ADMIN. CODE § 1301:6-3-06(D).
The OSA permits certain securities transactions—all of which limit the type of consideration, commissions, and other compensation paid to dealers, and the number and type of purchasers—to be registered by description. Corporations are permitted to register securities transactions by description if the consideration paid or exchanged for the securities is limited to cash or tangible property in Ohio and commissions and other compensation paid to dealers are limited to three percent of the offering. Securities transactions by corporations, partnerships, limited liability companies, associations, syndicates, pools, trusts, and other unincorporated associates may be registered by description where sales are limited to thirty-five purchasers, excluding sales to purchasers who purchase $100,000 or more of the securities, officers, directors, managers, general partners, and trustees, and where commissions and other remuneration paid to securities dealers are limited to ten percent of the offering. Finally, a corporation may register an offering made exclusively to its own security holders as long as any commissions are paid only to dealers who have agreed to purchase all unsold securities. For offerings over $250,000

60. Until recently, the OSA also permitted registering securities—as distinguished from securities transactions—by description. See OHIO REV. CODE ANN. §§ 1707.05 & 1707.07 (West 1994) (repealed by 2001 Ohio Laws 24, § 2 [effective Oct. 8, 2001]). Registration by description was limited to high quality securities including: issuers with a three-year earnings history, if § 1707.03(A), first mortgage bonds secured by real estate or leasehold estate, other than oil, gas or mining leaseholds, located in the United States or Canada not in default, if § 1707.03(B), land trust certificates, if § 1707.03(C), debt securities secured by commercial vessels, if § 1707.03(D), and securities secured by collateral securities deposited in a trust with a bank, trust company, savings and loan association, savings bank, or credit union, if § 1707.03(E); see id. § 1707.01(O). However, the 124th General Assembly repealed the provisions permitting registering securities by description effective October 8, 2001. See 2001 Ohio Laws 24, §§ 1 & 2 (repealing §§ 1707.05 & 1707.07 and amending, inter alia, §§ 1707.06 & 1707.08).

The Division suggested the repeal in response to the Ohio Supreme Court's decision in State v. Hud, 734 N.E.2d 363 (Ohio 2000), which held that section 1707.44(B)(1) prohibited misrepresentations only when registering securities by description, not when registering transactions by description, and reversed the conviction of an attorney who had been prosecuted for violating section 1707.44(B)(1) by admittedly making misrepresentations in registering transactions by description. Hud, 734 N.E.2d at 367. Further, between January 1, 1992, and December 31, 2000, the Division received no filings for the registration of securities by description pursuant to section 1707.05. Section 1707.44(B)(1) was subsequently amended to prohibit "knowingly making or causing to be made any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement" for the purpose of "[r]egistering securities or transactions, or exempting securities or transactions from registration," under the OSA. OHIO REV. CODE ANN. § 1707.44(B)(1) (West Supp. 2002).

61. OHIO REV. CODE ANN. § 1707.06(A)(1).
62. Id. § 1707.06(A)(2) & (3).
63. Id. § 1707.06(A)(4).
and all oil and gas offerings, the issuer must file an offering circular and deliver a copy to investors prior to sale.\textsuperscript{64}

Registrations by description are effective upon receipt by the Division or when sent by certified mail,\textsuperscript{65} and are generally effective for sixteen months from the date of filing.\textsuperscript{66} Because offerings eligible for registration by description necessarily involve limited selling efforts or a limited number of offerees, merit review of such offerings is limited,\textsuperscript{67} but the Division may suspend the filing if the offering is being made on "grossly unfair terms" or is being made in violation of statutory or administrative rule provisions.\textsuperscript{68}

\textbf{b. Registration by Qualification}

Registration by qualification is Ohio's most extensive registration because it involves a full merit review by the Division and an effective registration prior to sales in Ohio. Most offerings registered by qualification are small offerings exempt from federal registration under SEC Rule 504,\textsuperscript{69} intrastate offerings exempt from federal registration under section 3(a)(11) of the Securities Act of 1933\textsuperscript{70} or SEC Rule 147,\textsuperscript{71} or debt offerings by issuers exempt from federal registration under section 3(a)(4) of the Securities Act of 1933.\textsuperscript{72}

Issuers or dealers must file a signed and sworn application on either the Division's Form 9 or the Form U-1 with all required exhibits.\textsuperscript{73} An offering circular or a Form U-7 must be filed with the Division and delivered to investors prior to signing a subscription agreement or delivering investment funds to the issuer or dealer.\textsuperscript{74} Financial statements prepared in accordance with generally accepted accounting principals\textsuperscript{75} are required, but an audit by an independent certified public accountant is not required for all offerings.\textsuperscript{76} Commissions and other compensation for the sale of securities may not directly, or indirectly,

\begin{itemize}
\item \textsuperscript{64} OHIO ADMIN. CODE § 1301:6-3-06(D) (2002).
\item \textsuperscript{65} OHIO REV. CODE ANN. § 1707.08.
\item \textsuperscript{66} OHIO ADMIN. CODE § 1301:6-3-08(A). The Division is empowered to extend the effectiveness of a registration by description up to two years from the date of filing. See id. § 1301:6-3-08(B).
\item \textsuperscript{67} See OHIO REV. CODE ANN. § 1707.09.
\item \textsuperscript{68} See id. § 1707.13 (West 1994); OHIO ADMIN. CODE § 1301:6-3-06(E) & (F).
\item \textsuperscript{69} 17 C.F.R. § 230.304 (2002).
\item \textsuperscript{71} 17 C.F.R. § 230.147.
\item \textsuperscript{72} 15 U.S.C. § 77e(a)(4).
\item \textsuperscript{73} OHIO ADMIN. CODE § 1301:6-3-09(A).
\item \textsuperscript{74} Id. § 1301:6-3-09(D).
\item \textsuperscript{75} See OHIO REV. CODE ANN. §§ 1707.09(D) & (E) & 1707.20(C) (West Supp. 2002).
\item \textsuperscript{76} OHIO ADMIN. CODE §§ 1301:6-3-06(D)(11) & 1301:6-3-09(D).
\end{itemize}
exceed fifteen percent and may be paid only to persons licensed by the Division.

Subject to certain exemptions, the OSA authorizes the Division to conduct a merit review of securities registered by qualification. There are two statutory merit standards: Ohio Revised Code section 1707.09(J), which requires that the issuer receive eighty-five percent of the offering proceeds, and section 1707.09(K), which permits the Division to impose escrow, subordination, or advertising restrictions where the consideration to be paid for the securities is “intangible property of doubtful value.”

c. Registration by Coordination

Registration by coordination permits issuers that have filed with the SEC to follow a streamlined filing procedure with the Division. Filings may be made on forms adopted by the SEC. Unlike the Uniform Securities Acts, the OSA allows registration by coordination of offerings made under SEC Regulation A.

While a registration by coordination must be on file with the Division for only fifteen to thirty days prior to being declared effective, it is subject to the same merit review standards as a registration by qualification. The Division may deny the effectiveness of a registration by coordination if it finds that “the business of the issuer is fraudulently conducted, that the proposed offer or disposal of securities is on grossly

77. OHIO REV. CODE ANN. § 1707.09(J).
78. See id. §§ 1707.01(E)(1), 1707.14(A)(1) & 1707.44(A)(1).
79. Securities that are exempt under section 1707.02 and transactions that are exempt under section 1707.03 or that conform to section 1707.04 are exempt from merit review. See id. § 1707.09.
80. See id. § 1707.09(J).
81. See id. § 1707.09(K).
82. See OHIO REV. CODE ANN. § 1707.091(A); OHIO ADMIN. CODE § 1301:6-3-091(A) (2002).
83. See UNIF. SEC. ACT (1956) § 303, 7C U.L.A. 171-72 (2000); UNIF. SEC. ACT (1985) § 303, 7C U.L.A. 38-40. See generally THOMAS LEE HAZEN, THE LAW OF SECURITIES REGULATION § 4.15, at 197-98 n.11 (3d ed. 1996) (“When a federal exemption from registration is obtained, such as by reliance on Regulation A, state registration by coordination is unavailable [under the Uniform Securities Acts] and the issuer must look to either registration by qualification (the long-form) or registration by notification (the short-form).”)
84. See OHIO REV. CODE ANN. § 1707.091(A).
85. See id. § 1707.091(C).
86. See id. § 1707.01(Q)(3).
unfair terms, or that the plan of issuance and sale of securities would defraud or deceive, or tend to defraud or deceive purchasers. 87

2. Exempt Securities and Exempt Transactions

The OSA establishes two categories of exemptions from the OSA’s securities registration requirements: securities exemptions and transactional exemptions. An exempt security is always exempt from registration. A security exempt from registration once as a result of the manner in which it is sold is not necessarily exempted from registration when it is resold.

a. Exempt Securities

Section 1707.02 of the Ohio Revised Code exempts securities issued by the United States, state and local governments and agencies, and foreign governments with which the United States maintains diplomatic relations; 88 banks; 89 public utilities; 90 insurance companies; 91 nonprofit organizations and cooperatives; 92 and "blue chip" issuers whose securities are not in default. 93 The OSA also exempts, inter alia, commercial paper and promissory notes "not offered directly or indirectly for sale to the public," 94 and securities listed, or authorized for listing, on the New York Stock Exchange, American Stock Exchange, National Market System of the National Association of Securities Dealers Automated Quotation System, and securities of the same issuer that are equal in seniority to, or senior to, such listed securities. 95 By

---

87. OHIO ADMIN. CODE § 1301:6-3-091(B) (2002).
88. See OHIO REV. CODE ANN. §§ 1707.02(B) & (K).
89. See id. § 1707.02(C).
90. See id. § 1707.02(F); see also id. § 1707.01(M).
91. See id. § 1707.02(H).
92. See id. § 1707.02(I). This provision does not exempt the sale of notes, bonds, debentures, other evidences of indebtedness, or promises or agreements to pay money. These debt offerings are usually registered by description or by qualification. See id.
93. See id. § 1707.02(J).
94. Id. § 1707.02(G); see OHIO ADMIN. CODE § 1301:6-3-02(D) (2002) (identifying the circumstances under which commercial paper and promissory notes will be deemed to be "not offered for sale directly or indirectly to the public"); State v. Taubman, 606 N.E.2d 962, 966-67 (Ohio Ct. App. 1992) (upholding the validity of what is now OHIO ADMIN. CODE § 1301:6-3-02(D)).
95. OHIO REV. CODE ANN. § 1707.02(E)(2)(a) & (d).

The OSA’s "exchange-listed" exemption is substantively identical to the category of "covered securities" described in Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. § 77r(b)(1) (2000). See Thomas E. Geyer, "Covered Securities" Under the Ohio Securities Act, OHIO SEC. BULL. 96:4, at 1-2 (1996). Some practitioners have taken the position that since state law securities registration requirements are preempted with respect to "covered securities," a state is without authority to recognize a securities registration
administrative rule, the Division has extended "exchange listed" exempt security status to securities listed on Tier I of the Pacific Stock Exchange, Tier I of the Philadelphia Stock Exchange, and the Chicago Board of Options Exchange. 96

All of the securities exemptions are "self-executing," meaning that the exemption perfects without the necessity of a filing with the Division. 97 The OSA does not require specific disclosures or use of an offering circular or a prospectus in connection with the sale of an exempt security. However, all sales of exempt securities are subject to the fraud prohibitions of the OSA. 98 The burden of proof to establish a security exemption is on the person claiming the exemption. 99

b. Exempt Transactions

Ohio Revised Code section 1707.03 contains a number of transactional exemptions based on the number and the type of purchasers, the manner of the offering, and the nature of the transaction. Pursuant to statutory authority, 100 the Division has established additional transactional exemptions by rule. Transactional exemptions cover both sales by issuers and some secondary sales.

Statutorily exempt issuer transactions include sales to institutional investors; 101 sales of stock at a public auction due to non-payment; 102 the sale of mortgages, other than oil, gas, and mining interests, to a single exemption for such securities. With all due respect to that position, the Division believed that including in the OSA a recognition of the exempt status of "exchange-listed" securities was useful to make clear that such securities are exempt from the Ohio securities registration requirements. See Thomas E. Geyer, H.B. 331's 'Non-Viable' Changes to the Ohio Securities Act, OHIO SEC. BULL. 2000:4 (2000).

96. OHIO ADMIN. CODE § 1301:6-3-02(A). These additional exemptions are "conditioned on such exchanges' listing standards, or segments or tiers thereof, continuing to be substantially similar to those of the New York stock exchange, the American stock exchange, or the national market system of the NASDAQ stock market." Id. § 1301:6-3-02(B).

97. See, e.g., In re Direct Participation Servs., No. 97-072, 1997 Ohio Sec. LEXIS 81, at *3 (Mar. 3, 1997).

98. See, e.g., OHIO REV. CODE ANN. § 1707.44(B) & (G). See generally Geyer, supra note 4, at 411 n.392.


100. See OHIO REV. CODE ANN. § 1707.03(V).

101. See id. § 1707.03(D). As for who is an "institutional investor," see id. § 1707.01(S); OHIO ADMIN. CODE § 1301:6-3-01(D) (2002); infra note 256. Section 1707.14(A)(2) requires persons, other than issuers, selling securities to a institutional investor to be licensed by the Division as a dealer, or to sell through a licensed dealer. OHIO REV. CODE ANN. § 1707.14(A)(2); see also infra note 236 and accompanying text.

102. See OHIO REV. CODE ANN. § 1707.03(F).
purchaser;\textsuperscript{103} sales or issuance of certain rights, warrants, or options,\textsuperscript{104} the exercise of rights, warrants, or options which previously have been registered or exempted,\textsuperscript{105} dividends, exchanges, or distributions by a corporation to its security holders,\textsuperscript{106} reorganizations under the federal Bankruptcy Act;\textsuperscript{107} sales of equity securities to up to ten purchasers by corporations or limited liability companies in a private transaction;\textsuperscript{108} the sale of oil and gas interests in a single well to not more than five natural persons;\textsuperscript{109} offerings exempt under section 4(2) of the Securities Act of 1933;\textsuperscript{110} mergers and other reorganizations;\textsuperscript{111} offerings exempt under SEC Rule 505;\textsuperscript{112} and public offerings limited to accredited investors as defined under SEC Rule 501.\textsuperscript{113} The foregoing exemptions are self-executing,\textsuperscript{114} except for offerings under section 4(2) of the Securities Act of 1933,\textsuperscript{115} SEC Rule 505,\textsuperscript{116} and certain public offerings limited to accredited investors.\textsuperscript{117}

Statutorily exempt secondary transactions include certain "good faith" sales by or on behalf of bona fide owners;\textsuperscript{118} sales by persons acting in a fiduciary capacity,\textsuperscript{119} sales by pledgees;\textsuperscript{120} sales by banks, savings and loans, savings banks or credit unions if at a profit of not more than two percent;\textsuperscript{121} secondary sales through licensed securities dealers not involving an issuer or underwriter;\textsuperscript{122} and unsolicited trades executed through licensed securities dealers.\textsuperscript{123}

\textsuperscript{103} See id. § 1707.03(I). This exemption may be available for both the initial issuance of the mortgage and resale.

\textsuperscript{104} See id. § 1707.03(G).

\textsuperscript{105} See id. § 1707.03(I).

\textsuperscript{106} See id. § 1707.03(K); see also OHIO ADMIN. CODE § 1301-6-3-01(B) (2002).

\textsuperscript{107} See OHIO REV. CODE ANN. § 1707.03(L).

\textsuperscript{108} See id. § 1707.03(O); see also OHIO ADMIN. CODE § 1301-6-3-03(C) & (D).

\textsuperscript{109} See OHIO REV. CODE ANN. § 1707.03(P).

\textsuperscript{110} See id. § 1707.03(Q); see also 13 U.S.C. § 77d(2) (2000).

\textsuperscript{111} See OHIO REV. CODE ANN. § 1707.03(U).

\textsuperscript{112} See id. § 1707.03(V); see also 17 C.F.R. § 230.303 (2002).

\textsuperscript{113} See OHIO REV. CODE ANN. § 1707.03(Y); see also 17 C.F.R. § 230.501.

\textsuperscript{114} See Memorizing the Exemption Pursuant to R.C. 1707.03(O), OHIO SEC. BULL. 96:3, at 14 (1996).

\textsuperscript{115} See OHIO REV. CODE ANN. § 1707.03(W)(4); see also OHIO ADMIN. CODE § 1301-6-3-03(B) (2002).

\textsuperscript{116} See OHIO REV. CODE ANN. § 1707.03(W)(3).

\textsuperscript{117} See id. § 1707.03(Y)(10).

\textsuperscript{118} See id. § 1707.03(B).

\textsuperscript{119} See id. § 1707.03(C).

\textsuperscript{120} See id. § 1707.03(E).

\textsuperscript{121} See id. § 1707.03(I).

\textsuperscript{122} See id. § 1707.03(M) & (N). This exemption does not apply to transactions in which a dealer sells "short" to a customer and then exercises warrants to obtain shares to "cover" the short sale. See Chiles v. M.C. Capitol Corp., 642 N.E.2d 1113, 1119-20 (Ohio Ct. App. 1994). See generally Thomas E. Geyer, R.C. 1707.03(M) Not a "Free Exercise" Clause: Chiles v. M.C. Capitol Corporation, OHIO SEC. BULL. 95:3 (1993).

\textsuperscript{123} See OHIO REV. CODE ANN. § 1707.03(T).
Transactions exempted by rule include sales by banks of retail repurchase agreements, sales of direct or fractional interests of Government National Mortgage Association (GNMA)-backed or GNMA pass-through securities, sales of direct or fractional interests in a certificate of deposit or a pool of certificates of deposit under certain circumstances, sales pursuant to an employee benefit plan if the plan is qualified under sections 401 to 425 of the Internal Revenue Code of 1986, if the security is exempt from federal securities registration pursuant to SEC Rule 701, or the security is in compliance with the federal securities registration requirements, options, warrants, and subscription rights for "exchanged-listed" securities exempt from registration pursuant to Ohio Revised Code section 1707.02(A), sales of guarantees, letters of credits, standby purchase agreements or other credit enhancements in connection with government-issued securities exempt pursuant to section 1707.02(B), offers by issuers on the internet (or similar electronic medium), provided that the offer complies with certain conditions, and the sale of securities by an issuer formed primarily to

---

124. See OHIO ADMIN. CODE § 1301:6-3-03(E)(1) (2002). The exemption extends to sales by subsidiaries of a bank and service corporations owned by and organized to provide services to one or more banks. Id.

125. See id. § 1301:6-3-03(E)(2). The exemption extends to sales by subsidiaries of a bank and service corporations owned by and organized to provide services to one or more banks. Id.

126. See id. § 1301:6-3-03(E)(3).

127. See id. § 1301:6-3-03(E)(4). The exemption is applicable provided that: (1) the certificates of deposit are issued by a bank with assets of $2,000,000,000 or more; (2) no more than ten percent of the CD pool's assets are invested in the CDs of any one bank; and (3) the total expenses of sale, issuance, and distribution of the securities do not exceed three percent of the gross proceeds of the sale of the securities. Id. § 1301:6-3-03(E)(4)(a)-(c).

128. See id. § 1301:6-3-03(E)(5). In order to meet this Ohio exemption in the case of securities sold pursuant to SEC Rule 701, 17 C.F.R. § 230.701 (2002), any commission, discount, or other remuneration paid or given for the sale of the securities in Ohio must be paid only to dealers or salespersons licensed by the Division. See OHIO ADMIN. CODE § 1301:6-3-03(E)(5)(b).

129. See id. § 1301:6-3-03(E)(6); see also supra notes 95-96 and accompanying text. The exemption extends to units that consist of an option, warrant or subscription right and an exchange-listed security. See OHIO ADMIN. CODE § 1301:6-3-03(E)(6).

130. See OHIO ADMIN. CODE § 1301:6-3-03(E)(7); see also supra note 88 and accompanying text.

131. See OHIO ADMIN. CODE § 1301:6-3-03(E)(8).

132. Namely, (1) the offer must indicate, directly or indirectly, that securities are not being offered to any person in the state of Ohio; (2) the issuer does not otherwise attempt to sell securities in Ohio; (3) the offer is not specifically directed to any Ohio person by, or on behalf of, the issuer; and (4) no sales of securities are made in Ohio as a result of the offer unless the securities (a) have been registered in Ohio by description, qualification, or coordination, (b) are the subject matter of a transaction that has been registered by description, (c) are otherwise exempt, or (d) are the subject matter of an exempt transaction, and (e) a final prospectus, offering circular, or form U-7 (if required) has been delivered to persons in Ohio prior to such sale. See id. § 1301:6-3-03(E)(8)(a)-(c).
provide "professional services," as defined in section 1785.01(A), if the sale complies with certain conditions.

The person claiming a transactional exemption bears the burden of proving it applies. Regardless of exempt status, all sales of securities are subject to the OSA's anti-fraud provisions.

3. Notice Filings

After the enactment of the National Securities Markets Improvement Act of 1996, the OSA was amended to include notice filing provisions for certain categories of "covered securities" as defined in section 18 of the Securities Act of 1933. Issuers relying on SEC Rule 506 must file with the Division a Form D, fee, and consent to service within fifteen days of the first sale in Ohio. Investment companies that have registered securities with the SEC must make a notice filing with the Division by filing a Form U-1, a Form NF, or a copy of the registration statement filed with the SEC. The OSA also contains a residual provision requiring a notice filing with the Division for any "covered securities" that are not otherwise eligible for an exemption.

133. OHIO REV. CODE ANN. § 1785.01(A) (West Supp. 2002).
134. See OHIO ADMIN. CODE § 1301.6-3-03(E)(9). In general, the conditions require that no commission or other remuneration be paid, directly or indirectly, in connection with the sale of the security and that ownership of the securities be limited to employees, partners, officers, directors, shareholders, members, or managers who perform professional services for the issuer. See id. § 1301.6-3-03(E)(9)(a)-(b)(i).
135. OHIO REV. CODE ANN. § 1707.43; see e.g., Chiles v. M.C. Capital Corp., 642 N.E.2d 1115, 1122 (Ohio Ct. App. 1994).
136. See supra note 98.
140. See OHIO REV. CODE ANN. § 1707.03(N). NSMIA caused a split in compliance for private offerings. If an offering qualifies under SEC Rule 506, it is an offering of "covered securities" and the companion Ohio exemption is section 1707.03(N). If an offering does not qualify under SEC Rule 506 but qualifies as an offering "not involving a public offering" under section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2), the offering does not involve "covered securities" and the companion Ohio exemption is section 1707.03(Q). See OHIO REV. CODE ANN. § 1707.03(Q); supra note 110. See generally Michael P. Miglietta, Rule 506 Amendments and Ohio's Model Accredited Investor Exemption, OHIO SEC. BULL. 98-4 (1998).
141. OHIO REV. CODE ANN. § 1707.092. The OSA has been amended to permit electronic filings by investment companies. See id. § 1707.093; see also OHIO ADMIN. CODE § 1301.6-3-03 (2002).
142. See OHIO REV. CODE ANN. § 1707.092(C)(1). The notice filing called for in section 1707.092(C)(1) consists of any document filed with the SEC pursuant to the Securities Act of 1933, together with annual or periodic reports of the value of the securities sold or offered to be sold to persons located in Ohio. See id. § 1707.092(C)(2).
B. Liability for Selling Unregistered Securities

The OSA prohibits the sale of unregistered securities,\textsuperscript{143} and provides that every sale made in violation of the OSA is voidable at the election of the purchaser.\textsuperscript{144} Additionally, liability may attach if, although an offering is registered with the Division, the seller fails to satisfy some condition subsequent to the registration.\textsuperscript{145} While an unregistered sale is voidable at the purchaser’s option, the underlying security is not invalidated by the violation of the OSA.\textsuperscript{146}

Although tempered by the affirmative defenses discussed below,\textsuperscript{147} Ohio courts have imposed a standard approaching strict liability against sellers of unregistered, nonexempt securities.\textsuperscript{148}

The general rule is that when a defendant has made no attempt to either file the appropriate securities registration or obtain an exemption from registration, the defendant may not claim that the resulting securities violation did not materially affect the protection contemplated by R.C. Chapter 1707. Thus, even though a transaction may be potentially eligible for an exemption, the failure to actually register or comply with that exemption violates the protection afforded by R.C. Chapter 1707.\textsuperscript{149}

Moreover, the Ohio Supreme Court has upheld liability for the sale of an unregistered security where the purchaser approached the issuer and negotiated the terms of the transaction.\textsuperscript{150} And, the Tenth District Court of Appeals recently upheld a trial court’s finding of liability for the sale of unregistered securities even though the complaint did not specifically assert a violation of the OSA.\textsuperscript{151}

\textsuperscript{143} See id. § 1707.44(C)(1).
\textsuperscript{144} See id. § 1707.43 (West 1994).
\textsuperscript{145} See, e.g., \textit{In re Bell & Beckwith}, 89 B.R. 632, 642-43 (Bankr. N.D. Ohio 1988) (finding that section 1707.43 would support a cause of action where the issuer failed to comply with escrow conditions imposed as part of a registration by qualification). The court found that the failure to satisfy escrow was a “material violation.” \textit{Id.}
\textsuperscript{146} See \textit{OHIO REV. CODE ANN.}, § 1707.38.
\textsuperscript{147} See infra Part III.D.
\textsuperscript{150} See \textit{Callahan v. Class Onc., Inc.}, 567 N.E.2d 1036, 1037 (Ohio 1991).
1. Parties

Liability for the sale of unregistered securities extends beyond the actual seller and issuer of the securities.\(^{132}\) Under section 1707.43 of the Ohio Revised Code, "every person who has participated in or aided the seller in any way in making such sale" is potentially jointly and severally liable.\(^{133}\)

"Inducing" a plaintiff to invest creates liability,\(^{134}\) but inducement is not the only basis for liability under section 1707.43.\(^{135}\) In Miller v. Griffith,\(^{136}\) the court extended liability to the president of the issuer, notwithstanding that his only "participation" was signing the stock certificate that represented the unregistered securities.\(^{137}\) In Boland v. Hammond,\(^{138}\) the Fourth District Court of Appeals extended liability to a defendant who did not have direct contact with the plaintiffs, but arranged meetings between the plaintiffs and the issuer, collected investment proceeds and forwarded them to the issuer, distributed promissory notes and interest payments from the issuer to the investors, and stood to gain financially if investments were made in the issuer.\(^{139}\) In Crane v. Courtright,\(^{140}\) the Tenth District Court of Appeals found that the defendant was a "seller" of unregistered fractional interests in an oil and gas lease because he supplied geological information and reported progress of test drilling to plaintiff and "encouraged" plaintiff to invest, although he did not consummate the sale.\(^{161}\) And, in Sorensen v. Tenuta,\(^{162}\) the same court held an officer of the issuer liable where he signed the subscription agreement on behalf of the issuer and had discussed the deal with the purchaser.\(^{163}\)


\(^{133}\) Ohio Rev. Code Ann. § 1707.43 (West 1994); see, e.g., Federated Management, 738 N.E.2d at 861 ("[P]articipating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43.").

\(^{134}\) See Federated Management, 738 N.E.2d at 860-61.

\(^{135}\) See id. ("[T]he inducement test is but one factor in determining liability under R.C. 1707.43.").


\(^{137}\) See id. at 157 ("[T]he evidence shows that Mr. Leroy Vignon was president of the corporation and that he signed the purported certificate for the ten shares of stock as president of the corporation and in that sense contributed to this transaction and participated in the consummation of the transaction and, therefore, would be equally at fault with [the person who actually sold the securities].").


\(^{139}\) See id. at 793 ("Given his extensive involvement in the sales transactions and his financial stake in obtaining investors for Rogers and Sunbelt, we find that a reasonable person could only conclude that Hammond 'participated in or aided' Rogers and Sunbelt in the sale of securities . . . .").

\(^{140}\) 206 N.E.2d 913 (Ohio Ct. App. 1964).

\(^{141}\) See id. at 914, 916.

\(^{142}\) 577 N.E.2d 408 (Ohio Ct. App. 1989).

\(^{143}\) See id. at 411.
Attorneys, accountants, and other professionals whose activities go beyond providing professional services to an issuer may also be liable. In *Hild v. Woodcrest Association*, the court held that an accounting firm that had prepared financial and investment information to attract investors had participated in the sale of securities. In *Reidel v. Acutote of Colorado*, the U.S. District Court for the Southern District of Ohio found officers of a third-party consulting/marketing firm that was retained by an issuer to be liable for selling unregistered securities where the officers marketed, promoted, solicited, and gave investment advice about the issuer’s securities. The *Reidel* court recognized that section 1707.43’s applicability to anyone who “participated in or aided the seller in any way” makes the Ohio provision “much broader than the parallel federal provision” — Section 12(a)(1) of the 1933 Securities Act. However, the OSA does provide a “safe harbor” from liability for professionals whose activities are incidental to the practice of their profession.

In order to recover under the OSA, a plaintiff must be a “purchaser.” One who purchases securities directly or indirectly through an agent may satisfy the “purchaser” requirement of section 1707.43. The purchaser may assign a section 1707.43 cause of action. And, although the OSA does not contain a survival provision like that contained in the Uniform Securities Acts, a securities cause of action may survive under Ohio’s general survival statute.

---

166. See id. at 1055-57.
168. See id. at 1067.
169. See id. at 1066.
172. OHIO REV. CODEANN. § 1707.43 (West 1994); see, e.g., Anderson v. BancOhio Nat'l Bank, No. C-840913, 1983 WL 8844, at *2 (Ohio Ct. App. Nov. 27, 1983) (“As the only persons entitled to relief under R.C. 1707.43 through 1707.43 are purchasers.”); Smith v. Wait, 330 N.E.2d 431, 434 (Ohio Ct. App. 1973) (“R.C. 1707.43 can create no claim for relief in Gushman . . . because Gushman does not allege that he personally was the purchaser of any of the securities involved.”).
173. See Ware v. Kowars, No. 90AP-450, 2001 WL 38731, at *3 (Ohio Ct. App. Jan. 23, 2001) (“R.C. 1707.43 applies to actions for recovery 'based upon or arising out of a sale or contract for sale made in violation of Chapter 1707 of the Revised Code,' and, as such, it is irrelevant whether the plaintiff is directly investing in the defendant’s securities or hiring the defendant to purchase stocks for her.”).
175. See UNIF. SEC. ACT (1956) § 410(d), 7C U.L.A. 266 (2000) (“Every cause of action under this statute survives the death of any person who might have been a plaintiff or defendant.”); UNIF. SEC. ACT (1985) § 609(c), 7C U.L.A. 82 (same).
176. OHIO REV. CODEANN. § 2305.21 (West 1994) (“In addition to the causes of action which survive at common law, cause of action for mesne profits, or injuries to the person or property, or for deceit of fraud,
The Division may not sue to compel rescission, nor may it sue to recover damages on behalf of aggrieved investors.\textsuperscript{177}

2. Covered Securities

The OSA does not appear to impose any civil liability for the failure of an issuer to make a notice filing for an offering of covered securities. If an issuer relying on SEC Rule 506\textsuperscript{178} or an investment company\textsuperscript{179} fails to make a required notice filing with the Division, section 18 of the Securities Act of 1933 indicates that such failure may be corrected by promptly submitting the required fees and forms.\textsuperscript{180} Under the OSA and the Division's administrative rules, a corrective notice filing can be made any time after a sale is made.\textsuperscript{181} Thus, in the case of an issuer relying on Rule 506 that failed to file with the Division, the issuer could make a corrective notice filing with the Division upon tender of the securities or the filing of a suit under section 1707.43. This corrective filing arguably would eliminate any potential liability, provided that the conditions of the underlying Rule 506 exemption are met. Notwithstanding such a corrective filing, a purchaser still may be able to bring an action under the OSA alleging fraud in the sale of covered securities, or that the offering was not properly exempted under Rule 506.

C. Remedies

1. Rescission or Recissory Damages

Section 1707.43 of the Ohio Revised Code provides that the purchaser of securities sold in violation of section 1707.44(C)(1) may, upon tender of the securities in person or in open court, bring an action to recover the purchase price and all taxable court costs.\textsuperscript{182} A plaintiff who no longer owns the securities need not tender them and may recover rescissory damages based on the difference between her initial investment and the amount she received in the resale.\textsuperscript{183} While the OSA

\textsuperscript{178} 17 C.F.R \textsection 230.506 (2002); see \textit{Ohio Rev. Code Ann.} \textsection 1707.03(X) (West Supp. 2002).
\textsuperscript{179} \textit{Ohio Rev. Code Ann.} \textsection 1707.092.
\textsuperscript{181} \textit{Ohio Rev. Code Ann.} \textsection 1707.391; \textit{Ohio Admin. Code} \textsection 1301:6-3-391(F) & (G) (2002).
\textsuperscript{182} \textit{Ohio Rev. Code Ann.} \textsection 1707.43 (West 1994).
does not provide for any interest prior to a judgment, the purchaser may recover the full purchase price of the securities (or the full difference between the purchase price and the resale price) without an offset for any income, dividends, or tax benefits received from the investment.

2. Punitive Damages

The OSA does not provide for punitive damages.

3. Injunctive Relief and Receivership

The Division may seek to enjoin violators of section 1707.44(C)(1), and may seek the appointment of a receiver. The OSA makes no such provision for private plaintiffs.

D. Defenses

1. Failure to Timely Accept Offer of Rescission

A purchaser is barred from recovering under section 1707.43 if she has failed to accept a qualifying offer of rescission within thirty days of the date of the offer. A "qualifying" rescission offer must have been made (1) in writing, (2) at least two weeks after the date of the sale or contract for sale, (3) by "the seller or by any person who has participated in or aided the seller in any way in making such sale or contract of sale," and must have (4) offered "to take back the security in question and to refund the full amount paid by [the] purchaser."

It is likely that an Ohio court would recognize an offer in the form of the Division's Explanatory Statement/Non-Prejudice Statement as a

186. See, e.g., Mandalaywala, 2001 WL 118392, at *3-5; Crater, 633 N.E.2d at 1216.
187. See, e.g., Mandalaywala, 2001 WL 118392, at *3-6; Crater, 633 N.E.2d at 1216; Sorenson, 377 N.E.2d at 413.
190. See id. § 1707.27.
191. See OHIO REV. CODE ANN. § 1707.43 (West 1994).
192. Id.
qualifying offer. A person seeking to establish this defense should deliver the rescission offer by a method that provides evidence of delivery. Presumably, a court would recognize that the thirty-day period begins to run no later than the date of delivery. It is likely that a court would construe the "acceptance date" liberally such that a purchaser would be entitled to rescission if acceptance is manifested within the thirty day period although received by the person making the offer after the thirty day period has expired.

An offer to rescind that does not disclose the relevant violation of the OSA may not constitute a valid rescission offer under section 1707.43.194

2. Immaterial Violation

A plaintiff is not entitled to rescission if "the court determines that the violation did not materially affect the protection contemplated by the violated provision."195 The burden is on the seller to show that a violation is not material,196 but the purchaser must allege that the violation materially affected the protection contemplated under the OSA.197 Whether a violation is material or immaterial is a question of law.198

As a matter of law, the sale of unregistered securities "materially affects" the protection contemplated by the OSA and entitles the purchaser to rescission.199 However, mere technical violations of the statutory registration requirements or the rules promulgated thereunder may not "materially affect" the protection contemplated by the OSA. For example, the court in Obernau v. CIDCO Investment Services, Inc.200 refused to grant rescission where the form required to perfect a transactional exemption was filed with the Division fourteen to sixteen days late.201 However, three years later, in Sherman v. River Oaks Office

198. See Bronough, 242 N.E.2d at 376.
201. See id. at 1073.

The Obernau court explained:

Generally, where no attempt was ever made to file any registration or even to obtain an exemption from registration, there could be no claim that the violation was not material.
Plaza, Ltd., the same court held that the Obenauf court’s conclusion that the violation was immaterial was dicta, and reversed a summary judgment in favor of the seller who did not file with the Division the form required to perfect a transactional exemption until sixty-nine days after the sale.

3. Statute of Limitations

Actions under section 1707.43 must be brought either within two years of when the purchaser knew or had reason to know of the violation of the OSA or within four years from the date of sale or contract for sale, whichever period expires first.

Since “sale” is defined as including “every act by which a sale is made,” one Ohio court has held that the four-year limitations period based on the date of sale does not begin to run until the final act required to complete the sale — in that case, making the final payment for the securities — is accomplished. However, another Ohio court has held that the four-year statute of limitations began to run on the date that the subscription agreement was signed, rather than on the (later) date the plaintiff made final payment for the securities.

However, if a filing was made which was perhaps incomplete in some respects, but which substantially followed the provisions of R.C. Chapter 1707, then the resulting violation may not materially affect the protection contemplated by the violated provision.

The record in the instant case indicates that the Form 3-Q filed by IFFS on January 11, 1983 was accepted and stamped “completed” by the Ohio Division of Securities. This court accepts the trial court’s finding that this late filing of Form 3-Q did not materially affect the protection contemplated by R.C. 1707.03(Q). The record before us contains substantial, credible evidence upon which the trial court could have found that the late filing of Form 3-Q was not sufficient to cause appellants to be liable under R.C. 1707.43.

Id. (citations omitted).


203. Id. at 986.

204. See id.

205. OHIO REV. CODE ANN. § 1707.43 (West 1994).

206. Id. § 1707.01(C)(2) (West Supp. 2002); see supra Part II.A.


208. ... Kondrat points out that he had not paid off the entire note used to finance the investment and that the sale of the investment, therefore, was not complete until the final payment was made. We disagree. The sale of the security was complete in 1989 [when Kondrat signed the subscription agreement]. That Kondrat was still paying off the financing loan did not affect the finality of that sale, nor does it affect the date the statute of limitations began to run. The payments were merely the fulfillment of an obligation separate and apart from the sale.

Ohio courts generally give plaintiffs the benefit of the doubt as to the level of knowledge required to trigger the two-year limitations period.\textsuperscript{209} For example, the mere fact that the plaintiff served as a director of the issuer has been held insufficient to imply that the plaintiff knew his shares were unregistered.\textsuperscript{210} Likewise, a plaintiff’s overall sophistication and experience as an investor have been held insufficient to impute knowledge that his shares were unregistered.\textsuperscript{211} Knowledge of one violation of the OSA does not trigger the two-year statute of limitations for another violation of the OSA.\textsuperscript{212}

On the other hand, disclosure in the offering materials that the offering is unregistered constitutes sufficient notice to commence the two-year limitations period.\textsuperscript{213} Furthermore, a letter from the issuer advising a purchaser that the issuer sold some unregistered securities may also give the purchaser “reason to know” sufficient to trigger the two-year limitations period.\textsuperscript{214} In the words of one court of appeals: "The two-year statute of limitations begins to run when the plaintiff has reason to know that the defendant has failed to register a security and not when there is reason to know of underlying facts which relate to the failure of registration."\textsuperscript{215}

Notwithstanding the fact that the purchase or sale of securities may be accomplished pursuant to a contract, violations arising from the sale

\textsuperscript{211} The Eastman court explained:

There is . . . no case law cited holding that plaintiff, merely by becoming a director, was charged with knowledge regarding the registration or exemption of the stock.

Although members of a board of directors may have, by the nature of their position, extensive knowledge of all aspects of the corporation, whether a director has actual knowledge must be determined on a case-by-case basis according to the facts. Frequently, directors rely on the expertise of a corporation’s officers that the corporation is in compliance with statutes and regulations.

In the absence of a factual background which shows that a shareholder knew that shares of stock were not properly registered or exempted, the two-year statute of limitations provided in [OHIO REV. CODE ANN.] § 1707.43 begins to run upon the actual discovery of the defect.

\textit{Id. Eastman} has been criticized for ignoring that "constructive" knowledge, as well as actual knowledge, will trigger the two-year statute of limitations in section 1707.43. See, e.g., Gounaris v. Apple, No. 11356, 1990 WL 26091, at *5-6 (Ohio Ct. App. Mar. 6, 1990).


\textsuperscript{210} Seffer, 1989 WL 107039, at *12.
of securities are governed by the OSA’s two-year/four-year limitations period, not the fifteen-year limitations period for breach of contract.\textsuperscript{216}

4. \textit{In Pari Delicto}

Under the doctrine of \textit{in pari delicto}, “no action will lie to recover on a claim based upon, or in any manner depending upon, a fraudulent, illegal or immoral transaction or contract to which the plaintiff was a party.”\textsuperscript{217} Ohio federal courts have recognized the \textit{in pari delicto} defense in actions brought under section 1707.43 for the sale of unregistered securities. Applying Ohio law, the Sixth Circuit Court of Appeals noted that an \textit{in pari delicto} defense may be available where a securities purchaser’s wife represented the defendant securities broker that sold the limited partnership interest in violation of the OSA.\textsuperscript{218} On the other hand, an issuer of securities was not permitted to use the \textit{in pari delicto} defense absent evidence that the purchaser had engaged in any fraudulent conduct.\textsuperscript{219}

5. Registered Offerings

Registration by the Division does not constitute a representation by the State of Ohio to the public that the securities are safe to buy.\textsuperscript{220} Representations that a security offered or sold has been in any manner endorsed by the Division are prohibited.\textsuperscript{221}

6. Safe Harbor for Attorneys, Accountants, and Engineers

Attorneys, accountants, and engineers whose involvement in an unregistered sale “is incidental to the practice of the person’s profession,” are deemed, by statute, “not . . . to have effected, participated in,

\begin{itemize}
\item \textsuperscript{216} See OHIO REV. CODE ANN. § 2303.06 (West 1994); see, e.g., Helman v. EPL Prolong, Inc., 743 N.E.2d 484, 493 (Ohio Ct. App. 2000); Lynch v. Dean Witter Reynolds, Inc., 731 N.E.2d 1203, 1207-08 (Ohio Ct. App. 1999); see also supra Part I.A.3.a(ii).
\item \textsuperscript{218} Mark v. FSC Sec. Corp., 870 F.2d 391, 337 n.3 (6th Cir. 1989).
\item \textsuperscript{219} \textit{In re Bell & Beckwith}, 89 B.R. 632, 641 (Bankr. N.D. Ohio 1988) (“Case law holds that for a defense based on \textit{in pari delicto} to be allowed in securities cases, the fault of the parties must be clearly mutual, simultaneous, and relatively equal.” (quotation omitted)).
\item \textsuperscript{220} See Devoe v. State, 337 N.E.2d 396, 401 (Ohio Ct. App. 1975); Smith v. Wait, 330 N.E.2d 431, 434 (Ohio Ct. App. 1975). Nor is the State of Ohio liable for the fraudulent registration of securities in violation of the OSA’s express statutory provisions. See Devoe, 337 N.E.2d at 400.
\item \textsuperscript{221} OHIO REV. CODE ANN. § 1707.44(C)(4) (West Supp. 2002); see Devoe, 337 N.E.2d at 401.
\end{itemize}
or aided the seller in any way in making, a sale or contract of sale in violation of [the OSA]."\textsuperscript{222} This safe harbor codified prior case law, which had held professionals must "participate" in the sale of securities for liability to attach under section 1707.43.\textsuperscript{223}

Cases decided after the enactment of section 1707.431(A) have recognized liability only where the activities are beyond "incidental" to the professional services and rise to the level of "participation" in the sale. For example, in \textit{Gerlach v. Wergowski},\textsuperscript{224} the court of appeals held that an accountant was not entitled to the protection of section 1707.431(A) where he introduced the investment to his clients and then signed the stock certificates as secretary of the issuer.\textsuperscript{225} And, in \textit{Perkowski v. Megas Corp.},\textsuperscript{226} an attorney receiving compensation for the sale of securities that were recommended on his radio talk show was not entitled to the protection of section 1707.431.\textsuperscript{227}

7. Safe Harbor for "Bringing Together"

Section 1707.431(B) excludes from those who may be liable for having "effected, participated in, or aided the seller in any way in making" an unregistered sale

[any person, other than an investment adviser or an investment adviser representative, who brings any issuer together with any potential investor, without receiving, directly or indirectly, a commission, fee, or other remuneration based on the sale of any securities by the issuer to the investor. Remuneration received by the person solely for the purpose of offsetting the reasonable out-of-pocket costs incurred by the person shall not be deemed a commission, fee, or other remuneration.\textsuperscript{228}]

A person claiming this safe harbor for a publicly advertised meeting must file with the Division a notice "indicating an intent to cause or hold

\textsuperscript{222} \textit{Ohio Rev. Code Ann.} § 1707.431(A).
\textsuperscript{223} See, e.g., \textit{Leeth v. Decorator's Mfg.}, 425 N.E.2d 920, 923 (Ohio Ct. App. 1979) (holding that the corporation's attorney must have at least signed the investment agreement to be liable to the purchaser). However, prior to the enactment of section 1707.431(A), an accounting firm was held liable under section 1707.43 when it contacted its own clients regarding an investment. \textit{See Hild v. Woodcrest Ass'n}, 391 N.E.2d 1047, 1056-37 (Ohio Com. Pl. 1977).
\textsuperscript{224} 584 N.E.2d 1220 (Ohio Ct. App. 1989).
\textsuperscript{225} \textit{See id. at} 1221-22.
\textsuperscript{227} \textit{See id. at} 379-80.
\textsuperscript{228} \textit{Ohio Rev. Code Ann.} § 1707.431(B) (West Supp. 2002).
such a meeting at least twenty-one days prior to the meeting.229 Failing to file the notice does not create a presumption that a person was participating in or aiding in the making of a sale or contract of sale in violation of the OSA.230

8. Corrective Filings

The OSA permits two types of corrective filings with the Division for securities sold without being properly registered or exempted.231 Rescission offers made in connection with these corrective filings foreclose civil liability.232

a. Corrective Filings in the Case of “Excusable Neglect”

Section 1707.391 allows registration violations in connection with certain exempt transactions, securities that may be the subject of transactions eligible for registration by description, and notice filings for covered securities to be corrected by filing Division Form 391, provided that the original failure to file was the result of “excusable neglect.”233 “Excusable neglect” means, within limits,234 failing to timely or properly make a filing with the Division.235 Thus, Form 391 filings are permitted only when there is a failure to timely236 or properly make a required filing with the Division.237 An issuer may file Form 391 only if

229. Id. The Division may, upon receipt of such notice, issue an order denying the availability of an exemption (not more than fourteen days after receipt of the notice) based on a finding that the applicant is not entitled to the exemption. Id.

230. Id.

231. See id. § 1707.391; id. § 1707.39 (West 1994).

232. See supra Part III.D.1.


234. “Excusable neglect” does not include any failure to timely or properly file an application to exempt, qualify, or register securities by an issuer who has itself, or together with its affiliates, filed more than two applications for retroactive exemption, qualification, or registration within twelve months of the date of the filing of the form 391 under consideration unless the issuer establishes in writing to the division that there is good cause to include the failure to timely or properly file within excusable neglect.

235. OHIO ADMIN. CODE § 1301:6-3-391(C) (2002). Nor does it encompass paying commissions to unlicensed persons, fraud, misrepresentations, material omissions, or failing to comply with the statutory requirements of the underlying exemption or of registration by description. For example, an “excusable neglect” filing would not correct a prohibited general solicitation during an offering under section 4(2) of the Securities Act of 1933, 15 U.S.C. § 77d(2) (2000), or payments of commissions to an unlicensed dealer in violation of sections 1707.14(A)(1)(b) and 1707.44(A), OHIO REV. CODE ANN. §§ 1707.14(A)(1)(b) & 1707.44(A).

236. See OHIO ADMIN. CODE § 1301:6-3-391(A).

237. See id. § 1301:6-3-391(A)(1).

238. See id. § 1301:6-3-391(A)(2).
the issuer otherwise qualified for the transactional exemption, registration by description, or notice filing.\textsuperscript{238} Investment companies may also correct oversales under section 1707.391.\textsuperscript{239}

For transactions exempt under sections 1707.03(Q), (W), and (Y), the Form 391 must be filed within six months of the earliest sale made in violation of the OSA.\textsuperscript{240} "Excusable neglect" filings for securities that may be the subject matter of a transaction eligible for registration by description must be filed within one month of the earliest sale.\textsuperscript{241} The Division generally denies filings outside of the one and six month filing periods.\textsuperscript{242} For offerings of covered securities,\textsuperscript{243} a notice filing correcting "excusable neglect" may be made any time after the sale.\textsuperscript{244} A Form 391 filing is effective fourteen days after filing, unless the Division denies the filing based on a finding of a lack of excusable neglect.\textsuperscript{245} A rescission offer is not required under a Form 391, but an issuer may consider a rescission offer under section 1707.43 as additional insurance against potential civil liability.

\textit{b. Qualification of Securities Sold Without Compliance}

If securities are sold in violation of the OSA, and are not eligible for correction pursuant to section 1707.391, an application for qualification pursuant to section 1707.39 may be made on Division Form 39. Securities that are the subject of a Form 39 filing may be qualified if the Division finds investors will not be damaged, defrauded, or prejudiced by such qualification.\textsuperscript{246}

A party filing Form 39 must file all offering materials and financial statements of the issuer. The Division requires that each purchaser sign an Explanatory Statement/Statement of Non-Prejudice\textsuperscript{247} and make a rescission offer. Applicants may be required to provide supplemental

\textsuperscript{238} See id. § 1301:6-3-391(A).
\textsuperscript{239} See id. § 1301:6-3-391(G).
\textsuperscript{240} See id. § 1301:6-3-391(B)(1)-(3).
\textsuperscript{241} See id. § 1301:6-3-391(B)(4).
\textsuperscript{242} See id. § 1301:6-3-391(E). See generally Mark V. Holdman, \textit{Ohio Commissioner’s Letter, OHIO SEC. BULL. 86:2}, at 1 (1986) (noting that, although Rule 1301:6-3-391 “does not eliminate the possibility of the Commissioner exercising discretion . . . , the present policy of the Division is to use extremely limited discretion in this regard”).
\textsuperscript{244} See OHIO ADMIN. CODE § 1301:6-3-391(F) & (G).
\textsuperscript{245} See id. § 1301:6-3-391(E).
\textsuperscript{246} OHIO REV. CODE ANN. § 1707.39 (West 1994).
\textsuperscript{247} Available in the "Division Forms" section of the Division’s website, http://www.securities.state.oh.us.
disclosures to purchasers if adequate information was not provided at the time of the investment. The Explanatory Statement/Statement of Non-Prejudice indicates that the rescission offer is open for only thirty days, so if a purchaser does not request rescission within that period the securities may be qualified. Qualification of securities under section 1707.39 estops the Division from taking enforcement action and eliminates any potential civil liability under section 1707.43.\footnote{See \textit{Ohio Rev. Code Ann.} § 1707.39.} The Division may withdraw Form 39 applications that are not completed within twelve months.\footnote{See \textit{Id.} Part IV.A.2.}

\section*{IV. LIABILITIES AND REMEDIES FOR THE UNLICENSED SALE OF SECURITIES}

\subsection*{A. Overview of Definitions of and Licensing Requirements for Securities Dealers and Securities Salespersons}

\section*{1. Securities Dealers}

A "dealer" is a person, other than a salesperson,\footnote{\textit{Ohio Rev. Code Ann.} § 1707.01(E)(1)(a).} who engages or professes to engage in Ohio, for either all or part of his or her time, directly or indirectly, either in the business of the sale of securities for his or her own account, or in the business of the purchase or sale of securities for the account of others in the reasonable expectation of receiving a commission, fee, or other remuneration as a result of engaging in the purchase and sale of securities.\footnote{See \textit{Id.} § 1707.01(E)(1)(a).} However, an issuer, or any officer, director, employee, or trustee of, or partner in, or any general partner of an issuer, that sells, offers for sale, or does any act in furtherance of the sale of a security that represents an economic interest in that issuer, is not a "dealer," provided that he, she, or it receives no commission, fee, or other similar remuneration for the sale.\footnote{\textit{Ohio Rev. Code Ann.} § 1707.01(E)(1)(A).}
Subject to certain statutory exceptions, no person may act as a dealer without being licensed by the Division or being exempt from licensure. A person who does not meet the definition of dealer need not be licensed as such. Licensed dealers that have one hundred or more retail customers and annual revenues of $150,000 or more must also register with the SEC, again subject to certain statutory exceptions.

Notwithstanding any other exceptions to the dealer-licensing requirement, no person other than an issuer selling its own securities may engage in the business of selling securities to an institutional investor unless licensed by the Division.

2. Securities Salespersons

A “salesperson” is any “natural person, other than a dealer, who is employed, authorized, or appointed by a dealer to sell securities within the Division by rule exempts from the definition of “dealer” under division (E)(1) of this section. Id. § 1707.01(E)(1)(b)-(f).

The Division has, pursuant to the authority granted it by section 1707.01(E)(1)(f), exempted several more classes of persons, including members of the New York Stock Exchange, persons subject to Section 15(c) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o (2000), and, subject to certain restrictions, registered members in good standing of any Canadian stock exchange or self-regulatory agency. See OHIO ADMIN. CODE § 1301.6-3-01(F)(1)(b)-(c) & (3).

233. The OSA excepts from its dealer licensure requirements persons transacting business through or with a licensed dealer, persons participating in transactions exempt under section 1707.34, persons transacting in securities that are the subject matter of one or more transactions enumerated in sections 1707.03(B) to (L), (O) to (R), or (U) to (Y), or in section 1707.06, except when a commission, discount, or other remuneration is paid or given in consideration for such transactions, and issuers selling their own securities or those of their subsidiary — provided that such securities are specified under sections 1707.02(G) or (I) or under section 1707.04. See OHIO REV. CODE ANN. § 1707.14(A)(1)(a)-(d).

234. See id. § 1707.14(A)(1).

235. See id. § 1707.14(B).

Exceptions to this SEC registration requirement exist for: (1) a bank, savings and loan association, savings bank, or credit union chartered under the laws of the United States or any state thereof; and (2) a dealer that enters into, and is in compliance with, an undertaking accepted by the Division, in which the dealer agrees that it will not engage in any transaction involving the buying, selling, or otherwise dealing in securities with any natural person in Ohio, except for transactions involving either of the following: (a) securities of corporations or associations that have qualified for treatment as nonprofit organizations pursuant to Section 301(c)(3) of the Internal Revenue Code of 1986; or (b) securities or transactions that are described in section 1707.14(A)(1)(a)-(d). See id.

236. See id. § 1707.14(A)(2). Section 1707.01(S) defines “institutional investor” as: any corporation, bank, insurance company, pension fund or pension fund trust, employees’ profit-sharing fund or employees’ profit-sharing trust, any association engaged, as a substantial part of its business or operations, in purchasing or holding securities, or any trust in respect of which a bank is trustee or co-trustee. “Institutional investor” does not include any business entity formed for the primary purpose of evading the OSA.

See id. § 1707.01(S), see also OHIO ADMIN. CODE § 1301.6-3-01(D) (“Institutional investor” . . . includes, but is not limited to, “qualified institutional buyer,” as that term is defined in 17 C.F.R. 230.144(A)”).
Because this definition requires a relationship (employed, authorized, or appointed) between a salesperson and a dealer, there can be no "independent" securities salespersons in Ohio. The general partners of a partnership, and the executive officers of a corporation or unincorporated association, licensed as a dealer are not salespersons within the meaning of this definition, nor are such clerical or other employees of an issuer or dealer as are employed for work to which the sale of securities is secondary and incidental. Every salesperson must be licensed by the Division and employed only by the licensed dealer specified in the salesperson's license. Thus, a salesperson may work for only one licensed dealer. "Dual affiliation" is prohibited. There are no exceptions to the salesperson-licensing requirement.

B. Liability for the Unlicensed Sale of Securities

The OSA prohibits the unlicensed sale of securities and provides that every sale made in violation of the OSA's licensing requirements is voidable at the election of the purchaser. Intent is not a requirement for a violation of the OSA's licensing requirements. A contract for sale made in violation of the OSA's licensing requirement "necessarily involves the violation of a statute" and "is against public policy and will not be enforced."

Anyone meeting the statutory definition of dealer or salesperson and not licensed by the Division or properly exempted from licensure will be liable for any securities they sell. In addition, the broad language of section 1707.43 extends joint and several liability to "every person who has participated in or aided the seller in any way in making such sale."

257. OHIO REV. CODE ANN. § 1707.01(F)(1).  
238. Id. § 1707.01(F)(2). However, the Division may require a license from any such partner, executive officer, or employee if it determines that protection of the public necessitates the licensing. See id.  
239. See id. § 1707.16(A).  
260. See id. § 1707.44(A)(1).  
261. See id. § 1707.43 (West 1994).  
262. See id. § 1707.44(A)(1) ("No person shall . . . sell securities in this state without being licensed . . ."). With two exceptions, relating to issuers who have been "blacklisted," see id. § 1707.44(H), and acts by dealers in derogation of certain provisions of Section 13 of the Securities Exchange Act of 1934, see id. § 1707.44(L), every other liability prohibition in section 1707.44 requires knowing, intentional, or deceptive conduct. See id. § 1707.44(B)-(G), (I)-(K) & (N).  
264. See id. § 1707.43.  
265. Id.
Ohio courts have construed section 1707.43 liberally, and have extended liability for the unlicensed sale of securities to a defendant who signed the sale agreement and was the only representative of the issuer with whom the plaintiff discussed the deal. The fact that a defendant did not receive compensation does not preclude liability for the unlicensed sale of securities. "Inducing" a plaintiff to invest creates liability, but inducement is not the exclusive means for establishing liability under section 1707.43. A single unlicensed transaction is sufficient to create liability under section 1707.43.

The plaintiff must be a "purchaser." One who purchases securities directly or indirectly through an agent may satisfy the "purchaser" requirement of section 1707.43. The purchaser may assign a section 1707.43 cause of action. Although the OSA does not contain a survival provision, a securities cause of action may survive under Ohio's general survival statute.

The Division may not bring an action to rescind transactions on behalf of purchasers or to impose personal liability for damages on issuers, including directors.

C. Remedies

1. Rescission and Rescissory Damages

Section 1707.43 provides that the purchaser of securities sold in violation of section 1707.44(A)(1) may, upon tender of the securities in person or in open court, bring an action to recover the purchase price and all taxable court costs. A plaintiff who no longer owns the securities need not tender them and may recover rescissory damages

266. See, e.g., Federated Mgmt. Co. v. Coopers & Lybrand, 738 N.E.2d 842, 861 (Ohio Ct. App. 2000) ("[P]articipating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43.").
268. See id.
269. See supra note 134.
270. See supra notes 133-171 and accompanying text.
272. See supra note 172.
273. See supra note 173.
274. See supra note 174.
275. See supra note 176.
276. See supra note 177.
277. See OHIO REV. CODE ANN. § 1707.43 (West 1994).
based on the difference between her initial investment and the amount she received in the resale.\textsuperscript{278}

Ohio courts have emphasized the right to recover the full amount of the purchase price, rejecting offsets because of returns on the investment,\textsuperscript{279} tax benefits,\textsuperscript{280} and dividends.\textsuperscript{281} However, pre-judgment interest is not recoverable.\textsuperscript{282}

2. Punitive Damages

The OSA does not provide for punitive damages.\textsuperscript{283}

3. Injunctive Relief and Receivership

The Division may seek to enjoin violators of section 1707.44(A)(1),\textsuperscript{284} and may seek the appointment of a receiver.\textsuperscript{285} The OSA makes no such provision for private plaintiffs.

D. Defenses

1. Failure to Timely Accept Offer of Rescission

A purchaser is barred from recovering under section 1707.43 if she has failed to accept a qualifying offer of rescission within thirty days of the date of the offer.\textsuperscript{286} A "qualifying" rescission offer must have been made (1) in writing, (2) at least two weeks after the date of the sale or contract for sale, (3) by "the seller or by any person who has participated in or aided the seller in any way in making such sale or contract of sale," and must have (4) offered "to take back the security in question and to refund the full amount paid by [the] purchaser."\textsuperscript{287} An offer to rescind that does not disclose the relevant OSA violation may not constitute a valid rescission offer.\textsuperscript{288} It is likely that a court would recognize use of

\textsuperscript{278} See supra note 183.
\textsuperscript{279} See supra note 185.
\textsuperscript{280} See supra note 186.
\textsuperscript{281} See supra note 187.
\textsuperscript{282} See supra note 184.
\textsuperscript{283} See supra note 188.
\textsuperscript{284} See supra note 189.
\textsuperscript{285} See supra note 190. However, the Division may not sue to compel rescission, nor may it sue to recover damages on behalf of aggrieved investors. See supra note 177.
\textsuperscript{286} See OHIO REV. CODE ANN. § 1707.43 (West 1994).
\textsuperscript{287} See id.
\textsuperscript{288} See supra note 194.
the Division’s Explanatory Statement/Non-Prejudice Statement as a sufficient written offer.280

A person seeking to establish this defense should deliver the rescission offer by a method that provides evidence of delivery. Presumably, a court would recognize that the thirty-day period begins to run no later than the date of delivery. It is also likely that a court would construe the “acceptance date” liberally such that a purchaser would be entitled to rescission if acceptance is manifested within the thirty day period although received by the person making the offer after the thirty day period has expired.

2. Immaterial Violation

Section 1707.43 expressly provides another defense, stating that a plaintiff is not entitled to rescission if “the court determines that the violation did not materially affect the protection contemplated by the violated provision.”290 Ohio state courts addressing this issue have held that violation of the OSA’s licensing requirements does “materially affect” the protections of the OSA.291 However, one Ohio federal court has held that unlicensed activity did not “materially affect” the plaintiff’s protection where the defendant, although unlicensed in Ohio, was licensed in other states, another salesman who was present at the sales meeting was licensed in Ohio, and the firm was licensed in Ohio.292

3. Statute of Limitations

As previously discussed,293 actions under section 1707.43 must be brought within the shorter period of either two years of when the purchaser knew, or had reason to know, of the OSA violation or four years from the date of sale or contract for sale.294

As is true regarding the degree of knowledge required to trigger the two-year limitations period with respect to the sale of unregistered securities,295 Ohio courts generally give plaintiffs the benefit of the doubt

289. See supra note 193.
292. See Wieringa v. Oppenheimer & Co., Nos. C-80-368 & C-81-414, 1985 WL 510, at *13 (N.D. Ohio Mar. 7, 1985) (reasoning that the lack of Ohio licensure did not relate to the investment strategy that was discussed at the sales meeting).
293. See supra notes 203-216 and accompanying text.
295. See supra note 209.
regarding the degree of knowledge required to trigger the two-year limitations period with respect to the sale of securities by an unlicensed person. For example, in *Crater v. International Resources, Inc.*, the court held that the statute of limitations on the unlicensed sale of securities did not begin to run until the plaintiff gained actual knowledge of the defendant’s unlicensed status through a certification from the Division, notwithstanding that the statute of limitations on the sale of unregistered securities began to run at an earlier time when the plaintiff received an offering document stating that the securities were unregistered. On the other hand, in *J.J. Enterprises v. Hawk Energy Co.*, where the defendant presented evidence showing that the purchaser knew that the seller was unlicensed on the date of sale, the court held that the two-year limitations period began to run on the date of sale.

4. Entitlement to Licensing Exception

Several of the OSA’s securities registration and exemption provisions carry licensing exceptions. However, for the defendant to successfully claim the exception, the seller must have actually complied with the pertinent securities registration or exemption provision.

297. *Id.* at 1213-16; *see also* Sorenson v. Tenuta, 377 N.E.2d 408, 411-12 (Ohio Ct. App. 1989) (holding that the limitations period on a cause of action for the unlicensed sale of securities did not begin to run until the plaintiff was informed by his attorney that the defendant was unlicensed).
299. *Id.* at *2.
300. Section 1707.14(A)(1) states in pertinent part:

No person shall act as a dealer, unless the person is licensed as a dealer by the division of securities, except in the following cases:

(b) When the securities are the subject matter of one or more transactions enumerated in divisions (B) to (L), (O) to (R), and (U) to (Y) of section 1707.03, or in section 1707.06 of the Revised Code, except when a commission, discount, or other remuneration is paid or given in consideration with transactions enumerated in divisions (O), (Q), (W), (N), and (Y) of section 1707.03, or in section 1707.06 of the Revised Code;

(c) When the person is an issuer selling securities issued by it or by its subsidiary, if such securities are specified under division (G) or (I) of section 1707.02, or under section 1707.04 of the Revised Code;

(d) When the person is participating in transactions exempt, under section 1707.34 of the Revised Code, from this chapter.

301. For example:

Common to each of these licensing exceptions cited by the appellants, however, is the basic requirement that the issuer of the securities complete some form of filing with the Division of Securities. In this case, the Division of Securities has certified that it does not have on record any filing by the appellants concerning the working interests sold to Crater, nor do the appellants contend that they attempted to undertake such a filing.
5. Statutory Safe Harbors for Certain Activities

As previously discussed, the OSA provides safe harbors from liability for certain activities. Section 1707.431(A) provides a safe harbor for attorneys, accountants, and engineers, whose activities in connection with the sale of securities is incidental to the practice of their profession. Section 1707.431(B) provides a safe harbor for certain "bringing together" activities, provided that the person who engages in the "bringing together activities does not receive any commission, fee or other remuneration based on the sale of any securities. In addition, section 1707.01(E)(1)(d) provides an exception to the definition of "dealer" for "any person that brings an issuer together with a potential investor and whose compensation is not directly or indirectly based on the sale of any securities by the issuer to the investor."

V. LIABILITIES AND REMEDIES FOR MISREPRESENTATION OF MATERIAL FACTS, OMISSION OF MATERIAL FACTS, AND FRAUD IN THE SALE AND PURCHASE OF SECURITIES

A. Common Law Liabilities, Remedies, and Defenses

Regardless of whether a defendant has committed an actionable violation of one or more provisions of the OSA, a purchaser or seller who has been wronged in a securities transaction may have one or more claims under Ohio common law.
1. Common Law Causes of Action

a. Fraud

The elements of a cause of action for common law fraud are: (1) a misrepresentation or omission (2) of a fact that is material to the transaction at hand, made (3) with knowledge of the representation’s falsity or of the concealed fact, or with such utter disregard and recklessness as to truth or falsehood that knowledge may be inferred, and (4) with the intent of misleading another into justifiably relying upon it, (5) resulting in an injury proximately caused by that reliance.\textsuperscript{306}

As a general rule, fraud cannot be based on a misrepresentation concerning a future event.\textsuperscript{307} "Mere predictions about the future, expectations, or opinions are not fraudulent misrepresentations unless [they] are fraudulently made."\textsuperscript{308} However, a promise to do or to refrain from doing some act in the future, made with the intent not to perform as promised, will support a claim for fraud.\textsuperscript{309}

A material omission may give rise to a claim of fraud, provided that the concealing party owed the other a duty to disclose.\textsuperscript{310} Such a duty arises in a fiduciary relationship\textsuperscript{311} or in another relationship of similar
trust and confidence. The duty to disclose “may also be required of a party to a business transaction where such disclosure is necessary to dispel misleading impressions that are or might have been created by partial revelation of the facts.”

A misrepresented or omitted fact is material if it is likely, under the circumstances, to affect the conduct of a reasonable person with reference to the transaction.

A defendant’s actual knowledge of the falsehood or material omission is, of course, sufficient to constitute fraud. However, a plaintiff may also satisfy the “knowledge” prong by showing that the defendant made the false representation or concealed the relevant fact “recklessly and without any knowledge or information on the subject calculated to induce such belief.”

Intent to mislead another into relying on a misrepresentation or concealment can be inferred from the totality of the circumstances, since it is rarely provable by direct evidence. Where intent is lacking, Ohio law recognizes a cause of action for constructive fraud, which has been defined generally as any “inequitable conduct that is not accompanied by affirmative false representations.”

---

In re Termination of Employment of Pratt, 321 N.E.2d 603, 609 (Ohio 1974). A securities salesperson is a fiduciary of his or her clients, see infra note 335 and accompanying text, as is an investment adviser, see infra note 356 and accompanying text.

312. See, e.g., Hadden View Inv. Co. v. Coopers & Lybrand, 436 N.E.2d 212, 215 (Ohio 1982) (holding that the accountant for a limited partnership owed a duty to disclose certain information to the limited partners, whose reliance on the accountant’s work was reasonably foreseeable); Leib, 702 N.E.2d at 1262 (“A person’s duty to speak . . . may arise in any situation where one party imposes confidence in the other because of that person’s position, and the other party knows of this confidence.”) (quoting Mancini v. Gorick, 336 N.E.2d 8, 10 (Ohio Ct. App. 1978)); see also Stone v. Davis, 419 N.E.2d 1094, 1098 (Ohio 1981) (“A fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed.”).


315. See, e.g., id.


319. Hanes, 471 N.E.2d at 808.

There may be fraud in law, legally deduced from certain acts, even though both parties were strictly honest and had no intention of fraud. Constructive fraud may arise from the circumstances of the transaction or the relationship of the parties, without the existence of fraudulent intent affecting the conscience. . . . Courts . . . may hold acts fraudulent although there is no intent to defraud. The fraud is the same in either case, the distinction being in the nature of the relief rather than in the character of the fraud.

Id. (citations omitted).
Whether reliance is justifiable is a question of fact, requiring “an inquiry into the relationship between the parties.” Reliance is justifiable “if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation.” In addition, at least one Ohio court has suggested that “indirect reliance” is sufficient in a securities dispute. In *Hansen v. Landaker,* the Tenth District Court of Appeals recognized that securities plaintiffs could prove “indirect reliance” if the brokers or investment advisers upon whom plaintiffs relied obtained their information from the offering circular. The court concluded that such “indirect reliance” would not “[subject] plaintiffs to reliance defenses.” In the case of an omission, reliance may be presumed if materiality is established.

A fraud cause of action requires a resulting injury proximately caused by the reliance. Proximate cause is a “natural and continuous sequence that contributes to produce the result, and without which the result could not have happened.” Privity is not required to assert a claim of common law fraud.

A plaintiff must plead fraud with particularity, which normally requires pleading the “time, place, and content of the false representation, the fact misrepresented, and the nature of what was obtained or given as a consequence of the fraud.” Ohio courts decide the

“Constructive” fraud requires that the parties have a “special confidential or fiduciary relation” which affords the power and means to one to take undue advantage of or exercise undue influence over another. *Ohio Univ. Bd. of Trs. v. Smith,* 724 N.E.2d 1153, 1160 (Ohio Ct. App. 1999). In such situations, “the law indulges in an assumption of fraud for the protection of valuable social interests based upon an enforced concept of confidence, both public and private.” *Perlberg,* 247 N.E.2d at 308, quoted with approval in *Hansen,* 471 N.E.2d at 808.


323. See id. at 45.

324. Id.

325. See *Rubin v. Schottstein, Zox & Dunn,* 143 F.3d 263, 268 (6th Cir. 1998).

326. See *Leal,* 702 N.E.2d at 1263.


328. See *Haddon View Inv. Co. v. Coopers & Lybrand,* 436 N.E.2d 212, 215 (Ohio 1982) (“[T]here is no question that privity is not required to assert a claim of common law fraud, out of a concern that an innocent party should not suffer at the hands of an intentional wrongdoer.”).

329. See *OHIO R. CIV. PROC. 9(b),* see also *Haddon View,* 436 N.E.2d at 215. However, intent, knowledge, and other conditions of mind may be pleaded generally. *OHIO R. CIV. PROC. 9(b).*

appropriate degree of specificity on a case-by-case basis, depending on whether or not the allegation is "specific enough to inform the defendant of the act of which the plaintiff complains, and to enable the defendant to prepare an effective response and defense."

b. Fraudulent Nondisclosure

The state of Ohio law regarding "fraudulent nondisclosure" is unsettled. There is Ohio case law holding that "fraudulent nondisclosure" is proved by establishing the elements of fraud, including the existence of a duty to disclose, and is not a distinct cause of action. On the other hand, the Ohio Supreme Court has recognized fraudulent nondisclosure as a distinct cause of action, requiring knowledge, but not intent, and implying a duty to speak as a matter of law:

[A] party is under a duty to speak, and therefore liable for nondisclosure, if the party fails to exercise reasonable care to disclose a material fact which may justifiably induce another party to act or refrain from acting, and the non-disclosing party knows that the failure to disclose such information to the other party will render a prior statement or representation untrue or misleading.

c. Negligent Misrepresentation

Ohio law supports a cause of action for negligent misrepresentation where "[o]ne who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their

331. See Baker, 385 N.E.2d at 543.
332. Id. at 545-46; see also F & J Roofing, 318 N.E.2d at 1220 ("[T]he pleadings must be sufficiently particular to apprise the opposing party of the claim against him.").
333. See supra text accompanying note 306.
334. See supra notes 310-313 and accompanying text.

For a thoughtful discussion of the tension apparent in Ohio cases wrestling with the existence and requisites of this cause of action, see Gen. Acquisition, Inc. v. GenCorp Inc., 766 F. Supp. 1460, 1477-82 (S.D. Ohio 1990).
business transactions.\textsuperscript{337} The supplier of such false information, if he failed to exercise reasonable care or competence in obtaining or communicating the information,\textsuperscript{338} is liable for any pecuniary loss suffered by those who justifiably relied on the false information.\textsuperscript{339} The elements of fraud and negligent misrepresentation "are very similar,"\textsuperscript{340} with failure to exercise due care replacing the intent element of common law fraud.\textsuperscript{341} Unlike fraud, negligent misrepresentation requires an affirmative statement. No cause of action will lie for a negligent omission.\textsuperscript{342}

d. Negligent Nondisclosure

In \textit{General Acquisition, Inc. v. GenCorp Inc.},\textsuperscript{343} the U.S. District Court for the Southern District of Ohio, struggling through the morass of Ohio


\textsuperscript{338} Whether a supplier of information has used reasonable care or competence in obtaining the information provided is dependent upon the circumstances and will vary according to many factors. "When the information concerns a fact not known to the recipient, he is entitled to expect that the supplier will exercise that care and competence in its ascertainment which the supplier's business or profession requires and which, therefore, the supplier professes to have by engaging in it." Proof of the standard of care and competence that a business or profession requires must necessarily be provided through expert testimony unless the lack of skill or care is so apparent as to be within the comprehension of laymen and requires only common knowledge and experience to understand and judge it.

\textsuperscript{339} See Delmar, 334 N.E.2d at 838; Martin v. Ohio State Univ. Found., 742 N.E.2d 1198, 1209 (Ohio Ct. App. 2000); Leal, 702 N.E.2d at 1233; \textit{Textron Financial}, 684 N.E.2d at 1269.

The Ohio Supreme Court has upheld a trial court's dismissal for failing to state a cause of action for negligent misrepresentation of a complaint alleging that a newspaper reader relied to his detriment in making securities investments based on a negligent report in the newspaper because the reader was not "within [the] special limited class (or group) of foreseeable persons as set forth in [\textit{Restatement (Second) of Torts} § 552(2)(a)]." Gutter v. Dow Jones, Inc., 490 N.E.2d 898, 900 (Ohio 1986). The court also "question[ed] whether appellee's reliance on the news account, without verifying the trading status of the bonds with a broker or otherwise, could ever be considered 'justifiable.'" \textit{Id.}

\textsuperscript{340} Martin, 742 N.E.2d at 1209. That said,

[v]vhile a plaintiff may allege, in the alternative, both fraud and negligent misrepresentation as to the same course of conduct, a defendant cannot be found to have committed an act both intentionally and negligently... Where fraud and negligent misrepresentation are claimed as to the same set of underlying facts, if fraud is proved, then the claim of negligent misrepresentation is necessarily subsumed thereby.

\textsuperscript{341} See id.; supra text accompanying notes 306 and 317.

\textsuperscript{342} See Martin, 742 N.E.2d at 1209; Leal, 702 N.E.2d at 1233; \textit{Textron Financial}, 684 N.E.2d at 1269; Zuber v. Ohio Dep't of Ins., 316 N.E.2d 244, 246-47 (Ohio Ct. App. 1986).

nondisclosure law, distilled from it a cause of action for negligent nondisclosure:

A plaintiff can premise an action for misrepresentation, like nondisclosure, on a claim of fraud or negligence.

This Court and others have characterized this theory of recovery as fraudulent nondisclosure. This label, at least under the instant facts, is a misnomer. Scienter is an essential element in any fraud claim. A cause of action premised on fraud inherently denotes intentional action on the part of the defendant. Inasmuch as negligent conduct may serve as the basis for a claim for nondisclosure, the theory of recovery should be designated as "negligent" or "fraudulent" nondisclosure depending upon the underlying conduct.\(^{344}\)

Grounded in Section 551 of the Restatement (Second) of Torts,\(^{345}\) negligent nondisclosure—like fraud based on the intentional omission of a material fact\(^{346}\) and (if in fact it is a distinct cause of action) fraudulent nondisclosure\(^{347}\)—requires that the nondisclosing party owe the other party a duty to speak.\(^{348}\) A negligent nondisclosure cause of action seems to be the logical corollary to the negligent misrepresentation cause of action. Again, lack of due care replaces the intent element of

---

344. Id. at 1481-82.
345. Section 551 provides:

1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.

2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

(a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and

(b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

(c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and

(d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and

(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

RESTATEMENT (SECOND) OF TORTS, supra note 336, § 551.
346. See supra text accompanying notes 310-313.
347. See supra text accompanying note 336.
348. See RESTATEMENT (SECOND) OF TORTS § 551(1) (subjecting the nondisclosing party to liability "if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question").
common law fraud. In addition to lack of due care, the plaintiff must prove knowledge, materiality, causation, reliance, proximate cause, and the existence of a duty to disclose.

**e. Breach of Fiduciary Duty**

The Ohio Supreme Court has defined a fiduciary relationship as "a relationship 'in which special confidence and trust is reposed in the integrity and fidelity of another and there is a resulting position of superiority or influence, acquired by virtue of this special trust.'" In addition, the court has found that "[a] fiduciary relationship need not be created by contract; it may arise out of an informal relationship where both parties understand that a special trust or confidence has been reposed." A fiduciary must disclose all material information that he or she learns concerning the subject matter of the fiduciary relationship. Consequently, a fiduciary may be liable in fraud for failing to disclose material information.

A securities salesman is a fiduciary of her clients. An investment adviser is also a fiduciary. For example, in applying Ohio law in *General Acquisition v. GenCorp Inc.*, the District Court for the Southern District of Ohio found that a national financial advisory firm was a fiduciary where it solicited an opportunity to advise and represent a publicly-held company in connection with corporate acquisitions, and after being given that opportunity, was made aware of confidential information about the publicly-held company's finances and strategy. Having found a fiduciary relationship, the court denied the defendant's

---

349. See supra text accompanying note 341.
351. Ed Schory & Sons, Inc. v. Soc'y Nat'l Bank, 662 N.E.2d 1074, 1081 (Ohio 1996) (quoting In re Termination of Employment of Pratt, 321 N.E.2d 603, 609 (Ohio 1974)). Cf. Steinfeils v. Ohio Dep't of Commerce, 719 N.E.2d 76, 82 (Ohio Ct. App. 1998) (holding that the principal of the corporation that was the general partner of a limited partnership did not owe a fiduciary duty to the purchaser of interests in the limited partnership, even though the purchase was effected through face-to-face transactions between the principal and the purchaser).
354. See supra notes 310-312 and accompanying text.
358. Id. at 1472-73.
motion to dismiss, finding that defendant may have breached its fiduciary duty in at least three ways: by disclosing confidential information about plaintiff; by failing to disclose to plaintiff its relationship with a competing corporate bidder; and by using inside information to trade in shares of plaintiff's shares. 359

As the General Acquisition decision demonstrates, a fiduciary duty may be breached in a variety of ways, most commonly by failing to disclose material information. 360 An action for breach of fiduciary duty accrues when the plaintiff's interest is impaired by the breach, 361 and is subject to the four-year statute of limitations contained in Ohio Revised Code section 2305.09. 362 However, as discussed in detail below, 363 courts have looked beyond a pleading styled as a breach of fiduciary duty and applied Ohio Revised Code section 1707.43's two-year/four-year limitations period where the allegations are "inextricably interwoven" with the sale of securities. 364

f. Breach of Contract

Ohio courts have not been receptive to efforts to characterize a securities law claim as a breach of contract. Plaintiffs attempt this characterization in order to take advantage of the fifteen-year statute of limitations on breach of contract claims. 365 However, Ohio courts have rejected such attempts to avoid the shorter limitations period afforded by the OSA. 366

g. Detrimental Reliance

Ohio law does not recognize a cause of action for detrimental reliance. 367 However, some Ohio courts have construed actions captioned

359. Id. at 1474-77.
360. See id. See generally Byrley v. Nationwide Life Ins. Co., 640 N.E.2d 187, 198 (Ohio Ct. App. 1994) ("A broker and client are in a fiduciary relationship and, therefore, the broker owes the client a duty to disclose material information concerning investments.").
363. See supra Part V.A.3.a.ii.
365. OHIO REV. CODE ANN. § 2303.06 (West 1994).
2. Common Law Remedies

a. Actual Damages and Rescission

Upon proving fraud, negligence, or breach of fiduciary duty, a plaintiff is entitled, at her option, to recover actual damages proximately caused by the defendant’s wrongdoing, or to rescind the transaction, in lieu of seeking actual damages. A plaintiff opting for rescission must act without unreasonable delay.

Rescission is intended to restore the parties to their respective pre-transaction situations. In returning the parties to their status quo ante, it is generally necessary to award the plaintiff her out-of-pocket expenses. Ohio law characterizes these out-of-pocket expenses as damages because "they represent the loss not cured by the cancellation of the contract."
b. Punitive Damages

A plaintiff who proves fraud or breach of fiduciary duty may recover punitive damages, provided that she shows either that the defendant's tortious conduct was "aggravated by the existence of malice or ill will" or was "particularly gross or egregious." A plaintiff may make such a showing by evidence of intentional, willful, or wanton acts, or by malice inferred from conduct and surrounding circumstances.

"[T]o recover punitive damages, a plaintiff must prove 'a positive element of conscious wrongdoing.' Neither negligent misrepresentation nor negligent nondisclosure will support an award of punitive damages.

The decision to award punitive damages is within a trial court's discretion. However, a court may not award punitive damages in the absence of actual damages.

376. See, e.g., Byrle v. Nationwide Life Ins. Co., 640 N.E.2d 187, 199-200 (Ohio Ct. App. 1994). See generally Preston v. Murr, 512 N.E.2d 1174, 1175 (Ohio 1987) ("Ohio courts, since as early as 1859, have allowed punitive damages to be awarded in tort actions which involve fraud, malice, or insult." (citing Roberts v. Mason, 10 Ohio St. 277 (1859))).


381. See Preston, 312 N.E.2d at 1176 (observing that "something more than mere negligence is always required" to justify the award of punitive damages).


The purpose of the [a] rule is to keep the punitive damages awarded a mere incident of the cause of action, rather than let it become a cause of action in and of itself. Punitive damages are awarded as punishment for causing compensable harm and as a deterrent against similar action in the future. No civil cause of action in this state may be maintained simply for punitive damages.

c. Attorney’s Fees

A court may award a prevailing plaintiff her attorneys’ fees in cases involving fraud or breach of a fiduciary duty where punitive damages are warranted. A court need not actually award punitive damages before it can award attorney fees. The decision whether to award attorneys’ fees, where permitted, rests within the sound discretion of the trial court.

3. Defenses to Common Law Causes of Action

a. Limitations

i. Generally

To avoid the bar of limitations, a plaintiff must bring claims of fraud, negligent misrepresentation, negligent nondisclosure and breach of fiduciary duty within four years of the date on which the plaintiff’s cause of action accrued. A defendant asserting limitations bears the burden of proving that the plaintiff failed to do so.

A fraud cause of action accrues when the plaintiff actually or constructively discovers the fraud. A person “constructively discovers” fraud when he possesses “facts sufficient to alert a reasonable person to the possibility of wrongdoing.”

A negligence cause of action accrues at the time the negligence occurs. Ohio courts have declined to extend the "discovery rule" to negligence actions in the absence of express statutory authority, and have held the "discovery rule" does not apply to negligence claims arising out of the sale of securities. As a result, limitations begin to run on the date the negligent act or nondisclosure occurred, not the date the injury occurred.

A cause of action for breach of fiduciary duty accrues when the breach occurs, rather than when the plaintiff discovers the breach.

ii. The Section 2305 Statutes of Limitations Versus the Section 1707.43 Statute of Limitations

On a number of occasions, courts have addressed the interaction of Ohio Revised Code section 2305.09's general four-year fraud statute of limitations (and its discovery rule) and section 1707.43's two-year/four-year statute of limitations. Since the discovery rule contained in section 2305.09 is more favorable, plaintiffs often attempt to cast their cause of action in the nature of fraud. However, the plain language of section 1707.43 states that its limitations period applies to "action[s] for any recovery based upon or arising out of a sale or contract for sale made in violation of the [OSA]." As the following discussion demonstrates, in cases involving securities issues styled as fraud claims, courts have tended to find that section 1707.43, rather than section 2305.09, provides the appropriate statute of limitations.

---

393. See, e.g., Inrexsion REIT One, 546 N.E.2d at 211.


398. See Hatan, 743 N.E.2d at 488.
399. This tendency should not be confused with older decisions by federal courts in Ohio holding that Ohio Rev. Code Ann. § 2305.09, not Ohio Rev. Code Ann. § 1707.43, provided the appropriate limitations period for federal securities fraud claims under SEC Rule 10b-5. See, e.g., Gaudin v. KDI Corp., 576 F.2d 708, 711-12 (6th Cir. 1978); Nickels v. Kochler Mgmt. Corp., 541 F.2d 611, 614-16 (6th Cir. 1976).
As previously discussed, courts also have explored the interaction of section 2305.06's fifteen-year statute of limitations for breach of contract and section 1707.43's two-year/four-year statute of limitations. Similarly, where the nature of the case is securities, courts have held that section 1707.43 provides the appropriate statute of limitations.

The starting point for the judicial discussions of the applicable limitations period in a securities case usually is the proposition that the court "must look to the actual nature or subject matter of the case, rather than the form in which an action is pleaded, to determine the applicable limitations period." While more than one court has recognized that section 1707.43 was not intended to apply to securities fraud cases based solely upon common law fraud, courts have broadly construed what constitutes "based upon or arising out of a sale or contract for sale made in violation of the [OSA]" for purposes of applying the section 1707.43 limitations period.

In *Hater v. Gradson Division of McDonald & Co. Securities*, the plaintiffs alleged fraud by virtue of the defendants' concealment of a number of facts regarding a limited partnership and partnership property. Plaintiffs further alleged that the fraudulent acts occurred after the sale of the limited partnership interests, and that their claim was brought as "owners" of securities, rather than as "purchasers" of securities. Accordingly, plaintiffs contended that section 2305.09 provided the appropriate limitations period. The First District Court of Appeals rejected this contention, holding that the "allegations of fraud [were] inextricably interwoven with the sale of the partnership units," and

1976). Prior to 1991 there was no uniform limitations period for 10b-5 actions, so courts looked to the law of the forum state for the appropriate period. See *Gaudin*, 576 F.2d at 711. In 1991, in *Lamm*, *Pleva*, *Lipton*, *Propis & Petigruz v. Gilbertson*, 501 U.S. 330 (1991), the United States Supreme Court established a uniform limitations period for 10b-5 actions of one year from discovery and not more than three years after the violation, and rendered moot the borrowing of state limitations periods. See *id.* at 364.

400. See *supra* Part III.D.3.


403. Notwithstanding this broad construction, courts still recognize that section 1707.43 and common law fraud create different causes of action. For example, the common law fraud requires reliance, while *Ohio Rev. Code Ann.* § 1707.43 does not. See *Ferritto*, 743 N.E.2d at 983. The common law is available to defrauded purchasers or sellers, while section 1707.43 is available only to purchasers. See *Nicks*, 541 F.2d at 616. The common law requires intent, or at least recklessness, while section 1707.43 may not, depending on the provision of the OSA that is allegedly violated. See *id.*; see also *James B. Farmer & Toba Jeanne Feldman, Fraud in Securities Transactions: A Comparison of Civil Remedies Under the Ohio Securities Act, the Uniform Securities Act, and the Federal Securities Acts*, 49 U. Cin. L. Rev. 814, 821 (1980).


405. See *id.* at 197.
concluded that section 1707.43 provided the appropriate limitations period.\footnote{406 \textit{Id.} at 197-98; see also DiCello v. Shepard, No. 77107, 2001 WL 175344, at *6 (Ohio Ct. App. Feb. 22, 2001) ("[T]he limitations period of R.C. 1707.43 clearly applies where, as here, the plaintiff claims his recovery is "based upon" or "arises out of" a violation of the blue sky provisions.").}  

In \textit{Lynch v. Dean Witter Reynolds, Inc.},\footnote{407 731 N.E.2d 1205 (Ohio Ct. App. 1999).} plaintiffs claimed that the defendant securities brokerage firm breached brokerage account contracts by failing to make required disclosures, engaging in self-dealing, acting without due diligence, and improperly managing the investment accounts. Since the acts occurred after the opening of the brokerage account contracts, and were allegedly unrelated to the purchase of securities, the plaintiffs reasoned that the claims should be subject to the fifteen-year statute of limitations for breach of contract contained in section 2305.06. However, the Second District Court of Appeals found that the allegations related to defendant’s sales practices, marketing, and representations on which the plaintiffs would have relied in deciding to purchase securities, and therefore “clearly arose out of the sale or contract for sale of the securities.”\footnote{408 \textit{Id.} at 1207.} Because specific statutory provisions prevail over general provisions,\footnote{409 \textit{See id.; see also OHIO REV. CODE ANN. § 1.51 (West 1994) ("If a general provision conflicts with a special or local provision, . . . the special or local provision prevails as an exception to the general provision, unless the general provision is the later adoption and the manifest intent is that the general provision prevail.").}} the court concluded that section 1707.43 provided the appropriate limitations period.\footnote{410 \textit{See Lynch,} 731 N.E.2d at 1207 ("Accordingly, if the investor’s claims can be characterized both as violations of the specific provisions of OHIO REV. CODE ANN. Chapter 1707 and as breaches of their contracts with Dean Witter, the limitations period set forth in OHIO REV. CODE ANN. § 1707.43 prevails over the general limitations period for breach of contract claims.").}}  

In \textit{Ware v. Kowars},\footnote{411 No. 00AP-450, 2001 WL 38731 (Ohio Ct. App. Jan. 23, 2001).} a customer (Ware) sued her stockbroker (Kowars) claiming that Kowars engaged in unauthorized and unsuitable activities in managing Ware’s brokerage account. Ware’s complaint alleged conversion, breach of contract, breach of fiduciary duty, and fraud. The Tenth District Court of Appeals rejected the argument that the limitation periods for those theories should apply. Specifically, the court relied on \textit{Lynch} to reject Ware’s contention that the breach of contract limitations period should apply because her claims allegedly arose not from the sale of securities, but from mismanagement of her account after the securities were purchased.\footnote{412 \textit{Id.} at *4. The court also noted that “if a plaintiff’s claims can be characterized both as violations of the specific provisions of R.C. Chapter 1707 and as a breach of contract claim, the limitations period set forth in R.C. 1707.43 prevails over the general limitations period for breach of an oral contract.” \textit{Id.}} Similarly, the court relied on \textit{Haler} to
reject application of the limitation period for fraud even though the complaint sounded in fraud. The court concluded:

Although [Ware] has attempted to avoid the application of R.C. 1707.43 by framing her counts as common law claims for breach of contract, breach of fiduciary duty [and fraud], "we must look to the actual nature or subject matter of the case, rather than the form in which an action is pleaded, to determine the applicable limitations period...." In reviewing the allegations of [Ware]'s complaint, we find that [Ware] has alleged conduct that [violates] R.C. Chapter 1707's prohibition against fraud in the sale of securities. ... As such, [Ware]'s allegations are "inextricably interwoven" with the sale of the securities and, therefore, controlled by the limitations period contained in R.C. 1707.43.\textsuperscript{113}

In \textit{Goldberg v. Cohen},\textsuperscript{114} the plaintiffs alleged that false and misleading statements induced them to buy limited partnership units and common stock. The complaint did not allege that the statements violated section 1707, but did state that the interests plaintiffs purchased constituted "securities" as defined in the OSA. The Seventh District Court of Appeals rejected the plaintiffs' attempt to rely on the section 2305.09 limitations period. Citing \textit{Hater} and \textit{Lynch}, the court stated: "[I]f a complaint alleging common-law fraud is predicated on the sale of securities, the applicable statute of limitations is found in R.C. 1707.43, not R.C. 2305.09."\textsuperscript{115}

By contrast, the Ninth District Court of Appeals gave the plaintiffs the benefit of the section 2305.09 limitations period in \textit{Ferritto v. Alejandro}.\textsuperscript{116} In that case, the defendant (Alejandro) sold both investments and insurance policies to the Ferrittos. However, Alejandro purchased investments for less than the amount given to him for that purpose by the Ferrittos, and used the difference for his own personal purposes. The Ferrittos sued based on several causes of action, including common law fraud. The complaint did not contain a cause of action under section 1707, but the trial court applied the section 1707.43 limitations period anyway.\textsuperscript{117} The court of appeals reversed, recognizing that the Ferrittos' complaint did not "seek to recover the purchase price of securities or damages for a violation of R.C. Chapter 1707; rather they [sought] damages for [Alejandro]'s false statements that securities were

\textsuperscript{113} \textit{Id.} at *3.
\textsuperscript{114} No. 01-CA-49, 2002 WL 1371031 (Ohio Ct. App. June 13, 2002).
\textsuperscript{115} \textit{Id.} at *3.
\textsuperscript{116} 743 N.E.2d 978 (Ohio Ct. App. 2000).
\textsuperscript{117} \textit{See id.} at 981-82.
purchased.” The court found that the false statements “were not made with the purpose of selling securities . . . . Rather, Alejandro’s statements were, allegedly, made with the intent to induce the Ferritos to deposit funds with Alejandro so that he could pocket their investment money.” Therefore section 2305.09 provided the appropriate statute of limitations.

The Eighth District Court of Appeals recently applied the section 2305.09 limitations period in Intrater v. Van Cauwenbergh,

a case in which the plaintiff (Intrater) did not allege violations of the OSA, but instead claimed that the defendant (Van Cauwenbergh) fraudulently induced Intrater to give her $41,000 to purchase securities and that Van Cauwenbergh converted the funds to her own use. Specifically, in 1986 and 1987, Intrater gave the funds to Van Cauwenbergh to be invested by Intrater’s then-fiancé (Weiss), a purported “stock market genius.” The “genius” demanded complete secrecy, and Intrater received no documentation regarding the supposed investment. However, Van Cauwenbergh did provide Intrater with three “guarantee checks,” the third of which bounced in September 1987. On several occasions during 1989, Intrater requested an accounting; but, instead of providing one, Van Cauwenbergh stated that Intrater’s investment had grown to over $300,000. Intrater reiterated her request for an accounting through a series of five letters written between 1995 and 1997. Eventually, Intrater filed suit in 1999, alleging fraud and conversion. Van Cauwenbergh moved for summary judgment based on the statute of limitations, but did not argue the section 1707.43 limitations period. The trial court denied the motion. The jury found that Intrater first discovered or should have discovered Van Cauwenbergh’s fraud on January 1, 1996. As such, Intrater’s suit was timely since it was filed within four years of January 1, 1996. The court of appeals affirmed, with the majority holding that the commencement of the limitations period and the reasonableness of discovery were questions for the jury. A spirited dissent argued that Intrater had an affirmative

418. Id.
419. Id. at 982-83.
420. See id. at 983.
422. See id. at *1.
423. See id.
424. See id. at *1-2.
425. See id. at *2.
426. See id. at *3.
427. See id.
428. See id. at *4.
obligation to exercise reasonable diligence and to further investigate the status of her investment, and that, had she satisfied her obligation, she would have discovered Van Cauwenberghe’s wrongdoing no later than 1989.429

iii. Equitable Estoppel as a Means of Tolling Limitations

While Ohio courts have been reluctant to read a “discovery rule” into the negligence statute of limitations, the doctrine of equitable estoppel provides a means of avoiding “the inequitable use of the statute of limitations.”430 Equitable estoppel “precludes a party from asserting certain facts where the party, by his conduct, has induced another to change his position in good faith reliance upon that conduct.”431 The purpose of the doctrine “is to prevent actual or constructive fraud and to promote the ends of justice.”432 A plaintiff asserting equitable estoppel to avoid the bar of limitations must prove (1) that the defendant made a factual misrepresentation; (2) that it was misleading; (3) that it induced actual, reasonable, and good faith reliance by the plaintiff; and (4) that the plaintiff’s reliance caused him detriment.433 Moreover, the factual misrepresentation triggering the estoppel must consist of “(1) an affirmative statement that the statutory period to bring an action was larger than it actually was, (2) promises to make a better settlement of the claim if plaintiff did not bring the threatened suit, or (3) similar representations or conduct on the part of the defendants.”434

In Helman v. EPL Prolong, Inc.,435 the Seventh District Court of Appeals relied on Hafer and Lynch to find that the plaintiffs’ claim of breach of contract based on the failure to deliver stock pursuant to a subscription agreement was “inextricably interwoven with a fraudulent sale of securities,” and therefore subject to the section 1707.43 limitations period.436 However, the court remanded the case for the trier of fact to determine if the defendants should be equitably estopped from asserting the section 1707.43 statute of limitations as a defense, since there was

429. See id. at *8-9 (O’Donnell, J., dissenting).
433. See Helman, 743 N.E.2d at 495; Doe v. Blue Cross/Blue Shield of Ohio, 607 N.E.2d 492, 498
   Pac. R.R., 753 F.2d 776, 777 (9th Cir. 1985)), quoted with approval in Helman, 743 N.E.2d at 495.
436. See id. at 493-94.
some evidence that false assurances by certain defendants may have reasonably induced plaintiffs to forebear from suing.\footnote{See id. at 496.}

iv. The Limitations Period for a Defrauded Seller

Notwithstanding the courts’ tendency to apply the section 1707.43 limitations period in all cases of securities fraud, by its express terms section 1707.43 extends only to defrauded purchasers.\footnote{See Toledo Trust Co. v. Nye, 392 F. Supp. 484, 491 (N.D. Ohio 1973) ("It is clear after examining the statutory scheme that the Ohio Blue Sky Law has no provision for the action complained of by the plaintiff, which is an action by a seller claiming fraud by a purchaser in the sale of a security.").} Therefore, the cause of action of a defrauded seller sounds in common law fraud, and is governed by the section 2305.09 limitations period.\footnote{See Baker v. Pfreifer, 940 F. Supp. 1168, 1181-83 (S.D. Ohio 1996); see also Plantation Hous. Partners Ltd. v. Lindsey, No. 38196, 1991 WL 34726, at *4 (Ohio Ct. App. Mar. 14, 1991) ("R.C. 1707.43... addresses the remedy for a purchaser to recover his purchase price for securities sold in violation of R.C. 1707. Plantation, however, ... is a seller/creditor seeking payment of a debt owed. This cause of action is not brought under theegis of R.C. 1707 and so the R.C. 1707.43 statute of limitations is inapplicable to it.").}

b. Laches

Laches arise from the plaintiff’s failure “to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party.”\footnote{Connin v. Bailey, 472 N.E.2d 328, 329 (Ohio 1984) (quoting Smith v. Smith, 146 N.E.2d 434, 456-57 (Ohio Ct. App. 1957), aff’d, 136 N.E.2d 113 (Ohio 1959)).} Laches is an affirmative defense on which the defendant bears the burden of proof.\footnote{See State ex rel. N. Olmstead Fire Fighters Ass’n v. N. Olmstead, 597 N.E.2d 136, 142 (Ohio 1992). “[D]elay in and of itself in asserting a right does not constitute laches—length of time alone is insufficient to constitute a material prejudice.” Connin, 472 N.E.2d at 330.} In order to raise laches, the defendant must show that (1) an unreasonable amount of time lapsed before the plaintiff asserted the claim, (2) the plaintiff had no excuse for such delay, (3) the plaintiff knew or should have known of the injury or wrong giving rise to the claim, and (4) the defendant was prejudiced by the plaintiff’s delay.\footnote{See State ex rel. Mallory v. Pub. Employees Ret. Bd., 694 N.E.2d 1356, 1363 (Ohio 1998); McPherson v. McPherson, 90 N.E.2d 673, 680 (Ohio 1950). The doctrine of “unclean hands” is discussed in Part V.A.3.h, infra.} In addition, a defendant who seeks to rely on laches must not have “unclean hands.”\footnote{449}
c. Estoppel

The purpose of equitable estoppel is to "prevent actual or constructive fraud and to promote the ends of justice." Estoppel must be asserted in good faith, and may not be invoked "to uphold crime, fraud, or injustice." Estoppel is an affirmative defense on which the defendant bears the burden of proof. The defendant must prove (1) that the plaintiff made a factual misrepresentation, (2) that was misleading, (3) that induced the defendant to rely reasonably and in good faith, and (4) that the defendant was injured by his reliance. The defendant "must have relied on conduct of an adversary in such a manner as to change his position for the worse." The defendant's adverse reliance must have been "reasonable" — meaning that he "did not know and could not have known, that [his adversary's] conduct was misleading."

d. Waiver

Waiver is the voluntary relinquishment of a known right. Waiver requires (1) an existing right, (2) knowledge of that right, and (3) an intention to relinquish the right. In addition, if the waiver is based upon an agreement between the parties or between the waiving party and a third party, the waiver must be supported by consideration. An obligee may waive one or more rights by words or by conduct that renders performance by the obligor impossible, or seems to dispense

449. Id.
450. See State ex rel. Wallace v. State Med. Bd., 732 N.E.2d 960, 963 (Ohio 2000); Chubb v. Ohio Bureau of Workers' Comp., 690 N.E.2d 1267, 1269 (Ohio 1998); see also Marfield v. Cincinnati, Dayton & Toledo Traction Co., 144 N.E. 689, 691 (Ohio 1924) ("A 'waiver' is the voluntary surrender or relinquishment of a known legal right or intentionally doing an act inconsistent with claiming it.").
451. As a general rule, the doctrine of waiver is applicable to all personal rights and privileges, whether secured by contract, conferred by statute, or guaranteed by the Constitution, provided that the waiver does not violate public policy. See State ex rel. Hess v. Akron, 7 N.E.2d 411, 413 (Ohio 1937), quoted with approval in Sanitary Commercial Servs., Inc. v. Shank, 566 N.E.2d 1213, 1218 (Ohio 1991).
with complete performance at a time when the obligor might fully perform.\textsuperscript{433} Silence does not amount to a waiver "where one is not bound to speak."\textsuperscript{434} A defendant who had a duty to perform and who changed her position as a result of the plaintiff's words or conduct may claim waiver.\textsuperscript{435} Waiver is an affirmative defense on which the defendant bears the burden of proof.\textsuperscript{436}

e. Disclaimer

Fraud and negligence require reasonable reliance,\textsuperscript{437} and Ohio courts have held that a plaintiff cannot reasonably rely upon any representation that was expressly disclaimed by the defendant at or before the time the transaction of which the plaintiff complains was consummated.\textsuperscript{438} The theory is that by disclaiming all external representations, one party effectively warns the other that such representations are worthless.\textsuperscript{439} However, the disclaimer must be reasonable. For example, where a disclaimer purports to eliminate from the agreement the express oral representations made by the seller, "the disclaimer is unreasonable because it would be unjust to permit the disclaimer to eliminate the representations after they had become a part of the essence of the bargain and induced the plaintiff to enter into the contract."\textsuperscript{440}

f. Ratification

Ratification is "the approval by act, word or conduct of that which was improperly done, or of a wrong which was committed."\textsuperscript{441} A\textsuperscript{footnotemark}
plaintiff's acquiescence in the wrongful conduct of the defendant may preclude the plaintiff "from obtaining . . . remedies to which he would otherwise be entitled." Ratification is an affirmative defense on which the defendant asserting it bears the burden of proof. In order to establish ratification, the defendant must prove that (1) the plaintiff acquiesced "with knowledge of the wrongful acts themselves and of their injurious consequences;" (2) the plaintiff's acquiescence was "voluntary, not the result of accident, nor of causes rendering it a physical, legal or moral necessity;" and (3) the plaintiff's acquiescence "last[ed] for a reasonable length of time, so that it will be inequitable even to the wrongdoer to enforce the peculiar remedies of equity against him after he has been suffered to go on unmolested and his conduct apparently acquiesced in." Ratification may be express or implied. The principal need not ultimately benefit from this conduct in order to establish ratification.

A principal seeking to avoid liability for the wrongdoing of its agent may raise lack of ratification as a defense. In general, ratification will be found where the principal, with full knowledge of the facts, conducts

under no disability voluntarily adopts and gives sanction to some unauthorized act or defective proceeding, which without his sanction would not be binding on him. It is this voluntary choice, knowingly made, which amounts to a ratification of what was theretofore unauthorized, and becomes the authorized act of the party so making the ratification.

462. Gross, 34 Ohio Cir. Dec. at 338 (quoting 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 917 (1907)).

For example:

On June 12, 1990, Fifth Third honored Trinity's sight draft. Fifth Third then . . . debited [Stinebaugh's] agri-line of credit for the total sum paid Trinity. Thereafter, . . . after initially disputing the payment and the debiting of his account, Stinebaugh, on January 15, 1991, paid Fifth Third the $43,000 charged to his credit line. Stinebaugh's act of paying the $43,000 was, in essence, his voluntary ratification of the transaction. Stinebaugh asserts no disability, coercion, involuntariness or illegality influencing his decision to pay the credit line. Stinebaugh freely admits that he knowingly made a voluntary choice to pay the $43,000, thus sanctioning Fifth Third's payment to Trinity.


itself in a way that manifests its intention to approve an earlier act performed by its agent that did not bind it. 468

\[ \text{g. Intervening Cause} \]

Proximate cause is an element of both fraud and negligence causes of action. 469 Under Ohio law, proximate cause is a “natural and continuous sequence that contributes to produce the result, and without which the result could not have happened.” 470 If an injury is “the natural and probable consequence” of the defendant’s fraud or negligence “and it is such as should have been foreseen” by the defendant “in the light of all the attending circumstances, the injury is then the proximate result” of the defendant’s fraud or negligence. 471

An “intervening cause” breaks the causal connection between the defendant’s fraud or negligence and the plaintiff’s injury. 472 Whether the intervening cause breaks the causal connection depends on whether the intervening cause was reasonably foreseeable by the one who committed the fraud or negligence. 473 The test for foreseeability is whether a reasonably prudent person would have anticipated that an


   For example, a contract entered into by an officer of a corporation without authorization may nonetheless be binding upon the corporation if its board of directors ratifies the contract. See Campbell, 493 N.E.2d at 240. Where the board of directors possesses actual knowledge of the facts, a ratification may be effected through the board’s (1) acceptance of a benefit from the contract, (2) acquiescence to the contract, or (3) failure to repudiate the contract within a reasonable period of time. See id. at 241.

469. See supra notes 306, 326-327, 339, and 350 and accompanying text.


472. See Westfield Insurance, 714 N.E.2d at 944.

473. See Mudrich, 90 N.E.2d at 863; Mussivand, 344 N.E.2d at 272; Westfield Insurance, 714 N.E.2d at 944; see also Cascone v. Herb Kay Co., 451 N.E.2d 813, 819 (Ohio 1983) (“Whether an intervening act breaks the causal connection between the negligence and the injury, thus relieving one of liability for his negligence, depends upon whether that intervening actor was a conscious and responsible agency which could or should have eliminated the hazard, and whether the intervening cause was reasonably foreseeable by the one who was guilty of the negligence.”).

   There are, also, intervening causes which could not be contemplated by a person as a consequence of the negligent act, but are nevertheless considered normal incidents of the risks the defendant has created. These acts would be considered intervening causes to the injury, but they would not supersede a party’s own negligence as the proximate cause of the injury. However, “[i]f the defendant can foresee neither any danger of direct injury, nor any risk from an intervening cause, the defendant is simply not negligent.” Westfield Insurance, 714 N.E.2d at 944-43 (quoting W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 44, at 311 (5th ed. 1984)).
injury was likely to result from the performance or nonperformance of an act.\textsuperscript{474} The defendant need not have anticipated the particular injury alleged by the plaintiff; it is sufficient that his act is likely to result in an injury to someone.\textsuperscript{473}

\textbf{h. Unclean Hands and In Pari Delicto}

Ohio courts will not permit a plaintiff to recover for fraud if she has "unclean hands."\textsuperscript{476} There must be no willful misconduct on her part either regarding the subject matter of her claim or the bringing of the claim itself.\textsuperscript{477} However, the plaintiff need not be pristine:

The maxim, "He who seeks equity must come with clean hands," requires only that the party must not be guilty of reprehensible conduct with respect to the subject matter of his suit. "[A] court of equity is not an avenger of wrongs committed at large by those who resort to it for relief, however careful it may be to withhold its approval from those which are involved in the subject-matter of the suit and which prejudicially affect the rights of one against whom relief is sought."\textsuperscript{478}

Under the doctrine of \textit{in pari delicto}, no action will lie "to recover on a claim based upon, or in any manner depending upon, a fraudulent, illegal or immoral transaction or contract to which the plaintiff was a party."\textsuperscript{479} "Where parties are equally in the wrong, courts will not give one legal redress against the other but will leave them where it finds them."\textsuperscript{480} \textit{In pari delicto} is an affirmative defense on which the defendant bears the burden of proof.\textsuperscript{481} At least one Ohio court has held that, for purposes of properly and timely pleading affirmative defenses, \textit{in pari delicto} is separate from unclean hands, waiver, and estoppel.\textsuperscript{482}

\textsuperscript{474} See \textit{Massicott}, 544 N.E.2d at 272; Menifee \textit{v.} Ohio Welding Prods., Inc., 472 N.E.2d 707, 710 (Ohio 1984).

\textsuperscript{475} See \textit{Massicott}, 544 N.E.2d at 272.

\textsuperscript{476} See, e.g., Union Painless Dentists \textit{v.} Mullens, 19 Ohio Dec. 136, 138 (Ohio Super. Ct. 1908) ("One seeking relief from the fraud of others must himself be free from fraud.").


\textsuperscript{480} Id. However, if a statute implicated by the claims "is for the protection of one of the parties and where that party has no real choice but to acquiesce in the illegality, then he will not be held to be in \textit{in pari delicto} and denied relief." \textit{Glyco \textit{v.} Schultz}, 289 N.E.2d 919, 924 (Ohio Mun. Ct. 1972).


\textsuperscript{482} See id.
B. Civil Liabilities, Remedies, and Defenses Under the Ohio Securities Act

1. Statutory Prohibitions

The OSA contains several statutory prohibitions on fraud, misrepresentation of material facts, and omission of material facts in the purchase and sale of securities. These prohibitions apply regardless of whether the securities are registered with the Division, properly exempted from registration, or the subject of a notice filing. These prohibitions also apply regardless of whether a person is licensed by the Division or properly exempted from licensure. The Ohio Supreme Court has declared that the OSA is a remedial law; and, therefore, should be liberally construed.\(^{483}\)

\(^{a.}\) General Prohibition on Fraud

The OSA forbids any person “in purchasing or selling securities” from “knowingly engag[ing] in any act or practice that is . . . declared illegal, defined as fraudulent, or prohibited” by the OSA.\(^{484}\) For purposes of the OSA, a person engages in an act or practice “knowingly” if she represents facts to be different than she knew or should have known them to be if she had exercised reasonable diligence to ascertain the facts.\(^{485}\) Reasonable diligence is “due diligence of a character exercised by a fair and ordinarily prudent person under the same or similar circumstances.”\(^{486}\)

The OSA defines “fraud,” “fraudulent,” “fraudulent acts,” “fraudulent practices,” or “fraudulent transactions” to mean

any device, scheme, or artifice to defraud or to obtain money or property by means of any false pretense, representation, or promise; any fictitious or pretended purchase or sale of securities; and any act, practice, transaction, or course of business relating to the purchase or sale of securities that is fraudulent or that has operated or would operate as a fraud upon the seller or purchaser.\(^{487}\)

Construing this definition in \textit{In re Columbus Skyline Securities},\(^{488}\) the Ohio Supreme Court held that “the legislature broadly drafted R.C.

---

\(^{483}\) See supra note 5.


\(^{486}\) \textit{Warner}, 364 N.E.2d at 43.

\(^{487}\) \textit{Ohio Rev. Code Ann.} § 1707.01(J).

\(^{488}\) 660 N.E.2d 427 (Ohio 1996).
1707.01(j) to draw from all securities case law defining fraudulent conduct in both state and federal courts. In so doing, the court recognized the legislature’s intent to “incorporate” into the OSA’s fraud definition the collected teaching of both state and federal case law. The Columbus Skyline court went on to hold that a securities dealer’s excessive price “mark-ups” were fraudulent under the OSA since they would be considered fraudulent under federal case law.

The fraudulent act or practice must be in connection with the purchase or sale of the security, rather than an act or practice committed subsequent to the sale. However, a promise or representation made in connection with the purchase or sale of a security is not rendered fraudulent by the subsequent violation of the promise or by a change in circumstances unless, at the time of the purchase or sale, the defendant had no intention to keep the promise or knew that the circumstances would change.

The OSA’s general prohibition on fraud prohibits both affirmative misrepresentations of material fact and omissions of material fact, as long as the party failing to disclose owed the plaintiff a duty to disclose. As previously discussed, a duty to disclose arises from a fiduciary relationship or some other relationship of similar trust and confidence. A securities salesperson stands in a fiduciary relationship

489. Id. at 429.

As the Columbus Skyline court explained:

Recognizing the creativity of unscrupulous securities dealers intent on defrauding Ohio investors, the General Assembly . . . drafted R.C. 1707.01(j) so that securities case law, both state and federal, provides the appropriate standards. This is sagacious for several reasons. First, the securities market is constantly evolving. By incorporating into the statute a larger body of law by which to define fraudulent conduct, the General Assembly has provided for inevitable changes in market structure that might otherwise require redrafting of the statute. This has the desirable effect of preventing Ohio securities law from developing in a vacuum, and furthers the goal of unifying securities law.

Second, [many] federal standards . . . are more well developed than state standards. Federal courts and administrative tribunals like the Securities and Exchange Commission have a greater experience with, and a more continuous exposure to, the complicated field of securities fraud cases and, consequently, provide a more extensive body of law to draw from in defining fraud.

Columbus Skyline, 660 N.E.2d at 429-30.
491. See id. at 430-31.
492. See State v. Walsh, 420 N.E.2d 1013, 1017 (Ohio Ct. App. 1979). Ohio courts have not further construed the phrase “in connection with.” Under federal securities law, that phrase has been construed to mean “in a manner reasonably calculated to influence the investing public.” SEC v. Texas Gulf Sulphur Co., 401 F.2d 833, 862 (2d Cir. 1968).
493. See Walsh, 420 N.E.2d at 1017.
495. See supra text accompanying notes 351-352.
with his or her clients,496 as does an investment adviser.497

Despite the parallels between the Ohio common law of fraud and the OSA's general anti-fraud provision, a plaintiff need not prove common law fraud before she can recover for a violation of section 1707.44.498

b. Prohibitions on False Representations

The OSA prohibits knowingly making or causing another to make "any false representation concerning a material and relevant fact, in any oral statement or in any prospectus, circular, description, application, or written statement" for the purpose of, inter alia, selling securities.499 A person acts "knowingly" if she represents facts to be different than she knows or should know them to be if she exercised reasonable diligence to ascertain the facts.500

This provision prohibits only affirmative misrepresentations; it does not apply to fraudulent omissions.501 There is no reliance element to this prohibition.502 Furthermore, because this provision extends to any "written statement," a court applying Ohio law should not restrict its scope to the limited definition of "prospectus" established under comparable federal law.503

Materiality is not defined in the OSA, and the Ohio courts have not yet defined it in the context of an OSA claim. The test for materiality under Ohio common law is whether a fact is likely, under the circumstances, to affect conduct of a reasonable person with reference to the transaction.504 The relevant federal test for materiality is whether there is a substantial likelihood that the information "would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."505

The OSA also prohibits representations not authorized by the issuer or at material variance with statements or documents filed with the

496. See supra note 335.
497. See supra note 336.
500. See supra notes 483-486 and accompanying text.
504. See supra text accompanying note 314.
Division.  Further, the OSA prohibits any person from "knowingly and intentionally" selling, causing to be sold, offering for sale, or causing to be offered for sale, "any security ... accompanied by a statement that the security offered or sold has been or is to be in any manner indorsed by the division."  

\[\text{c. Prohibitions on False Statements Regarding Value of Securities or Securities Transactions}\]

The OSA prohibits making false statements or advertisements regarding the value of securities.

No person, with purpose to deceive, shall make, issue, publish, or cause to be made, issued, or published any statement or advertisement as to the value of securities, or as to alleged facts affecting the value of securities, or as to the financial condition of any issuer of securities, when the person knows that such statement or advertisement is false in any material respect.  

The "purpose to deceive" element is met if a person represents facts to be different than she should have known them to be if she had exercised reasonable diligence to ascertain the facts.  This prohibition on false statements regarding the value of securities prohibits only affirmative misrepresentations; it does not apply to fraudulent omissions.

The OSA also prohibits purposefully making a false report regarding transactions in securities.

\[\text{d. Specific Prohibitions in the Case of Insolvency}\]

The OSA prohibits failing to disclose insolvency in several ways. First, no person who is an officer, director, or trustee of, or a dealer for, any issuer, who knows that the issuer's liabilities exceed its assets, may

---

\[306. \text{See Ohio Rev. Code Ann. § 1707.44(E) (West Supp. 2002) ("No person with intent to aid in the sale of any securities on behalf of the issuer, shall knowingly make any representation not authorized by such issuer or at material variance with statements and documents filed with the division by such issuer.").}\]

\[307. \text{Id. § 1707.44(C)(4); see also Ohio Admin. Code § 1301:6-1-01 (2002) (providing that the Division will not issue any statement or opinion as to the value or merit or any security, nor give its endorsement to any security or plan of sale).}\]

\[308. \text{Ohio Rev. Code Ann. § 1707.44(J).}\]

\[309. \text{See State v. Warner, 364 N.E.2d 18, 43 (Ohio 1970).}\]

\[310. \text{See id. at 48.}\]

\[311. \text{See Ohio Rev. Code Ann. § 1707.44(K) ("No person, with purpose to deceive, shall make, record, or publish or cause to be made, recorded, or published, a report of any transaction in securities which is false in any material respect.").}\]
sell any securities of or for that issuer without disclosing the issuer's insolvency to the purchaser.\textsuperscript{512}

A second, broader provision prohibits any person from selling, causing to be sold, offering for sale, or causing to be offered for sale, any securities of an insolvent issuer, with knowledge that the issuer's liabilities exceed its assets and with intent to deceive the purchaser.\textsuperscript{513}

A third insolvency prohibition applies to securities dealers:

No dealer in securities, knowing that the dealer's liabilities exceed the reasonable value of the dealer's assets, shall accept money or securities, except in payment of or as security for an existing debt, from a customer who is ignorant of the dealer's insolvency, and thereby cause the customer to lose any part of the customer's securities or the value of those securities, by doing either of the following without the customer's consent:

1. Pledging, selling, or otherwise disposing of such securities, when the dealer has no lien on or any special property in such securities;
2. Pledging such securities for more than the amount due, or otherwise disposing of such securities for the dealer's own benefit, when the dealer has a lien or indebtedness on such securities.\textsuperscript{514}

2. Liabilities and Remedies for, and Defenses to, Violating the Statutory Prohibitions on False Representations, Omissions, and Fraud

\textit{a. Liabilities and Remedies}

Violation of the foregoing statutory prohibitions on false representations, omissions, and fraud gives the purchaser a right of rescission.\textsuperscript{515} Case law has recognized that a formal tender of the securities is not a prerequisite to recovery by a plaintiff who no longer owns the securities at issue.\textsuperscript{516} The plaintiff may recover the full amount paid for the securities, and all taxable court costs.\textsuperscript{517} Ohio courts have emphasized the right to recover the full amount of the purchase price, rejecting

\textsuperscript{512} See id. § 1707.44(D).
\textsuperscript{513} See id. § 1707.44(E).
\textsuperscript{514} Id. § 1707.44(F). This section contains its own affirmative defense, applicable in the event that, at the time the securities involved were pledged, sold, or disposed of, the dealer had in the dealer's possession or control, and available for delivery, securities of the same kinds and in amounts sufficient to satisfy all customers entitled to the securities, upon demand and tender of any amount due on the securities. See id.
\textsuperscript{515} See id. § 1707.43 (West 1994).
\textsuperscript{516} See supra note 183.
\textsuperscript{517} See OHIO REV. CODE ANN. § 1707.43.
offsets because of returns on the investment,\textsuperscript{318} tax benefits,\textsuperscript{319} and dividends.\textsuperscript{320} However, pre-judgment interest is not recoverable.\textsuperscript{321}

\textbf{b. Parties}

The plaintiff must be a "purchaser."\textsuperscript{322} Although Ohio courts have not construed the meaning of "purchaser" in the context of an action for statutory fraud, misrepresentations, or omissions, a plaintiff might have to be the actual purchaser of the securities at issue, as is the case under federal securities law.\textsuperscript{323} However, one court has recognized that the actual purchaser may assign a section 1707.43 cause of action.\textsuperscript{324} And, although the OSA does not contain a survival provision like that contained in the Uniform Securities Act,\textsuperscript{325} a securities cause of action may survive under Ohio's general survival statute.\textsuperscript{326}

The defendants in an action under section 1707.43 consist of "every person who has participated in or aided the seller in any way in making such sale,"\textsuperscript{327} and joint and several liability may be imposed on each such defendant.\textsuperscript{328} Ohio courts have construed section 1707.43 liberally, especially where there are allegations of fraud.\textsuperscript{329} "Participating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43."\textsuperscript{330} "Inducing" a plaintiff to invest creates liability,\textsuperscript{331} but inducement is not exclusive means for establishing liability under section 1707.43.\textsuperscript{332}

\begin{footnotesize}
\textsuperscript{318} See supra note 185.
\textsuperscript{319} See supra note 186.
\textsuperscript{320} See supra note 187.
\textsuperscript{321} See supra note 184.
\textsuperscript{322} OHIO REV. CODE ANN. § 1707.43.
\textsuperscript{324} In re Bell & Beckwith, 89 B.R. 632, 639 (Bankr. N.D. Ohio 1988).
\textsuperscript{325} See supra note 175.
\textsuperscript{326} OHIO REV. CODE ANN. § 2305.21 (West 1994) ("In addition to the causes of action which survive at common law, causes of action for mesne profits, or injuries to the person or property, or for deceit of fraud, also shall survive; and such actions may be brought notwithstanding the death of the person entitled or liable thereto.").
\textsuperscript{327} Id. § 1707.43.
\textsuperscript{328} Id.
\textsuperscript{330} See supra note 133.
\textsuperscript{331} See supra note 134.
\textsuperscript{332} See supra note 135.
\end{footnotesize}
Ohio courts have also extended liability to officers and directors who participate in the sale. In a case alleging misrepresentations, directors were deemed to have knowledge of any matter of fact, where in the exercise of reasonable diligence, they should have secured such knowledge. The court found that:

Such a presumption of knowledge is consistent with a director’s fiduciary duties to the shareholders and conducive to sound public policy in that it should encourage directors to become involved, knowledgeable, and alert to corporate wrongdoing rather than sitting back like the Three Monkeys, See No Evil, Hear No Evil, and Speak No Evil.

In addition, liability extends beyond the actual seller and issuer of the security. In a case alleging misrepresentations in the sale of securities and alleging that a bank was liable under section 1707.43, the Tenth District Court of Appeals reversed summary judgment in favor of the bank. The court held that reasonable minds could differ as to whether the bank “participated in or aided the seller,” where there was evidence that the bank engaged in activities “that went beyond normal commercial banking activities” and that it “conceived, organized and directly participated in the underwriting.”

Attorneys, accountants, and other professionals who, beyond providing professional services to an issuer, participate in or aid sales may also be liable. However, the OSA provides a “safe harbor” from liability for professionals whose activities are incidental to the practice of their profession.

c. Defenses

i. Failure to Timely Accept Offer of Rescission

As previously discussed, a plaintiff cannot maintain a cause of action under section 1707.43 if she failed to accept a written offer of

333. See supra note 136.
335. Id. at 1363-66.
338. OHIO REV. CODE ANN. § 1707.431 (West Supp. 2002); see supra Parts III.D.6, III.D.7 & IV.D.1.c.
339. The OSA also provides a safe harbor for certain “bringing together” activities. See supra Part III.D.7.
340. See supra Parts III.D.1 & IV.D.1.a.
rescission within thirty days of the date of the rescission offer.\textsuperscript{340} Any person who participated in or aided the seller in any way may make a qualifying rescission offer at least two weeks after the date of sale.\textsuperscript{341} An offer to rescind that does not disclose the violation of the OSA may not constitute a valid rescission offer under section 1707.43.\textsuperscript{342}

\section*{ii. Immaterial Violation}

As previously discussed,\textsuperscript{343} a plaintiff is not entitled to rescission under section 1707.43 if “the court determines that the violation did not materially affect the protection contemplated by the violated provision.”\textsuperscript{344} However, this defense is inapplicable where the plaintiff has proven a violation of one of the aforementioned provisions that include materiality as an element: sections 1707.44(B)(4), (E), (G), (J), and (K).\textsuperscript{345}

\section*{iii. Statute of Limitations}

As previously discussed,\textsuperscript{346} actions under section 1707.43 must be brought within the shorter period of either two years of when the purchaser knew or had reason to know of the OSA violation, or four years from the date of sale or contract for sale. When a party “discovered fraudulent conduct or when he should have discovered it by exercising diligence” is a question of fact.\textsuperscript{347}

In \textit{Kondrat v. Morris},\textsuperscript{348} the court of appeals held that the four-year limitations period began to run on the date the plaintiff signed a subscription agreement to invest, notwithstanding that he did not make final payment on the securities until a later date.\textsuperscript{349} The \textit{Kondrat} court

\begin{itemize}
\item \textsuperscript{340} See \textit{Ohio Rev. Code Ann.} § 1707.43 (West 1994).
\item \textsuperscript{341} See id.
\item \textsuperscript{342} See \textit{In re Bell & Beckwith}, 89 B.R. 632, 641 (Bankr. N.D. Ohio 1988).
\item \textsuperscript{343} See supra Part III.D.2 & IV.D.1.b.
\item \textsuperscript{344} \textit{Ohio Rev. Code Ann.} § 1707.43.
\item \textsuperscript{345} See supra Part V.B.1.
\item \textsuperscript{346} See supra Parts III.D.3 & IV.D.1.c.
\item \textsuperscript{347} Roger v. Lehman Bros. Kuhn Loeb, Inc., 604 F. Supp. 222, 226 (S.D. Ohio 1984). As previously discussed, under the common law the time when a person “should have discovered” the fraud is the time when he or she possesses facts sufficient to alert a reasonable person to the possibility of wrongdoing. \textit{See Palm Beach Co. v. Dan & Bradstreet, Inc.}, 663 N.E.2d 718, 720 (Ohio Ct. App. 1995) (“It is noteworthy that this standard does not require the victim of the alleged fraud to possess concrete and detailed knowledge, down to the exact penny of damages, of the alleged fraud; rather, the standard requires only facts sufficient to alert a reasonable person of the possibility of fraud.”).
\item \textsuperscript{348} 692 N.E.2d 246 (Ohio Ct. App. 1997).
\item \textsuperscript{349} See id. at 250.
\end{itemize}
also held that the plaintiff had “reason to know” of fraud (for purposes of commencing the two-year limitations period) on the date he signed the subscription agreement because the defendant’s alleged statements that the investment posed minimal risks were inconsistent with the offering documents which stated that the investment involved a high degree of risk.\textsuperscript{330}

The plain language of section 1707.43 states that its limitations period applies to “action[s] for any recovery based upon or arising out of a sale or contract for sale made in violation of the [OSA].” As previously discussed in detail,\textsuperscript{331} in cases involving securities fraud, courts have tended to find that section 1707.43, rather than section 2305.09, provides the appropriate statute of limitations. Even alleged fraud occurring after the purchase of securities has been held to be “inextricably interwoven” with the sale of securities such that section 1707.43 provided the appropriate limitations period.\textsuperscript{332} Further, notwithstanding the fact that the purchase or sale of securities may be effected pursuant to a contract, violations arising from the sale of securities are governed by section 1707.43’s two-year/four-year limitations period, not the fifteen-year limitations period for breach of contract.\textsuperscript{333}

iv. Statutory Safe Harbors for Certain Activities

As previously discussed,\textsuperscript{334} the OSA provides a safe harbor from liability for certain activities. Section 1707.431(A) provides a safe harbor for attorneys, accountants, and engineers, whose activities in connection with the sale of securities is incidental to the practice of their profession.\textsuperscript{335} However, liability will attach to professionals whose activities go beyond “incidental,” such as the accountant who introduced the investment to his clients and then signed the stock certificate as secretary of the issuer or the attorney who was compensated for recommending the securities to listeners to his radio talk show.\textsuperscript{336} Section 1707.431(B) provides a safe harbor for certain “bringing together” activities, provided that the person who engages in the

\textsuperscript{330} See id. at 230-31.
\textsuperscript{331} See supra Part V.A.3.a.
\textsuperscript{334} See supra Parts III.D.6, III.D.7 & IV.D.5.
\textsuperscript{335} OHIO REV. CODE ANN. § 1707.431(A) (West Supp. 2002).
\textsuperscript{336} See supra notes 223-227.
“bringing together” activities does not receive any commission, fee or other remuneration based on the sale of any securities.\footnote{357}

3. Statutory Private Civil Cause of Action for False Sales Materials

a. The Cause of Action

The OSA contains an express private civil cause of action for the use of false sales materials. Ohio Revised Code section 1707.41 states in pertinent part:

In addition to the other liabilities imposed by law any person who, by a written or printed circular, prospectus, or advertisement, offers any security for sale, or receives the profits accruing from such sale, is liable, to any person who purchased such security relying on such circular, prospectus, or advertisement, for the loss or damage sustained by such relying person by reason of the falsity of any material statement contained therein or for the omission therefrom of material facts.\footnote{358}

The plain language of the statute makes clear that reliance, falsity, and materiality are elements of this cause of action.\footnote{359} The plaintiff must be a purchaser, but the plaintiff need not prove common law fraud in order to recover under section 1707.41.\footnote{360} The false statement or omission must relate to the security purchased.\footnote{361} The plaintiff may seek rescission or damages,\footnote{362} but punitive damages are not recoverable under section 1707.41.\footnote{363}

The provision extends to “written or printed circular, prospectus, or advertisement,” so it is unlikely that a court construing section 1707.41 would adopt the narrow definition of “prospectus” articulated under federal securities jurisprudence.\footnote{364}

\footnotetext[357]{OHIO REV. CODE ANN. § 1707.431(B).}
\footnotetext[358]{Id. § 1707.41 (West 1994).}
\footnotetext[359]{See also Citizens Nat’l Bank v. Barge-In, Inc., No. CA83-07-008, 1984 WL 3429, at *3 (Ohio Ct. App. Sept. 28, 1984) (expressly recognizing that reliance is a necessary element of a section 1707.41 cause of action).}
\footnotetext[360]{See supra note 498.}
\footnotetext[361]{See Braun v. N. Ohio Bank, 430 F. Supp. 367, 373-74 n.14 (N.D. Ohio 1977).}
\footnotetext[363]{See supra note 188.}
\footnotetext[364]{See supra note 303.
b. Defendants

Section 1707.41 provides that "any person who ... offers any security for sale, or receives the profits accruing from such sale, is liable." Courts have construed this provision broadly. For example, the Tenth District Court of Appeals held that a national bank could be liable under section 1707.41 where the bank received "referral fees" consisting of a percentage of the advisory fees earned by the financial advisor to a securities offering, and a percentage of the underwriting fees earned by the underwriter of the offering.

Section 1707.41 also expressly extends liability to directors of culpable parties:

Whenever a corporation is so liable, each director of the corporation is likewise liable unless he shows that he had no knowledge of the publication complained of, or had just and reasonable grounds to believe the statement therein to be true or the omission of facts to be not material. ...Lack of reasonable diligence in ascertaining the fact of such publication or the falsity of any statement contained in it or of the omission of such material fact shall be deemed knowledge of such publication and of the falsity of any untrue statement in it or of the omission of material facts.

Case law confirms that liability will be extended to directors "who have failed to use due diligence in reviewing or preparing a publication." Ohio courts have also extended section 1707.41 liability to a corporation acting as a general partner of an "offering" entity, and the directors thereof.

In connection with providing for director liability, the OSA also gives directors a right to contribution:

Any such director, upon the payment by him of a judgment so obtained against him, shall be subrogated to the rights of the plaintiff against such corporation, and shall have the right of contribution for

566. See, e.g., Moore v. Fenex, Inc., 809 F.2d 297, 304-03 (6th Cir. 1987) (extending liability under section 1707.41 to a securities salesperson); Byrdley, 640 N.E.2d at 195 (reversing summary judgment in favor of a financial adviser on a section 1707.41 claim).
567. Federated Mgmt. Co. v. Coopers & Lybrand, 738 N.E.2d 842, 838 (Ohio Ct. App. 2000). Ultimately the court concluded that the bank was not liable under section 1707.41 because there were no false material statements. See id. at 838-39; see also Baker v. Conlan, 383 N.E.2d 543, 547-48 (Ohio Ct. App. 1979) (finding that a corporation acting as the general partner of a partnership that sold securities was liable as a recipient of "profits accruing from" the sales where evidence showed that the corporation received investor proceeds).
568. OHIO REV. CODE ANN. § 1707.41.
570. See id. at 547-48.
the payment of such judgment against such of his fellow directors as
would be individually liable under this section. 371

However, a director may recover contribution only from other directors
who were found liable in the underlying action. In Hainbuchner v.
Miner, 372 director Miner sued fellow director Caldwell for contribution.
In the underlying action in which Miner and Caldwell were co-
defendants, Miner had been found liable for the sale of unregistered
securities, but Caldwell had not. 373 In the action for contribution, the
Ohio Supreme Court allowed Caldwell to use the finding of his lack of
liability in the underlying action as a res judicata defense, and avoid
contribution to Miner. 374

c. Defenses

i. Nonculpability

A defendant can avoid liability under section 1707.41 if he “estab-
ishes that he had no knowledge of the publication thereof prior to the
transaction complained of, or had just and reasonable grounds to
believe such statement to be true or the omitted facts to be not ma-
terial.” 375

A director can also avoid liability by showing that she “had no
knowledge of the publication complained of, or had just and reasonable
grounds to believe the statement therein to be true or the omission
of facts to be not material.” 376 However, a director’s lack of reasonable
diligence “shall be deemed knowledge of such publication and of the
falsity of any untrue statement in it or of the omission of material
facts.” 377

ii. Limitations

Section 1707.41 contains its own statute of limitations:

No action brought against any director, based upon the liability
imposed by this section, shall be brought unless it is brought within
two years after the plaintiff knew, or had reason to know, of the facts

371. OHIO REV. CODE ANN. § 1707.41.
373. See id. at 425.
374. See id. at 427.
375. OHIO REV. CODE ANN. § 1707.41.
376. Id.
377. Id.
by reason of which the actions of the person or the director were unlawful, or within four years after the purchase of the securities, whichever is the shorter period.  

Read literally, this statute of limitations applies only to actions against directors. This raises the question of which limitations period applies to a section 1707.41 claim against non-directors. There appear to be three alternatives: first, notwithstanding the literal restriction to actions against directors, the section 1707.41 limitations period applies to all section 1707.41 actions; second, the section 1707.43 two-year/four-year limitations period governs section 1707.41 actions against non-directors; or third, section 1707.41 actions against non-directors are governed by Ohio’s general four-year fraud statute of limitations, section 2305.09. To date, the Ohio courts have provided no guidance on this issue.

4. Statutory Private Civil Cause of Action for Failing to Disclose One’s Interest in a Transaction

The OSA creates an express private civil cause of action where a person, in the giving of investment advice, fails to disclose his or her agency or interest in the transaction. Liability under section 1707.42(A) extends to any person giving investment advice for personal gain, meaning that a putative defendant need not meet the definition of “investment adviser” in order to be liable under this provision.

The plain language of this provision establishes the elements of this cause of action: (1) intent to secure financial gain to self; (2) receipt of commission or reward; (3) lack of disclosure; (4) damages; and (5) tender. Presumably, the lack of any one of these elements would serve as a

---

578. Id. The statute also contains a statute of limitations for the aforementioned director’s right of contribution: “In the case of an action to enforce a right of contribution under this section, it is brought within two years after the payment of the judgment for which contribution is sought.” Id.

579. See generally Friedman, supra note 36, § 43.03(D).


Section 1707.42(A) provides:

Whoever, with intent to secure financial gain to self, advises and procures any person to purchase any security, and receives any commission or reward for the advice or services without disclosing to the purchaser the fact of the person’s agency or interest in such sales, shall be liable to the purchaser for the amount of the purchaser’s damage thereby, upon tender of the security to, and suit brought against, the adviser, by the purchaser . . . .

Id.

581. While this cause of action generally relates to investment advice, there are several reasons why its application should not be limited to investment advisors. First, the 1707.42(A) cause of action pre-dates the 1999 adoption of investment adviser regulation in Ohio. Second, there is case law under 1707.42(A) that construes the provision broadly. Third, there is no need to prove non-compliance with any provisions of the Ohio investment adviser law in order to pursue a 1707.42(A) claim.
sufficient defense. However, at least one Ohio court has held that a claim under this section could move forward without the satisfaction of all the statutory elements. In *Simmons v. Merrill Lynch, Pierce, Fenner & Smith*, the Eighth District Court of Appeals upheld a cause of action under section 1707.42(A) where the defendant recommended that the plaintiff "sell short" shares of Armstrong Cork, and failed to disclose that it had shares of Armstrong Cork in its inventory. The court reached this conclusion despite the lack of any tender, since the plaintiff had nothing to tender after a short sale.

By the express terms of the statute, the one-year limitations period on this cause of action begins to run on the date of purchase.

5. Effect of Arbitration Agreement

Because Ohio law favors arbitration, aggrieved investors may have to arbitrate their claims. Like the United States Supreme Court, the Ohio Supreme Court has recognized the validity of an arbitration provision in a brokerage agreement.

In *ABM Farms, Inc. v. Woods*, an investor filed suit against her stockbroker and his brokerage firm claiming, among other things, fraud, breach of duty, and intentional infliction of emotional distress. When opening the brokerage account, the investor had signed an "Acceptance Form" that included an arbitration provision. A related "Account

---

383. A short sale is a sale of borrowed stock anticipating a decline in the price of the stock so that when the short seller repurchases to replace the borrowed stock he can do so at a cost less than that he originally sold. *Id.* at 363 n.1.
385. *OHIO REV. CODE ANN.* § 1707.42(A) ("No suit shall be brought more than one year subsequent to the purchase.").

The Ohio legislature has expressed its own preference:

A provision in any written contract . . . to settle by arbitration a controversy that subsequently arises out of the contract, or out of the refusal to perform the whole or any part of the contract, or any agreement in writing between two or more persons to submit to arbitration any controversy existing between them at the time of the agreement to submit, or arising after the agreement to submit, from a relationship then existing between them or that they simultaneously create, shall be valid, irrevocable, and enforceable, except upon grounds that exist at law or in equity for the revocation of any contract.

*OHIO REV. CODE ANN.* § 2711.01(A) (West 1994).

388. 692 N.E.2d 374 (Ohio 1998).
389. The following language appeared on the Acceptance Form in bold type directly above plaintiff's signature:
Agreement” also contained an arbitration clause. In light of these provisions, the defendants moved to stay the proceeding. In response, the investor claimed that she had been fraudulently induced to agree to arbitration. In considering the case, the Ohio Supreme Court first held that in order to defeat a motion for stay, a party must demonstrate that the arbitration provision itself in the contract at issue, and not merely the contract in general, was fraudulently induced. The court then concluded that there was no evidence of fraudulent inducement of the arbitration provision.

The First District Court of Appeals recently held, in Cohen v. Paine Webber, Inc., that an arbitration clause in a brokerage agreement did not cover claims alleging conversion and fraudulent concealment.

By signing below I also acknowledge that:

***

(b) I have received, read and understand the terms and conditions of the Account Agreement set forth in the accompanying booklet.

(c) In accordance with the pre-dispute arbitration clause in Section 13 of the Brokerage Agreement on page 7, I am agreeing in advance to arbitrate any controversies which may arise with you.

_id. at 376 (alteration in original).

390. The Account Agreement, which plaintiff did not review prior to signing the Acceptance Form, stated:

15. Arbitration. You understand that:

Arbitration is final and binding on the parties.

The parties are waiving their right to seek remedies in court, including the right to jury trial.

***

You agree that all controversies which may arise between us, including but not limited to those involving any transaction or the construction, performance, or breach of the Account Agreement or any other agreement between us, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration.

_id.

391. See id. at 377-78.

392. See id. at 378.

The Ohio Supreme Court noted:

In order to prove fraud in the inducement, a plaintiff must prove that the defendant made a knowing, material misrepresentation with the intent of inducing the plaintiff's reliance, and that the plaintiff relied upon that misrepresentation to her detriment.

There was no evidence presented to the trial court that [the broker] discussed arbitration at all with [plaintiff], much less that he made a misrepresentation about it. [Plaintiff] testified that arbitration was “[n]ever brought up, ever.” [Plaintiff] signed two documents in establishing her relationship with [the brokerage firm] . . . .

***

The law does not require that each aspect of a contract be explained orally to a party prior to signing. The contract [plaintiff] signed contained about six sentences, comprising less than a quarter of a page. The [arbitration] provisions at issue were not in fine print, and are part of an industry standard. The provisions were neither hidden nor out of the ordinary, and [the broker] did not misrepresent their nature.

_id. (citation omitted).

Samuel Ginsburg had opened a brokerage account with Paine Webber in 1992, and had signed an arbitration agreement, that provided in pertinent part:

I agree, and by carrying an account for me Paine Webber agrees, that any and all controversies which may arise between me and Paine Webber concerning any account, transaction, dispute or the construction, performance, or breach of this or any other agreement, whether entered into prior, on or subsequent to the date hereof, shall be determined by arbitration. Any arbitration under this agreement shall be held under and pursuant to and be governed by the Federal Arbitration Act.\(^{394}\)

Ginsburg died in 1999, and shortly after his death it was discovered that over $1,000,000 had been stolen from his Paine Webber account. Ginsburg’s executor, Cohen, filed suit in 2000 alleging conversion and fraudulent concealment.\(^{395}\) There was no dispute that the Cohen, as executor, was bound by the arbitration agreement, but the trial court (without opinion) denied Paine Webber’s motion to stay the action and compel arbitration.\(^{396}\) The court of appeals affirmed, stating:

Although the arbitration provision is broad, stating that it covers any and all controversies pertaining to the brokerage account, we cannot say, as a matter of law, that a claim alleging such tortious conduct as aiding and abetting theft is subject to the arbitration provision here.\(^{397}\)

The court explained that the arbitration clause was a contract, that a contract requires a meeting of the minds, and that “there was no meeting of the minds that the arbitration provision would cover claims alleging tortious forms of theft.”\(^{398}\) Since there was no meeting of the minds, and the suit alleged conduct beyond the scope of the brokerage agreement, the court held that the claims of conversion and fraudulent concealment were not subject to the arbitration provision.\(^{399}\)

More recently the U.S. District Court for the Northern District of Ohio followed Cohen in Fazio v. Lehman Brothers, Inc.\(^{600}\) The Fazio plaintiffs alleged that stockbroker Frank Gruttadauria, while employed by Lehman Brothers, misappropriated their funds and created false account statements in violation of the federal and Ohio securities laws.

---

395. See id.
396. See id. at *2.
397. Id. at *3.
398. Id.
399. See id.
Lehman Brothers filed a motion to compel arbitration and stay the proceedings. Like the plaintiff in Cohen, the Fazio plaintiffs argued that their claims of theft were outside the scope of the arbitration agreement contained in the account agreement each plaintiff had with Lehman Brothers. The court agreed, reasoning that "[c]onduct amounting to theft is so beyond what is expected from a broker that such conduct could not have been within the reasonable contemplation of the plaintiffs when they signed the alleged account agreements." The court concluded:

Stated plainly, when the Plaintiffs signed the alleged account agreements, they had no reasonable concern or contemplation that their assets would be stolen. There was, therefore, no meeting of the minds with respect to any portion of the alleged account agreements, including the arbitration provisions. In addition, claims arising from allegations of outright theft are beyond the scope of such arbitration provisions.

VI. SECONDARY LIABILITY FOR SECURITIES VIOLATIONS

A. Statutory Control Person Liability

Unlike the federal securities laws, and most other states' securities laws, the OSA does not contain a provision establishing categorical
control person liability. However, as previously discussed, direct liability under the OSA is far-reaching. Section 1707.43 imposes joint and several liability on "every person who has participated in or aided the seller in any way in making such sale or contract for sale."

**B. Director and Officer Liability for Corporate Fraud**

In general, a defendant may be held liable for fraud notwithstanding the fact that the defendant did not himself make the fraudulent statement or omission. Ohio law recognizes that corporate directors and officers may be liable in their individual capacities for acts of corporate fraud. This personal liability may attach even though the corporation is also liable. In order for a corporate director or officer to be personally liable for fraud, "it must be shown that he knew the statement was false, that he intended it to be acted upon by the parties seeking redress, and that it was acted upon to the injury of the party.

The director’s or officers’s knowledge is a question of fact.

**C. Respondeat Superior**

The doctrine of respondeat superior holds an employer liable for torts committed by its employee in the scope of his employment. If the tort is intentional (e.g., fraud), the "behavior giving rise to the tort must be

---


605. The closest thing to categorical control person liability under the OSA is the provision in section 1707.41—which establishes civil liability for the use of false or misleading advertising or offering materials—that each director of a corporation found liable for violating section 1707.41 be "likewise liable unless he shows that he had no knowledge of the publication complained of, or had just and reasonable grounds to believe the statement therein to be true or the omission of facts to be not material." OHIO REV. CODE ANN. § 1707.41 (West 1994).

606. See supra Parts III.B.1, IV.B. & V.B.2(b).

607. OHIO REV. CODE ANN. § 1707.43.


calculated to facilitate or promote the business for which the servant was employed.\footnote{614}

Ohio courts have applied this doctrine to hold brokerage firms liable for the illegal acts of their brokers in the sale of securities.\footnote{615} At least one court has gone further, applying the doctrine to securities law violations generally.\footnote{616}

Whether an employee is acting within the scope of his or her employment is a question of fact.\footnote{617}

\section*{D. Aiding and Abetting}

Section 1707.43 extends liability for selling unregistered securities and for material misrepresentations and omissions in the sale of securities to, \textit{inter alia}, "every person who has ... aided the seller in any way in making such sale."\footnote{618} Therefore, the OSA imposes "aiding and abetting" liability for violations of the OSA.

While the OSA's position is clear with respect to statutory claims, there is some disagreement as to whether Ohio law supports a cause of

\footnotesize{

\begin{itemize}

\item 614. \textit{Byrd}, 365 N.E.2d at 587 (quotation omitted); accord \textit{Tucker}, 726 N.E.2d at 1116.
\item 615. See, e.g., \textit{Byrle v. Nationwide Life Ins. Co.}, 640 N.E.2d 187, 196 (Ohio Ct. App. 1994); see also \textit{Holloway v. Howeryd}, 336 F.2d 690, 695 (6th Cir. 1975) (remarking that the parallel federal laws "were not intended to preempt the operation of the doctrine of respondeat superior in a case involving unlawful activities of a brokerage firm's employees").
\item 616. See \textit{Leff v. CIP Corp.}, 340 F. Supp. 837, 868 (S.D. Ohio 1982). While \textit{Leff} was decided under federal securities law, there is no reason to believe that an Ohio court would distinguish \textit{Leff} in order to avoid applying the doctrine to a securities claim brought under Ohio law.
\item 617. See \textit{Osborne v. Lyles}, 387 N.E.2d 825, 829 (Ohio 1982); \textit{Tucker}, 726 N.E.2d at 1116.
\item 618. \textit{OHIO REV. CODE ANN.} § 1707.43 (West 1994).
\item The parallel federal securities laws do not contain similar language. As a consequence, the U.S. Supreme Court held in \textit{Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.}, 511 U.S. 164 (1994), that no private cause of action exists for aiding and abetting a violation of Section 10(b) of the 1934 Securities Exchange Act and SEC Rule 10b-5. See \textit{id.} at 191. See generally Steven A. Mleet, \textit{Textualist Statutory Interpretation Kills Section 10(b) "Aiding and Abetting" Liability}, 63 \textit{DEF. COUNS.} J. 38 (1996); Marc I. Steinberg, \textit{The Ramifications of Recent U.S. Supreme Court Decisions on Federal and State Securities Regulation}, 70 \textit{NOTRE DAME L. REV.} 489, 491-301 (1993) (chronicling the Supreme Court's adherence to "strict statutory construction" in Section 10(b) and Rule 10b-5 cases, beginning, prominently, with \textit{Ernst & Ernst v. Hochfelder}, 425 U.S. 185 (1976), and culminating in \textit{Central Bank of Denver}). The Sixth Circuit has followed suit. See \textit{Rubin v. Schottenscin, Zoel & Dunn}, 110 F.3d 1247, 1257 (6th Cir. 1997), \textit{reversed on other grounds en banc}, 143 F.3d 263 (6th Cir. 1998); see also \textit{In re SmarTalk Telesevices, Inc. Sec. Litig.}, 124 F. Supp. 2d 527, 347 (S.D. Ohio 2000). However, because the \textit{Central Bank of Denver} Court specifically found that no private aiding and abetting cause of action existed because the 1934 Act contained no language providing one, \textit{see Central Bank of Denver}, 511 U.S. at 191, and because the OSA does contain such language, see \textit{OHIO REV. CODE ANN.} § 1707.43, Ohio courts should not follow \textit{Central Bank of Denver}. See generally \textit{Rowley, Muddy Waters, Blue Skies ..., supra note 11}, at 730-32; \textit{Rowley, They Tell, VoI., Neither Do They Spin ..., supra note 11}, at 382-84 (discussing the viability of "aiding and abetting" claims under comparable provisions in the Mississippi Securities Act, \textit{MISS. CODE ANN.} § 73-71-101 et seq. (1999), and the Oregon Securities Law, \textit{OR. REV. STAT.} § 39.003 et seq. (1999)).
\end{itemize}

action for aiding and abetting common-law fraud. In *Federated Management Co. v. Coopers & Lybrand*, the Tenth District Court of Appeals held that "Ohio does not recognize a claim for aiding and abetting common-law fraud," reasoning that "one who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud." Four months later, in *Aetna Casualty & Surety Co. v. Leahey Construction Co.*, the U.S. Sixth Circuit Court of Appeals held that Ohio law does recognize a claim for civil aiding and abetting. The court found support for its holding in Ohio state court recognition of section 876(b) of the Restatement (Second) of Torts, which provides in pertinent part: "For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he ... knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." The *Leahey Construction* court stated that the aiding and abetting cause of action requires two elements: (1) knowledge that the primary party's conduct is a breach of duty, and (2) substantial assistance or encouragement to the primary party in carrying out the tortious act. Further, the court took the position that the knowledge element is satisfied where the aider and abettor has a general awareness of its role in the other's tortious conduct.

**E. Civil Conspiracy**

Under Ohio law, a civil conspiracy is a "malicious combination of two or more persons to injure another in person or property, in a way not competent for one alone, resulting in actual damages." Civil conspiracy and aiding and abetting are similar, but distinct, causes of action. The elements of a civil conspiracy cause of action are: "(1) a

622. 219 F.3d 519 (6th Cir. 2000).
623. 219 F.3d 519 (6th Cir. 2000).
624. 219 F.3d 519 (6th Cir. 2000).
625. 219 F.3d 519 (6th Cir. 2000).
626. 219 F.3d 519 (6th Cir. 2000).
628. See Aetna Cas. & Sur. Co. v. Leahey Constr. Co., 219 F.3d 519, 534 (6th Cir. 2000). ("The prime distinction between civil conspiracies and aiding-abetting is that a conspiracy involves an agreement to participate in a wrongful activity. Aiding-abetting focuses on whether a defendant knowingly gave 'substantial assistance' to someone who performed wrongful conduct, not on whether the defendant agreed to join in the wrongful conduct." (emphasis omitted)).
malicious combination; (2) two or more persons; (3) injury to person or property; and (4) existence of an unlawful act independent from the actual conspiracy."  \footnote{629}

The Ohio Supreme Court has defined “malice” in the context of a civil conspiracy claim as “that state of mind under which a person does a wrongful act purposely, without a reasonable or lawful excuse, to the injury of another.” \footnote{630} The “two or more person element” has the effect of “enlarg[ing] the pool of potential defendants from whom a plaintiff may recover for an underlying tort.” \footnote{631} However, damages “must be caused by a tort committed in the furtherance of the conspiracy.” \footnote{632}

\section*{VII. CONCLUSION}

A person aggrieved by improprieties in the purchase or sale of securities may find Ohio law superior to, or at least an appropriate complement to, federal securities law. Such persons can look to both the OSA and Ohio common law for relief. When applicable, \footnote{633} the OSA provides remedies for the sale of unregistered securities, \footnote{634} the unlicensed sale of securities, \footnote{635} and material misrepresentations, material omissions, and fraud in the purchase and sale of securities. \footnote{636} The OSA’s remedial provisions are liberally construed, \footnote{637} and liability is far-reaching. \footnote{638} The primary civil remedy is rescission, \footnote{639} although money damages are available under limited circumstances. \footnote{640}

Remedies for improprieties in the purchase or sale of securities may also be available under Ohio common law theories. \footnote{641} These common law theories support actions for rescission, money damages, and, in some cases, punitive damages. \footnote{642}

\footnote{629} Id. at 334 (quoting Universal Coach, Inc. v. N.Y. City Transit Auth’y, 629 N.E.2d 28, 33 (Ohio Ct. App. 1993); see also Williams, 700 N.E.2d at 868 (“An underlying unlawful act is required before a civil conspiracy claim can succeed.”)).

\footnote{630} Williams, 700 N.E.2d at 868 (quoting Pickle v. Swinchart, 166 N.E.2d 227, 229 (Ohio 1960)).


\footnote{632} Id.

\footnote{633} See supra Part II for a discussion of the applicability of the OSA.

\footnote{634} See supra Part III.

\footnote{635} See supra Part IV.

\footnote{636} See supra Part V.B.

\footnote{637} See supra note 5.

\footnote{638} See supra Parts III.B, IV.B, and V.B.2; see also supra Part VI (discussing secondary liability).

\footnote{639} O H I O R E V. CODE AN N. § 1707.43 (West 1994).

\footnote{640} See id. § 1707.41; id. § 1707.42 (West Supp. 2002).

\footnote{641} See supra Part V.A.

\footnote{642} See supra Part V.A.2.
The Ohio Supreme Court has recognized that the OSA is "remedial in nature" and was "drafted broadly to protect the investing public." Combined with various common law causes of action, Ohio law offers a variety of remedies for victims of untoward securities transactions.
