Stockbroker Malpractice

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“STOCKBROKER MALPRACTICE” THEORIES OF LIABILITY

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FEDERAL SECURITIES FRAUD

I. Elements

The elements of a securities fraud claim based on violations of § 10(b) of the Securities Exchange Act of 1934 and the Securities and Exchange Commission's Rule 10b–5 include the following:

1) a material misrepresentation or omission by the defendant;
2) scienter;
3) connection between the misrepresentation or omission and the purchase or sale of a security;
4) reliance upon the misrepresentation or omission;
5) economic loss; and
6) loss causation.[1]

II. Materiality

A fact becomes "material" for purposes of the federal securities law if there is "a substantial likelihood that [its] disclosure ... would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available."[2]

III. Misrepresentations and Omissions

A. Misrepresentations

The recommendation of unsuitable investments may constitute federal securities fraud.[3] Claims of this sort require proof that the the broker knew or reasonably believed that he was recommending investments unsuited to the plaintiffs' needs, that the defendant knowingly misrepresented or concealed information concerning the investment's unsuitability, and that the plaintiff justifiably relied upon this fraud.[4] The law may take industry suitability regulations into consideration in determining whether a broker's conduct violated § 10(b) and Rule 10b-5.[5]

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1 *Erica P. John Fund v. Halliburton Co.*, 131 S.Ct. 2179, 2184 (2011).

2 *Matrixx Initiatives v. Siracusano*, 131 S.Ct. 1309, 1318 (2011).

3 *See, e.g., Clark v. John Lamula Investors, Inc.*, 583 F.2d 594 (2nd Cir. 1978); *Wyman v. Prime Discount Sec.*, 819 F. Supp. 79, 84-85 (D. Me. 1993).

4 *Louros v. Kreicas*, 367 F. Supp. 2d 572, 585 (S.D.N.Y. 2005).

5 *GMS Group v. Benderson*, 326 F.3d 75, 82 (2nd Cir. 2003); *Johnson v. Aegon USA*, 355 F. Supp. 2d 1337, 1344-45 (N.D. Ga. 2004); *see* NASD RULE 2310 (brokers must have "reasonable grounds for believing that [an investment] recommendation is suitable for [their] customer upon the basis of the facts, if any, disclosed by such customer" as to his other security holdings and as to his financial situation and needs).

A broker may commit federal securities fraud through the excessive and unauthorized trading in a customer account.[6] A fuller discussion of "churning" appears below.

B. **Omissions**

"In the case of an omission, the duty to disclose generally arises when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them."[7] The law weighs the following factors in determining whether an investment professional owes his clients a duty to disclose:

1) the relationship of the parties,;
2) their relative access to information;
3) the benefit that the defendant derives from the relationship;
4) the defendant's awareness that the [investor] was relying upon the relationship in making his investment decision; and
5) the defendant's activity in initiating the transaction.[8]

Section 10(b) and Rule 10b-5 themselves create an affirmative duty to disclose material information "when necessary to make statements made, in light of the circumstances under which they were made, not misleading."[9] A defendant must be truthful, accurate, and complete in his disclosures, even if he did not originally have an "independent duty to speak."[10]

IV. **Scienter**

To violate §10(b) and Rule 10b-5, a broker must act with an "intent to deceive, manipulate, or defraud."[11] Recklessness also satisfies the scienter requirement under these provisions.[12] In this context, recklessness entails "highly unreasonable conduct which is an extreme departure from the standards of ordinary care."[13]

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6 *See, e.g., Armstrong v. McAlpin*, 699 F.2d 79 (2nd Cir. 1983).

7 *Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 189 (2nd Cir. 1998) (quotation marks omitted).

8 *SEC v. TLC Inv. and Trade Co.,* 179 F. Supp. 2d 1149, 1153-54 (C.D. Cal. 2001); *see also WPP Luxembourg Gamma Three Sarl v. Spot Runner, Inc.*, ___ F.3d ___, 2011 WL 3673116 at *5 (9th Cir. 2011).

9 *Matrixx Initiatives*, 131 S.Ct. at 1321.

10 *Caiola v. Citibank, N.A.*, 295 F.3d 312, 331 (2nd Cir. 2002).

11 *Matrixx Initiatives*, 131 S.Ct. at 1323.

12 *Frank v. Dana Corp.*, 646 F.3d 954, 959 (6th Cir. 2011).

13 *Id.*

V. **Reliance**

Section 10(b) and Rule 10b-5 require that claimants "reasonably" rely upon the defendant's falsehoods.[14] The "reasonableness of reliance is determined at the time of the transaction in question."[15] The law makes this assessment according to a recklessness standard.[16] Relevant factors include the following:

1) The sophistication of expertise of the plaintiff in financial and securities matters;
2) the existence of longstanding business or personal relation-ships;
3) access to the relevant information;
4) the existence of a fiduciary relationship;
5) concealment of the fraud;
6) the opportunity to detect the fraud;
7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and
8) the generality or specificity of the misrepresentations.[17]

"An investor may not [reasonably] rely on a misrepresentation if, through minimal diligence, ... [he] investor should have discovered the truth."[18] In case of omissions, the law presumes reliance, once the plaintiff established the materiality of the concealed information.[19]

VI. **Loss Causation**

"Loss causation requires the plaintiff to show that the "defendant's deceptive conduct cause their claimed economic" injury.[20] This element of federal securities fraud "has been likened to the tort concept of proximate cause, meaning that in order for the plaintiff to recover it must prove the damages it suffered were a foreseeable consequence" of the defendant's misconduct.[21] Loss causation exists if the plaintiffs can demonstrate that they "would have been spared all or an

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14 *ST Microelectronics v. Credit Suisse Sec. (USA)*, 648 F.3d 68, 82 (2nd Cir. 2011).

15 *Semerenko v. Cendant Corp.*, 223 F.3d 165, 179-80 (3rd Cir. 2000), *cert. denied*, 531 U.S. 1149 (2001).

16 *Brown v. Eathboard Sports USA*, 481 F.3d 901, 921 (6th Cir. 2007).

17 *Id.*

18 *Pension Committee v. Bank of Am. Sec.*, 592 F. Supp. 2d 608, 622 (S.D.N.Y. 2009); *accord*, *Nathel v. Siegal,* 592 F. Supp. 2d 452, 466 (S.D.N.Y. 2008).

19 *Affiliated Ute Citizens v. United States*,406 U.S. 128, 153 (1972); *see also Rubin v. Schottenstein Zox & Dunn*, 143 F.3d 263, 268 (6th Cir. 1998).

20 *Erica P. John Fund.*, 131 S.Ct. at 2183; *see also Brown*, 481 F.3d at 920.

21 *Suez Equity Investors v. Toronto Dominion Bank*, 250 F.3d 87, 96 (2nd Cir. 2001); *see also In re Beacon Assoc. Litig.*, 745 F. Supp. 2d 386, 413 (S.D.N.Y. 2010).

ascertainable portion of [their] loss absent the fraud."[22] The "plaintiff need not show that the defendant's misconduct was the sole and exclusive cause of his injury," so long as it was a "substantial" or "significant contributing cause."[23]

VII. **Damages**

In a "suit for damages" under § 10(b) and Rule 10b-5, the claimant cannot recover "a total amount in excess of his actual damages."[24] Plaintiffs may quantify their injury in terms of "out-of-pocket loss, the benefit of the bargain, or some other appropriate standard."[25] "The general rule allows [defrauded] plaintiffs ... to recover the difference between the value of the consideration they gave and the value of the security they received, plus consequential damages that can be proved with reasonable certainty to have resulted from the fraud."[26]

On a claim for the fraudulent mismanagement of a securities account, damages may equal the initial value of the portfolio; adjusted by the loss reflected in an index tracking the performance of the appropriate market over the pertinent period; less the closing value of the portfolio.[27] Plaintiffs may recover for securities fraud, even if their account produced an overall profit, if the evidence shows they would have earned more absent the defendants' wrongdoing.[28] Punitive damages and attorneys fees remain unavailable under § 10(b) and Rule 10b-5.[29]

CHURNING

I. **General Considerations**

Churning "denotes a course of excessive trading through which a broker advances his own interests (*i.e.*, commissions based on volume) over those of his customer."[30] In churning an account,

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22 *Sglambo v. McKenzie*, 739 F. Supp. 2d 453, 474 (S.D.N.Y. 2010) (quotation marks omitted).

23 *FindWhat Investor Group v. FindWhat.com*, ___ F.3d ___, 2011 WL 4506180 at *20 (11th Cir. 2011).

24 15 U.S.C. § 78bb(a).

25 *Osofsky v. Zipf*, 645 F.2d 107, 111 (2nd Cir. 1981).

26 *Arrington v. Merrill Lynch*, *Pierce, Fenner & Smith*, 651 F.2d 615, 621 (9th Cir. 1981).

27 *Rolfe v. Blythe, Eastman, Dollon & Co.*, 637 F.2d 77, 84 (2nd Cir. 1980).

28 *See, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206 (8th Cir. 1990).

29 *Rubin v. Schottenstein Zox & Dunn*, 119 F. Supp. 2d 787, 792 (S.D. Ohio 2000).

30 *Costello v. Oppenheimer & Co.*, 711 F.2d 1361, 1367 (7th Cir. 1983); *see also Smith v. Petrou*, 705 F. Supp. 183, 187 (S.D.N.Y. 1989).

brokers commit federal securities fraud[31] and violate their common-law fiduciary duties.[32] Investors must prove three distinct elements in order to establish such a claim:

1) the trading in their account must appear excessive in light of their avowed trading objectives;
2) the broker must have exercised control over the activity in the account;
3) the broker must have implemented the excessive trading with the requisite scienter.[33]

II. Excessive Trading

With respect to a churning claim, the law assesses the level of activity in an account " "in light of the investment objectives of the customer."[34] Where, for instance,"the goals of an investor are aggressive or speculative, as opposed to conservative and circumspect, it is easier to conclude that a given course of trading has not been excessive."[35] In contrast, a high level of activity that reflects "no [investment] strategy at all" suggests the possibility of churning.[36]

No single standard determines whether excessive trading has taken place.[37] The length of time securities remain in an account reflects upon this issue.[38]

A portfolio's turnover ratio represents another factor pertinent in determining whether excessive trading has taken place.[39] "Turnover ratio" refers to the ratio of the total costs of purchases made for an account during a specified period of time to [the] amount invested."[40] "[T]here is no

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[31] *See, e.g., Armstrong v. McAlpin*, 699 F.2d 79 (2nd Cir. 1983); *Bergen v. Rothschild*, 648 F. Supp. 582 (D.D.C. 1986).

[32] *Miley v. Oppenheimer & Co.*, 637 F.2d 318 (5th Cir. 1981) (construing Texas law); *Twomey v. Mitchum, Jones & Templeton*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968); *Byrley v. Nationwide Life Ins. Co.*, 94 Ohio App. 3d 1, 14-15, 640 N.E.2d 187 (1994). (suggesting that allegations of churning will support fiduciary-duty claim).

[33] *Rizek v. SEC*, 215 F.3d 157, 162 (1ST Cir. 2000); *Mihara v. Dean Witter & Co.*, 619 F.2d 814, 821 (9thCir. 1980); *Arceneaux v. Merrill Lynch, Pierce, Fenner & Smith*, 767 F.2d 1498, 1501 (11th Cir. 1985).

[34] *Mihara*, 619 F.2d at 821.

[35] *Costello*, 711 F.2d at 1368.

[36] *Bieganek v. Wilson*, 642 F. Supp. 768, 771 (N.D. Ill. 1986) (commodities case).

[37] *Mihara*, 619 F.2d at 821.

[38] *See, e.g., Costello*, 711 F.2d at 1369; *Mihara*, 619 F.2d at 821.

[39] *See, e.g., Costello*, 711 F.2d at 1369; *Mihara*, 619 F.2d at 821; *Freundt-Alberti v. Merrill Lynch, Pierce, Fenner & Smith*, 134 F.3d 1031, 1032 (11th Cir. 1998).

[40] *In re Thomson McKinnon Sec.*, 191 B.R. 976, 983 (Bankr. S.D.N.Y. 1996).

bright line test available to delineate [turnover ratios] into permissible and non-permissible camps."[41] Courts, however, typically regard a turnover ratio of six as a "benchmark" for excessive trading.[42] Similarly, "absent special circumstances," a turnover ratio of two does not give rise to liability for churning.[43]

The practice of "in and out" trading also may signal an excessive level of activity in a securities account.[44] "In and out" trading "denotes the sale of all or part of a customer's portfolio, with the money reinvested in other securities, followed by the sale of the newly acquired securities".[45] "In and out" trading "is a practice [that is] extremely difficult for a broker to justify."[46]

In assessing whether churning has taken place, the law may take into the account's "annualized commission-to-equity ratio."[47] This calculation "reflects the amount of profit that would have to be earned during a period just to pay for commissions."[48]

Another "primary test for excessive trading is the relationship between the net amount of money invested and the transaction costs that are incurred."[49] This "cost-to-equity" ratio reflects the rate of return required on the customer's net investments to pay "commissions and other expenses before the account breaks even and returns the first dollar of income or appreciation to the investor."[50] A "cost-to-equity ratio in excess of 20% generally indicates" an excessive volume of trading.[51] Certain authorities hold that when this "break-even rate ... reaches 24%," a "conclusive" presumption of churning arises.[52]

III. **Control**

In maintaining a discretionary account, customers formally give their broker control ove r the trades made on their behalf. "Even if an account is non-discretionary," however, "a broker may

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41 *Id.*

42 *Freundt-Alberti*, 134 F.3d at 1032; *see also Mihara*, 619 F.2d at 82.

43 *Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 490-91 (6th Cir. 1990) (affirming dismissal of churning claim).

44 *See, e.g.,Carras v. Burns* 516 F.2d 251, 258 (4th Cir. 1975); *Costello*, 711 F.2d at 1369.

45 *Costello*, 711 F.2d at 1369, fn. 6.

46 *Id.*

47 *See, e.g., Bieganek*, 642 F. Supp. at 771 (commodities case).

48 *Bowley v. Stotler & Co.*, 751 F.2d 641, 649 (3rd Cir. 1985) (commodities case).

49 *In re Sweeney*, 50 S.E.C. 761, Release No. 34-29884 at *3 (Oct. 30, 1991).

50 *In re Simpson*, Release No. ID-148 at *31 (Sep. 21, 1999).

51 *In re Howard*, 78 S.E.C. 338, Release No. 34-46269 at *3 (July 26, 2002).

52 *In re Simpson*, Release No. ID-148 at *31.

exercise de-facto control" for purposes of a churning claim.[53] This situation frequently arises in cases involving "relatively inexperienced and unsophisticated investor."[54] Brokers may assume de-facto control where "the customer lacks the ability to manage the account and must take [their] word for what is happening."[55]

Brokers may lull customers into "relinquishing control" over their portfolio by creating an "atmosphere of trust and confidence."[56] Customers also may cede control if they are "intimidated by the broker and reluctant to make suggestions or contradict any suggestion" that he makes.[57] In either circumstance, the "requisite degree of control is met when the client routinely follows the recommendations of the broker."[58]

IV. **Scienter**

A broker who acts recklessly manifests the necessary level of scienter for purposes of a churning claim.[59] In this context, recklessness entails

> highly unreasonable [conduct], involving not merely simple, or even inexcusable negligence, but an extreme departure from the standards of ordinary care, which presents a danger [to the client's interests] so obvious the actor must have been aware of it.[60]

To recover for churning, customers must establish this level of culpability with respect to the overall course of trading, rather than in connection with each separate trade in their account.[61]

The "scienter required" to establish churning is "implicit in the nature of the conduct."[62] "Therefore, the scienter element of churning may be inferred from the amount of the commissions charged or an annual turnover rate in excess of six."[63]

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53 *Rivera v. Clark Melvin Sec.*, 59 F. Supp. 2d 280, 290 (D.P.R. 1999); *see also Carras*, 516 F.2d at 258.

54 *Karlen v. Ray E. Friedman & Co.*, 688 F.2d 1193, 1203 (8th Cir. 1982)

55 *Carras,* 516 F.2d at 258.

56 *In re Thomson MacKinnon*, 191 F.R.D. at 985.

57 *Arceneaux*, 767 F.2d at 1502.

58 *Mihara*, 619 F.2d at 821.

59 *See, e.g., id.*; *Arceneaux*, 767 F.2d at 1501.

60 *Gelfer v. Pegasystems, Inc.*, 96 F. Supp. 2d 10, 13 (D. Mass. 2000); *see also Anixter v. Home Stake Prod. Co.*, 77 F.3d 1215, 1232 (10th Cir. 1996)..

61 *Mihara*, 619 F.2d at 821.

62 *Armstrong*, 699 F.2d at 91; *accord*, *In re Thomson MacKinnon*, 191 B.R. at 986.

63 *Sheldon Co. Profit Sharing Plan & Trust v. Smith*, 828 F. Supp. 1262, 1273 (W.D. Mich. 1993) (granting summary judgment for defendant on churning claim); *see also Rivera*, 59 F. Supp. 2d at 291.

V. **Damages**

Customers victimized by churning suffer "two distinct harms" – losses in the form of excess commissions, and diminution of the portfolio's value due to the broker's conduct.[64] Damages awarded in such cases should compensate the customer for each.[65]

With respect to the account's decreased value, damages will equal the difference between the portfolio's actual value and the value it would have reached had no churning taken place.[66] Awards of this kind necessarily will "always be somewhat speculative."[67] For this reason, damages in a churning case "need only be a fair approximation of actual damages."[68]

In instances where "it is not possible to determine what [an] account would have been worth had there been no churning," the customer may only recover commissions and any other definite losses attributable to the excessive trading."[69] Customers may recover these amounts even in cases where the value of their accounts appreciated, notwithstanding the broker's churning.[70]

<u>OHIO SECURITIES ACT</u>

I. **R.C. 1707.44(G)**

R.C. 1707.44(G) provides that

> [n]o person in ... selling securities shall knowingly engage in any act or practice that is, ... [under the Ohio Securities Act] ... declared illegal, defined as fraudulent, or prohibited.

Fraud under the Ohio Securities Act includes "any device, scheme or artifice to defraud or obtain money or property by means of any false pretense, representation or promise."[71] Courts look

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64 *Miley*, 637 F.2d at 326.

65 *Id.*; *see also McGinn v. Merrill Lynch, Pierce, Fenner & Smith*, 736 F.2d 1254, 1256-57 (8th Cir. 1984); *Hatrock v. Edward D. Jones, Inc.*, 750 F.2d 767, 773-74 (9th Cir. 1984), *aff'd*, 472 U.S. 192 (1986)..

66 *Miley*, 637 F.2d at 328.

67 *Kravitz v. Pressman Frohlich & Frost, Inc.*, 447 F. Supp. 203, 216 (D. Mass. 1978).

68 *Hatrock*, 750 F.2d at 774.

69 *Carras,* 516 F.2d at 258.

70 *See, e.g., Davis v. Merrill Lynch, Pierce, Fenner & Smith*, 906 F.2d 1206 (8th Cir. 1990); *In re Thomson MacKinnon*, 191 B.R. at 986-87.

71 R.C. 1707.01(J).

to the common law of fraud in identifying conduct that violates R.C. 1707.44(G).[72] Federal securities decisions also serve as a "defining source for 'fraud'" under the Ohio Securities Act.[73] The "anti-fraud provisions" of the Act "must be liberally construed" in order to fulfill the statute's purpose of protecting the investing public.[74]

II. Presumption of Knowledge

In cases involving the Ohio Securities Act, the defendant is presumed to know "any matter of fact, where in the exercise of reasonable diligence he should, prior to the alleged commission of the offense in question, have secured such knowledge."[75] This presumption of knowledge applies in civil actions as well as criminal prosecutions brought under the Act.[76]

III. Rescission

A. General Considerations

Under R.C. 1707.43, "[e]very sale or contract for sale made in violation of" the Ohio Securities Act becomes "voidable at the election of the purchaser."[77] This provision permits recovery of the full "purchase price" paid by the plaintiff.[78]

B. Persons Liable

Liability under R.C. 1707.43 extends beyond the actual seller of securities.[79] In fact, plaintiffs have a right to recover from everyone who "participated in or aided the seller in any way" in making the illegal sale.[80] This standard is "very broad."[81] A defendant does not have to "induce" the plaintiffs to invest in order to face liability under R.C. 1707.43.[82]

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72 *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d 366, 383, 738 N.E.2d 842 (2000).

73 *In re Columbus Skyline Sec.*, 74 Ohio St. 3d 495, 498, 660 N.E.2d 427 (1996).

74 *Id.*

75 R.C. 1707.29.

76 *See Jelm v. Galan*, No. 58093, 1991 WL 30266 at *6 (Ohio App. Mar. 7, 1991); *Diversified Prop. Corp. v. Winters Bank & Trust Co.*, 13 Ohio App. 2d 190, 234 N.E.2d 608 (1967).

77 R.C. 1707.43(A).

78 *Bronaugh v. R.&E. Dredging Co.*, 16 Ohio St. 2d 35, syllabus ¶1, 242 N.E.2d 572 (1968).

79 *See Hild v. Woodcrest Ass'n*, 59 Ohio Misc. 13, 28, 391 N.E.2d 1047 (Ohio C. Pl. 1977).

80 R.C. 1707.43(A).

81 *Miller v. Griffith*, 92 Ohio L. Abs. 488, 196 N.E.2d 154, 156 (Ohio C. P. 1961).

82 *Federated Mgmt. Co.*, 137 Ohio App. 3d at 383.

R.C. 1707.43 imposes "liability without fault."[83] Defendants need not have participated in violating the Ohio Securities Act, so long as they "participated" in making the unlawful sale or "aided the seller in any way."[84]

C. **Irrelevancy of Reliance**

While common law fraud includes the "element of reliance by the purchaser, ... a claim under R.C. 1707.44 does not mandate such reliance."[85] Plaintiffs may therefore obtain rescission under R.C. 1707.43 "for intentional misrepresentation without a showing of reliance."[86]

D. **Irrelevancy of Loss Causation**

Rescission under R.C. 1707.43 "is not ... compensatory" in nature.[87] The statute serves to vindicate the "protection contemplated by" the violated statutory provisions – not the "protection actually denied to the rescinding buyer."[88] The "illegality" of the contested sale therefore determines the availability of relief under R.C. 1707.43, not whether the plaintiffs suffered economic injury.[89] The plaintiffs need not prove any "loss attributable" to the violation of the Ohio Securities Act that gave rise to their claim.[90]

In fact, plaintiffs may obtain rescission under R.C. 1707.43 even if they were "aware of the [statutory] noncompliance ... at the time of the sale."[91] R.C. 1707.43 permits a buyer to rescind an illegal sale even if he initiated the transaction.[92]

E. **Relief Available**

As indicated above, R.C. 1707.43 entitles the plaintiff to recoup the full "purchase price" paid

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83 *Martin v. Steubner*, 485 F. Supp. 88, 97 (S.D. Ohio 1979), *aff'd* , 652 F.2d 652 (6th Cir. 1981), *cert. denied*, 454 U.S. 1148 (1982).

84 *Id.*; *In re National Century Fin. Enter. Inv. Litig.*. 580 F. Supp. 2d 630, 649 (S.D. Ohio 2008).

85 *Ferritto v. Alejandro*, 139 Ohio App. 3d 363, 368, 743 N.E.2d 978 (2000).

86 *Nickels v. Koehler Mgmt. Corp.*, 541 F.2d 611, 616 (6th Cir. 1976), *cert. denied*, 429 U.S. 1074 (1977); *accord*, *Murphy v. Stargate Def. Sys. Corp.*, 498 F.3d 386, 392 (6th Cir. 2007); *Wilson v. Ward*, 183 Ohio App. 3d 494, 2009-Ohio-2078, 917 N.E.2d 821, at ¶19.

87 *Crane v. Courtright*, 2 Ohio App. 2d 125, 128, 206 N.E.2d 913 (1964).

88 *Bell v. Le-Ge, Inc.*, 20 Ohio App. 3d 127, 131, 485 N.E.2d 282 (1985).

89 *Crater v. International Res.*, 92 Ohio App. 3d 18, 25, 633 N.E.2d 1212 (1993).

90 *Bell*, 20 Ohio App. 3d at 131; *accord*, *Miller*, 196 N.E.2d at 156.

91 *Pencheff v. Adams*, 5 Ohio St. 3d 153, fn. 1, 449 N.E.2d 1277 (1983).

92 *Callahan v. Class One, Inc.*, 58 Ohio St. 3d 76, 567 N.E.2d 1036 (1991).

in the unlawful securities transaction.[93] This is a remedy distinct from "damages."[94] R.C. 1707.43 provides for full restitution of the purchase price, even if the rescinded purchase generated income for the plaintiffs – pushing their total recovery beyond 100 percent.[95] Courts do not reduce an award under R.C. 1707.43 by the amount in dividends or other returns that the plaintiff received in connection with the rescinded transaction.[96] Nor do they diminish the plaintiff's recovery to reflect the tax benefits made available by the investment.[97]

F. **Materiality of Violation**

R.C. 1707.43 expressly provides that even if the plaintiff proves his case, rescission remains unavailable if the unlawful aspects of the contested sale did not "materially affect the protection contemplated by the violated" section of the Ohio Securities Act.[98] Defendants bear the burden of establishing this defense to liability.[99] Ultimately the court decides the issue of materiality under R.C. 1707.43 as a matter of law.[100]

G. **Necessity of Tender**

As a prerequisite to obtaining rescission under R.C. 1707.43, plaintiffs must "tender" the securities obtained in the unlawful sale "to the seller in person or open court."[101] When the plaintiffs have sued participants in the sale, rather than the "seller" itself, the "tender" goes to the participants.[102] The plaintiffs may make the"tender" at trial.[103] The tender becomes unnecessary if the plaintiff previously sold the securities in question back to the defendant.[104]

IV. **R.C. 1707.41**

Under R.C. 1707.41,

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93 *Bronaugh*, syllabus ¶1.

94 *Byrley v. Nationwide Life Ins. Co.*, 94 Ohio App. 3d 1, 20, 640 N.E.2d 187 (1994).

97 *See Mandalaywala v. Yajnik*, No. 00AP-741, 2001 WL 118592 at *4 (Ohio App. Feb. 13, 2001).

95 *Crater*, 92 Ohio App. 3d at 25.

96 *Sorenson v. Tenuta*, 62 Ohio App. 3d 696, 703, 577 N.E.2d 408 (1989).

98 R.C. 1707.43(A). The "protection contemplated" by R.C. 1707.44(G) is preventing the "fraudulent exploitation of the investing public." *See Columbus Skyline*, 74 Ohio St. 3d at 498 (discussing purposes of Ohio Securities Act generally).

99 *Biernbaum v. Midwest Oil & Gas Co.*, 108 Ohio App. 560, 567, 160 N.E.2d 410 (1959).

100 *Bronough*, 16 Ohio St. 2d 35.

101 R.C. 1707.43(A).

102 *Crane*, 2 Ohio App. 2d at 129.

103 *Wilson*, 2009-Ohio-2078 at ¶13-¶14.

104 *Roger v. Lehman Bros. Kuhn Loeb*, 621 F. Supp. 114, 119 (S.D. Ohio 1985).

> any person that, 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 that purchased the security relying on the circular, prospectus, or advertisement, for the loss or damage sustained by the relying person by reason of the falsity of any material statement contained therein or for the omission of material facts ....[105]

R.C. 1707.41 applies to both public and private offerings of securities.[106] To recover, purchasers much show reliance upon either a misstatement or omission of material information in written offering or sales materials.[107]

R.C. 1707.41 does not include an express scienter requirement.[108] It does, however, excuse from liability defendants who show that they "had no knowledge of the publication prior to the transaction complained of, or had just and reasonable grounds to believe the [contested] statement to be true of the omitted facts to be not material."

R.C. 1707.41 and R.C. 1707.43 embody "alternative" remedies.[109] R.C. 1707.41 "could hardly be broader" in providing for recovery of any "loss or damage sustained" by the plaintiffs – a standard that must receive liberal interpretation, given the "remedial nature of the statute."[110] Punitive damages remain unavailable under R.C. 1707.41.[111]

NEGLIGENCE AND BREACH OF FIDUCIARY DUTY

I. General Considerations

Negligence generally involves "a failure to comply with a legal duty" owed to the "person injured."[112] To prove negligence, plaintiffs must show

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105 R.C. 1707.41(A).

106 *In re National Century Fin. Enter.*, 504 F. Supp. 2d 287 (S.D. Ohio 2007).

107 *See generally* THOMAS E. GEYER, MICHAEL P. MIGLETS, & KEITH A. ROWLEY, "CIVIL LIABILITY AND REMEDIES IN OHIO SECURITIES TRANSACTIONS," 70 *U. CIN. L. REV*. 939, 1009 (2002).

108 *See Byrley*, 94 Ohio App. 3d at 21 ("R.C. 1707.41 has been interpreted as providing for a lower level of scienter ... than would be required under ... common law fraud").

109 *Federated Mgmt. Co. v. Coopers & Lybrand*, No. 03AP-204, 2004 WL 2941159, 2004-Ohio-6977 at ¶11 (Ohio App. Dec. 21, 2004); *see also* *Byrley*, 94 Ohio App. 3d at 20.

110 *Federated Mgmt. Co.*, 2004-Ohio-6977 at ¶13.

111 *Byrley*, 94 Ohio App. 3d at 21.

112 *Meyer Dairy Prod. Co. v. Gill*, 129 Ohio St. 633, syllabus, ¶3, 196 N.E. 428 (1935).

1) a legal duty owed to them by the defendant;
2) a breach of that duty; and
3) injury proximately resulting from the breach.[113]

"A claim of breach of fiduciary duty is basically a claim of negligence, albeit involving a higher standard of care."[114] The "standard of care" establishes what a "defendant must do, or must not do ... to satisfy" its duty to the plaintiff.[115]

II. Duty and Breach

A. General Duties of Brokers

Under Ohio law, the

> relation of principal and agent is a fiduciary one, implying trust and confidence. Thus, a broker is a fiduciary who owes to his or her employer the duty of good faith and loyalty as to all matters within the scope of his or her employment.[116]

The specific duties owed by the broker to his customer depends upon the level of his "discretion" over the activity in the customer's account.[117]

B. Discretionary vs. Non-Discretionary Accounts

With respect to non-discretionary accounts, where the customer retains ultimate authority over the trading that takes place, the broker's duties include

- the duty to recommend a stock only after studying it sufficiently to become informed as to its nature, price, and financial prognosis;
- the duty to inform the customer of the risks involved in purchasing or selling a particular security;
- the duty not to misrepresent any fact material to the transaction; and
- the duty to transact business only after receiving prior authorization from the customer.[118]

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113 *Robinson v. Bates*, 112 Ohio St. 3d 17, 24, 2006–Ohio–6362, 857 N.E.2d 1195, at ¶21.

114 *Strock v. Pressnell*, 38 Ohio St. 3d 207, 216, 527 N.E.2d 1235 (1988).

115 W. PAGE KEETON, *PROSSER AND KEETON ON TORTS* § 53 (5th Ed. 1984).

116 10 *OHIO JUR. 3D* BROKERS § 126 (2011).

117 *See id.; Burns v. Prudential Sec.*, 167 Ohio App. 3d 809, 2006-Ohio-3550, 857 N.E.2d 621, at ¶34.

118 *Burns*, 2006-Ohio-3550 at ¶34.

Brokers handling discretionary accounts "become fiduciaries in the broad sense and have increased duties to keep customers informed regarding the changes in the market that affect the customer's interest and to explain the practical impact and potential risks of the course of dealing" that the broker implements.[119]

"Where a customer relinquishes practical control over this brokerage account to a stockbroker, the broker owes wide-ranging fiduciary duties ... to manage the account in accordance with the customer's wishes."[120] In assessing the applicability of this rule, the law looks to "how account transactions have actually been conducted."[121] The "key" consideration "is whether the customer can independently evaluate his broker's suggestions, based on the information available to him and his ability to interpret it."[122]

In assuming practical control over an account, a broker commits himself to "act with the utmost good faith, reasonable care, and loyalty concerning the customer's account, and owes a duty to keep informed regarding changes in the market which affect his customer's interests."[123] The broker must "protect those interests, to keep the customer informed as to each completed transaction, and to explain forthrightly the practical impact and potential risks of the course of dealing in which the broker is engaged."[124]

Moreover, in situations where a "stockbroker's recommendations [are] invariably followed," the broker has an obligation to "determine the customer's actual financial situation and needs."[125] If it would be "improper and unsuitable to carry out ... speculative objectives expressed by the customer," the broker bears the duty of explaining the situation to the customer and refraining "from acting except upon" the customer's direct orders.[126] Under such circumstances, while the broker may "advise the customer about the speculative options available, he ... should not solicit the customer's purchase of any such ... securities."[127] A stockbroker who assumes de-facto control over an account also may have a duty to diversify the customer's portfolio.[128]

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[119] *Id.*

[120] *Rupert v. Clayton Brokerage Co.*, 737 P.2d 1106, 1109 (Colo. 1987).

[121] *FDIC v. Refco Group, Ltd.*, 989 F. Supp. 1052, 1081 (D. Colo. 1997) (applying Colorado law); *see also In re Thomson McKinnon Sec.*, 191 B.R. 976, 984-85 (Bankr. S.D.N.Y. 1996).

[122] *Donald K. Lindemuth Co. v. Shannon Fin. Corp.*, 660 F. Supp. 261, 265 (N.D. Cal. 1987) (applying California law).

[123] *Rupert*, 737 P.2d at 1109.

[124] *Id.*

[125] *Duffy v. Cavalier*, 215 Cal. App. 3d 1517, 1538, 264 Cal Rptr. 740 (1989), *quoting Twomey v. Mitchum, Jones & Templeton*, 262 Cal. App. 2d 690, 69 Cal. Rptr. 222 (1968).

[126] *Id.*

[127] *Id.*

[128] *See., e.g., Johnston v. CIGNA Corp.*, 916 P.2d 643, 648-49 (Colo App. 1996).

C. **Relevance of Industry Regulations**

Under Rule 2310 of the National Association of Securities Dealers, brokers must have "reasonable grounds for believing that [an investment] recommendation is suitable for [their] customer upon the basis of the facts, if any, disclosed by such customer" as to his other security holdings and as to his financial situation and needs. Rule 2310 also requires brokers, before executing recommended trades, to make "reasonable efforts" to learn the customer's financial status, tax status, investment objectives, and other relevant information.

New York Stock Exchange Rule 405 requires brokers and brokerage firms to

> 1) Use due diligence to learn the essential facts relative to every customer, every order, every cash or margin account ...; and
> 2) Supervise diligently all accounts handled by registered representatives of the organization.

Certain courts have held that investors may assert claims directly under NASD Rule 2310 and NYSE Rule 405.[129] Most cases hold that no such private right of action exists.[130] Nevertheless, these rules merit consideration in determine "what fiduciary duties are owed by a broker to an investor."[131] They also define the standard of care that brokers owe to customers.[132] (Customers may base a breach of contract claim on Rule 2310 and Rule 405 when their account agreement binds the broker to comply with these regulations.)[133]

D. **Relevance of Internal Guidelines**

The failure of a brokerage firm to comply with its own internal guidelines cannot by itself support a customer's claim for damages.[134] A violation of internal policy may nevertheless serve as proof that the broker did not fulfill a "duty" of "due care" owed to its customers, thereby substantiating allegations of negligence.[135]

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129 *See Cook v. Goldman Sachs & Co.*, 726 F. Supp. 151, 156 (S.D. Tex. 1989); *Deputy v. Lehman Bros.*, No. 2:02-CV-718-RTR, 2003 WL 24305008 at *4-*5 (E.D. Wis. Jan. 7, 2003).

130 *See, e.g., Craighead v. E.F. Hutton & Co.*, 899 F.2d 485, 493 (6th Cir. 1990).

131 *Lange v. H. Hentz & Co.*, 418 F. Supp. 1376, 1383-84 (N.D. Tex. 1976); *see also Birotte v. Merrill Lynch, Pierce, Fenner & Smith*, 468 F. Supp. 1172, 1179 (D.N.J. 1979).

132 *Javitch v. First Montauk Fin. Corp.*, 279 F. Supp. 2d 931, 938 (N.D. Ohio 2003); *see also Ferritto v. Olde & Co.*, 62 Ohio App. 3d 582, 577 N.E.2d 101 (1989); *Piper, Jaffray & Hopwood v. Ladin*, 399 F. Supp. 292, 298 (S.D. Iowa 1975).

133 *Komanoff v. Mabin, Nugent & Co.*, 884 F. Supp. 848, 860 (S.D.N.Y. 1995).

134 *See, e.g., De Kwiatkowski v. Bear, Stearns & Co.*,306 F.3d 1293, 1311 (2nd Cir. 2002)*; Farmland Indus. v. Frazier-Parrott Commodities, Inc.*, 871 F.2d 1402, 1407 (8th Cir.1989).

135 *De Kwiatkowski*, 306 F.3d at 1311.

III. Proximate Causation

Proximate causation entails "some reasonable connection between the act or omission of the defendants and the damage the plaintiff has suffered."[136] It requires proof that the plaintiff's injury "would not have taken place" but for the "natural and continuous" chain of incidents triggered by the defendants' misconduct.[137] The plaintiff must also show that the defendants could have reasonably foreseen the harm resulting from their actions.[138]

Independent "intervening" events can sever the causal link between the defendants' wrongdoing and the plaintiffs' injury.[139] An "intervening event," however, will not negate proximate causation if the defendants could have "reasonably foreseen that ... [it] was likely to happen."[140] Moreover, "[t]here may be more than one proximate cause of an injury."[141] Even when "an act is not the sole cause of the injury, that act can still be sufficient to satisfy the element of proximate cause so long as it put in motion the sequence of events leading to the injury."[142] As these principles suggest, a defendant cannot "relieve himself from liability merely by showing that the wrong or act of another directly contributed to produce the injury and damage."[143]

IV. Damages

A. General Considerations

Compensatory damages serve to make the plaintiff whole "for the wrong done to him ... by the defendant."[144] An appropriate award makes "amends for the "actual loss" suffered by the plaintiff at the hands of the defendant.[145] Stated otherwise, the propose "measure of damages is that which will compensate and make the plaintiff whole."[146]

Plaintiffs cannot recover in "cases where it is not certain that ... [they] suffered any damage."[147] "The injury must be appreciable ... [and] capable of being weighed and appraised" in

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136 *Queen City Terminals v. General Am. Transp. Corp.*, 73 Ohio St. 3d 609, 618, 653 N.E.2d 661 (1995) (internal quotation marks omitted).

137 *Clinger v. Duncan*, 166 Ohio St. 216, 222, 141 N.E.2d 156 (1957).

138 *Mudrich v. Standard Oil Co.*, 153 Ohio St. 31, 39, 90 N.E.2d 859 (1950).

139 *Queen City Terminals*, 73 Ohio St. 3d at 619.

140 *Taylor v. Webster*, 12 Ohio St. 2d, 53, syllabus ¶2, 231 N.E.2d 870 (1967).

141 *Id.*, 12 Ohio St. 2d at 57.

142 *Doyle v. Fairfield Mach. Co.*, 11th Dist., 120 Ohio App. 3d 192, 211, 697 N.E.2d 667 (1997).

143 *Northwestern Ohio Nat. Gas Co. v. First Congregational Church*, 12 Ohio L. Abs. 454, 457 (Ohio App. 1932), *aff'd*, 126 Ohio St. 140, 184 N.E. 512 (1933).

144 *Fantozzi v. Sandusky Cement Prod. Co.*, 64 Ohio St. 3d 601, 612, 597 N.E.2d 474 (1992).

145 *Id.*

146 *Pryor v. Webber*, 23 Ohio St. 2d 104, syllabus ¶1, 263 N.E.2d 235 (1970).

147 30 OHIO JUR. 3D *DAMAGES* § 2 (2011).

order to support a favorable verdict.[148] While uncertainty "as to the existence of damages" precludes recovery, "uncertainty as to their amount" does not.[149] "Once a right to damages has been established, that right cannot be denied because damages are incapable of being calculated with mathematical certainty."[150] The plaintiffs need only present "a reasonable basis of computation" that at least "approximate[s]" the amount of their losses.[151] The necessary level of specificity depends upon the nature of the defendant's misconduct and other attendant circumstances.[152]

B. **Brokerage Cases**

A broker's mismanagement of an account may result in both the customer's payment of "excessive commissions and the excessive decline in the value of the investor's portfolio."[153] The customer can recover both under a claim for breach of fiduciary duty.[154]

Under the "benefit of the bargain" standard of damages, plaintiffs may recover amounts reflecting what they would have had if the broker had "invested [their] funds as directed."[155] In securities arbitrations, customers have used the "well managed portfolio" standard to obtain this type of recovery. [156] The "well managed portfolio" standard measures "the principal loss on unsuitable investments, plus whatever gain they would have enjoyed in the market had they been invested in a suitable investment, usually measured by a well-known securities market index."[157]

In certain cases, a broker's negligence entitles his clients to the "difference between what [they] have now and what [they] would have had on the date the fiduciary relation closed if plaintiff[s] had retained the original portfolio and received the benefit of its appreciation and dividends."[158] Courts reduce such awards by withdrawals made by the customer.[159]

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148 *Id.*

149 *Accurate Die Casting Co. v. City of Cleveland.*, 2 Ohio App. 3d 386, 391, 442 N.E.2d 459 (1981).

150 *Geyan v. Queen City Grain Co.*, 71 Ohio App. 3d 185, 192, 593 N.E.2d 328 (1991).

151 *Cincinnati Gas & Elec. Co. v. J.T. Lohrer Constr. Co.*, 9 Ohio Misc. 2d 23, 24, 459 N.E.2d 1327 (Ohio C. Pl. 1983).

152 *Lovelady v. Rheinlander*, 66 Ohio App. 409, 416, 34 N.E.2d 788 (1940).

153 *Miley v. Oppenheimer & Co.*, 637 F.2d 318, 329 (5th Cir. 1981).

154 *Id.*

155 *See Visconsi v. Lehman Bros.*, 244 Fed. Appx. 708, 713 (6th Cir. 2007).

156 DENNIS A. STUBBLEFIELD, "THE NUTS AND BOLTS OF CUSTOMER-STOCKBROKER ARBITRATION," 51 *ORANGE CTY LAWYER* 13 (DEC. 2009).

157 *Id.*

158 *Vucinich v. Paine Webber, Jackson & Curtis*, 803 F.2d 454, 461 (9th Cir. 1986).

159 *Twomey*, 262 Cal. App. 2d 690.

COMMON-LAW FRAUD

To recover for fraud, a claimant must generally establish the following elements:

1) the misrepresentation or concealment
2) of facts material to the parties' transaction
3) made with knowledge of its falsity; and
4) with the intent of misleading another; and
5) justifiable reliance upon the deceit
6) that proximately causes injury to the victim.[160]

I. Misrepresentations and Omissions

There exists "only one quality of truth. It is not subject to relative gradations into positive, comparative, and superlative."[161] Given this principle, a fraud claim may rest upon "imperfect information [disseminated] in a way calculated to produce a [misleading] impression."[162] A party also commits fraud by disseminating "equivocal, evasive, or misleading [information] calculated to convey a false impression, even though [it] may be literally true."[163] Half-truths as well constitute fraud.[164]

The suppression of material information constitutes fraud in situations where the defendant has an obligation to disclose the material facts.[165] "A broker and client are in a fiduciary relationship and, therefore, the broker owes the client a duty to disclose material information concerning investments."[166]

A "person's duty to speak does not necessarily depend on the existence of a fiduciary relationship."[167] It instead 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 the confidence."[168] A defendant becomes obligated to speak when his failure to disclose "information to the other party will render a prior statement or representation untrue or misleading."[169] Parties must also reveal those facts

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160 *Gaines v. PreTerm-Cleveland, Inc*, 33 Ohio St. 3d 54, 55, 514 N.E.2d 709 (1987); *Volbers-Klarich v. Middletown Mgmt.*, 125 Ohio St. 3d 494, 2010-Ohio-2057, 929 N.E.2d 434, at ¶27.

161 *Harrison v. State*, 112 Ohio St. 429, 434, 147 N.E. 650 (1925), *aff'd* 270 U.S. 632 (1926).

162 *Long v. Mulford*, 17 Ohio St. 484, 505 (1867); *Bay v. Hunter Sav. Ass'n*, 539 F. Supp. 1020, 1025 (S.D. Ohio 1982) (construing Ohio law).

163 *Van Camp v. Bradford*, 63 Ohio Misc, 2d 245, 255, 623 N.E.2d 731 (Ohio C. Pl. 1993).

164 *Steiner v. Roberts*, 72 Ohio L. Abs. 391, 131 N.E.2d 238, 242 (Ohio App. 1955).

165 *Miles v. Perpetual Savings & Loan*, 58 Ohio St. 2d 97, 99, 388 N.E.2d 1367 (1979).

166 *Byrley v. Nationwide Life Ins. Co.*, 94 Ohio App. 3d 1, 18, 640 N.E.2d 187 (1994)

167 *Leal v. Holtvogt*, 123 Ohio App. 3d 51, 76, 702 N.E.2d 1246 (1998).

168 *Mancini v. Gorick.*, 41 Ohio App. 3d 373, 374-75, 536 N.E.2d 8 (1987).

169 *Miles*, 58 Ohio St. 2d at 99.

required to "dispel misleading impressions that are or might have been created by partial revelation of the facts."[170]

II. Materiality

Facts are "material" if they are "likely, under the circumstances, to affect the conduct of a reasonable person with [respect] to the transaction."[171] In a securities context, the law classifies facts as "material" if a "reasonable investor" would likely regard them as "significantly alter[ing]"the "total mix of information available" concerning a prospective purchase.[172]

III. Knowledge

Liability for fraud may rest upon either actual or constructive knowledge by the defendant of the deceptive nature of his conduct.[173] Moreover, if the defendant makes an affirmative statement without any knowledge as to its veracity, "he is as culpable as if he had willfully asserted that to be true which he absolutely knew to be false."[174]

IV. Intent

A fraudulent intent exists where the perpetrator purposefully tries to deceive or mislead the claimant, or to convey a "false impression" of the true state of affairs.[175] Defendants cannot avoid liability for fraud simply by disproving an intent to deceive the particular plaintiff who filed suit against them.[176] "If there was a general design to defraud all such as could be defrauded ..., the plaintiff who has suffered from the fraud" becomes entitled to recovery.[177] Liability for fraud arises where the "defendants, with the design to defraud the public generally, knowingly ... h[o]ld forth false and deceptive colors."[178] As these principles suggest, defendants can incur liability for fraud without manifesting a specific intent to mislead.[179]

V. Justifiable Reliance

As a general rule, justifiable reliance exists where a person of ordinary prudence, under the

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170 *Blon v. Bank One*, 35 Ohio St. 3d 98, 101, 519 N.E.2d 363 (1988).

171 *Leal*, 123 Ohio App. 3d at 76.

172 *In re Cardinal Health Sec. Litig.*, 426 F. Supp. 2d 688, 744 (S.D. Ohio 2006).

173 *Pumphrey v. Quillen*, 165 Ohio St. 343, syllabus, 135 N.E.2d 328 (1956).

174 *Id.*, 165 Ohio St. at 347.

175 *Id.* at 344.

176 50 *OHIO JUR. 3D* FRAUD AND DECEIT § 74 (2011)

177 *Id.*

178 *Bartholomew v. Bentley*, 15 Ohio 659, 667 (1846).

179 *See Bryant v. Lawson Milk Co.*, 22 Ohio App. 3d 69, 488 N.E.2d 934 (1985).

prevailing circumstances, would have accepted the truth of the defendant's assertions.[180] The law, however, does not carry this "requirement ... so far ... [as to] ignore or protect positive, intentional [deception] successfully practiced upon the ... unwary."[181] A defendant cannot "shield himself" from liability "because the party he was dealing with was careless or too confiding."[182] A "defrauded party does not owe to the party who defrauded him an obligation to use diligence to discover the fraud."[183]

Accordingly, a plaintiff's reliance becomes justified if the defendants' statement does "not appear unreasonable on its face, and if ... the [plaintiff] had no apparent reason to doubt [its] veracity."[184] Courts may also presume reliance once the plaintiff establishes "nondisclosure of a material fact."[185]

VI. **Damages**

Under a claim for the fraudulent sale of securities, the plaintiff may recover the difference between the actual value of the security and the value as it was represented to be at the time of the sale.[186] The defendant becomes liable for punitive damages if he acted with actual malice in committing fraud.[187]

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180 *Fulton v. Aszman*, 4 Ohio App. 3d 64, 446 N.E.2d 803 (1982).

181 *Amerifirst Savings Bank v. Krug*, 136 Ohio App. 3d 468, 496, 737 N.E.2d 68 (1999) (internal citations omitted).

182 *Chapman v. Orrachio*, 8 Ohio L. Abs. 250, 251 (Ohio App. 1929).

183 *Steiner*, 131 N.E.2d at 242.

184 *Lepera v. Fuson*, 83 Ohio App. 3d 17, 26, 613 N.E.2d 1060 (1992); *accord*, *Gaines*, 33 Ohio St. 3d at 56.

185 *Cope v. Metropolitan Life Ins. Co*, 82 Ohio St. 3d 426, 436, 696 N.E.2d 1001 (1998); *see also Baughman v. State Farm Mut. Auto. Ins. Co*, 88 Ohio St. 3d 480, 727 N.E.2d 1265 (2000).

186 *Citizens Banking & Savings Co. v. Spitzer, Rorick & Co.*, 65 Ohio App. 309, 29 N.E.2d 892 (1938); *Rubin v. Schottenstein Zox & Dunn*, 119 F. Supp. 2d 787, 791 (S.D. Ohio 2000) (applying Ohio law).

187 *Byrley*, 94 Ohio App. 3d at 20; *Davis v. Sun Refining & Mktg. Co.*, 109 Ohio App. 3d 42, 58, 671 N.E.2d 1049 (1996).