

# Have my Trade Secrets been Misappropriated?

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## Unconscionability Defense to Arbitration

*Sebold v. Latina Design Build Group, L.L.C.*, 8th Dist. Cuyahoga No. 109362, 2021-Ohio-124

In this appeal, the Eighth Appellate District affirmed the trial court's decision agreeing that the arbitration provision was not procedurally unconscionable.

- **The Bullet Point:** Ohio has a strong public policy favoring arbitration of disputes. As such, Ohio courts will not deem an arbitration agreement unconscionable simply because there was an unequal bargaining power between contracting parties. Instead, a party asserting that an arbitration agreement is unconscionable must prove that the agreement is both procedurally and substantively unconscionable. To meet its burden under this two-prong test, a party demonstrates substantive unconscionability if there are unfair and unreasonable contract terms. To prove procedural unconscionability, a party must demonstrate that there was an absence of meaningful choice on the part of one of the parties. While a determination of unconscionability is a fact-sensitive question based upon a totality of the circumstances, there are several important factors to consider. As explained in this case, Ohio courts analyze an arbitration agreement for procedural unconscionability by looking at the relative bargaining positions of the contracting parties and considering factors such as "each party's age, education, intelligence, experience, and who drafted the contract." Other factors considered by the court include whether the stronger party knew that the weaker party would not be able to receive substantial benefits from the contract or whether the stronger party knew the weaker party was unable to protect its interests due to an infirmity or illiteracy. Here, the plaintiffs negotiated and renegotiated the contract with the defendant. The court also noted that there was no evidence the parties were rushed or pressured to sign the contract, and the plaintiffs had the opportunity to hire an attorney to review the contract. Consequently, the court determined the contract was not procedurally unconscionable.

## Fraudulent Conveyance

### *Mancz v. McHenry*, 2d Dist. Greene No. 2019-CA-74, 2021-Ohio-82

In this appeal, the Second Appellate District affirmed the trial court's decision, finding evidence of multiple badges of fraud and agreeing that the debtor fraudulently conveyed assets to her husband.

- **The Bullet Point:** Under the Ohio Uniform Fraudulent Transfer Act, a transfer made by a debtor is fraudulent as to a creditor if the transfer is made (1) "with actual intent to hinder, delay, or defraud any creditor of the debtor" or (2) without receiving a "reasonably equivalent value" where additional circumstances exist. R.C. 1334.06(A). Under R.C. 1336.04(B), there are 11 so-called "badges of fraud" that are considered when determining a debtor's actual intent. However, a creditor does not need to prove the existence of all 11 badges of fraud to have the transfer voided as fraudulent. Instead, a debtor's intent is established circumstantially by considering all of the badges of fraud. In fact, Ohio courts have found evidence of fraudulent intent even when only three badges of fraud were present. In this case, the court found evidence of multiple badges of fraud and determined the debtor fraudulently conveyed real estate and financial assets. As the court noted, the debtor's transfer of the real estate was to an insider as she conveyed her interests to her husband, and she did not receive value in exchange for her interests. In addition, the debtor retained possession or control of the real estate, the transfers were of substantially all of her assets, and the debtor had been sued and threatened with suit before and during the transfer. Consequently, the court declared void the debtor's deed transferring her interests to her husband.

## Misappropriation of Trade Secrets

### *Key Realty, Ltd. v. Hall*, 6th Dist. Lucas No. L-19-1237, 2021-Ohio-26

In this appeal, the Sixth Appellate District affirmed in part and reversed in part the trial court's decision, finding that the plaintiff's materials and business structure were publicly available, routine in the industry, and therefore not protected trade secrets.

- **The Bullet Point:** Under Ohio law, an entity alleging misappropriation of a trade secret must prove: "(1) the existence of a trade secret; (2) the acquisition of a trade secret as a result of a confidential relationship; and (3) the unauthorized use of a trade secret." The Ohio Supreme Court developed a six-factor test to analyze claims for misappropriation of a trade secret. Under this test, courts consider: "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." In this case, the court utilized the six-factor test and noted that each document the plaintiff claimed to be a trade secret was stored or located on a publicly available website. Further, substantial parts of the plaintiff's

business model were not proprietary but were instead used by many businesses in the industry. As the court explained, information that is known generally in the industry is not a secret and cannot be afforded trade secret protection. Regardless, even if the plaintiff's materials fell within a category of protected trade secrets, the plaintiff did not demonstrate that it actively took steps to maintain the information's secrecy. As the court warned, once material is publicly disclosed, it loses any status it ever had as a trade secret.

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## Consideration Needed to Contract

### *Bakhshi v. Baarlaer*, 2d Dist. Montgomery Nos. 28767, 28768, 2021-Ohio-13

In this appeal, the Second Appellate District affirmed in part the trial court's decision agreeing that as the plaintiff failed to provide any consideration for the promissory note, he was not entitled to foreclose on his mortgage.

- **The Bullet Point:** In an action for failure to pay under a promissory note, a party may defend itself by arguing failure or want of consideration. As explained by the court, these are two different defenses. The defense of want of consideration applies in instances where there is a total lack of any valid consideration for the contract. On the other hand, the defense of failure of consideration "is the neglect, refusal and failure of one of the contracting parties to do, perform or furnish, after making and entering into the contract, the consideration in substance and in fact agreed upon." Simply stated, failure of consideration exists when the contracting parties intended and agreed upon the consideration, but the consideration was not provided or satisfied. In this case, the defendant signed a promissory note and mortgage to the plaintiff as part of a construction contract. After execution, the plaintiff failed to either give the defendant the funds or to credit the amount of the promissory note against the final construction price. Consequently, there was a failure of consideration for the promissory note and the plaintiff was not entitled to foreclosure judgment on the defendant's property.

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