

Ohio Forms of Pleading and Practice

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Part I CIVIL PRACTICE AND PROCEDURE
1 OHIO RULES OF CIVIL PROCEDURE
CHAPTER 12 CIVIL RULE 12--Defenses and Objections--When and How Presented--By Pleading or Motion--Motion
for Judgment on the Pleading

3-12 Ohio Forms of Pleading and Practice Form 12:11A

**Form 12:11A Motion and Supporting Memorandum to Dismiss Conversion Claim
on Grounds of Statute of Limitations n1**

**In the Court of Common Pleas
..... County, Ohio
Commercial Docket**

<i>(Title of action)</i>	Case No. Judge:
	Motion to Dismiss

Defendant,, by and through undersigned counsel, moves this Court pursuant to Rule 12(B)(6) of the Ohio Rules of Civil Procedure to dismiss Plaintiff's Complaint With Motion to Transfer to Commercial Docket and Notice of Deposition ("Complaint") because it fails to state a claim against Defendant as Plaintiffs' claims are barred by the applicable three-year statute of limitations. In particular, Plaintiffs' claims of conversion against Defendant under the Uniform Commercial Code ("UCC") were not brought within the three-year statute of limitations pursuant to O.R.C. § 1303.16(G) and are not tolled by the discovery rule. A Memorandum in Support is attached hereto.

Respectfully submitted,

*(Signature with name, registration
number, address, telephone and fax
numbers and email address printed
beneath) n2*

Attorneys for Defendants,
.....

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I. Statement of Facts.

Plaintiffs assert a conversion claim against Defendant for the alleged conversion of check, No. ("Check"), in the amount of \$..... (Complaint at pp., Count; Complaint Ex.). Specifically, Plaintiffs allege that the Check was presented for deposit with and converted by Defendant on or about [date] pursuant to O.R.C. § 1303.60. (Complaint at pp.). Plaintiffs' Complaint alleging conversion claims against Defendant was filed on [date]. (Complaint at pp.). Plaintiffs do not allege any fraudulent concealment claims or conduct against Defendant in the Complaint.

II. Argument of Law.

A. Legal Standard.

A "motion to dismiss based upon a statute of limitations may be granted when the complaint shows conclusively on its face that the action is time-barred." *Doe v. Archdiocese of Cincinnati* (2006), 109 Ohio St.3d 491, 493 (citing *Velotta v. Leo Petronzio Landscaping, Inc.* (1982), 69 Ohio St.2d 376, paragraph three of the syllabus). "In order for a court to dismiss a complaint under Civ.R. 12(B)(6) for failure to state a claim upon which relief may be granted, it must appear beyond doubt that the plaintiff can prove no set of facts in support of his or her claim that would entitle the plaintiff to relief." *Id.* (citing *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 245) .

B. Plaintiffs' UCC Conversion Claims Were Brought

Beyond the Three-Year Statute of Limitations.

Plaintiffs' claims for conversion of the Check under O.R.C. § 1303.60 against Defendant falls under the UCC. *See* O.R.C. § 1303.60 (UCC 3-420). Ohio law provides that a UCC action for conversion of an instrument shall be brought within three years:

(G) Unless governed by other law regarding claims for indemnity or contribution, any of the following actions shall be brought within three years after the cause of action accrues:

(1) An action for conversion of an instrument, an action for money had and received, or a similar action based on conversion.

O.R.C. § 1303.16(G)(1).

Plaintiffs allege that the conversion by Defendant occurred on [date]. Because Plaintiffs' Complaint alleging conversion claims against Defendant was not filed until [date]. Plaintiffs are beyond the three-year statute of limitations under Section 1303.16(6).

C. The Discovery Rule Does Not Toll the Three-Year Statute of Limitations in this Case.

Ohio law is clear that the three-year statute of limitations for conversion under Section 1303.16(G) is *not* tolled by the discovery rule. In *Metz v. Unizan Bank*, the Northern District of Ohio held that the discovery rule does not apply to toll the running of the statute of limitations under O.R.C. § 1303.16(G) or O.R.C. § 1304.09:

Therefore, taking into consideration the factors considered by the Ohio Supreme Court in determining whether the discovery rule is appropriate, this Court has looked to the rationale underlying the statute of limitations, the interests and equities invoked where the injury was not immediately discovered, the language and intent of the General Assembly in enacting the applicable statutes of limitation, and the bulk of authority in other jurisdictions. Taking each of these factors into account and weighing the overall balance of interests, this Court finds that Ohio law does not support the application of the discovery rule to toll the running of the limitations period contained in O.R.C. § 1303.16(G) or O.R.C. § 1304.09.

Metz, 416 F. Supp. 2d 568, 579 (N.D. Ohio 2006) . The *Metz* holding was cited by the Eighth Ohio Appellate District in *Estate of Fislser v. Fislser*, 2007 Ohio 1000, P15 (Ohio App. 8th Dist. 2007).

Moreover, in a recent decision, the Northern District of Ohio in *Loyd v. Huntington Nat'l Bank*, followed the *Metz* decision in holding that the discovery rule did not toll the three-year statute of limitations for Plaintiffs' UCC conversion claims because of the Ohio legislature's intent not to extend the discovery rule to conversion of negotiable instruments. *Id.* at *29-*30. The *Loyd* Court reasoned:

Ohio courts have found that the "great bulk of authority runs very strongly against" the application of the discovery rule for claims involving the theft or conversion of negotiable instruments. In addition, the Ohio General Assembly, in enacting the UCC, specifically chose to toll the running of the statute of

limitations until after the injury was discovered in some instances but not in others. The legislature did not specifically add a discovery rule to the statutes of limitation applicable in this case. The Ohio Supreme Court has held that the fact that the General Assembly included language establishing a discovery rule under some UCC sections but not in others "argues strongly that it was not the legislature's intent to apply the discovery rule to [the later] claims." *Investors REIT One v. Jacobs*, 46 Ohio St. 3d at 181, 546 N.E.2d at 211, citing *Kirsheman v. Paulin*, 155 Ohio St. 137, 146, 98 N.E.2d 26, 31 (1951). "The legislature's express inclusion of a discovery rule for certain [claims] ... implies the exclusion of other torts arising under the statute"

Id. at *22-*23.

As the above decisions make clear, the discovery rule does not apply to toll the running of the statute of limitations for conversion of negotiable instruments. Plaintiffs make no fraudulent concealment allegations against Defendant. Plaintiffs, therefore, cannot assert the UCC conversions claim against Defendant since the claim is barred by the statute of limitations. O.R.C. B 1303.16(G)(1).

Respectfully submitted,

(Signature with name, registration number, address, telephone and fax numbers and email address printed beneath) n3

(Proof of service of copy) n4

FOOTNOTES:

(n1)Note 1. **Source of Form.** Form adapted from papers in *Mattlin Holdings LLC v. First City Bank*, 189 Ohio App. 3d 213, 2010 Ohio 3700 (8th Dist. 2010), provided courtesy of Jeffrey A. Willis, Esq., Dinsmore & Shohl, L.L.P., Cincinnati, Ohio. The discovery rule did not toll the statute of limitations on plaintiffs' UCC conversion claim, since there was no allegation of any fraudulent concealment on the part of the defendant banks. Plaintiffs did not claim that the banks committed or participated in the alleged fraud, but rather that the banks' failure to ensure that the check had been properly indorsed merely facilitated the fraud.

(n2)Note 2. **Signing.** See Form 12:1, N. 3, *above*.

(n3)Note 3. *Ibid.*

(n4)Note 4. **Proof of service of copy.** See Form 12:1, N. 4, *above*.