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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

SUPREME COURT OF OHIO,

Plaintiff and Respondent,

v.

HERITAGE MARKETING AND  
INSURANCE SERVICES, INC., et al.,

Defendants and Appellants.

G044810

(Super. Ct. No. 30-2010-00388985)

O P I N I O N

Appeals from orders of the Superior Court of Orange County, Frederick Paul Horn, Judge. Affirmed.

Robert L. Wishner for Defendants and Appellants.

Steckbauer Weinhart Jaffe, Barry S. Glaser, James M. Gilbert, and Sean A. Topp, for Plaintiff and Respondent.

Plaintiff, the Supreme Court of Ohio,<sup>1</sup> entered an Ohio judgment enjoining defendants Heritage Marketing and Insurance Services, Inc. (Heritage), and Jeffrey Norman from the unauthorized practice of law in that state, and assessing civil penalties. Plaintiff then registered the sister state judgment in California.

Defendants appeal from the denials of their motions to vacate that judgment. They contend the underlying Ohio judgment was void due to bias, conflicts with fundamental California public policy, and exceeded the Ohio Supreme Court's jurisdiction by imposing criminal fines. Each contention fails. We affirm.

## FACTS

Under Ohio law, only Ohio licensed attorneys may give estate planning advice or prepare living trusts in that state. That has been clear since at least 1997.<sup>2</sup> (*Trumbull Cty. Bar Assn. v. Hanna* (Ohio 1997) 684 N.E.2d 329, 331.) Ohio has continued to protect its residents from the “trust-mill operations” of unlicensed laypeople. (*Cleveland Bar Assn. v. Sharp Estate Serv.* (Ohio 2005) 837 N.E.2d 1183, 1188; accord *Cincinnati Bar Assn. v. Kathman* (Ohio 2001) 748 N.E.2d 1091, 1095.)

The Ohio constitution vests the Ohio Supreme Court with jurisdiction over the practice of law, including regulating the unauthorized practice of law. (*American Family Prepaid Legal v. Columbus Bar* (6th Cir. 2007) 498 F.3d 328, 333 (*American*

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<sup>1</sup> We will use “plaintiff” to refer to the Supreme Court of Ohio in its capacity as a party, and “Ohio Supreme Court” to refer to it in its capacity as a court.

<sup>2</sup> California shares this concern. “In the past several years, mounting criticism has been leveled at the marketing of living trusts by nonlawyers with only cursory oversight by attorneys. Such activities have been characterized as the unauthorized practice of law, and the living trust companies have been called ‘trust mills.’” (*Estate of Swetmann* (2000) 85 Cal.App.4th 807, 812, fn. 3; accord *People ex. rel. Bill Lockyer v. Fremont Life Ins. Co.* (2002) 104 Cal.App.4th 508, 512 [recounting Attorney General’s civil action against insurer selling living trusts and annuities].)

*Family I*.) That court appoints the members of the Board of Commissioners on the Unauthorized Practice of Law (UPL Board), whose reports are “subject to review by the Ohio Supreme Court.” (*Ibid.*) Thus, “the UPL Board serves as an arm of the Ohio Supreme Court.” (*Ibid.*)

In 2002, the UPL Board received a complaint that defendant Norman and two companies he co-owned — defendant Heritage and American Family Prepaid Legal Corporation (American Family) — were engaging in the unauthorized practice of law.<sup>3</sup> (See *Columbus Bar Assn. v. American Family Prepaid Legal* (Ohio 2009) 916 N.E.2d 784, 786 (*American Family II*.) The parties entered into a consent agreement whereby defendants and American Family agreed to stop selling living trusts and similar documents, which they agreed constituted the unauthorized practice of law. (*Ibid.*)

In March 2005, the Columbus Bar Association filed motions with the Ohio Supreme Court to enforce the consent agreement. (*American Family II, supra*, 916 N.E.2d at p. 788.) Over defendant’s written opposition, the Ohio Supreme Court issued an interim cease and desist order the next month. It directed the UPL Board to hold a hearing to determine whether defendants and American Family had violated the consent agreement. (*Ibid.*) American Family filed a “Motion to Clarify,” contending the interim cease and desist order violated its due process rights. (*American Family I, supra*, 498 F.3d at p. 331.) The Ohio Supreme Court denied the motion. (*Id.* at pp. 331-332.)

American Family next filed suit in federal district court. (*American Family I, supra*, 498 F.3d at p. 332.) It alleged the Ohio rule authorizing interim cease and desist orders violated due process. (*Ibid.*) The district court dismissed the action on the ground of abstention. (*Ibid.*; see also *Younger v. Harris* (1971) 401 U.S. 37 (*Younger*) [federal courts should abstain from enjoining state judicial proceedings involving important state interests].) The Sixth Circuit affirmed that dismissal in *American Family I, supra*, 498

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<sup>3</sup> The other co-owner, Stanley Norman, was a party to the Ohio UPL proceedings but is not a party here. We omit further mention of him.

F.3d at page 330. It held the UPL Board hearing constituted judicial proceedings (*id.* at p. 333) involving Ohio’s “important interest in regulating the unauthorized practice of law” (*id.* at p. 334). It further held the Ohio Supreme Court afforded an adequate opportunity to raise any constitutional challenges. (*Id.* at p. 335.) The Sixth Circuit noted American Family waived any due process claim by raising it for the first time in the Motion to Clarify. (*Ibid.*) It also noted “[t]he final report of the UPL Board is subject to review by the Ohio Supreme Court,” and “there is no reason to presume that the Ohio Supreme Court would not entertain American Family’s due process claim during its review of the UPL Board’s findings.” (*Ibid.*)

In December 2007, a panel of the UPL Board granted summary judgment to the Columbus Bar Association and denied the summary judgment motion of defendants and American Family. (*American Family II, supra*, 916 N.E.2d at p. 789.) The full UPL Board later adopted the panel’s recommendations, finding defendants and American Family violated the consent agreement. (*Ibid.*) It recommended imposing \$700,000 in civil penalties against them.

The Ohio Supreme Court reviewed and adopted the UPL Board’s recommendations in October 2009. (*American Family II, supra*, 916 N.E.2d at p. 806.) In a detailed and comprehensive opinion, it found “by a preponderance of the evidence that [defendants and American Family] engaged in the unauthorized practice of law.” (*Id.* at p. 797.) It noted “American Family and Heritage agents in particular had to have a clear understanding of their excesses. A corporate predecessor, American Heritage Corporation, saw its then resident attorney suspended from the practice of law for one year. [Citation.] Again, except for the ruse of the prepaid legal plan, American Heritage operated in the very same manner as American Family and Heritage did here.” (*Ibid.*)

The Ohio Supreme Court “impose[d] a civil penalty of \$6,387,990, assessed jointly and severally, against” defendants and American Family. (*American Family II, supra*, 916 N.E.2d at p. 800.) It “calculated this penalty by multiplying the

number of persons who purchased living-trust documents . . . 3,202, by the fee collected from each individual, \$1,995.” (*Ibid.*) The court also assessed costs against American Family, Heritage, and Norman. (*Ibid.*) Defendants moved for reconsideration, contending the board had formed “a fixed anticipatory judgment” against them. The Ohio Supreme Court denied the motion.

In 2010, plaintiff applied in the Orange County Superior Court for entry of judgment on a sister state judgment. The court entered judgment accordingly in the amount of \$6,441,990.43. Heritage and Norman filed separate motions to vacate the judgment. The court denied the motions.

## DISCUSSION

“Full Faith and Credit shall be given in each State to the . . . judicial Proceedings of every other State.” (U.S. Const., art. IV § 1.) “[T]he law is well established that upon a claim that a foreign judgment is not entitled to full faith and credit, the permissible scope of inquiry is limited to a determination of whether the court of forum had fundamental jurisdiction in the case. Accordingly, a judgment entered by one state must be recognized by another state if the state of rendition had jurisdiction over the parties and the subject matter and all interested parties were given reasonable notice and opportunity to be heard.” (*World Wide Imports, Inc. v. Bartel* (1983) 145 Cal.App.3d 1006, 1010 (*World Wide Imports*).

“[T]he differing public policy or laws of the enforcing state cannot contravene the full faith and credit clause of the Constitution. As has been repeatedly stated, California must, regardless of policy objections, recognize the judgment of another state as res judicata, and this is so even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California.” (*World Wide Imports, supra*, 145 Cal.App.3d at p. 1011.)

“Partially in response to the constitutional mandate of full faith and credit, the California Legislature enacted the Sister State Money Judgments Act (the Act) to provide economical and expeditious registration procedures for enforcing sister state money judgments in California. [Citations.] A California judgment can be obtained simply by registering a sister state judgment with the specified superior court, thereby avoiding the necessity of bringing a completely independent action here.” (*Bank of America v. Jennett* (1999) 77 Cal.App.4th 104, 114 (*Jennett*); accord Code Civ. Proc., § 1710.10 et seq.)

“Under the Act, however, a defendant retains the right to assert those defenses to the enforcement of a sister state judgment which were available under the former procedure (which required a separate lawsuit to enforce the judgment). [Citation.] [¶] Although the Act does not enumerate the available defenses, the Law Revision Commission’s comment to Code of Civil Procedure section 1710.40 ‘explains that defenses to enforcement of the judgment may include the following: (1) the judgment is not final and unconditional; (2) the judgment was rendered in excess of jurisdiction; (3) the judgment was obtained by extrinsic fraud; (4) the judgment is not enforceable in the state of rendition; (5) the judgment has already been paid; (6) the plaintiff is guilty of misconduct; or (7) suit on the judgment is barred by the statute of limitations in the state where enforcement is sought.’” (*Jennett, supra*, 77 Cal.App.4th at pp. 114-115, fn. omitted; accord Code Civ. Proc., § 1710.40, subd. (a).)

Here, defendants do not dispute the Ohio Supreme Court (1) had personal jurisdiction over them, (2) had subject matter jurisdiction over the UPL claims against them, and (3) provided them notice and an opportunity to be heard. (See *World Wide Imports, Inc., supra*, 145 Cal.App.3d at p. 1010 [requirements for full faith and credit].)

Nonetheless, defendants assert the California judgment should be vacated for three reasons. First, they contend the underlying Ohio judgment is void because the UPL Board was dominated by Ohio lawyers biased against laypeople. Second, they

contend the Ohio judgment offends California's fundamental policy of equal protection for laypeople accused of the unauthorized practice of law. Third, they assert the Ohio Supreme Court exceeded its jurisdiction by imposing criminal fines against them.

First, defendants' bias claim is untimely.<sup>4</sup> They did not raise the bias issue with the UPL panel or the full UPL Board, despite "[t]he general rule . . . requir[ing] that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process." (*Marcus v. Director, Office of Wkrs' Comp. Prog.* (D.C. Cir. 1976) 548 F.2d 1044, 1051, fn. omitted.) Nor did defendants seek relief on this ground from the Ohio Supreme Court, which would have "entertain[ed a] due process claim during its review of the UPL Board's findings." (*American Family I, supra*, 498 F.3d at p. 335; accord *Fieger v. Thomas* (6th Cir. 1996) 74 F.3d 740, 749 ["We are confident the Michigan Supreme Court takes constitutional challenges to its regulations pertaining to lawyer conduct very seriously"].) While defendants asserted bias in their motion for reconsideration, they claimed only that the UPL Board had prejudged the case and was personally biased against them. Defendants did not challenge the composition of the UPL Board or panel in any forum, until now.

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<sup>4</sup> Defendants cite no case from any jurisdiction refusing to give full faith and credit to a sister state judgment on the ground of bias. But one might reason a biased adjudicator is incapable of providing due process. (See *World Wide Imports, supra*, 145 Cal.App.3d at p. 1010 [parties to sister state judgment entitled to notice and opportunity to be heard]; see also *Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 57, 60 (*Ward*) [due process violated when adjudicator has financial interest in case].) Similarly, one might conclude a judgment tainted by bias would not be "enforceable in the state of rendition." (*Jennett, supra*, 77 Cal.App.4th at p. 115; see *Cuyahoga Bd. of M. Retard. v. Ass'n of C. Teach. Of R.* (Ohio Ct.App. 1975) 351 N.E.2d 777, 782 (*Cuyahoga*) [judgment "null and void" when entered by judge subject to disqualification].)

Even if we reached its merits, the bias claim flounders. Defendants note the UPL Board included one layperson and 11 Ohio lawyers, who potentially benefitted from barring laypeople from selling living trusts. Defendants rely upon a *Younger* abstention case, *Gibson v. Berryhill* (1973) 411 U.S. 564 (*Gibson*), which affirmed a district court finding the Alabama Board of Optometry was “so biased by . . . pecuniary interest that it could not constitutionally conduct” certain license revocation hearings. (*Id.* at p. 578.) The board was biased because it was “composed solely of optometrists in private practice for their own account,” but had “the aim . . . to revoke the licenses of all optometrists in the state who were employed by business corporations [who] accounted for nearly half of all the optometrists practicing in Alabama.” (*Ibid.*)

But *Gibson* is inapt because the board there was truly interested in the proceeding. The Alabama Board of Optometry sought to drive “nearly half” of the state’s optometrists out of business, in order to restrict the practice of optometry to sole practitioners like those on the board. (*Gibson, supra*, 411 U.S. at p. 578.) Thus, “success in the Board’s efforts would possibly redound to the personal benefit of members of the Board, sufficiently so that . . . the Board was constitutionally disqualified from hearing the charges filed against the” corporate optometrists. (*Ibid.*) Here, defendants make no showing laypeople occupy any significant percentage of the Ohio market for living trusts.

And in *Gibson*, the last word on licensure belonged to the biased board.<sup>5</sup>

That was “the statutory body with authority to issue, suspend, and revoke licenses for the

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<sup>5</sup> *Gibson* also stressed the district court’s closer connection to local issues. The Supreme Court acknowledged it was “remote . . . from the local realities underlying this case,” whereas the district court “very likely . . . ha[d] a firmer grasp of the facts and of their significance to the issues presented.” (*Gibson, supra*, 411 U.S. at p. 579.) We are similarly remote from the issue here — was an Ohio board appointed by the Ohio Supreme Court exercising jurisdiction granted by the Ohio Constitution too biased to decide whether defendants breached their agreement to stop violating Ohio law by selling living trusts in Ohio to Ohio residents? Nothing suggests this question is best answered by the courts of California.

practice of optometry.” (*Gibson, supra*, 411 U.S. at p. 567.) And indeed, *Gibson* vacated the district court’s injunction for reconsideration in light of an intervening Alabama Supreme Court decision allowing optometrists to work for corporations. (*Id.* at pp. 580-581.) Here, the UPL Board had no independent authority to enjoin defendants or impose civil penalties upon them. The UPL merely made recommendations to the Ohio Supreme Court, which had jurisdiction over the unauthorized practice of law. (See *American Family I, supra*, 498 F.3d at p. 331.) And defendants do not contend the Ohio Supreme Court itself held any impermissible bias.<sup>6</sup>

Second, defendants’ equal protection contention falls flat. Defendants assert there are “rare exceptions to the application of the full faith and credit clause . . . when there is a violation of some fundamental state public policy.” (*United Bank of Denver v. K & Y Trucking Co.* (1983) 147 Cal.App.3d 217, 222; accord *Brinker v. Superior Court* (1991) 235 Cal.App.3d 1296, 1299 [same].) But these cases apply no such exception. (See *United Bank*, at p. 223 [sister state judgment was “not so offensive” it could not be enforced]; see also *Brinker*, at p. 1300 [sister state judgment “was entitled to full faith and credit”].) In fact, each case confirms “there is no precedent for an exception in the case of a money judgment in a civil suit.” (*United Bank*, at p. 222; accord *Brinker*, at p. 1299 [same].) And that is the type of judgment at issue here.

Even if such an exception exists, defendants identify no fundamental California policy at stake here. They note California affords the full protections of a trial court civil action to laypeople accused of the unauthorized practice of law. (Bus. & Prof. Code, §§ 6126, 6126.3.) Defendants claim this shows California treats these laypeople

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<sup>6</sup> The UPL Board’s limited role distinguishes *Ward*, which held the possibility of appeal and trial de novo did not cure the lack of due process in an initial hearing by an interested adjudicator. (*Ward, supra*, 409 U.S. at pp. 61-62 [a party “is entitled to a neutral and detached judge in the first instance”].) Here, the Ohio judgment was entered in the first instance by the Ohio Supreme Court, whose impartiality is undisputed. That impartiality also distinguishes *Cuyahoga*, which held a judge’s bias vitiated his appointment of a mediator. (*Cuyahoga, supra*, 351 N.E.2d at p. 783.)

equally with other persons “accused of improper civil or criminal activities.” And they insist this amounts to a fundamental policy of equal protection. We disagree.

“[R]egardless of policy objections,” California must “recognize the judgment of another state as *res judicata* . . . even though the action or proceeding which resulted in the judgment could not have been brought under the law or policy of California.” (*World Wide Imports, supra*, 145 Cal.App.3d at p. 1011.) The Ohio Supreme Court has original jurisdiction over the practice of law;<sup>7</sup> it adopted rules regarding the unauthorized practice of law; and it entered the Ohio judgment pursuant to those rules. We must give full faith and credit to that judgment, regardless of how California chooses to police the unauthorized practice of law within its borders.

Third, defendants assert the Ohio Supreme Court exceeded its jurisdiction by levying criminal fines in the Ohio judgment. (See *Jennett, supra*, 77 Cal.App.4th at p. 115 [no full faith and credit for sister state judgment entered in excess of jurisdiction].) They rely on an Ohio double jeopardy case, *State v. Gustafson* (Ohio 1996) 668 N.E.2d 435, which observed a civil penalty may become punitive if it is disproportionate to the harm caused and serves only the purpose of deterrence or retribution. (*Id.* at p. 433.)

Here, the approximately \$6.3 million civil penalty was proportionate to the harm caused. More than 3,200 Ohio residents paid \$1,995 each for defendants’ unauthorized living trusts. Disgorging those proceeds serves a remedial purpose. (See *S.E.C. v. Bilzerian* (D.C.Cir. 1994) 29 F.3d 689, 696 [disgorgement of “illicit gains” “is remedial in nature and does not constitute punishment within the meaning of double jeopardy”].) “[T]he forfeiture of illegal proceeds . . . merely places that party in the lawfully protected financial status quo that he enjoyed prior to launching his illegal scheme. This is not punishment ‘within the plain meaning of the word.’” (*U. S. v. Tilley*

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<sup>7</sup> The Ohio Supreme Court’s original jurisdiction undercuts defendants’ claim that the Ohio judgment is a mere administrative award. (See *World Wide Imports, supra*, 145 Cal.App.3d at p. 1012 [such awards may not deserve full faith and credit].)

(5th Cir.1994) 18 F.3d 295, 300.) The Ohio judgment evinces no punitive intent or effect. (See *Kennedy v. Mendoza–Martinez* (1963) 372 U.S. 144, 168-169 [test for determining whether statute is “penal or regulatory in character”].)

#### DISPOSITION

The orders are affirmed. Plaintiff shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

FYBEL, J.