§ 1.02 The Legal Bases To Be Excused From Performance

[1] *Force Majeure* Clauses

In the parlance of contract law, "*force majeure*" (superior or irresistible force) generally means that a party to a contract is excused of its obligations because some unforeseen event beyond that party's control has prevented performance of those obligations or made performance excessively burdensome. As detailed in ***Corbin on Contracts Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.13 (*Force Majeure* Clauses)**, *force majeure* clauses are employed to list events that make contractual performance impossible or impracticable. "The party who relies on a *force majeure* clause to excuse performance bears the burden of proving that the event was beyond the party's control and without its fault or negligence."[1] One court explained:

> A force majeure clause, like this one, allocates the risk of loss "if performance becomes impossible or impracticable," especially as a result of an event or effect the parties … have anticipated or controlled. The clause generally lists a series of events such as earthquakes, storms, floods, natural disasters, wars, or other 'acts of God' which the parties to a contract have agreed upon as excuses of non-performance." "A claim of force majeure is equivalent to an affirmative defense."[2]

The contract—not extra-contractual legal bases such as impracticability—is the starting point, and in most instances, the end-point, for discovering whether a post-formation event excuses performance. In fact, parties probably will lose the benefit of the extra-contractual gap-filler doctrines by including a *force majeure* clause that covers the same subject matter. The esteemed Judge Richard Posner wrote: "If … the parties include a force majeure clause in the contract, the clause supersedes the [impossibility] doctrine … [L]ike most contract doctrines, the doctrine of impossibility is an 'off-the-rack' provision that governs only if the parties have not drafted a specific assignment of the risk otherwise assigned by the provision."[3] One court explained:

> Historically, the theory of force majeure embodied the concept that parties could be relieved of performance of their contractual obligations when the performance was prevented by causes beyond their control, such as an act of God … . However, much of the theory's "historic underpinnings have fallen by the wayside" with the result that force majeure is now "little more than a descriptive phrase without much inherent substance." … . Indeed, the scope and effect of a force majeure clause depends on the specific

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[1] *OWBR LLC v. Clear Channel Communs., Inc., 266 F. Supp. 2d 1214, 1222 (D. Haw. 2003)*.

[2] *Ricoh USA, Inc. v. Innovative Software Sol., Inc., 2020 U.S. Dist. LEXIS 222659, *19–20 (E.D. Pa. Nov. 30, 2020)*.

[3] *Commonwealth Edison Co. v. Allied-General Nuclear Services, 731 F. Supp. 850, 855 (N.D. Ill. 1990)*.

In *Aquila, Inc. v. C. W. Mining, 2007 U.S. Dist. LEXIS 80276, *16 (D. Utah Oct. 30, 2007)*, CWM sought to be excused of its contractual obligation to supply coal, but the court held that CWM could not invoke the extra-contractual gap-filler doctrines because the parties' contract contained a *force majeure* clause that expressly spelled out when supervening events would excuse performance. The terms of the *force majeure* clause—including a notice requirement—had not been satisfied, so "CWM cannot rely on common law defenses and the U.C.C., thereby circumventing the terms and limitations that the parties negotiated in the Contract."

> contract language, and not on any traditional definition of the term … . In other words, when the parties have defined the nature of force majeure in their agreement, that nature dictates the application, effect, and scope of force majeure with regard to that agreement and those parties, and reviewing courts are not at liberty to rewrite the contract or interpret it in a manner which the parties never intended … . The party seeking to excuse its performance under a force majeure clause bears the burden of proof of establishing that defense.[4]

In ***Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.13 [*Force Majeure* Clauses]**, we posit whether a *force majeure* clause is even necessary in all cases. The short answer is that it is not if it merely repeats rights that the law otherwise provides via one of the extra-contractual doctrines—the parties run the risk of limiting rights they otherwise would have if the provision is not well-drafted.

The COVID-19 pandemic has prompted parties to look at their existing contracts to discern if a party may be excused from performing. But it has also provided an opportunity to rethink how the contract can be better drafted to respond to other crises. A lot of parties were caught off guard by this pandemic and paid an enormous price. Many are intent on seeing to it that this does not happen again.

[2] Extra-Contractual Bases to Excuse Performance

[A] Impossibility/Impracticability

Contract law is based on the fundamental premise of *pacta sunt servanda*—promises must be kept. ***See Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.01 [Introduction to Impossibility of Performance and Frustration of Purpose].** The theories excusing contractual performance are exceptions to this rule and are not lightly applied.

The doctrine of impossibility can be traced to *Taylor v. Caldwell*[5] where Caldwell licensed a music hall for Taylor's use and, without the fault of either party, the hall burned down. The court was careful to pay homage to the rigid rule that one is bound to carry out one's contract, "although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible." Nonetheless, it went on to limit that rule to contracts that are not subject to an "implied condition." In the case before it, the court found an understanding between the parties at the time the contract was formed that their agreement was subject to the implied condition that, if the music hall perished prior to its use, the parties would be excused from performing. ***Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.01 [Introduction to Impossibility of Performance and Frustration of Purpose].**

Modern contract law, both at common law and under the Uniform Commercial Code (UCC), has repackaged the impossibility doctrine as impracticability, though sometimes it is still called impossibility. "[M]any courts even use the terms [impracticability and impossibility] interchangeably."[6] Now, literal impossibility is no longer required in many jurisdictions. Impracticability has been described in many ways, but essentially it is when the non-occurrence of the supervening circumstance was a basic assumption of the parties at the time of contracting; performance has been made excessively burdensome—that is, impracticable—by a supervening event that was not caused by the party seeking to be excused; and the supervening event was, in some sense, unforeseeable (but not inconceivable—foreseeability cannot be equated with "conceivable" or else nothing is unforeseeable[7])—that is, it was so unlikely that a reasonable party would not have guarded against it in the

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[4] *Specialty Foods of Ind., Inc. v. City of S. Bend, 997 N.E.2d 23, 27 (Ind. App. 2013)*. See also *Bayou Place Ltd. P'ship v. Alleppo's Grill, Inc., 2020 U.S. Dist. LEXIS 43960 (D. Md. March 13, 2020)* (same).

[5] Taylor v. Caldwell, 3 B. & S. 826 (1863).

[6] City of Starkville v. 4-*County Elec. Power Ass'n, 819 So. 2d 1216, 1224 (Miss. 2002)*.

[7] *Specialty Tires of Am., Inc. v. CIT Group/Equipment Fin., Inc., 82 F. Supp. 2d 434, 438–439 (W.D. Pa. 2000)*.

contract. If the event could have been foreseen, it could have been guarded against in the contract.[8] ***See Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.02 [Evolution of Impossibility and Frustration of Purpose Doctrines]; *Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.06 [Commercial Impracticability].**

But an important theme that runs throughout the law of impracticability, and all related theories, is that even severe market downturns, in and of themselves, do not excuse performance. ***Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.06 [Commercial Impracticability].** Perhaps no *force majeure* event in American history has shown this to be true more than the COVID-19 pandemic. The market goes up and the market goes down; entire industries suffer downturns—but none of it is a reason to excuse a party from a contract unless the contract expressly says so. "[T]he possibility that the market price for polysilicon could skyrocket or plummet for a myriad of reasons would have been well within [the parties'] contemplation. The fact that the [long-term supply agreements] provided a fixed price for polysilicon suggests that the parties anticipated that the market price could change and that they wanted to establish a stable price that would operate independently of the market."[9] These are precisely the kinds of risks that parties to a contract should reasonably contemplate or foresee at the time of contract formation. ***Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.06 [Commercial Impracticability].** The parties are free to allocate in their contract the risk of market fluctuations—or, for that matter, any other risk, foreseeable or unforeseeable—but they must do it expressly. The default principles of impossibility or impracticability will not do it for them.

[B] Frustration of Purpose

This aptly named doctrine focuses on the parties' purpose in making their contract and has nothing to do with a party's inability to perform. It applies where a supervening event fundamentally changes the nature of a contract and makes one party's performance worthless to the other. The best explanation for it is an example. In the landmark case of *Krell v. Henry,*[10] Henry rented a room from Krell for the purpose of viewing the coronation of King Edward VII. But the King fell ill, and the coronation was postponed for several months. The very purpose of the contract—a room with a view of the coronation—was frustrated, and performance was excused. **See *Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 5.01 [Frustration of Purpose Justifying Nonperformance].** The theory is not recognized in all jurisdictions and succeeds only rarely. ***See Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 5.01 [Frustration of Purpose Justifying Nonperformance]; § 5.05 [The Frustration of Purpose Defense Succeeds Only in Unusual Cases].**

[C] Uniform Commercial Code § 2-615

The Uniform Commercial Code (UCC) governs contracts for the sale of goods. *Section 2-615 of the U.C.C.* adopts a progressive standard of commercial impracticability to excuse performance. That section makes clear that the contract may state "a greater obligation" than is stated in the UCC on the party to be excused of performance. "Delay in delivery or non-delivery in whole or in part by a seller … is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid."[11] If the impracticability affects only "only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular

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[8] See, e.g., *RPH Hotels 51st St. Owner, LLC v HJ Parking LLC, 2021 NY Slip Op 30286(U) (Jan. 28, 2021)*.

[9] *Hemlock Semiconductor Operations, LLC v. SolarWorld Indus. Sachsen GmbH, 867 F.3d 692 (6th Cir. 2017)*.

[10] Krell v. Henry, 2 K.B. 740 [1903].

[11] *UCC § 2-615(a)*.

customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable."[12] Finally, "[t]he seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."[13] Although *UCC § 2-615* technically applies only to contracts for the sale of goods, depending on the jurisdiction, courts may apply it by analogy to other types of contracts.

***See Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.06 [Commercial Impracticability].**

[D] Convention on Contracts for the International Sale of Goods (CISG) Article 79

The Convention on Contracts for the International Sale of Goods (CISG) is an international treaty that applies to most international contracts for the sale of goods made by parties with their principal places of business in different CISG countries. The U.S. and most major trading nations (with the notable exception of the U.K.) have ratified the CISG. Parties to contracts may opt out of this treaty, and many American attorneys prefer to do so due to some significant differences between the CISG and the Uniform Commercial Code. Among other things, the CISG has no parol evidence rule, which makes it far more likely that evidence of pre-contract formation negotiations will be admitted to interpret the words of a contract.

The impossibility of performance doctrine in CISG is found in Article 79, which provides, in part: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."[14]

Article 79 has many similarities to American law. There is a dearth of American case law interpreting or applying Article 79. Even where it applies, an American court may view it as if it were *U.C.C. § 2-615*.[15]

***See Corbin on Contracts: Force Majeure and Impossibility of Performance Resulting From COVID-19* § 2.06 [Commercial Impracticability].**

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[12] *UCC § 2-615(b)*.

[13] *UCC § 2-615(b)*.

[14] CISG, Art. 79(1).

[15] See *Raw Materials Inc. v. Manfred Forberich GmbH & Co., 2004 U.S. Dist. LEXIS 12510 (N.D. Ill. July 7, 2004)*.

34 Erie C.L.J. 160
Court of Common Pleas of Pennsylvania, Erie County.

Burkhardt et ux.
v.
Rockey

No. 193.
|
November term, 1949.
|
May 24, 1951.

Attorneys and Law Firms

Robert J. Firman and *William W. Knox*, for plaintiffs.

Walter S. Nowatny, for defendant.

Before WAITE, P. J. (specially presiding), EVANS, P. J., and LAUB, J.

Opinion

***272** WAITE, P. J.

****1** This is an action of trespass brought to recover damages to plaintiff's property caused by obstructing the flow of water in a small creek running through defendant's property causing the overflow across plaintiff's land.

The case was tried before the court and a jury which on March 8, 1951, returned a verdict for plaintiff in the amount of $1,050.

On March 15, 1951, seven days after the date of the verdict, motions were presented on behalf of defendant asking for a new trial and for judgment non obstante verdicto upon which motion rules to show cause were granted.

On April 25, 1951, when the matter came before the court for argument the attorneys for plaintiff filed a motion to strike off the rules heretofore granted on defendant's motions for the reason that the motions were presented more than four days after the verdict was rendered. These matters are now before the court sitting en banc for determination.

Section 1, rule 27, of the rules of court provides that all motions for new trials and in arrest of judgment, shall be made to the court and the reasons filed, within four days after a verdict. By law a motion for judgment non obstante veredicto must be filed within the same length of time as that allowed for a new trial (see 12 PS §684). This court rule is merely declaratory of the ancient English common law, by which a party was given four days after verdict to ask for a new trial. It is true that there is authority in Pennsylvania to the effect that the court may grant special permission to file such motions nunc pro tunc, but it is also true that special permission must be obtained upon good cause shown. In the instant case no such permission has been granted. Moreover, in the instant case no motion has ever been filed asking leave to file ***273** the motions for a new trial or for judgment non obstante veredicto nor has any reason been shown for the delay in filing the motions.

****2** For the reasons above stated we are clearly of opinion that defendant's motions for a new trial and for judgment non obstante veredicto should be refused.

Moreover, after carefully reviewing the law and the evidence we are also clearly of opinion that defendant's motion for a new trial and for judgment non obstante veredicto must be refused on the record.

The testimony shows that plaintiffs and defendant are the owners of adjoining properties on the north side of the Buffalo Road, known as Pennsylvania Route 20 in Harborcreek Township, Erie County, Pa. A small stream extends in a northerly direction towards Lake Erie and crosses the easterly portion of defendant's property within two or three feet of the west line of plaintiff's farm, which is primarily a fruit farm with a grape vineyard thereon. On August 1, 1949, one Herman Peplinski, a tenant and former employe of defendant was, with defendant's knowledge, operating a bulldozer–moving brush, dirt, stones and other debris into the bed of this small creek. The next morning Chris F. Burkhardt, one of the plaintiffs, pointed this out to defendant, calling his attention to the danger of the overflow of the creek upon plaintiff's property. Defendant admittedly agreed to have this material removed from the bed of the creek and claimed to have done so. This was denied by plaintiff. More than two weeks later, on August 17, 1949, an unusually heavy rainfall occurred and this creek was dammed up by the debris and overflowed across defendant's property causing the damage complained of. The defense was that this overflow of the stream and the consequent damages to plaintiff's property was an Act of God for which defendant would not be liable. An Act of God is defined as "any irresistible disaster, ***274** the result of natural causes, such as earthquakes, violent storms,

lightning and unprecedented floods. It is such a disaster arising from such causes, and which could not have been reasonably anticipated, guarded against or resisted. It must be due directly and exclusively to such a natural cause without human intervention. It must proceed from the violence of nature or the force of the elements alone, and with which the agency of man had nothing to do. If the injury is caused by the agency of man co-operating with the violence of nature or the force of the elements, it is not the 'Act of God'.'D'

See Piqua v. Morris et al., 98 Ohio 42, 7 A. L. R. 129, 120 N. E. 300. As to the effect of negligence concurring with Act of God, see 22 R. C. L. 131.

In the instant case the testimony shows that from 1930 to August 17, 1949, there had been no overflow of this creek across plaintiff's property, although there had been other heavy rainfalls, particularly in 1947 when the precipitation during a 24-hour period was more than twice as great as that of August 17, 1949.

****3** Whether or not the operator of the bulldozer in the instant case was at the time an agent or employe of defendant is not controlling since admittedly defendant knew of the obstruction, and as the testimony shows, failed to remove it.

It is fundamental law that an owner must so use his property so as not to harm another.

The testimony in the case is conflicting, but in our opinion the verdict in favor of plaintiffs is fully sustained by the weight of the credible testimony. The case was fairly tried and we find no errors either in the admission of the evidence or the charge of the court. In our opinion this was clearly a case for the jury.

For the reasons herein stated the rules to show cause heretofore granted on defendant's motions for a new ***275** trial and for judgment non obstante veredicto must be discharged.

And now, to wit, May 24, 1951, the rule to show cause heretofore granted on defendant's motions for a new trial and for judgment non obstante veredicto is discharged and the prothonotary is directed to enter judgment upon the verdict against defendant and in favor of plaintiff upon payment of the jury fee.

All Citations

34 Erie C.L.J. 160, 79 Pa. D. & C. 271, 1952 WL 4324

368 Pa.Super. 557
Superior Court of Pennsylvania.

Robert W. DORN
v.
STANHOPE STEEL, INC., Cambridge Industries, Inc. and L.B. Foster Company.
Appeal of STANHOPE STEEL, INC. and Cambridge Industries, Inc.

No. 455 Pitts. 1986.
|
Argued Sept. 11, 1986.
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Filed Nov. 4, 1987.
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Reargument Denied Jan. 5, 1988.

Synopsis

Employee brought action against employer and employer's parent corporation for breach of exclusive brokerage agreement. The Common Pleas Court, Civil Division, Allegheny County, No. GD 84–9536, Weir, J., directed verdict in favor of employee against employer, and the jury returned verdict in favor of employee against parent corporation. Employer and parent corporation appealed. The Superior Court, No. 455 Pittsburgh, 1986, Rowley, J., held that: (1) brokerage agreement established contract of agency, rather than contract of employment; (2) agency agreement was terminated by operation of law when employer voluntarily discontinued operations; (3) employer remained obligated under the agreement to pay agreed upon compensation, notwithstanding termination of the agreement; and (4) implied condition that employer's obligation would remain effective only so long as employer remained in business could not be read into the agreement.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Judgment as a Matter of Law (JMOL)/Directed Verdict.

West Headnotes (19)

[1] **Appeal and Error** Matters Improperly Included

Copies of brokerage agreement which appeared as "exhibits" to brief in support of posttrial relief could not be considered as part of the record on appeal, in action for breach of the agreement, even though copies of the agreement were part of the original record and even though copies of the agreement were part of the reproduced record on appeal; original record, as certified for appeal, did not contain the "exhibits" admitted at trial, and paper may not be made part of the record on appeal simply by reproducing it. Rules App.Proc., Rule 1921, 42 Pa.C.S.A.

11 Cases that cite this headnote

[2] **Brokers** Defenses

Allegation that at time corporation sold its assets, it was losing vast amounts of money and its financial position was such that it could not even pay its normal operating expenses was, by itself, insufficient to relieve corporation from obligations under exclusive brokerage agreement.

[3] **Contracts** Duration of Contract in General

Generally, contracts survive discontinuance of business operations. 15 P.S. §§ 1907, 2111.

[4] **Labor and Employment** Termination; cause or reason in general

Labor and Employment Discharge or layoff

Contract of employment for definite term cannot be lawfully terminated by employer prior to expiration date.

2 Cases that cite this headnote

[5] **Principal and Agent** Revocation by Principal

Principal and Agent Damages for Revocation or Breach of Contract

Principal always has power to revoke agency; nevertheless, power to revoke does not

necessarily absolve principal of liability for breach of agency contract.

4 Cases that cite this headnote

[6] **Brokers** Appointment or employment

Agreement between corporation employer and employee was contract of agency, rather than contract of employment, in action to determine liability under agreement after corporation discontinued its operations and sold all of its assets; agreement provided that employee was acting as broker and independent contractor and permitted employee to establish contractual relations between corporation and third persons. 15 P.S. §§ 1907, 2111.

[7] **Brokers** Duration and termination of agency

Agency agreement between corporation employer and broker employee was terminated by operation of law when corporation voluntarily discontinued its operations and sold all of its assets.

[8] **Brokers** Revocation of authority

Corporation/principal remained obligated under brokerage agreement to pay agreed upon compensation, notwithstanding termination of the brokerage agreement by voluntary dissolution of corporation. 15 P.S. §§ 1907, 2111.

1 Case that cites this headnote

[9] **Brokers** Performance of Contract of Employment

Agency agreement for sale of steel sheet piling and H-bearing piles was not "output contract," or "requirements contract," for purposes of determining liability of corporation/principal under the agreement upon voluntary dissolution of corporation; agent contracted to sell steel sheet piling and H-bearing piles, not all of the steel sheet piling and H-bearing piles corporation produced. 15 P.S. §§ 1907, 2111.

2 Cases that cite this headnote

[10] **Courts** Construction of state Constitutions and statutes

The Superior Court was not bound by a federal district court's interpretation of state law concerning liability under agency agreement upon termination of the agency relationship. 15 P.S. §§ 1907, 2111.

4 Cases that cite this headnote

[11] **Brokers** Duration and termination of agency

Implied condition that obligation of corporation/principal would remain effective only so long as corporation remained in business could not be read into brokerage agreement with agent; length of agreement was specified, and agreement provided both specific grounds and specific method for termination. 15 P.S. §§ 1907, 2111.

1 Case that cites this headnote

[12] **Brokers** Revocation of authority

Provision in brokerage agreement permitting principal to terminate agreement "if for other reasons it is deemed advisable to the best interest of all parties concerned" did not excuse principal's liability under the agreement when principal discontinued its operations and sold all of its assets; option to terminate agreement was limited to situations in which it would be in the best interest of all parties concerned, and principal failed to point to any best interest of broker/agent that would have been served by termination of the agreement. 15 P.S. §§ 1907, 2111.

1 Case that cites this headnote

[13] **Corporations and Business Organizations** Separate corporations

Evidence was sufficient to support finding that parent corporation was liable for obligations imposed upon its separately-operated subsidiary by agency agreement; the trial court had

determined that although parent and subsidiary had observed many of the requirements for maintaining separate corporate identities, they did not do so in their dealings with agent. 15 P.S. §§ 1907, 2111.

[14] **Appeal and Error** For Errors or Irregularities

Appeal and Error All or Part of Evidence

New Trial Sufficiency of evidence

All evidence offered, whether admitted or not, had to be considered in reviewing propriety of denial of new trial, in action to determine liability under agency contract upon voluntary dissolution of principal/corporation; motion for new trial does not test verdict itself, but rather, legal proceedings resulting in verdict, and basis of new trial motion is not that judgment is unsupported by sufficient evidence, but that alleged trial error affected verdict.

14 Cases that cite this headnote

[15] **New Trial** Reception of evidence

Exclusion of principal's testimony concerning discussions which occurred during negotiations of agency agreement and circumstances which existed when agreement was extended and when principal discontinued its operations did not entitle principal to new trial, in action to determine liability under the agreement upon voluntary dissolution of principal/corporation; there was no indication that principal would have contradicted agent's testimony that issue concerning continued operation of corporation was never discussed before agreement was signed. 15 P.S. §§ 1907, 2111.

[16] **Brokers** Duration and termination of agency

Language of termination provision in brokerage/agency agreement was not ambiguous and could not reasonably be interpreted in manner advanced by corporation/principal, in action to determine liability under the agreement upon principal's voluntary dissolution. 15 P.S. §§ 1907, 2111.

2 Cases that cite this headnote

[17] **Brokers** Breach by principal of contract of employment

Corporation/principal failed to establish that its losses, which resulted in discontinuation of operations and sale of all assets, constituted change in business environment well beyond the normal range and failed to establish that losses were related to agency/brokerage agreement for sale of steel sheet piling and H-bearing piles; therefore, principal was not excused from performance under the agreement by virtue of the doctrines of supervening impracticability and supervening frustration. 15 P.S. §§ 1907, 2111.

6 Cases that cite this headnote

[18] **Appeal and Error** Specification of Errors

Alleged error in jury charge concerning when parent corporation could be liable for obligations of subsidiary could not be reviewed on appeal, in action to determine liability under agency agreement after subsidiary/principal voluntarily discontinued operations; nothing in statement of questions suggested intention to raise issue concerning erroneous or prejudicial jury charge. 15 P.S. §§ 1907, 2111; Rules App.Proc., Rule 2116, 42 Pa.C.S.A.

[19] **Corporations and Business Organizations** Weight and sufficiency

Verdict finding parent corporation liable for obligations imposed upon subsidiary by agency agreement was not against the weight of the evidence; parent corporation's president actively participated in contract discussions between agent and subsidiary, was consulted prior to extension of the agreement, and signed letter terminating the agreement. 15 P.S. §§ 1907, 2111.

1 Case that cites this headnote

Attorneys and Law Firms

****800** ***562** James P. Hollihan, Pittsburgh, for appellants.

James R. Cooney, Pittsburgh, for appellees.

Before BROSKY, ROWLEY and POPOVICH, JJ.

Opinion

ROWLEY, Judge:

Stanhope Steel, Inc. (Stanhope) and Cambridge Industries, Inc. (Cambridge) appeal from the judgment entered against them in the amount of $127,698.76 in favor of appellee, Robert W. Dorn, following the denial of appellants' motions seeking post-trial relief in this action for breach of a written exclusive brokerage agreement. Three issues are raised on appeal: (1) Were obligations which Stanhope had under its brokerage contract with its agent, Dorn, extinguished as a matter of law when Stanhope voluntarily discontinued business? (2) Was the continued existence and operation of Stanhope an implied condition of the brokerage contract when the contract contained specific provisions for termination, and such provisions did not address the continued existence and operation of the corporation? (3) Is Stanhope entitled to a new trial to establish that it is excused from performing under the contract because of supervening impracticability and supervening frustration. We affirm.

****801** **[1]** The case had its genesis in a written agreement entered into between appellee and Stanhope on October 1, 1979 and a written five year extension of the agreement executed on May 1, 1981. Throughout the 1960's and 1970's, prior to execution of the agreement at issue here, ***563** appellee sold and leased steel pilings for R.C. Stanhope, Inc. In 1979, R.C. Stanhope, Inc. was purchased by Cambridge, a holding company. Thereafter, R.C. Stanhope, Inc.'s name was changed to Stanhope Steel, Inc. and was operated as a subsidiary of Cambridge. Shortly thereafter, Stanhope and appellee executed a written brokerage agreement.[1] The agreement defined appellee's role as Stanhope's "sole and exclusive broker in the rental and sale of steel sheet piling and H-bearing piles" in certain regions and as a "broker and independent contractor engaged in promoting and selling various lines...." The agreement was for a term of three years and contained the following provision for termination before the term of three years expired:

> [T]his exclusive Broker's Agreement may be terminated at any time, at the option of Stanhope Steel, Inc. (1) in the event of your death or disability, (2) if for any reason beyond your control you are prevented from fully carrying out all of the provisions of this Broker's Agreement, or (3) if for other reasons it is deemed advisable to the best interest of all parties concerned. Notice of any such termination, at the option of Stanhope Steel, Inc., as aforesaid, shall be given in writing at least six months ... before such termination.

***564** In 1981, appellee sought and secured a five year extension of the 1979 agreement. The extension took effect on May 1, 1981. In early 1984 Cambridge sold the assets of Stanhope to L.B. Foster Company.[2] On February 7, 1984 appellee was notified in writing that the agreement was terminated.

Appellee filed the present action seeking damages for breach of the exclusive brokerage agreement against Stanhope, Cambridge and L.B. Foster. The case was tried before a jury and the trial court directed a verdict in favor of appellee against Stanhope. The amount of appellee's claimed damages was stipulated subject, however, to appellant's argument that appellee, if entitled to recover at all, was entitled to recover, at the most, six months compensation. The only issues submitted to the jury were the liability of Cambridge and L.B. Foster. The jury returned a verdict in favor of appellee against Cambridge, and in favor of L.B. Foster against appellee. On appeal appellants argue that they are entitled to judgment n.o.v. or, in the alternative, a new trial.

I. Judgment N.O.V.

[2] Appellants present four arguments in support of their contention that they are entitled to judgment n.o.v., as a matter of law, based on the record before us.[3] Appellee, ****802** ***565** on the other hand, argues that he was entitled to, and properly received, a directed verdict based on the record. For reasons which follow, we reject each of appellants' four claims that they were entitled to judgment n.o.v. on this record.

Our standard of review in considering appellants' argument for judgment n.o.v. is well settled:

> [O]n appeal from the refusal of the lower court to enter judgment n.o.v., the sole duty of the appellate

> court is to decide whether there was sufficient evidence to sustain the verdict, granting the verdict winner the benefit of every favorable inference reasonably to be drawn from the evidence and rejecting all unfavorable testimony and influences.

Walasavage v. Marinelli, 334 Pa.Super. 396, 407, 483 A.2d 509, 514–15 (1984) (citation omitted). In reviewing appellants' arguments relative to their judgment n.o.v. claim, we will consider only the evidence on record. "In determining the sufficiency of the evidence, we consider the evidence actually received, whether the trial rulings thereon were correct or not." *Reichman v. Wallach,* 306 Pa.Super. 177, 185, 452 A.2d 501, 505 (1982) (citations omitted). Additionally, it is crucial to bear in mind the distinction between appellants' claim that they are entitled to judgment n.o.v., and their claim, addressed in Part II. of this opinion, that the trial court erred in directing a verdict in favor of appellee.

A.

[3] Appellants first argue that they are entitled to judgment n.o.v. because any obligations which Stanhope had under the agreement were extinguished when it discontinued business and its assets were sold to L.B. Foster.[4] At ***566** the outset, we note the general maxim that "a corporation dissolved by its voluntary act remains bound by its outstanding executory contracts." 19 Am.Jur.2d *Corporations* § 2888. In the case before us, the act of selling Stanhope's assets to L.B. Foster was the functional equivalent to corporate dissolution because *all* of the assets were sold and the company went out of business. Thus, the distinction is one without a difference in this case. Professor Williston states in his treatise that where the corporation voluntarily dissolves itself, "a contract, although made impossible of performance, is made so by the act of the corporation, and [the corporation] or its assets are liable for its failure to fulfill its obligation." 18 Williston on Contracts (1978) § 1960; *Martin v. Star Publishing Co.,* 50 Del. 181, 126 A.2d 238, 243 (1956). These concepts are addressed by §§ 1907 and 2111 of the Pennsylvania Business Corporation Law. "The dissolution of a business corporation ... shall not take away or impair any remedy given against such corporation, its directors or shareholders, for any liability incurred prior to such dissolution, if suit thereon is brought and service of process had before or within two years after the date of such dissolution." 15 Pa.S. § 2111(A). As to corporate mergers, "[t]he surviving or new corporation shall thenceforth be responsible for all the liabilities and obligations of each of the corporations so merged or consolidated." 15 Pa.S. § 1907. These statutes and general principles support the view, preferable to that of appellants, that contracts generally survive the discontinuance of business operations.

[4] **[5]** Appellants' contention that their obligations were extinguished by reason of ****803** discontinued operations and sale of assets must fail unless the agreement falls within the purview of a valid exception. In determining whether the agreement in question falls within a valid exception to the general rule, it is important to distinguish between employment contracts and agency contracts. A corporation's rights and duties regarding its employee or agent vary according to the nature of the relationship. The distinction ***567** becomes crucial when termination is involved. A contract of employment for a definite term cannot be lawfully terminated by an employer prior to the expiration date. *Alpern v. Hurwitz,* 644 F.2d 943 (2d Cir.1981). However, a principal always has the power to revoke agency. *Restatement (Second) of Agency* § 118, comment b. Nevertheless, such power to revoke does not necessarily absolve the principal of liability for breach of the agency contract. Under the Restatement, "[a] principal has a duty not to repudiate or terminate the employment in violation of the contract of employment." *Restatement (Second) of Agency* § 450.

[6] There can be no doubt that the relationship between Stanhope and Dorn was one of principal and agent. First, Stanhope referred to the agreement as a "brokerage arrangement," and the agreement states that Dorn is "acting as a broker and independent contractor." As stated in 12 Am.Jur.2d *Brokers* § 30, "[t]he essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of law applicable to principal and agent govern their respective rights and liabilities throughout...." Second, the agreement specified that Dorn's duties were to "diligently and aggressively promote the rental, sale, and purchase for Stanhope Steel of [steel sheet piling and H-bearing piles] by diligently calling on customers and prospective customers located in your exclusive territories." This comports with the view that "an agent represents his principal in business dealings and is employed to establish contractual relations between the principal and third persons, while a servant is not." 53 Am.Jur.2d *Master & Servant* § 3.

Thus, the terminology given to the agreement, and the duties thereunder, establish that a contract of agency existed between Stanhope and Dorn, and not a contract of employment.

[7] "[T]o terminate an agency, there must be either a lapse of time, accomplishment of the anticipated results, external changes in the relationship (e.g., death of parties, changes in business conditions), or mutual consent, revocation, or renunciation." ***568** *Scott v. Purcell,* 264 Pa.Super. 354, 399 A.2d 1088, 1093, aff'd 490 Pa. 109, 415 A.2d 56 (1979). The sale of Stanhope's assets undoubtedly constituted an external change in the relationship. Therefore, we hold that the agency agreement between Stanhope and Dorn was terminated by operation of law when Stanhope voluntarily discontinued operations.

[8] We now address the question of whether appellants were entitled to judgment n.o.v. in light of the termination. If, as appellants claim, Stanhope's obligations to Dorn were extinguished when the agency agreement was terminated, appellants would be entitled to judgment n.o.v. For reasons which follow, we find that Stanhope remained obligated under the agreement to pay Dorn the agreed upon compensation, [5] notwithstanding our holding that the voluntary dissolution terminated the agency agreement by operation of law. In reaching this conclusion we look to the seminal case of *John L. Rowan & Co. v. Hull,* 55 W.V. 335, 47 S.E. 92 (1904), which has been widely cited for the proposition that although an agency, not coupled with an interest, but of a fixed duration, may be revoked by the principal at will, the principal will be liable to the agent for damages for wrongful revocation within such time. ****804** *Geyler v. Dailey,* 70 Ariz. 135, 217 P.2d 583 (1950); *Levander v. Johnson,* 181 Wis. 68, 193 N.W. 970 (1923); *Rucker & Co. v. Glennan,* 130 Va. 511, 107 S.E. 725 (1921); *Cloe v. Rogers,* 31 Okl. 255, 121 P. 201 (1912); *Hancock v. Stacy,* 103 Tex. 219, 125 S.W. 884 (1910); *Novakovich v. Union Trust Co.,* 89 Ark. 412, 117 S.W. 246 (1909).

In *Rowan,* the owner of a farm entered into a written agreement with a real estate agent to list his farm for a period of three months. The agent found a buyer during that time, but the owner decided not to sell and revoked the ***569** agent's authority to find a buyer. The agent sued to recover his commission under the agreement. The owner/principal contended that he had the power to revoke at any time, notwithstanding the three-month term under the agreement, and that the agent at most was entitled to compensation for his expenses incurred under the power. The Court held that the agent was entitled to his full commission. It reasoned:

> [T]he principal may revoke the authority at any time. But it by no means follows that, though possessing this power, the principal has a right to exercise it without liability, regardless of his contract in the matter. It is entirely consistent with the existence of the power that the principal may agree that for a definite period he will not exercise it, and for the violation of such agreement the principal is as much liable as for the breach of any other contract.

47 S.E. at 93. We agree with the reasoning in *Rowan,* and we adopt the principles set forth by that court. Under the facts of the case at bar, we find no material difference between appellant Stanhope's decision to voluntarily discontinue its business by selling its assets to L.B. Foster, thereby eliminating the purpose of its relationship with appellee, and the owner's exercise of his right to terminate the agency in *Rowan.* The methods of terminating the agent/broker's authority were different, but the agent/broker has been no less wronged in either case, and liability attaches to the same extent, due to the voluntary nature of the principal's conduct in each case. Therefore, we hold that the trial court acted properly in directing that the verdict be entered in favor of the appellee.

[9] We are cognizant of cases which hold that a principal will not be liable for breach of "output" agreements [6] with an agent, where the principal, in good faith, was forced to ***570** cease production due to circumstances beyond its control. In *Sheesley v. Bisbee Linseed Co.,* 337 Pa. 197, 10 A.2d 401 (1940), the defendant manufactured edible oils from crushed seeds and sold the meal as a by-product. Plaintiff, a livestock feed dealer with many years of sales experience, entered into an exclusive brokerage contract [7] with defendant, agreeing to aggressively push the sale of Colza Oilmeal in certain specified counties of Pennsylvania and Maryland. Defendant's letter agreement covered "only our production of pure Colza Oilmeal ... and all other

products which we produce are specifically exempted from this agreement." *Id.* at 200, 10 A.2d at 403. The contract was for a period of one year with an option to extend it to five years. When Congress imposed a two cents per pound tax on import of the seed, defendant determined that the retail price of the meal would be too high for the product to sell. *Id.* Defendant ceased production, and plaintiff brought suit for breach of contract.

The Court found that because the written instrument expressly stated "[t]his agreement covers only our production of pure Colza Oilmeal," it was an output contract. As such, the Court held, there was no implied obligation to keep the plant in operation. *Id.* at 202, 10 A.2d at 404. ****805** Thus, since the action was taken in "entire good faith and not for the purpose of injuring plaintiff," the Court reasoned, defendant did not violate any of its obligations to plaintiff by ceasing production of the product.

In *Du Boff v. Matam Corp.,* 272 A.D. 502, 71 N.Y.S.2d 134 (1947), plaintiffs were appointed sales agents for "all home appliance products produced" by defendant for a period of five years. Defendant liquidated its business and sold all assets. The Court held that defendant had no obligation to continue in business, since a requirements/output contract was involved. As with *Sheesley,* disposition of ***571** this case turned on the fact that a requirements/output contract was involved.

The case at bar differs materially from the afore-mentioned cases in that the contract cannot be construed as a requirements or output contract. Dorn contracted to sell "steel sheet piling and H-bearing piles," not *all the steel sheet piling and H-bearing piles Stanhope produces.* Consequently, when Stanhope ceased producing those items by going out of business, the company breached its agreement with Dorn.

B.

Appellants argue, in the alternative, that they are entitled to judgment n.o.v. because there is an *implied condition* in the brokerage agreement that Stanhope's obligation would remain effective only so long as it remained in business. Appellants assert that *McDole v. Duquesne Brewing Company,* 281 Pa.Super. 78, 421 A.2d 1155 (1980) and *Von Lange v. Morrison–Knudsen Company, Inc.,* 460 F.Supp. 643 (M.D.Pa.1978) support this proposition. Because "[c]ontingencies not provided against in a written agreement will not ordinarily excuse performance," *Swarthmore Boro. v. Philadelphia Rapid Transit Co.,* 280 Pa. 79, 84, 124 A. 343, 345 (1924), we first examine the process of determining when an agreement may be made subject to an implied condition such that the occurrence or non-occurrence of the condition would extinguish a party's duty to perform under a contract.

"An event may be made a condition either by the agreement of the parties or by a term supplied by the court." *Restatement (Second) of Contracts* § 226. Although commentators have classified conditions as express, constructive, implied-in-law and implied-in-fact, we agree with Professor Murray's suggestion that it is preferable to categorize conditions as either express or constructive. J. Murray, *Murray on Contracts,* § 143 (1974). An express condition is one that the parties manifested either by their words or conduct, while a constructive condition is one supplied by ***572** the court in the interest of equity and justice even though the parties did not discuss or consider the matter. *Id.* No particular language is required to create an express condition. "An intention to make a duty conditional may be manifested by the general nature of an agreement, as well as by specific language. Whether the parties have, by their agreement, made an event a condition is determined by the process of interpretation." Restatement, *supra,* comment a. For example, the purpose of the parties in entering the agreement is given great weight. *Id.* As to constructive conditions, comment c of the Restatement § 226 states, "[w]hen the parties have omitted a term that is essential to a determination of their rights and duties, the court may supply a term which is reasonable in the circumstances...." In comment c to the Reporter's Note following § 226, the difficulty in attempting to separate the two types of analyses is discussed.

> Whether a court is inferring a condition from the parties' unclear expression of intention or constructing one as a matter of lawmaking is often unclear, because the processes overlap: the values that encourage a court to construct a condition were usually present when the parties were negotiating and thus support inferences about their actual intentions.

Further, a court should not create a constructive condition if it would clearly conflict with another provision of the contract. 3A Corbin on Contracts (1960) § 653. *See also* Restatement, *supra,* § 227 (Standards ****806** of Preference with Regard to Conditions) and § 229 (Excuse of Condition to Avoid Forfeiture).

With these precepts in mind, we direct our attention to *McDole,* in which employees of Duquesne Brewing filed an action in equity seeking injunctive relief and money damages when, due to continued economic losses, Duquesne closed its brewing operation and the employees lost their jobs. The employees contended that their termination was in violation of lifetime employment contracts they had entered into with Duquesne fourteen years earlier.

***573** The chancellor in *McDole* found that the parties, during contract discussions, had not discussed or contemplated the possible shutdown of the brewery. In rejecting the employees' request for relief, the chancellor concluded

> it was the intent and belief of the parties, when the individual employment agreements were negotiated, that Duquesne would continue in the particular business in which the Appellants were employed. The Chancellor stated: "The implied condition that [Duquesne] would continue in the brewing business was breached in 1972 through no fault of either party, and thus, '*frustrated the purpose* ' for which the contracts of 1958 were made."

Id. 281 Pa.Super. at 82, 421 A.2d at 1157. The trial court *en banc* affirmed the chancellor's denial of relief to the employees, finding that the parties' contemplation of Duquesne's continued corporate existence resulted in an implied condition in the individual contracts of employment.[8] This Court agreed with that conclusion, and noted that the method of payment set forth in contracts, by reference to the current collective bargaining agreement or the prevailing rate of pay in the brewery, offered further support for its conclusion because if the brewery ceased operation, then the provisions would have no sensible application. Lastly, the Court pointed out that other jurisdictions had reached similar conclusions when called upon to interpret lifetime or permanent contracts.

In *Von Lange,* a diversity action relied upon by appellants, an employee and the president/majority shareholder of a corporation participating in a partnership for the manufacture of bonded rail joints, brought an action in their own behalf against the other corporate partner for breach of a sales-representative agreement. The agreement, which was entered into at the same time as the partnership agreement, provided that plaintiffs would sell the rail joints for the partnership. When defendant terminated the partnership, it also terminated the sales-representative agreement. ***574** Plaintiffs asserted that termination of the sales agreement constituted a breach and they sought money damages for the monthly payments provided for in the agreement which had a term of three years. The case was tried non-jury and the district court made findings of fact, conclusions of law, and set forth its reasons for entering judgment in favor of defendant. The court concluded that the termination of the partnership agreement also served to terminate the sales-representative agreement and, alternatively, that an implied term of the sales agreement was the continued existence of the partnership business. The district court specifically found that the sales agreement provided for the possibility of termination, but did not provide for a method of termination. The court noted that where there is no express provision in a contract as to its duration or termination, the intentions of the parties may be determined from factors outside the agreement. The court then examined the circumstances surrounding the execution of the sales agreement and found that the following factors led to the conclusion that the existence of the partnership was an implied condition of the sales-representative agreement:

> the Sales Representative Agreement concerned only the sale of bonded rail joints produced by the partnership; the $4,500 monthly payment was solely an advance against commissions to offset expenses in generating sales; the Von Langes under ****807** the agreement were to use their best efforts to obtain orders for bonded rail joints, and finally the Sales Representative Agreement specifically referred to termination before expiration of the three-year term.

Von Lange at 648–649.

Appellants point to the following similarities between the present case on the one hand, and *McDole* and *Von Lange* on

the other: 1) on cross-examination, appellee conceded that the parties did not discuss the prospect of Stanhope discontinuing business prior to entering the 1979 agreement; 2) appellee received commissions under the agreement; 3) appellee's duties were to promote the rental, sale ***575** and purchase of Stanhope's products; and 4) after Stanhope sold its assets, it no longer had a product to market and appellee's entitlement to receive a draw on commissions terminated since he could no longer make sales or market a nonexistent product.

We find, however, that appellants overlook crucial factual distinctions which distinguish *McDole* and *Von Lange* from the case before us.[9] Of critical importance in this case is the fact that the length of the brokerage contract is specified (five years). In *McDole,* however, our Court was construing "lifetime" employment contracts. The panel upheld the chancellor's findings precisely because a wide range of authority holds that "lifetime" employment contracts exist only so long as the employer remains in business. *McDole v. Duquesne Brewing Co.,* 281 Pa.Super. at 85, 421 A.2d at 1159.[10] Because the issues before us concern neither "employment contracts" nor contracts of "lifetime" duration, appellants' reliance on *McDole* is misplaced.

[10] **[11]** As to *Von Lange,* we initially point out that this Court is not bound by a federal district court's interpretation of state law. *Commonwealth v. Lacey,* 344 Pa.Super. 576, 496 A.2d 1256 (1985). However, we may look to the federal court's analysis if we are persuaded by its logic. *Id.* We agree with the trial court that the present case is distinguishable from *Von Lange* on the basis that the agreement to which Stanhope was bound provides both for specific grounds and a specific method for termination. *Von Lange* involved the interpretation of *two* agreements, both negotiated, executed and made effective as of the same date, by the same parties. In reaching its decision, ***576** the district court found that the parties' failure to provide for a method of termination in their sales representative agreement made it necessary to look outside that agreement in order to determine whether it was conditioned on the existence of the partnership. To reach its result, the court relied on "a general rule of contract law that where two writings are executed at the same time and are intertwined by the same subject matter that [sic] they should be construed together and interpreted as a whole." 460 F.Supp. at 647. Thus, the holding in *Von Lange,* that the principal was liable to pay the commissions to his agent only so long as the partnership existed, is founded on a narrow set of facts not present in the instant case.

Two other cases cited by appellants as support for their "implied term" argument are distinguishable on their facts. *American Bakery & Confectionery Workers v. Liberty Baking Co.,* 242 F.Supp. 238 (W.D.Pa.1965) and *Fraser v. Magic Chef–Food Giant Markets, Inc.,* 324 F.2d 853 (6th Cir.1963) are inapplicable to this matter because the courts in those cases were construing collective bargaining agreements. Collective bargaining between a labor union and management generally results in a "trade agreement" rather than a "contract of employment." *Amalgamated Association of Street, Electric Railway* ****808** *and Motor Coach Employes (sic) of America, Division 85 v. Pittsburgh Railways Company,* 393 Pa. 219, 142 A.2d 734 (1985). Appellants would have us mix apples and oranges in applying the holdings in those cases to the matter before us. Said the court in *Fraser:*

> Rights of employees under a collective bargaining agreement presuppose an employer-employee relationship. A collective bargaining agreement, in ordinary usage and terminology, does not create an employer-employee relationship nor does it guarantee the continuance of one. Employees' rights under such a contract do not survive a discontinuance of business and a termination of operations.

***577** 324 F.2d at 856. Because *Fraser* and *American Bakery* stand only for the narrow proposition that employees' rights under a collective bargaining agreement do not ordinarily survive a discontinuance of business and termination of operations, we decline to follow them in this case.

Our Supreme Court has recently noted that "[t]he law will not imply a different contract than that which the parties have expressly adopted. To imply covenants on matters specifically addressed in the contract itself would violate this doctrine." *Hutchison v. Sunbeam Coal Corp.,* 513 Pa. 192, 198, 519 A.2d 385, 388 (1986).

> [Appellants] fail to notice an important distinction in contract law between cases in which parties have agreed on a term, and cases in which they have remained silent as to a material term or have discussed the term but did not come to an agreement. The law will imply a term only for omitted covenants. There can be no implied covenant as to any matter specifically covered by the written contract between the parties.

Reading Terminal Merchants Association v. Samuel Rappaport Associates, 310 Pa.Super. 165, 176, 456 A.2d 552, 557 (1983) (citation omitted). Because *McDole* and *Von Lange* are distinguishable, appellants have failed to present any authority, nor has our research revealed any, for the proposition that a trial court may hold, as a matter of law, under evidence similar to that admitted in the present case that a principal may be excused from performing under a brokerage agreement on the ground that it has voluntarily chosen to sell its assets. We have reviewed the evidence admitted at trial—including the agreement itself and appellee's testimony—under the appropriate standard, and we conclude that appellants are not entitled to judgment n.o.v., either by operation of law or under the theory of an implied condition. In sum, by providing for a specific method of termination in the agreement, appellants were bound to follow the terms of the agreement in seeking termination. Therefore, the trial court did not err in concluding that appellants were not entitled to judgment n.o.v.

***578** C.

[12] Next, appellants, in support of their claim that they are entitled to judgment n.o.v. as a matter of law, argue that the agreement provides Stanhope with the exclusive option to terminate plaintiff's employment at any time, subject to six months notice. Their claim focuses on the following language which appears in the termination provisions of the agreement:

> [T]his exclusive Broker's Agreement may be terminated at any time, at the option of Stanhope Steel, Inc.... (3) if for other reasons it is deemed advisable to the best interest of all parties concerned.

R.R. 277a–278a; 744a–746a. Appellants argue that the deteriorating financial condition of Stanhope, which culminated in the sale of its assets and its inability to meet even payroll costs, led to the determination, by Stanhope, that it would be in the "best interest of all parties concerned" to terminate the agreement. Therefore, they submit that the language is unambiguous and that they are entitled to judgment n.o.v. as a matter of law.

The trial court rejected appellants' contention, finding as a matter of law that they could not be heard to say that termination of appellee's contract would be in his best interest. We agree.

Stanhope's option to terminate the brokerage agreement with appellee was limited ****809** to those situations in which it would be in "the best interest of *all parties* concerned." Appellants have failed to point to any best interest of the appellee that would be served by his termination. In fact, the only interest served by termination of the agreement was Stanhope's. Their interpretation of the clause suggests that Stanhope had the unfettered discretion to decide what was in the appellee's best interest; however, the language of the clause cannot reasonably be read to support such an interpretation because the clause limits the exercise of the option to situations in which termination would serve the best interest of *all* the parties, including appellee. Moreover, if we were to follow such an interpretation, ***579** we would be sanctioning an illusory promise, by which Stanhope has suffered no detriment. *See* J. Murray, *Murray on Contracts* § 76 (1974). If Stanhope wished to exercise the option without any restrictions whatsoever, the agreement could have been written to reflect that intention. By restricting termination to those situations in which the best interest of *all* parties will be served, and by not reading the clause as giving Stanhope the *sole* discretion in terminating appellee, we give effect to the whole agreement and avoid the illogical result of allowing Stanhope to terminate a five-year agreement at will.

D.

[13] Finally, Cambridge in support of its argument for judgment n.o.v. argues that the evidence was insufficient to hold it liable for the obligations of its subsidiary, Stanhope, arising out of the agreement. Cambridge submits that the evidence presented at trial established that Stanhope was a separately-operated subsidiary, with separate management, officers, books, records and offices; and, that although appellee was aware of Cambridge's separate existence, he made no attempt to contract with Cambridge. However, Cambridge downplays the fact that, with the exception of Russell Stanhope, all of Stanhope's officers were also officers of Cambridge, and that Henry Lange, the president of Cambridge, was consulted prior to the extension of appellee's contract in 1981.

Appellee argues that the evidence was sufficient to establish either that Cambridge was a party to the contract with appellee, or that Cambridge exercised control over Stanhope's dealings with appellee so that any separation between the corporations was illusory. Appellee relies on the following: all terms of the agreement between appellee and Stanhope were subject to the approval of Cambridge's president, Henry Lange; the agreement was drafted by counsel for Cambridge; Stanhope had to secure the approval of Cambridge's president to extend the agreement, as evidenced by a letter from Stanhope to appellee which stated ***580** that Lange would grant the extension, R.R. 748a, and that appellee was terminated by Lange. Appellee concedes that Lange was purportedly acting as an officer of Stanhope when he terminated appellee, but notes that a subsequent offer of severance pay was made by Lange on stationery bearing the Cambridge name.

The trial court rejected Cambridge's argument, finding that the evidence established that Cambridge, acting through Lange, granted appellee the extension he was working under at the time of termination and that Cambridge terminated the contract. The court also noted that after Stanhope was purchased by Cambridge, it became merely a department of Cambridge. Central to the trial court's conclusion was that although appellants observed many of the requirements for maintaining separate corporate identities, they did not do so in their dealings with appellee. We conclude that the trial court adequately discussed and properly disposed of Cambridge's challenges to the evidence.

In summary, having reviewed the record and the arguments advanced by appellants, we conclude that the evidence was more than sufficient to sustain the verdict. We hold that appellants are not entitled to judgment n.o.v. on this record.

II. A New Trial

Appellants alternatively argue that if they are not entitled to judgment n.o.v., they are at least entitled to a new trial. ****810** They assert that the issue of whether Stanhope's continued existence was an implied condition of the agreement was at least a question of fact for the jury and that the trial court therefore erred in directing a verdict in favor of appellee. Appellants submit that there were disputed issues of material and relevant fact which precluded the entry of a directed verdict, that the issue should have been submitted to the jury, and that the trial court improperly excluded evidence relevant to the issue of whether an implied condition existed. Specifically, appellants allege: that the trial court erred in excluding the testimony of ***581** Stanhope's President as to discussions which occurred during the negotiation of the brokerage agreement; that the language of the termination provision is ambiguous and should have been submitted to the jury; that the doctrines of supervening impracticability and supervening frustration excused Stanhope from performance; and, that the verdict was against the weight of the evidence. We address these issues individually.

[14] "The grant or denial of a new trial is within the sound discretion of the trial court, whose decision will be reversed only where the record indicates that the trial court committed an error of law or clearly and palpably abused its discretion." *Walasavage v. Marinelli, supra,* 334 Pa.Super. at 407, 483 A.2d at 515 (citation omitted). Because appellants allege that the trial court erred in excluding evidence concerning the alleged implied condition, we must consider all of the evidence offered by appellants, whether it was admitted or not, in reviewing the propriety of the denial of a new trial. *See* *Waddle v. Nelkin,* 511 Pa. 641, 515 A.2d 909 (1986) (Zappala, J. announcing judgment of the Court) (unlike a judgment n.o.v., a motion for new trial does not test the verdict itself, but rather, the legal proceedings resulting in the verdict and the basis of a new trial motion is not that the judgment is unsupported by sufficient evidence, but that an alleged trial error affected the verdict); *Stewart v. Chernicky,* 439 Pa. 43, 54–5, n. 11, 266 A.2d 259, 266 n. 11 (1970) (correction of errors in exclusion of evidence may properly be the subject of

a motion for new trial). As to the allegation of error regarding the trial court's entry of a directed verdict, we are guided by the following standard.

> A directed verdict can properly be granted by a court only if the facts are clear and free from doubt. *Correll v. Werner,* 293 Pa.Super. 88, 90, 437 A.2d 1004, 1005 (1981). In ruling on a motion for directed verdict, a court must "accept as true all facts and proper inferences which tend to support the contention of the party against whom the motion has been made and must reject all ***582** testimony and inferences to the contrary." *Thomas v. Allegheny & Eastern Coal Co.,* 309 Pa.Super. 333, 339, 455 A.2d 637, 639 (1982). Accord: *Correll v. Werner, supra.*

Person v. C.R. Baxter Realty Co., 340 Pa.Super. 537, 540, 490 A.2d 910, 911 (1985). On appeal, we must determine whether the trial court abused its discretion or committed an error of law which controlled the outcome of the case. *Jozsa v. Hottenstein,* 364 Pa.Super. 469, 528 A.2d 606 (1987).

A.

[15] In requesting a new trial, appellants argue that the trial court erred in excluding the testimony of Russell Stanhope, President of Stanhope Steel at the time, as to discussions which occurred during the negotiation of the brokerage agreement and circumstances which existed when the agreement was extended and when Stanhope discontinued its operations. However, neither at trial, nor on appeal, do appellants specifically set forth the nature of Mr. Stanhope's testimony on this issue. They do not allege that he would testify that the parties discussed whether the contractual relationship between them was contingent on the continuance of Stanhope's business. In fact, appellants' offer of proof focused on other matters. Counsel indicated that Mr. Stanhope would testify that the company was losing money and that appellee's agreement was terminated for this reason. There is no indication whatsoever that he would have contradicted ****811** appellee's testimony that the issue concerning the continued operation of Stanhope was never discussed before the agreement was signed. If Mr. Stanhope's testimony would have been that the matter was never discussed, then appellants were not prejudiced by the exclusion of his testimony since they were able to establish the same point when they cross-examined appellee. Therefore, we conclude that the trial court did not err in denying appellants' motion for a new trial on that basis.

***583** Appellants also argue that *McDole* requires that the issue of whether the parties intended the agreement to survive the discontinuance of Stanhope's operations should have been submitted to the jury because it was a factual issue. Under the facts and law of the present case, we find no error in the trial court's entry of a directed verdict in favor of appellee against Stanhope and, therefore, appellants are not entitled to a new trial.

B.

[16] We must also reject appellants' claim that the language of the termination provision of the agreement is ambiguous and should have been submitted to the jury in order for it to resolve the ambiguity. In *Hutchison v. Sunbeam Coal Corp., supra,* the Supreme Court set forth the following guide for courts presented with a claim that a provision of a contract is ambiguous.

> Determining the intention of the parties is a paramount consideration in the interpretation of any contract. *Robert F. Felte, Inc. v. White,* 451 Pa. 137, 143, 302 A.2d 347, 351 (1973); *Unit Vending Corp. v. Lacas,* 410 Pa. 614, 617, 190 A.2d 298, 300 (1963). The intent of the parties is to be ascertained from the document itself when the terms are clear and unambiguous. *Steuart v. McChesney,* 498 Pa. 45, 48–49, 444 A.2d 659, 661 (1982); *In re Estate of Breyer,* 475 Pa. 108, 115, 379 A.2d 1305, 1309 (1977). However, as this Court stated in *Herr Estate,* 400 Pa. 90, 161 A.2d 32 (1960), "where an ambiguity exists, parol evidence is admissible to explain or clarify or resolve the ambiguity, irrespective of whether the ambiguity is created by the language of the instrument or by extrinsic or collateral circumstances." *Id.* at 94, 161 A.2d at 34.
>
> We first analyze the lease to determine whether an ambiguity exists requiring the use of extrinsic evidence. A contract is ambiguous if it is reasonably susceptible of different constructions and capable of being understood in more than one sense. *Metzger v. Clifford Realty* ***584** *Corp.,* 327 Pa.Superior Ct. 377, 386, 476 A.2d 1, 5 (1984); *Commonwealth State Highway and Bridge Authority v. E.J. Albrecht Co.,* 59 Pa.Commonwealth Ct. 246, 251, 430 A.2d 328, 330 (1981). *See also Black's Law Dictionary* 73 (Rev. 5th ed. 1979). The court, as a matter of law, determines the existence of an ambiguity and interprets the contract whereas the resolution of conflicting parol

evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact. *Easton v. Washington County Insurance Co.,* 391 Pa. 28, 137 A.2d 332 (1957); *Fischer & Porter Co. v. Porter,* 364 Pa. 495, 72 A.2d 98 (1950). *See generally* 4 Williston on Contracts § 616 (3d ed. 1961).

Id. 513 Pa. at 200–01, 519 A.2d at 389–90. In the present case, the trial court correctly concluded that the language was not ambiguous and could not reasonably be interpreted in the manner advanced by Stanhope; hence, it did not err in refusing to submit the issue to the jury.

C.

[17] Appellants argue that they are entitled to a new trial on the issue of whether Stanhope was excused from performance under the brokerage agreement by virtue of the doctrines of supervening impracticability and supervening frustration. Under the doctrine of supervening impracticability, a party's duty to perform pursuant to a contract is discharged where such performance is made "impracticable," through no fault of its own, "by the occurrence of an event, the non-occurrence of which was a basic assumption on which the contract was made." *Restatement (Second) of* ****812** *Contracts* § 261. Comment d to § 261 defines "impracticable:"

> Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case ***585** within the rule stated in this Section. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance. However, "impracticability" means more than "impracticality." A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover.

The doctrine of supervening frustration is set forth in § 265 of the *Restatement.* That section states:

> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 265.

Stanhope was permitted to make a detailed offer of proof of the evidence it would present in support of its defense which was based on the financial problems Stanhope was experiencing at the time of plaintiff's termination, but the trial court refused to allow the matter to go to the jury. R.R. 421a–435a. According to appellants:

> The evidence which Stanhope sought to introduce demonstrates that: (1) Stanhope was losing vast amounts of money during the 1980–1983 period (R.R. at 421a–430a); (2) Cambridge advanced and loaned Stanhope vast amounts of money during the 1980–1983 period (R.R. at 434a); (3) Stanhope's largest creditor advised Stanhope that it would not [sic] longer advance funds (R.R. at 434a–

435a); and (4) at the time Stanhope terminated Dorn's contract, it did not have enough money to pay its operating expenses and payroll costs (R.R. at 432a).

***586** Appellants' brief at 29. This, coupled with the increase in interest rates, was the basis of Stanhope's justification of its discussion to terminate the agreement. Appellants argue that the trial court's exclusion of this evidence, and its refusal to submit the issue to the jury, was erroneous and entitles appellants to a new trial.

We are unpersuaded by appellant's arguments and we conclude that the trial court did not err in refusing to submit the matter to the jury. Stanhope created the supervening event by selling its business. Although appellants have argued that Stanhope was compelled to take this action as a result of market forces beyond its control, we agree with the trial court that the doctrines of commercial impracticability and frustration of purpose are to be applied sparingly and, on the basis of the record before us, including appellants' offer of proof, we conclude that appellants have failed to make out that the change in the business environment was "well beyond the normal range." *See* *W.R. Grace and Co. v. Local Union 759,* 461 U.S. 757, 768 n. 12, 103 S.Ct. 2177, 2185 n. 12, 76 L.Ed.2d 298 (1983) ("Economic necessity is not recognized as a commercial impracticability defense to a breach-of-contract claim."); *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc.,* 517 F.Supp. 1319 (E.D.La.1981) (mere fact that performance under contract would have deprived defendant of its anticipated profit and resulted in loss on contract was insufficient to show commercial impracticability, there being requirement of showing not only that defendant would perform at a loss, but also that loss would be especially severe and unreasonable). This distinction ****813** must be carefully heeded, otherwise, every agreement that becomes disadvantageous to a party, as a result of a subsequent downturn in the economy, would entitle that party to be excused from performing under the agreement. [11]

***587** Appellants cite *Gulf Oil Corp. v. Federal Power Commission,* 563 F.2d 588 (3rd Cir.1977), *cert. denied,* 434 U.S. 1062, 98 S.Ct. 1235, 55 L.Ed.2d 762 (1977) for the proposition that a party's contractual obligations may be excused by commercial impracticability where "the cost of performance has in fact become so excessive and unreasonable that the failure to excuse performance would result in grave injustice." *Id.* at 599. We think appellants' reliance on this case is unjustified. Gulf entered into a "Gas Purchase Contract" to deliver on a daily basis a large, specified quantity of natural gas to the pipelines of the Texas Eastern Transmission Company. Gulf had expected to obtain most of the gas from a nearby field in Plaquemines Parish, Louisiana, but it soon became evident to Gulf that it had vastly overestimated the reserves of that field. Gulf argued that because neither party had "entertained the thought that Gulf would be required to deliver gas from far off places at ... 'exorbitant' costs," the contract should be modified. *Id.* at 599. Under the facts of that case, the Third Circuit panel rejected a contention similar to that which appellants make in the case at bar, i.e., that performance may be excused if the cost of performance becomes so excessive and unreasonable as to make performance impracticable. The court held, "[t]he party seeking to excuse [its] performance [under the doctrine of supervening impracticability] must not only show that [it] can perform only at a loss but also that *the loss will be especially severe and unreasonable* " (emphasis added). *Id.* at 600. The court found that Gulf had failed to make such a showing.

Appellants, in their offer of proof, have not demonstrated that they had intended to make such a showing here. Supervening impracticability cases such as *Gulf Oil, Louisiana Power and Light,* and *Aluminum Co. of America v. Essex Group, Inc.,* 499 F.Supp. 53 (W.D.Pa.1980), each involve a particular contract which had become onerous and threatened the financial health of the company. However, in the matter before us, nowhere have appellants alleged that *their contract with appellee* is at the root of their alleged corporate losses. Rather, appellants attempt to ***588** turn the doctrine of supervening impracticability on its head and argue that because the business is failing for reasons completely unrelated to the contract in dispute, their obligations should be extinguished. We find no precedent in the law for such an argument, and appellants have provided us with none. Moreover, comment b to § 261 states that the continuation of the financial situations of the parties are ordinarily not basic assumptions which would affect a discharge. Events falling within the coverage of § 261 are generally due either to so called "acts of God" or the acts of third parties. Also, if the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter and will not be covered by § 261. "[A] party generally

assumes the risk of his own inability to perform his duty." *Restatement (Second) of Contracts* § 261, comment e. This comment was cited with approval in *Craig Coal Mining v. Romani,* 355 Pa.Super. 296, 513 A.2d 437 (1986). Having reviewed appellants' arguments and the relevant authorities, we conclude that the trial court did not err in denying appellants' motion for a new trial on the basis of the doctrine of supervening impracticability.

Likewise, appellants' reliance on the doctrine of supervening frustration is misplaced.[12] Comment b to § 265 clearly ****814** states that the doctrine applies "only when the frustration is without the fault of the party who seeks to take advantage of the rule." Further, the illustrations to comment a of § 263 emphasize this point. The trial court did not err in refusing to grant appellants a new trial on this issue.

D.

[18] Finally, Cambridge argues that the trial court erred in charging the jury on when a parent corporation can be ***589** held liable for the obligations of its subsidiary, and that the verdict was against the weight of the evidence. We do not address the allegations of error regarding the charge to the jury because they have been waived by appellants' failure to raise them in the statement of questions involved, as required by Pa.R.A.P. 2116.[13]

[19] The argument as to the weight of the evidence has been preserved. Appellant Cambridge asserts that "[t]he evidence overwhelmingly established that Cambridge carefully maintained the separateness of the two corporations," appellants' brief at 37, and that this entitles it to a new trial. We disagree.

A panel of this Court has stated:

> A motion for new trial on grounds that the verdict is contrary to the weight of the evidence concedes that there is sufficient evidence to sustain the verdict but contends, nevertheless, that the verdict is against the weight of the evidence. Whether a new trial should be granted on grounds that the verdict is against the weight of the evidence is addressed to the sound discretion of the trial judge, and his decision will not be reversed on appeal unless there has been an abuse of discretion.

Commonwealth v. Taylor, 324 Pa.Super. 420, 425, 471 A.2d 1228, 1230 (1984) (citations omitted). On appeal, this Court must determine "whether the verdict is so contrary to the evidence as to shock one's sense of justice." *Myers v. Gold,* 277 Pa.Super. 66, 419 A.2d 663 (1980). To summarize what we already have noted in Part I.D. of this opinion, appellee testified at trial that the President of Cambridge, Mr. Henry Lange, actively participated in the contract discussions between appellee and Stanhope. R.R. at 229a–231a. Cambridge's attorney, Mr. Rosenberg, drafted the contract which was eventually signed by the parties. R.R. at 230a. ***590** The letter terminating appellee's agency relationship with Stanhope was signed by Mr. Lange. R.R. at 254a, 296a and 762a. A letter which followed two weeks later, stating Stanhope's intention to provide appellee with three months severance pay, was written on Cambridge letterhead and signed by Mr. Lange. R.R. at 763a. We find appellant Cambridge's argument to be wholly without merit and conclude that under the standard articulated in *Myers,* a new trial is not warranted.

Judgment affirmed.

All Citations

368 Pa.Super. 557, 534 A.2d 798

Footnotes

1 The original record, as certified to us, does not contain the exhibits admitted at trial. Although appellants have included the exhibits as part of their reproduced record, a paper may not be made part of the record simply by reproducing it. *Pittsburgh's Airport Motel v. Airport Asphalt and Excavating Co.,* 322 Pa.Super. 149, 469 A.2d 226 (1983). The only place in the original record where any of the papers admitted at trial appear, are as "exhibits" to appellants' brief in support of post-trial relief. The "exhibits" are copies of the agreement at issue, dated October 1, 1979, and the five year extension of the October 1 agreement, dated May 1, 1981. Because the brief in support of post-trial motions and the attached "exhibits" were filed in the trial court, they constitute part of the original record. Pa.R.A.P. 1921; *Commonwealth v. Rini,* 285 Pa.Super. 475, 427 A.2d 1385 (1981). However, we must limit our review to those matters testified to at trial and the two "exhibits" which appear in the original record. We do not consider those exhibits which appear in the reproduced record, but not in the original record. *See Commonwealth v. Williams,* 357 Pa.Super. 462, 466, 516 A.2d 352, 354 (1986) ("It is the appellant's responsibility to provide a complete and comprehensive record to the reviewing court for the purposes of appeal.")

2 At oral argument, counsel for appellee agreed that the transaction was a bona fide sale.

3 Appellants raised a fifth argument in their motion for judgment n.o.v. relative to this claim, on the basis that Stanhope was entitled to a ruling, as a matter of law, that it was excused from performance under the doctrines of supervening impracticability and supervening frustration. Appellants present the same claim on appeal. As we noted at the outset, we may only consider the evidence actually admitted at trial in reviewing the trial court's denial of a judgment n.o.v. Because the trial court limited appellants to the presentation of offers of proof on the issue, appellants can only point to the following evidence in support of a judgment n.o.v.: "It is undisputed that, at the time it sold its assets to L.B. Foster, Stanhope Steel was losing vast amounts of money and its financial position was such that it could not even pay its normal operating expenses." Appellants' brief at 28. This allegation, by itself, is insufficient to entitle appellants to the entry of a judgment n.o.v. See our discussion in section II. C. of this opinion.

4 Appellants frame the issue in this manner: "Whether the discontinuance of Stanhope Steel's business in 1984 extinguished its obligations under a brokerage contract existing between Stanhope and Robert Dorn?" Appellants' brief at 2. Thus, appellants appear to contend that the act of corporate dissolution, as a matter of law, relieves them from their contractual duty to their agent.

5 The agreement couches the compensation in the following terms: "It is agreed that while you are the exclusive Broker for the territory contemplated by this agreement you shall have a draw of $4,000/month. This draw shall be the commission payable on sales, rentals and purchases aggregating 4,000 tons annually." The agreement then lists the rate at which the broker's commissions will be paid.

6 Under Pennsylvania decisions, "the buyer in a requirements contract has no duty to have any requirements and a seller under an output contract has no duty to have any output." *Fort Wayne Corrugated Paper Co. v. Anchor Hocking Glass Corporation,* 130 F.2d 471 (3d Cir.1942).

7 The Court found it "unnecessary to decide whether this contract created the relationship of 'vendor and vendee' between plaintiff and defendant, or an 'exclusive sales agency', or 'a grant of the right to sell the particular commodity within the prescribed territory to the exclusion of all others....'" *Sheesley,* 337 Pa. at 202, 10 A.2d at 403.

8 However, the trial court *en banc* declared that the doctrine of frustration of purpose was inapplicable. *McDole, id.* 281 Pa.Super. at 82, 421 A.2d at 1157–1158.

9 Appellants' assertions with regard to *McDole* and *Von Lange* more properly apply to the argument that the trial court erred in directing the verdict in favor of appellee. However, we adhere to the structure of appellants' brief and analyze the cases in terms of the argument for judgment n.o.v.

10 Our Court recently held that a contract of employment for life does not, without more, constitute an enforceable contract of employment for a specific, definite duration. *Murphy v. Publicker Industries, Inc.,* 357 Pa.Super. 409, 516 A.2d 47 (1986).

11 We note that Stanhope's offer of proof detailed the losses its overall operation experienced in the early 1980's. Extended analysis of this event, however, obscures the relevant issue of whether enforcement of the contract at issue—between appellee and Stanhope—would be impracticable.

12 Appellants incorrectly cite *Olbum v. Old Home Manor, Inc.,* 313 Pa.Super. 99, 459 A.2d 757 (1983), in support of their argument that the doctrine of supervening frustration applies in the instant matter. In deciding *Olbum,* our Court relied on principles of commercial impracticability as embodied in the *Restatement (Second) of Contracts* § 263.

13 Pa.R.A.P. 2116 states that "ordinarily[,] no point will be considered [on appeal] which is not set forth in the statement of the questions involved or suggested thereby." Nothing in appellants' third question ("Whether Cambridge Industries—Stanhope's parent corporation—can be held liable for Stanhope's contractual obligations?") suggests their intention to raise the issue of an erroneous or prejudicial jury charge.

120 Pa.Cmwlth. 269
Commonwealth Court of Pennsylvania.

James E. MARTIN, Petitioner,
v.
COMMONWEALTH of Pennsylvania, DEPARTMENT OF ENVIRONMENTAL RESOURCES, Respondent.

Argued April 21, 1988.
|
Decided Oct. 7, 1988.

Synopsis

The Department of Environmental Resources issued compliance order citing miner for failure to comply with provisions of consent order and agreement, and miner appealed. The Environmental Hearing Board affirmed the Department's order, and miner petitioned for review. The Commonwealth Court, No. 1354 C.D. 1986, Smith, J., held that: (1) miner's noncompliance with consent order by failing to develop, implement and submit erosion and sedimentation control plan was not excused by force majeure clause in consent order; (2) force majeure clause was rendered null and void where miner failed to properly notify Department within required time after miner became aware or should have become aware that delay would occur; (3) miner's noncompliance was not excused by contingencies not provided for in force majeure clause; (4) miner was afforded due process where Department notified miner that compliance order had been issued for failure to meet obligations under consent order, and where record demonstrated that miner failed to expressly request extension of time; and (5) Department did not have to consider lack of adverse environmental impact before issuing compliance order.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (11)

[1] **Contracts** Discharge by Impossibility of Performance

In order to use force majeure clause as an excuse for nonperformance of contract, event alleged as excused must have been beyond party's control and not due to any fault or negligence by nonperforming party.

4 Cases that cite this headnote

[2] **Contracts** Presumptions and burden of proof

In order to use force majeure clause as excuse for nonperformance of contract, nonperforming party has burden of proof as well as duty to show what action was taken to perform contract, regardless of occurrence of excuse.

2 Cases that cite this headnote

[3] **Contracts** Discharge by Impossibility of Performance

Acts of third party making performance of contract impossible do not excuse failure to perform if such acts were foreseeable.

1 Case that cites this headnote

[4] **Mines and Minerals** Particular modes of regulation in general

Failure to abide by provisions of consent order entered into with administrative agency, that miner was to develop, implement and submit erosion and sedimentation control plan by certain date, was not excused by force majeure clause of order where, although miner allegedly failed to comply because his engineer had difficulty in developing plan, it was foreseeable that engineer could not timely develop plan, and miner had sufficient time to take alternate steps to comply.

1 Case that cites this headnote

[5] **Mines and Minerals** State law and regulations in general

Miner failed to comply with force majeure clause in consent order which required minor to notify Department of Environmental Resources within five days and in writing within ten days of date miner became aware or reasonably should

have become aware that occurrence would cause delay or obstruction, where miner gave telephone and letter notice approximately one month after miner began series of 25 phone calls to his engineer regarding engineer's difficulty in developing plan required by consent order.

1 Case that cites this headnote

[6] **Administrative Law and Procedure** Construction, operation, and effect in general

Failure to abide by consent order with administrative agency was not excused by bad weather and equipment breakdown where those contingencies were not provided for in force majeure clause of consent order.

1 Case that cites this headnote

[7] **Constitutional Law** Notice and Hearing

Elements of due process are notice of government action and opportunity to be heard. U.S.C.A. Const.Amend. 14.

1 Case that cites this headnote

[8] **Constitutional Law** Mining and excavation; oil and gas

Mines and Minerals State law and regulations in general

Miner was afforded due process where letter from administrative agency notified miner that compliance order had been issued for failure to meet obligations under consent order, and where miner failed to expressly request extension of time in order to implement plan required by consent order. U.S.C.A. Const.Amend. 14.

[9] **Mines and Minerals** State law and regulations in general

Failure of Department of Environmental Resources to grant miner relief under force majeure clause of consent order was discretionary act which Environmental Hearing Board could disturb only where Department abused its discretion.

4 Cases that cite this headnote

[10] **Environmental Law** Enforcement in general; penalties and fines

In issuing discretionary compliance orders, Department of Environmental Resources must consider reasonableness of its actions as well as reasonable foreseeable social and economic impact.

[11] **Environmental Law** Duty of government bodies to consider environment in general

Enforcement order issued by Department of Environmental Resources as result of noncompliance with consent order was mandatory act which did not require Department to consider absence of adverse environmental impact before issuing order.

Attorneys and Law Firms

****677** ***270** Eugene E. Dice, Harrisburg, for petitioner.

Zelda Curtiss, Asst. Counsel, Pittsburgh, for respondent.

Before MacPHAIL and SMITH, JJ., and BARBIERI, Senior Judge.

Opinion

SMITH, Judge.

Petitioner James E. Martin (Martin) appeals from the April 10, 1986 order of the Environmental Hearing Board (Board) which affirmed the Department of Environmental Resources' (DER) issuance of a compliance ***271** order on December 14, 1983 citing Martin for failure to comply with provisions of an October 18, 1983 consent order and agreement. The decision of the Board is affirmed.

Questions presented for review are whether the Board's decision is supported by substantial evidence; whether the decision of the Board violated principles of due process of

law; and whether the Board abused its discretion in refusing to admit evidence showing the absence of any adverse environmental effect caused by the alleged violation.

The 1983 consent order entered into between Martin and DER imposed obligations on Martin to update, in compliance with the Surface Mining Conservation and Reclamation Act (Act), [1] erosion and sedimentation controls at the surface coal mining site operated by Martin. Paragraph 4(a) of the 1983 consent order specifically required Martin to develop and implement an erosion and sedimentation control plan (Plan) by December 5, 1983 and also by that same date to submit the Plan to DER for its approval. Martin submitted the Plan on December 6, 1983 which DER stipulated at trial was a de minimis violation. N.T., pp. 275–80, July 30, 1985 Hearing.

Based upon an inspection of the mining site on December 8, 1983, DER found Martin to be in violation of the law in that he failed to install and implement the erosion and sedimentation controls as required by the 1983 consent order. As a consequence, DER issued the December 14, 1983 compliance order. On December 29, 1983, DER also sent a notice of proposed civil penalty which notified Martin that because of the violations set forth in the compliance order, Martin was liable for ***272** a civil penalty of twenty thousand five hundred dollars ($20,500).

On January 19, 1984, Martin appealed the compliance order to the Board claiming that his obligations under the 1983 consent order were excused by the force majeure clause. [2] After hearing on April 10, 1986, the Board dismissed Martin's appeal, concluding that he failed to comply with the ****678** notification provisions of the force majeure clause. Hence, this appeal.

***273** This Court's scope of review is limited to determining whether the Board committed constitutional violations, errors of law, or whether any necessary findings were unsupported by substantial evidence. *Haycock Township v. Department of Environmental Resources,* 108 Pa.Commonwealth Ct. 466, 530 A.2d 514 (1987).

Martin initially contends that his obligations under DER's 1983 consent order are excused because failure to implement the Plan was due to events beyond his control and that the record does not contain substantial evidence to support the Board's finding of non-compliance with notice provisions contained in the force majeure provision. Martin relies upon language which grants additional time to comply if he is "obstructed or delayed" in implementation of any obligation under the consent order by "any delay or defaults by third parties under contract with him." Martin arranged with an engineer to design the Plan for the mining site, but due to an unusually heavy workload, the engineer was unable to develop the Plan by December 5, 1983. Martin asserts that without the Plan, he was unable to implement the erosion and sedimentation controls and that by analogy to commercial contracts, the delay is excusable since implementation of the Plan was commercially impracticable.

[1] **[2]** **[3]** In order to use a force majeure clause as an excuse for non-performance, the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as well as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse. *Gulf Oil Corp. v. Federal Energy Regulatory Commission,* 706 F.2d 444 (3d Cir.1983), *cert. denied,* 464 U.S. 1038, 104 S.Ct. 698, 79 L.Ed.2d 164 (1984). Acts of a third party making performance impossible do not excuse failure to perform ***274** if such acts were foreseeable. *Yoffe v. Keller Industries, Inc.,* 297 Pa.Superior Ct. 178, 443 A.2d 358 (1982).

[4] Examination of the record reveals that Martin failed to establish that the events which led to his non-performance were beyond his control or that he used due diligence in attempting to perform his obligations under the 1983 consent order. [3] DER's order required Martin, not his engineer, to develop, implement and submit the Plan. The Board further found that Martin knew as of October 18, 1983, the date the agreement was executed, that he was required to submit the Plan to DER. Although Martin testified that he made twenty-five phone calls to his engineer from ****679** November 7, 1983 to December 3, 1983, the Board found that he was aware as early as November 7, 1983 that the engineer had difficulty in developing the Plan. Therefore, Martin should have known at least ten days prior to December 5, 1983 of the delay in implementing the controls which would take seven to ten days to install as opposed to the two to three days estimated by Martin. [4] Thus, it was foreseeable that Martin's engineer could not timely develop the Plan thereby requiring Martin to take alternate steps to comply, which he failed to do. The record further indicates that Martin never requested an extension of time from DER.

[5] The force majeure clause required that Martin notify DER by telephone within five days and in writing ***275** within ten days of the date Martin became aware or reasonably should have become aware that an occurrence would cause delay or obstruction. Martin notified DER by telephone on December 5, 1983 that he was unable to submit, install and implement the Plan by that date. N.T., pp. 114–117, July 29, 1985 Hearing. Martin also notified DER by letter dated December 9, 1983 of his inability to install and implement the Plan as required, but failed to provide DER with a date by which he would have the erosion and sedimentation controls installed. N.T., p. 116, July 29, 1985 Hearing. The record thus contains substantial evidence to support the Board's findings that Martin failed to properly notify DER within the required time periods after Martin became aware or should have become aware that delay would occur, the effect of which rendered the force majeure clause null and void. Martin's argument that notice was timely given since he became aware on December 2, 1983 that delay would occur is unsupported by the record.

[6] Additionally, Martin incorrectly relies upon the Restatement (Second) of Contracts § 251 (1979) as his obligation to perform is not dependent upon the occurrence or non-occurrence of any condition in a commercial contract. Martin's obligation to install erosion and sedimentation controls is mandated by the 1983 consent order. Accordingly, Martin's failure to perform is not excused. Further, Martin argues that failure to implement the Plan was due to bad weather and equipment breakdown, contingencies not provided for in the force majeure clause. In *Dorn v. Stanhope Steel, Inc.*, 368 Pa.Superior Ct. 557, 534 A.2d 798 (1987), the Superior Court held that contingencies not provided for in a written agreement will not ordinarily excuse performance.

[7] **[8]** **[9]** Martin next argues that the Board's decision violated principles of due process as DER never informed Martin ***276** that his request for force majeure had been denied or that timeliness of notice was an issue. Martin also contends that DER should have provided an explanation for denial of his request for extension, yet the record demonstrates that Martin failed to expressly request an extension of time to implement the Plan. DER notified Martin by letter dated January 4, 1984 that a compliance order had been issued for failure to meet obligations under the consent order. N.T., p. 284, July 30, 1985 Hearing. Elements of due process are notice of government action and opportunity to be heard which were properly afforded to Martin. *See Barasch v. Pennsylvania Public Utility Commission,* 119 Pa.Commonwealth Ct. 81, 546 A.2d 1296 (1988); *Taylor v. Weinstein,* 207 Pa.Superior Ct. 251, 217 A.2d 817 (1966). Moreover, a failure by DER to grant Martin relief under the force majeure clause is a discretionary act which the Board may disturb only where DER abused its discretion. *Haycock Township v. Department of Environmental Resources,* 108 Pa.Commonwealth Ct. 466, 530 A.2d 514 (1987); *Warren Sand & Gravel Co. v. Department of Environmental Resources,* 20 Pa.Commonwealth Ct. 186, 341 A.2d 556 (1975).

[10] **[11]** Finally, Martin contends that the Board abused its discretion in refusing to admit evidence of a lack of any adverse environmental impact in evaluating whether ****680** excusable delay occurred. In issuing discretionary compliance orders, DER must consider the reasonableness of its actions as well as reasonably foreseeable social and economic impact. *East Pennsboro Township Authority v. Department of Environmental Resources,* 18 Pa.Commonwealth Ct. 58, 334 A.2d 798 (1975). However, economic and environmental concerns may be ignored where, as here, DER's actions are nondiscretionary. DER's enforcement order was mandatory and therefore evidence as to the absence of any adverse environmental ***277** impact is irrelevant. *Rochez Bros., Inc. v. Department of Environmental Resources,* 18 Pa.Commonwealth Ct. 137, 334 A.2d 790 (1975); 25 Pa.Code § 86.211. The Board thus did not abuse its discretion.

Accordingly, the decision of the Board is affirmed.

ORDER

AND NOW, this 7th day of October, 1988, the order of the Environmental Hearing Board dated April 10, 1986 is affirmed.

This decision was reached prior to the resignation of MacPHAIL, J.

All Citations

120 Pa.Cmwlth. 269, 548 A.2d 675

Footnotes

1 Act of May 31, 1945, P.L. 1198, *as amended,* 52 P.S. §§ 1396.1–1396.31.

2 The force majeure clause is contained in paragraph 17 of the 1983 consent order which states as follows:

> Martin will have additional time to carry out any obligation assumed herein, in the event Martin is obstructed or delayed in the commencement, implementation, or completion of any such obligation, *other than any obstruction or delay caused in whole or in part by Martin or by Martin's failure to submit a complete Plan or application under this Consent Order and Agreement,* by any act or delay due to vandalism, acts of God, work slowdown or stoppage, strike, unavailability of materials or labor, any delay or defaults of third parties under contract with Martin with respect to the obligations undertaken hereunder, or because of any other cause beyond the control of Martin, which, despite due diligence, Martin is unable to prevent. *Martin shall notify the Department by phone within five (5) days and in writing within ten (10) days of the date Martin becomes aware, or should have reasonably become aware, that such occurrence would cause delay or obstruction.* Such notification shall be made to the Mining Compliance Specialist, and shall include all relevant documentation such as copies of third party correspondence and documentation from an authorized representative of Martin specifying each of the excuses and Martin's efforts to perform its obligations on time. The failure of Martin to comply with the requirements of this paragraph specifically and in a timely fashion shall render this paragraph null and void and of no effect. The Department will extend the applicable compliance date for a period as necessary to compensate for the period of unavoidable delay, but in no event for a period which alone, or in conjunction with previous extensions, extends any compliance date for a total period greater than one hundred and eighty (180) days. Martin shall have the burden of proving any inability to comply with any obligation ordered in this Consent Order and Agreement. (Emphasis added.)

3 Martin offered no evidence as to whether there existed any type of contract, oral or written, between himself and his engineer.

4 Credibility determinations are for the Board. *Pritz Auto, Inc. v. State Board of Vehicle Manufacturers, Dealers and Salespersons,* 113 Pa.Commonwealth Ct. 89, 536 A.2d 485 (1988); *Department of Transportation v. Cumberland Construction Co.,* 90 Pa.Commonwealth Ct. 273, 494 A.2d 520 (1985), *appeal denied,* 513 Pa. 636, 520 A.2d 1386 (1987).

§ 455. Impossibility of Performance

It is the duty of a party making a promise to ascertain at the time whether or not performance is possible, and if he or she neglects to inform him- or herself, it is at his or her peril.

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Contracts: Law in Action, Volume I: The Introductory Course

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The term impossibility, as used in connection with the impossibility of performance of a contract, means not only strict impossibility, but impracticability because of extreme and unreasonable difficulty, expense, injury, or loss involved.[2607] Besides the doctrine of impossibility, this rule is also referred to as the doctrine of supervening impracticability[2608] or the doctrine of frustration of contractual purpose.[2609]

[2607] *Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358 (1960)*.

West v. Peoples First Nat'l Bank & Trust Co., 378 Pa. 275, 106 A.2d 427, 1954 Pa. LEXIS 593 (1954).

Performance is rendered impossible by an act of God (vis major), the law, or the other party.[2610]

Ordinarily, nothing will excuse performance of an absolute promise if the act promised is possible of performance, even though performance in the manner originally contemplated is rendered impossible without default of the promisor.[2611] It is the duty of the party making the promise to ascertain at the time whether or not performance is possible, and if he or she neglects to inform himself or herself, it is at his or her peril.[2612]

Stabler Constr. v. DOT, 692 A.2d 1150, 1997 Pa. Commw. LEXIS 176 (Pa. Commw. Ct. 1997) (because no one could objectively perform under the contract after the flood, the doctrine of impossibility excused party's continued performance).

F. J. Busse, Inc. v. Department of General Services, 47 Pa. Commw. 539, 408 A.2d 578 (1979) (flood damage did not make performance of a particular contract impracticable, even though it did make it more expensive).

Supervening impracticability

The usual situations in which impracticability arises involve either extreme difficulty or expense or the threat that performance will result in injury.—*Prusky v. Reliastar Life Ins. Co., 474 F.Supp.2d 695 (E.D. Pa. 2007)*.

[2608] See *Prusky v. Reliastar Life Ins. Co., 474 F.Supp.2d 695 (E.D. Pa. 2007)*.

[2609] *In re Greenfield Dry Cleaning & Laundry, 249 B.R. 634 (Bankr. E.D. Pa. 2000)*.

Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358 (1960) (doctrine of frustration of contractual purpose exists in Pennsylvania).

Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth., 916 A.2d 1183 (Pa. Super. Ct. 2007).

Pocono Springs Civic Ass'n v. Rovinsky, 845 A.2d 200, 2004 Pa. Commw. LEXIS 237 (Pa. Commw. Ct. 2004).

[2610] *Mar-Paul Co. v. Jim Thorpe Area School Dist., 7 Pa. D. & C.5th 387 (2008)*.

Drought

A promise to furnish water, if rendered impossible of performance by reason of a drought or other natural cause, was discharged.—*Ward v. Vance, 93 Pa. 499 (1880)*.

[2611] *Young v. Equitable Gas Co., 5 Pa. Super. 232 (1897)*.

Performance not excused

Inability to pay was not impossibility of performance which would constitute defense to action on contract.—*Lewis v. Harcliff Coal Co., 237 F. Supp. 6 (W.D. Pa. 1965)*.

A contract whereby defendant agreed to compensate plaintiff for discontinuing his "operations" which included right to use a railroad siding, tipple and coal-stripping operation, which right he assigned to defendant for a monetary consideration based on amount of coal marketed, was not rendered impossible of performance so as to excuse the defendant from performing the contract by withdrawal by the railroad of the plaintiff's right to use the railroad siding, where right to operate the strip mining facilities given up by plaintiff still continued and was the main consideration of the contract.—*Walker v. Saricks, 360 Pa. 594, 63 A.2d 9 (1949)*.

[2612]

Construction of street railway

A company which has entered into a contract with a borough to build a railway on a street is not relieved from its contract by reason of the fact that for a distance of 750 feet the company was confined to the use of about eleven feet only, in width, of the

The doctrine of frustration of contractual purpose holds that under the implied condition of the continuance of a contract's subject-matter, the contract is dissolved when the subject-matter is no longer available.[2613] When people enter into a contract that is dependent for the possibility of its performance on the continual availability of a specific thing, and that availability comes to an end by reason of circumstances beyond the control of the parties, the contract is prima facie regarded as dissolved.[2614] The purpose of a contract is frustrated when there is a change in the subject matter of a contract that is dependent on the possibility of its performance.[2615] Under the doctrine of "frustration of purpose," the duty to render performance is discharged (unless the language or the circumstances indicate the contrary), where, after a contract is made, a party's performance is made impracticable without his or her fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made.[2616] A court can and ought to examine the contract and the circumstances in which it was made, not of

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highway, and this is especially the case where the evidence is not conclusive that the railway could not have been constructed and operated on the street.—*Montooth v. Brownsville A. S. R. Co., 206 Pa. 338, 55 A. 1036 (1903)*.

[2613] *Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358 (1960)*.

Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005).

Pocono Springs Civic Ass'n v. Rovinsky, 845 A.2d 200, 2004 Pa. Commw. LEXIS 237 (Pa. Commw. Ct. 2004).

Denial of mining permit frustrated purpose of mining lease

Given that lessee could not obtain the necessary mining permit, its promised performance of paying to the lessors royalties based on tonnage of coal mined was excused due to impractibility. Lessee could not obtain the necessary mining permit. The lessors' promise to perform under the lease agreement was, therefore, also excused.—*Lichtenfels v. Bridgeview Coal Co., 366 Pa. Super. 304, 531 A.2d 22 (1987)*.

[2614] *Alvino v. Carraccio, 400 Pa. 477, 162 A.2d 358 (1960)*.

Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005).

Lichtenfels v. Bridgeview Coal Co., 366 Pa. Super. 304, 531 A.2d 22 (1987).

Pocono Springs Civic Ass'n v. Rovinsky, 845 A.2d 200, 2004 Pa. Commw. LEXIS 237 (Pa. Commw. Ct. 2004).

[2615]

No change shown

Landowner has not stated a claim that alleges that any such change has occurred, where he knew of the failed perk test starting shortly after purchasing the property. Moreover, there is nothing frustrating the performance of the contract between the landowners association and the landowner. Landowner purchased land that contained a covenant regarding payment of dues to a landowners association. Landowner is obligated to pay dues and in exchange is entitled to use certain facilities for which he pays dues for. As such, the terms of the contract are easily completed. Landowner may consider himself "frustrated" that he cannot build on the land in the way in which he envisioned. However, this does not frustrate either party's ability to fulfill the contract.—*Pocono Springs Civic Ass'n v. Rovinsky, 845 A.2d 200, 2004 Pa. Commw. LEXIS 237 (Pa. Commw. Ct. 2004)*.

[2616] *In re Greenfield Dry Cleaning & Laundry, 249 B.R. 634 (Bankr. E.D. Pa. 2000)*.

Purpose of settlement agreement was not frustrated

Subcontractor's performance of seeking "actual recovery" against contractor under settlement agreement was not frustrated or made dependent upon the prospect that the subcontractor could file an appeal in order to contest the entry of summary judgment entered against it. The fact that the subcontractor may have had summary judgment overturned on appeal existed in the realm of possibility only and was not "a basic assumption on which the contract was made."—*Ragnar Benson, Inc. v. Hempfield Twp. Mun. Auth., 916 A.2d 1183 (Pa. Super. Ct. 2007)*.

course to vary, but only to explain it, in order to see whether or not, from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract.[2617]

A party ordinarily is presumed, in the absence of an express provision to the contrary, to have assumed the risk of unforeseen contingencies arising during the duration of the contract.[2618] Under this rule, one undertaking to perform a contract during winter months in the northern country cannot be excused because of the general severity of the weather.[2619] Similarly, a contractor would not be excused from unforeseen soil conditions uncovered after commencement of performance under a contract.[2620] Generally, if the performance of a duty is made impracticable by having to comply with a domestic or foreign governmental regulation or order, that regulation or order is an event the non-occurrence of which was a basic assumption on which the contract was made.[2621]

If performance on one side or the other of a contract becomes excusably impossible while the transaction is still wholly executory on both sides, the contract is discharged and neither party is subject to further obligation of any kind, but when a party excused by impossibility has partly performed the contract on his or her side before impossibility arises, justice requires imposition of a quasi-contractual obligation on the party receiving such performance to pay its fair value.[2622] The performing party is generally allowed a claim for restitution to the extent his or her performance has benefited the other party. In a proper case, recovery may go beyond mere restitution and include elements of reliance by the claimant, even though they have not benefited the other party; moreover, if both parties have rendered some performance, each is entitled to restitution against the other.[2623] One defense to

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[2617] *Pocono Springs Civic Ass'n v. Rovinsky, 845 A.2d 200, 2004 Pa. Commw. LEXIS 237 (Pa. Commw. Ct. 2004)*.

[2618] *O'Neill Const. Co. v. Philadelphia, 335 Pa. 359, 6 A.2d 525, 1939 Pa. LEXIS 439 (1939)*.

Cramp & Co. v. Central Realty Corp., 268 Pa. 14, 110 A. 763 (1920).

In finding that the city substantially complied with the Byrne Justice Assistance Grants Program, the court noted that the doctrine of substantial compliance was a way of fashioning equitable relief in the case of imperfect performance on a contract. The court added that strict compliance with the requirements of statute and of the regulations duly promulgated in accordance therewith was mandatory; substantial compliance would be insufficient.—*City of Phila. v. Sessions, 280 F. Supp. 3d 579 (E.D. Pa. 2017)*.

The contract did not vary the general rule that contractors are responsible for unforeseen contingencies.—*Mar-Paul Co. v. Jim Thorpe Area Sch. Dist., 2008 Pa. Dist. & Cnty. Dec. LEXIS 172, 7 Pa. D. & C.5th 387 (County Ct. 2008)*.

Artificial gas line

One contracting to put two gas lines in a building, one for natural gas and one for artificial gas, was not relieved from putting in both lines because artificial gas was not used in the town in which the building was being erected.—*Morgan v. Gamble, 230 Pa. 165, 79 A. 410 (1911)*.

[2619] *Gross v. Exeter Mach. Works, Inc., 277 Pa. 363, 121 A. 195 (1923)*.

[2620] The school district contracted with general contractor and its site preparation subcontractor to build a new school. After work began, the subcontractor reported excessive moisture levels in the subgrade soil. Substantial delays arose, but the school district refused any change orders. This litigation ensued. The court noted that the contract did not vary the general rule that contractors are responsible for unforeseen contingencies.—*Mar-Paul Co. v. Jim Thorpe Area Sch. Dist., 2008 Pa. Dist. & Cnty. Dec. LEXIS 172, 7 Pa. D. & C.5th 387 (County Ct. 2008)*.

[2621] *Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005)*.

[2622] *West v. Peoples First Nat'l Bank & Trust Co., 378 Pa. 275, 106 A.2d 427, 1954 Pa. LEXIS 593 (1954)*.

[2623] *Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005)*.

unforeseen conditions, however, is constructive fraud by the other party withholding information about the condition at the time of the signing of the contract.[2624]

Similarly, under the doctrine of impossibility of performance applicable to the construction of contracts, if, after a contract is made, a party's performance is made impracticable through no fault of his or her own, the parties may waive the difficulties or terminate the agreement, ending all contractual obligations.[2625]

The Rules of Civil Procedure reveal that, among several listed affirmative defenses, impossibility of performance specifically shields a defendant from liability on a contract, and must be pleaded in a responsive pleading under the heading of "new matter."[2626] Accordingly, it is not available to a defendant at a preliminary objection stage.[2627]

Once impracticability of performance or frustration of purpose occurs, it is up to the parties to waive the difficulties or seek to terminate the agreement. If a party proceeds under the original contract, despite the impracticability that would otherwise justify his or her non-performance, and is then unable to perform as previously agreed, he or she can be liable for damages.[2628]

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[2624] Constructive fraud by suppression of truth in the making of the contract, *see,* supra, § 88.

Dep't of Gen. Servs. v. Pittsburgh Bldg. Co., 920 A.2d 973, 2007 Pa. Commw. LEXIS 160 (Pa.Commw. 2007).

Trail on fraud defense warranted

The school district contracted with general contractor and its site preparation subcontractor to build a new school. After work began, the subcontractor reported excessive moisture levels in the subgrade soil. The contractor and subcontractor raised the defense that the district withheld a narrative of the project prepared by its architect's consultant that discussed the subsoil conditions at the project and that cast doubt on winter grading of that soil. Instead, the district allegedly made assurances that soil conditions were appropriate. The court held that based on these allegations, factual issues precluding summary judgment arose concerning claims of constructive fraud that would supersede the contract's provisions and the general rule placing risk of unforeseen conditions on the contractor. Accordingly, the court denied summary judgment on both sides.—*Mar-Paul Co. v. Jim Thorpe Area Sch. Dist., 2008 Pa. Dist. & Cnty. Dec. LEXIS 172, 7 Pa. D. & C.5th 387 (County Ct. 2008)*.

[2625] *West v. Peoples First National Bank & Trust Co., 378 Pa. 275, 106 A.2d 427 (1954)*.

In re Appeal of Busik, 2000 Pa. Commw. LEXIS 461 (Pa. Commw. Ct. Aug. 9, 2000).

[2626] ***Pa.R.C.P. No. 1030***.

Refuse Mgmt. Sys. v. Consolidated Recycling & Transfer Sys., 448 Pa. Super. 402, 671 A.2d 1140 (1996).

[2627] *Wells v. Pittsburgh Board of Public Education, 31 Pa. Commw. 1, 374 A.2d 1009 (1977)*.

Dunlap-Hanna Pennsylvania Forms, Ch. 134 Defending the Action, P 134.32 New Matter—Affirmative Defenses (***Pa.R.C.P. No. 1030***).

[2628] *Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005)*.

7-28 Corbin on Contracts § 28.27.

§ 92. Adhesion Contracts and Unconscionability

Contracts or provisions of them may be unenforceable due to their unconscionability. They must be both procedurally and substantively unconscionable to be unenforceable.

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Adhesion contracts. An "adhesion contract" is defined as a standard form contract prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms.[607] Insurance contracts are generally considered contracts of adhesion because the parties are not of equal bargaining power and the consumer, should he or she want to obtain insurance, is forced to accept the non-negotiable terms of a

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[607] *Huegel v. Mifflin Constr. Co., 796 A.2d 350 (Pa. Super. Ct. 2002)*.

Robson v. E.M.C. Ins. Cos., 785 A.2d 507, 2001 PA Super 303 (2001).

standard form contract.[608] However, not every form contract can be termed a contract of adhesion.[609] Whether a contract is, in fact, an adhesion contract must be determined on an individual basis, in light of the particular circumstances and parties involved.[610]

Once a contract is deemed to be one of adhesion, its terms must be analyzed to determine whether the contract as a whole, or specific provisions of it, are unconscionable.[611] Merely because a contract is a contract of adhesion does not automatically render it unconscionable and unenforceable.[612]

Where the party allegedly having no meaningful choice in bargaining for a contract is a municipality, it is fair to conclude that there is substantially equal bargaining power, thereby negating any claim that the contract so entered into was one of adhesion.[613] Likewise, leases containing exculpatory clauses that could be considered contracts of adhesion will not be so termed when the parties involved are corporations with equal bargaining power.[614]

Unconscionability generally. The doctrine of unconscionability is both a statutory[615] and a common law defense to the enforcement of an allegedly unfair contract or provision in a contract.[616]

The party challenging the contract or provision bears the burden of affirmatively pleading and proving the unconscionability.[617] The issue of whether a contract is unconscionable is a question of law.[618]

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[608] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

Bishop v. Washington, 331 Pa. Super. 387, 480 A.2d 1088 (1984).

[609] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

[610] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

Commonwealth of Pennsylvania v. Monumental Properties, Inc., 10 Pa.Cmwlth. 596, 314 A.2d 333 (1973).

[611] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

Bishop v. Washington, 331 Pa. Super. 387, 480 A.2d 1088 (1984).

[612] *Huegel v. Mifflin Constr. Co., 796 A.2d 350 (Pa. Super. Ct. 2002)*.

Todd Heller, Inc., v. United Parcel Service, Inc., 754 A.2d 689, 2000 PA Super 171 (2000).

[613] *Robson v. E.M.C. Ins. Cos., 785 A.2d 507, 2001 PA Super 303 (2001)*.

[614] *Employers Liability Assurance Corp. v. Greenville Business Men's Asso., 423 Pa. 288, 224 A.2d 620, 1966 Pa. LEXIS 469 (1966)*.

[615] *See 13 Pa.C.S. § 2302*.

[616] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

Germantown Mfg. Co. v. Rawlinson, 341 Pa. Super. 42, 491 A.2d 138 (1985).

[617] *Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992)*.

Bishop v. Washington, 331 Pa. Super. 387, 480 A.2d 1088 (1984).

[618] *Huegel v. Mifflin Constr. Co., 796 A.2d 350 (Pa. Super. Ct. 2002)*.

Todd Heller, Inc., v. United Parcel Service, Inc., 754 A.2d 689, 2000 PA Super 171 (2000).

Elements of unconscionability. In order for a court to deem a contractual provision unconscionable, it must determine both that the contractual terms are unreasonably favorable to the drafter, and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.[619] The aspects entailing lack of meaningful choice and unreasonableness have been termed procedural and substantive unconscionability, respectively.[620]

Parties to a contract rarely consciously advert to any number of terms that are binding upon them. If such terms allocate the risks of the bargain in a manner that the parties should have reasonably expected, they are enforceable. If the terms of the contract suggest a reallocation of material risks, an attempted reallocation may be so extreme that regardless of apparent and genuine assent, a court will not enforce it. The parties will not be found to have agreed to an abnormal allocation of risks if the only evidence of it is an inconspicuous provision in the boilerplate of the standard form. At a minimum, the reallocation must be physically conspicuous. Beyond that, it must have been manifested in a fashion comprehensible to the party against whom it is sought to be enforced. Finally, such party must have had a reasonable choice in relation to such reallocation.[621]

In Pennsylvania, it is difficult for a party to a written contract to successfully argue that he or she should be freed from the terms of the contract due to unfairness. It is expected that parties will read contracts and if they sign them agree to be bound by their terms. This is true whether or not the complaining party took the trouble to actually read the agreement before signing. Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains. Moreover, it is difficult to argue that a contract is unconscionable when the complaining party had the right to cancel it. It is a firmly established principle of Pennsylvania law that one who enters a contract should do so only after due reflection of the possible consequences that could have been expected by a reasonably intelligent person, who cannot rely on the law to remedy his or her recklessness; whether

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Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992).

Bishop v. Washington, 331 Pa. Super. 387, 480 A.2d 1088 (1984).

[619] *Salley v. Option One Mortg. Corp., 592 Pa. 323, 925 A.2d 115 (2007)*.

Witmer v. Exxon Corp., 495 Pa. 540, 434 A.2d 1222 (1981).

Bayne v. Smith, 965 A.2d 265, 2009 PA Super 11 (Pa. Super. Ct. 2009).

Court was hard pressed to find unconscionable a contract that appellant had signed willingly 17 times prior to the 2002 tax season. Moreover, appellant was able to find employment immediately following her departure from employment with appellee. Accordingly, the trial court properly found the contract was not unconscionable. As the contract was not unconscionable, appellant's other arguments must fail.—*H & R Block Eastern Tax Servs. v. Zarilla, 69 A.3d 246 (Pa. Super. 2013)*.

Huegel v. Mifflin Constr. Co., 796 A.2d 350 (Pa. Super. Ct. 2002) (defendant failed to sustain the burden of proof).

Todd Heller, Inc., v. United Parcel Service, Inc., 754 A.2d 689, 2000 PA Super 171 (2000).

Denlinger, Inc. v. Dendler, 415 Pa. Super. 164, 608 A.2d 1061 (1992).

[620] *Salley v. Option One Mortg. Corp., 592 Pa. 323, 925 A.2d 115 (2007)*.

Bayne v. Smith, 965 A.2d 265, 2009 PA Super 11 (Pa. Super. Ct. 2009).

[621] *Strong v. Option One Mortgage Corp. (In re Strong), 356 B.R. 121 (Bankr. E.D. Pa. 2004)*, aff'd, *2005 U.S. Dist. LEXIS 12136 (E.D. Pa. June 20, 2005)*.

Germantown Mfg. Co. v. Rawlinson, 341 Pa. Super. 42, 491 A.2d 138 (1985).

a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction.[622]

In evaluating claims of unconscionability, courts generally recognize two categories: procedural, or unfair surprise unconscionability, and substantive unconscionability. Procedural unconscionability pertains to the process by which an agreement is reached and the form of an agreement, including the use therein of fine print and convoluted or unclear language.[623] This type of unconscionability involves, for example, material, risk-shifting contractual terms that are not typically expected by the party who is being asked to assent to them and often appear in the boilerplate of a printed form.[624] Substantive unconscionability refers to contractual terms that are unreasonably or grossly favorable to one side and to which the disfavored party does not assent.[625] Thus, unconscionability requires a two-fold determination: that the contractual terms are unreasonably favorable to the drafter and that there is no meaningful choice on the part of the other party regarding acceptance of the provisions.[626]

The Supreme Court of Pennsylvania and the federal courts in Pennsylvania refuse to hold contracts unconscionable simply because of a disparity in bargaining power.[627]

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[622] *Strong v. Option One Mortgage Corp. (In re Strong), 356 B.R. 121 (Bankr. E.D. Pa. 2004)*, aff'd, *2005 U.S. Dist. LEXIS 12136 (E.D. Pa. June 20, 2005)*.

[623] *Grimm v. First National Bank of Pennsylvania, 578 F. Supp. 2d 785 (W.D. Pa. 2008)* (noting that Pennsylvania courts applying law of unconscionability have held that an arbitration provision is enforceable, thus finding that the clause is not unconscionable, where it is not printed more prominently than other parts of the contract).

Red Bell Brewing Co. v. GS Capital, L.P. (In re RBGSC Inv. Corp.), 242 B.R. 851 (Bankr. E.D. Pa. 2000).

[624] *Grimm v. First National Bank of Pennsylvania, 578 F. Supp. 2d 785 (W.D. Pa. 2008)*.

[625] *Grimm v. First National Bank of Pennsylvania, 578 F. Supp. 2d 785 (W.D. Pa. 2008)*.

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[626] *Grimm v. First National Bank of Pennsylvania, 578 F. Supp. 2d 785 (W.D. Pa. 2008)*.

[627] *Witmer v. Exxon Corp., 495 Pa. 540, 434 A.2d 1222 (1981)*.

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  We use data from Instagram and other Meta Company Products, as well as from third-party partners, to show you ads, offers, and other sponsored content that we believe will be meaningful to you. And we try to make that content as relevant as all your other experiences on Instagram.

- **Research and innovation.**
  We use the information we have to study our Service and collaborate with others on research to make our Service better and contribute to the well-being of our community.

How Our Service Is Funded

Instead of paying to use Instagram, by using the Service covered by these Terms, you acknowledge that we can show you ads that businesses and organizations pay us to promote on and off the Meta Company Products. We use your personal data, such as information about your activity and interests, to show you ads that are more relevant to you.

We show you relevant and useful ads without telling advertisers who you are. We don't sell your personal data. We allow advertisers to tell us things like their business goal and the kind of audience they want to see their ads. We then show their ad to people who might be interested. We also provide advertisers with reports about the performance of their ads to help them understand how people are interacting with their content on and off Instagram. For example, we provide general demographic and interest information to advertisers to help them better understand their audience. We don't share information that directly identifies you (information such as your name or email address that by itself can be used to contact you or identifies who you are) unless you give us specific permission. Learn more about how Instagram ads work here.

You may see branded content on Instagram posted by account holders who promote products or services based on a commercial relationship with the business partner mentioned in their content. You can learn more about this here.

The Data Policy
Providing our Service requires collecting and using your information. The **Data Policy** explains how we collect, use, and share information across the **Meta Products**. It also explains the many ways you can control your information, including in the **Instagram Privacy and Security Settings**. You must agree to the Data Policy to use Instagram.

Your Commitments
In return for our commitment to provide the Service, we require you to make the below commitments to us.

Who Can Use Instagram. We want our Service to be as open and inclusive as possible, but we also want it to be safe, secure, and in accordance with the law. So, we need you to commit to a few restrictions in order to be part of the Instagram community.

- You must be at least 13 years old.
- You must not be prohibited from receiving any aspect of our Service under applicable laws or engaging in payments related Services if you are on an applicable denied party listing.
- We must not have previously disabled your account for violation of law or any of our policies.
- You must not be a convicted sex offender.

How You Can't Use Instagram. Providing a safe and open Service for a broad community requires that we all do our part.

- **You can't impersonate others or provide inaccurate information.**
  You don't have to disclose your identity on Instagram, but you must provide us with accurate and up to date information (including registration information), which may include providing personal data. Also, you may not impersonate someone or something you aren't, and you can't create an account for someone else unless you have their express permission.
- **You can't do anything unlawful, misleading, or fraudulent or for an illegal or unauthorized purpose.**
- **You can't violate (or help or encourage others to violate) these Terms or our policies, including in particular the Instagram Community Guidelines, Meta Platform Terms and Developer Policies, and Music Guidelines.**
  If you post branded content, you must comply with our Branded Content Policies, which require you to use our branded content tool. Learn how to report conduct or content in our Help Center.

- **You can't do anything to interfere with or impair the intended operation of the Service.**
  This includes misusing any reporting, dispute, or appeals channel, such as by making fraudulent or groundless reports or appeals.

- **You can't attempt to create accounts or access or collect information in unauthorized ways.**
  This includes creating accounts or collecting information in an automated way without our express permission.

- **You can’t sell, license, or purchase any account or data obtained from us or our Service.**
  This includes attempts to buy, sell, or transfer any aspect of your account (including your username); solicit, collect, or use login credentials or badges of other users; or request or collect Instagram usernames, passwords, or misappropriate access tokens.

- **You can't post someone else’s private or confidential information without permission or do anything that violates someone else's rights, including intellectual property rights (e.g., copyright infringement, trademark infringement, counterfeit, or pirated goods).**
  You may use someone else's works under exceptions or limitations to copyright and related rights under applicable law. You represent you own or have obtained all necessary rights to the content you post or share. Learn more, including how to report content that you think infringes your intellectual property rights, **here**.

- **You can’t modify, translate, create derivative works of, or reverse engineer our products or their components.**

- **You can't use a domain name or URL in your username without our prior written consent.**

Permissions You Give to Us. As part of our agreement, you also give us permissions that we need to provide the Service.

- **We do not claim ownership of your content, but you grant us a license to use it.**
  Nothing is changing about your rights in your content. We do not claim ownership of your content that you post on or through the Service and you are free to share your content with anyone else, wherever you want. However, we need certain legal permissions from you (known as a "license") to provide the Service. When you share, post, or upload content that is covered by intellectual property rights (like photos or videos) on or in connection with our Service, you hereby grant to us a non-exclusive, royalty-free, transferable, sub-licensable, worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings). This license will end when your content is deleted from our systems. You can delete content individually or all at once by deleting your account. To learn more about how we use information, and how to control or delete your content, review the Data Policy and visit the Instagram Help Center.

- **Permission to use your username, profile picture, and information about your relationships and actions with accounts, ads, and sponsored content.**
  You give us permission to show your username, profile picture, and information about your actions (such as likes) or relationships (such as follows) next to or in connection with accounts, ads, offers, and other sponsored content that you follow or engage with that are displayed on Meta Products, without any compensation to you. For example, we may show that you liked a sponsored post created by a brand that has paid us to display its ads on Instagram. As with actions on other content and follows of other accounts, actions on sponsored content and follows of sponsored accounts can be seen only by people who have permission to see that content or follow. We will also respect your ad settings. You can learn more here about your ad settings.

- **You agree that we can download and install updates to the Service on your device.**

Additional Rights We Retain

- If you select a username or similar identifier for your account, we may change it if we believe it is appropriate or necessary (for example, if it infringes someone's intellectual property or impersonates another user).

- If you use content covered by intellectual property rights that we have and make available in our Service (for example, images, designs, videos, or sounds we provide that you add to content you create or share), we retain all rights to our content (but not yours).

- You can only use our intellectual property and trademarks or similar marks as expressly permitted by our **Brand Guidelines** or with our prior written permission.

- You must obtain written permission from us or under an open source license to modify, create derivative works of, decompile, or otherwise attempt to extract source code from us.

Content Removal and Disabling or Terminating Your Account

- We can remove any content or information you share on the Service if we believe that it violates these Terms of Use, our policies (including our **Instagram Community Guidelines**), or we are permitted or required to do so by law. We can refuse to provide or stop providing all or part of the Service to you (including terminating or disabling your access to the Meta Products and Meta Company Products) immediately to protect our community or services, or if you create risk or legal exposure for us, violate these Terms of Use or our policies (including our **Instagram Community Guidelines**), if you repeatedly infringe other people's intellectual property rights, or where we are permitted or required to do so by law. We can also terminate or change the Service, remove or block content or information shared on our Service, or stop providing all or part of the Service if we determine that doing so is reasonably necessary to avoid or mitigate adverse legal or regulatory impacts on us. If you believe your account has been terminated in error, or you want to disable or permanently delete your account, consult our **Help Center**. When you request to delete content or your account, the deletion process will automatically begin no more than 30 days after your request. It may take up to 90 days to delete content after the deletion process begins. While the deletion process for such content is being undertaken, the content is no longer visible to other users, but remains subject to these Terms of Use and our Data Policy. After the content is deleted, it may take us up to another 90 days to remove it from backups and disaster recovery systems.

- Content will not be deleted within 90 days of the account deletion or content deletion process beginning in the following situations:

    - where your content has been used by others in accordance with this license and they have not deleted it (in which case this license will continue to apply until that content is deleted); or

    - where deletion within 90 days is not possible due to technical limitations of our systems, in which case, we will complete the deletion as soon as technically feasible; or

    - where deletion would restrict our ability to:

        - investigate or identify illegal activity or violations of our terms and policies (for example, to identify or investigate misuse of our products or systems);

        - protect the safety and security of our products, systems, and users;
        - comply with a legal obligation, such as the preservation of evidence; or
        - comply with a request of a judicial or administrative authority, law enforcement, or a government agency;
    - in which case, the content will be retained for no longer than is necessary for the purposes for which it has been retained (the exact duration will vary on a case-by-case basis).
- If you delete or we disable your account, these Terms shall terminate as an agreement between you and us, but this section and the section below called "Our Agreement and What Happens if We Disagree" will still apply even after your account is terminated, disabled, or deleted.

Our Agreement and What Happens if We Disagree

Our Agreement.

- Your use of music on the Service is also subject to our Music Guidelines, and your use of our API is subject to our Meta Platform Terms and Developer Policies. If you use certain other features or related services, you will be provided with an opportunity to agree to additional terms that will also become a part of our agreement. For example, if you use payment features, you will be asked to agree to the **Community Payment Terms**. If any of those terms conflict with this agreement, those other terms will govern.
- If any aspect of this agreement is unenforceable, the rest will remain in effect.
- Any amendment or waiver to our agreement must be in writing and signed by us. If we fail to enforce any aspect of this agreement, it will not be a waiver.
- We reserve all rights not expressly granted to you.

Who Has Rights Under this Agreement.

- Our past, present, and future affiliates and agents, including Instagram LLC, can invoke our rights under this agreement in the event they become involved in a dispute. Otherwise, this agreement does not give rights to any third parties.
- You cannot transfer your rights or obligations under this agreement without our consent.
- Our rights and obligations can be assigned to others. For example, this could occur if our ownership changes (as in a merger, acquisition, or sale of assets) or by law.

Who Is Responsible if Something Happens.

- Our Service is provided "as is," and we can't guarantee it will be safe and secure or will work perfectly all the time. TO THE EXTENT PERMITTED BY LAW, WE ALSO DISCLAIM ALL WARRANTIES, WHETHER EXPRESS OR IMPLIED, INCLUDING THE IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS FOR A PARTICULAR PURPOSE, TITLE, AND NON-INFRINGEMENT.

- We also don’t control what people and others do or say, and we aren’t responsible for their (or your) actions or conduct (whether online or offline) or content (including unlawful or objectionable content). We also aren’t responsible for services and features offered by other people or companies, even if you access them through our Service.

- Our responsibility for anything that happens on the Service (also called "liability") is limited as much as the law will allow. If there is an issue with our Service, we can't know what all the possible impacts might be. You agree that we won't be responsible ("liable") for any lost profits, revenues, information, or data, or consequential, special, indirect, exemplary, punitive, or incidental damages arising out of or related to these Terms, even if we know they are possible. This includes when we delete your content, information, or account. Our aggregate liability arising out of or relating to these Terms will not exceed the greater of $100 or the amount you have paid us in the past twelve months.

- You agree to defend (at our request), indemnify and hold us harmless from and against any claims, liabilities, damages, losses, and expenses, including without limitation, reasonable attorney's fees and costs, arising out of or in any way connected with these Terms or your use of the Service. You will cooperate as required by us in the defense of any claim. We reserve the right to assume the exclusive defense and control of any matter subject to indemnification by you, and you will not in any event settle any claim without our prior written consent.

How We Will Handle Disputes.

- Except as provided below, **you and we agree that any cause of action, legal claim, or dispute between you and us arising out of or related to these Terms or Instagram ("claim(s)") must be resolved by arbitration on an individual basis. Class actions and class arbitrations are not permitted**; you and we may bring a claim only on your own behalf and cannot seek relief that would affect other Instagram users. If there is a final judicial determination that any particular claim (or a request for particular relief) cannot be arbitrated in accordance with this provision's limitations, then only that claim (or only that request for relief) may be brought in court. All other claims (or requests for relief) remain subject to this provision.

- Instead of using arbitration, you or we can bring claims in your local "small claims" court, if the rules of that court will allow it. If you don't bring your claims in small claims court (or if you or we appeal a small claims court judgment to a court of general jurisdiction), then the claims must be resolved by binding, individual arbitration. The American Arbitration Association will administer all arbitrations under its Consumer Arbitration Rules. **You and we expressly waive a trial by jury.**

  The following claims don't have to be arbitrated and may be brought in court: disputes related to intellectual property (like copyrights and trademarks), violations of our Platform Policy, or efforts to interfere with the Service or engage with the Service in unauthorized ways (for example, automated ways). In addition, issues relating to the scope and enforceability of the arbitration provision are for a court to decide.

  This arbitration provision is governed by the Federal Arbitration Act.

  You can opt out of this provision within 30 days of the date that you agreed to these Terms. To opt out, you must send your name, residence address, username, email address or phone number you use for your Instagram account, and a clear statement that you want to opt out of this arbitration agreement, and you must send them here: Meta Platforms, Inc. ATTN: Instagram Arbitration Opt-out, 1601 Willow Rd., Menlo Park, CA 94025.

- Before you commence arbitration of a claim, you must provide us with a written Notice of Dispute that includes your name, residence address, username, email address or phone number you use for your Instagram account, a detailed description of the dispute, and the relief you seek. Any Notice of Dispute you send to us should be mailed to Meta Platforms, Inc., ATTN: Instagram Arbitration Filing, 1601 Willow Rd. Menlo Park, CA 94025. Before we commence arbitration, we will send you a Notice of Dispute to the email address you use with your Instagram account, or other appropriate means. If we are unable to resolve a dispute within thirty (30) days after the Notice of Dispute is received, you or we may commence arbitration.

- We will pay all arbitration filing fees, administration and hearing costs, and arbitrator fees for any arbitration we bring or if your claims seek less than $75,000 and you timely provided us with a Notice of Dispute. For all other claims, the costs and fees of arbitration shall be allocated in accordance with the arbitration provider's rules, including rules regarding frivolous or improper claims.

- For any claim that is not arbitrated or resolved in small claims court, you agree that it will be resolved exclusively in the U.S. District Court for the Northern District of California or a state court located in San Mateo County. You also agree to submit to the personal jurisdiction of either of these courts for the purpose of litigating any such claim.

- The laws of the State of California, to the extent not preempted by or inconsistent with federal law, will govern these Terms and any claim, without regard to conflict of law provisions.

Unsolicited Material.
We always appreciate feedback or other suggestions, but may use them without any restrictions or obligation to compensate you for them, and are under no obligation to keep them confidential.

Updating These Terms
We may change our Service and policies, and we may need to make changes to these Terms so that they accurately reflect our Service and policies. Unless otherwise required by law, we will notify you (for example, through our Service) before we make changes to these Terms and give you an opportunity to review them before they go into effect. Then, if you continue to use the Service, you will be bound by the updated Terms. If you do not want to agree to these or any updated Terms, you can delete your account, **here**.

Revised: 26 July 2022

Noncompete Legal Summary

In Pennsylvania, "[r]estrictive covenants are enforceable only if they are: (1) ancillary to an employment relationship between an employee and an employer; (2) supported by adequate consideration; (3) the restrictions are reasonably limited in duration and geographic extent; and (4) the restrictions are designed to protect the legitimate interests of the employer." *Socko v. Mid-Atlantic Sys. of CPA, Inc.*, 126 A.3d 1266, 1274 (Pa. 2015). "[R]estrictive covenants are not favored in Pennsylvania and have been historically viewed as a trade restraint that prevents a former employee from earning a living." *Hess v. Gebhard & Co.*, 808 A.2d 912, 917 (Pa. 2002). In "determining whether to enforce a non-competition covenant, the Court must balance the employer's protectible business interest against the oppressive effect on the employee's ability to earn a living in his or her chosen profession, trade or occupation." *Id.* at 920.

"As with other contracts, for an employment agreement containing a restrictive covenant to be enforced, consideration is crucial . . . . Thus, to be valid, a covenant not to compete must be consummated with the exchange of consideration." *Socko*, 126 A.2d at 1274-75. A "restrictive covenant, regardless of whether it is reasonable, will not be enforced if no consideration was exchanged for its execution." *Shepherd v. Pittsburgh Glass Works, LLC*, 25 A.3d 1233, 1243 (Pa. Super. Ct. 2011).

When an employee is already employed at the time a non-compete is presented, the continuation of an at-will employment relationship is not sufficient consideration. *See Socko*, 126 A.3d at 1275; *George W. Kistler, Inc. v. O'Brien*, 347 A.2d 311, 316 (Pa. 1975). Rather, "when a non-competition clause is required after an employee has commenced his or her employment, it is enforceable only if the employee receives 'new' and valuable consideration—that is, some corresponding benefit or a favorable change in employment status." *Socko*, 126 A.3d at 1275.

A party challenging the covenant's duration and geographic scope has the burden of proving such restrictions are unreasonable. *Wainwright's Travel Service, Inc. v. Schmolk*, 500 A.2d 476, 478-79 (Pa. Super. Ct.). The standard by which duration and scope are judged is whether the covenant "imposes restrictions broader than necessary to protect the employer." *Sidco Paper Co. v. Aaron*, 351 A.2d 250, 254 (1976). The reasonableness of the geographic scope and duration is a highly factual inquiry. *WellSpan Health v. Bayliss*, 869 A.2d 990, 999 (Pa. Super. Ct. 2005). A court may use its equitable power to modify unreasonable terms of restrictive covenants, such as overbroad geographic limits or duration. *See Quaker City Engine Rebuilders, Inc. v. Toscano*, 535 A.2d 1083, 1089 (Pa. Super. Ct. 1987); *Insulation Corp. of America v. Brobston*, 667 A.2d 729, 737 (Pa. Super. Ct. 1995).

"The presence of a legitimate, protectable business interest of the employer is a threshold requirement for an enforceable non-competition covenant." *WellSpan Health*, 869 A.2d at 997 (citing *Hess*, 808 A.2d at 920)). "Generally, interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills." *Id.* "A trade secret does not include an employee's aptitude, skill, dexterity, manual a nd mental ability, or other subjective knowledge." *Id.* "If the covenant is . . . for some other purpose, as for example, eliminating or repressing competition or to keep the employee from competing so that the employer can gain an economic advantage, the covenant will not be enforced." *Hess*, 808 A.2d at 920-21.

If the Court finds a protectable business interest, this "satisfies *only* the threshold question in a non-competition covenant dispute." *WellSpan Health.* 869 A.2d at 999 (emphasis in original). The Court must then balance "the employer's protectable business interest against the employee's interest in earning a living. Then, the court balances the employer and employee interests with the interests of the public." *Id.*

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

For Release

FTC Proposes Rule to Ban Noncompete Clauses, Which Hurt Workers and Harm Competition

Agency estimates new rule could increase workers' earnings by nearly $300 billion per year

January 5, 2023
Tags: Competition | Office of Policy Planning | Bureau of Competition | Unfair Methods of Competition

The Federal Trade Commission proposed a new rule that would ban employers from imposing noncompetes on their workers, a widespread and often exploitative practice that suppresses wages, hampers innovation, and blocks entrepreneurs from starting new businesses. By stopping this practice, the agency estimates that the new proposed rule could increase wages by nearly $300 billion per year and expand career opportunities for about 30 million Americans.

The FTC is seeking public comment on the proposed rule, which is based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act.

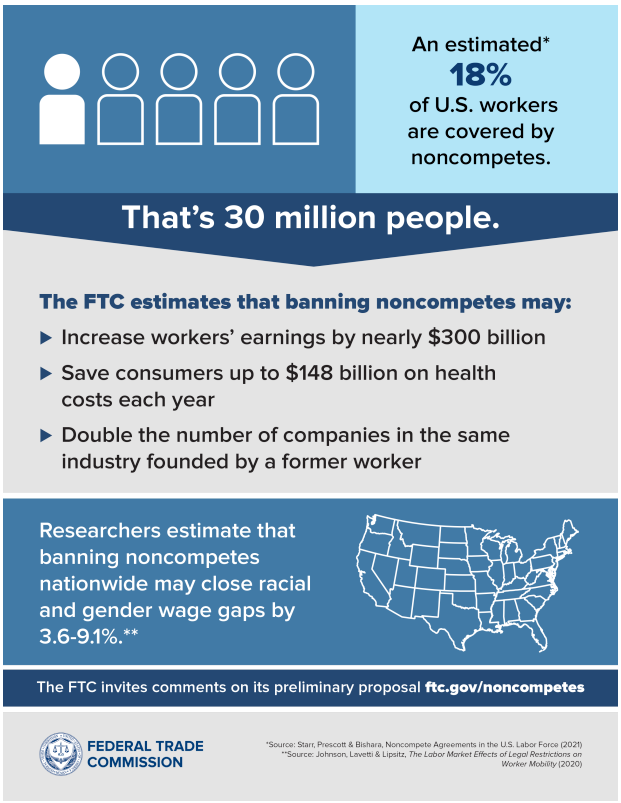
"The freedom to change jobs is core to economic liberty and to a competitive, thriving economy," said Chair Lina M. Khan. "Noncompetes block workers from freely switching jobs, depriving them of higher wages and better working conditions, and depriving businesses of a talent pool that they need to build and expand. By ending this practice, the FTC's proposed rule would promote greater dynamism, innovation, and healthy competition."

Companies use noncompetes for workers across industries and job levels, from hairstylists and warehouse workers to doctors and business executives. In many cases, employers use their outsized bargaining power to coerce workers into signing these contracts. Noncompetes harm competition in U.S. labor markets by blocking workers from pursuing better opportunities and by preventing employers from hiring the best available talent.

"Research shows that employers' use of noncompetes to restrict workers' mobility significantly suppresses workers' wages—even for those not subject to noncompetes, or subject to noncompetes that are unenforceable under state

law," said Elizabeth Wilkins, Director of the Office of Policy Planning. "The proposed rule would ensure that employers can't exploit their outsized bargaining power to limit workers' opportunities and stifle competition."

The evidence shows that noncompete clauses also hinder innovation and business dynamism in multiple ways—from preventing would-be entrepreneurs from forming competing businesses, to inhibiting workers from bringing innovative ideas to new companies. This ultimately harms consumers; in markets with fewer new entrants and greater concentration, consumers can face higher prices—as seen in the health care sector.



To address these problems, the FTC's proposed rule would generally prohibit employers from using noncompete clauses. Specifically, the FTC's new rule would make it illegal for an employer to:

- enter into or attempt to enter into a noncompete with a worker;
- maintain a noncompete with a worker; or
- represent to a worker, under certain circumstances, that the worker is subject to a noncompete.

The proposed rule would apply to independent contractors and anyone who works for an employer, whether paid or unpaid. It would also require employers to rescind existing noncompetes and actively inform workers that they are no longer in effect.

The proposed rule would generally not apply to other types of employment restrictions, like non-disclosure agreements. However, other types of employment restrictions could be subject to the rule if they are so broad in scope that they function as noncompetes.

This NPRM aligns with the FTC's recent statement to reinvigorate Section 5 of the FTC Act, which bans unfair methods of competition. The FTC recently used its Section 5 authority to ban companies from imposing onerous noncompetes on their workers. In one complaint, the FTC took action against a Michigan-based security guard company and its key executives for using coercive noncompetes on low-wage employees. The Commission also ordered two of the largest U.S. glass container manufacturers to stop imposing noncompetes on their workers because they obstruct competition and impede new companies from hiring the talent needed to enter the market. This NPRM and recent enforcement actions make progress on the agency's broader initiative to use all of its tools and authorities to promote fair competition in labor markets.

The Commission voted 3-1 to publish the Notice of Proposed Rulemaking, which is the first step in the FTC's rulemaking process. Chair Khan, Commissioner Rebecca Kelly Slaughter and Commissioner Alvaro Bedoya issued a statement. Commissioner Slaughter, joined by Commissioner Bedoya, issued an additional statement. Commissioner Christine S. Wilson voted no and also issued a statement.

The NPRM invites the public to submit comments on the proposed rule. The FTC will review the comments and may make changes, in a final rule, based on the comments and on the FTC's further analysis of this issue. The comment period is open through March 20, 2023.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

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§ 82. Mistake

While a unilateral mistake due to the negligence of the mistaken party generally affords no basis for relief, a mistake with reference to a material part of the subject matter of a contract may render such contract voidable.

Library References

Dunlap-Hanna, Pennsylvania Forms

LexisNexis® CD—Dunlap-Hanna, Pennsylvania Forms (CD-ROM)

LexisNexis® CD—Pennsylvania Transaction Guide: Legal Forms (CD-ROM)

Pennsylvania Civil Practice, 5th Ed.

Pennsylvania Transaction Guide: Legal Forms

Shepard's Pennsylvania Citations

Shepard's Atlantic Reporter Citations

Computer Contracts

Commercial Law and Practice Guide

Construction Law

Corbin on Contracts

Entertainment Industry Contracts

Forms and Procedures Under the UCC

Government Contracts: Law, Administration and Procedure

Corbin on Pennsylvania Contracts

Transactional Skills: Contract Preparation and Negotiating (What to Do—and What Not to Do)

Accounting for Government Contracts: Federal Acquisition Regulation

Pratt's Government Contracting Law Report

Contracts: Law in Action, Volume I: The Introductory Course

Contracts: Law in Action: Volume II: The Advanced Course

When parties assume to contract, and there is a mistake with reference to a material part of the subject matter, there is no contract, because of the want of mutual assent necessary to create one.[474] Of course, a contract is valid if a mistake relates to an immaterial fact on which the assent of the parties was not predicated.[475]

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[474] *United States ex rel. Whitaker v. Callaway, 371 F. Supp. 585 (E.D. Pa. 1974)*, aff'd without op., *510 F.2d 971 (3d Cir. Pa. 1975)*.

[475] *Sankey's Ex'rs v. First Nat'l Bank, 78 Pa. 48, 1875 Pa. LEXIS 94 (1875)*.

On the one hand, if a mistake is not mutual, but unilateral,[476] and is not due to the fault of the party not mistaken, but to the negligence of the one who acted under the mistake,[477] it affords no basis for relief. On the other hand, where there is mistake on one side and fraud on the other, relief is available.[478] Likewise, irrespective of active fraud, if the other party knows or has good reason to know of the unilateral mistake, relief will be granted to the same extent as a mutual mistake.[479]

Thus, ordinarily, a party to an executory contract will be granted no relief from his or her obligation thereunder because of his or her unilateral mistake in preparing a bid on which the contract was awarded.[480] However, if the

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[476] *Herman v. Stern, 419 Pa. 272, 213 A.2d 594 (1965)* (unilateral mistake will not void a contract).

McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A.2d 283 (1969).

[477] *McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A.2d 283 (1969)*.

Commonwealth, Dep't of General Services v. Collingdale Millwork Co., 71 Pa. Commw. 286, 454 A.2d 1176, 1983 Pa. Commw. LEXIS 1238 (1983) (unilateral mistake in formation of contract will generally bar equitable relief requested by party who has made mistake).

Woodmen of World Life Ins. Co. v. Arnold, 22 Pa. D. & C.2d 607 (1960), aff'd, *194 Pa. Super. 256, 166 A.2d 290 (1960)*.

Risk of mistake

In a contractual matter, a party bears the risk of mistake when he or she is aware, at the time the contract is made, that he or she has only limited knowledge regarding the facts to which the mistake relates but treats such limited knowledge as sufficient. After settling a medical malpractice claim based on allegedly negligent care received by her decedent at the hospital where the defendant was employed as an emergency room physician, the plaintiff executed a joint tortfeasor release, agreeing to release from liability the hospital and its agents, ostensible agents, servants, etc. in regard to the conduct that led to the plaintiff's lawsuit. The plaintiff then sued the defendant, who argued that he was free from liability under the terms of the release. The court held that the release clearly and unambiguously included the defendant within its ambit, despite the fact that he was an independent contractor who was insured by the same insurance company who had hired the hospital's counsel to protect its own interests. After settlement negotiations but before signing the release, the plaintiff was alerted to unusual language in the release, inserted to protect the defendant in light of recent case law suggesting that emergency room contracting physicians might be found to be ostensible agents of hospitals. The plaintiff bore the risk of mistake for signing a release of whose scope she was not fully aware, held the court, and her counsel should have realized that the defendant was covered thereunder.—*Whitehill v. Matthews, 40 Pa. D. & C.4th 58 (C.P. 1998)*.

[478] *McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A.2d 283 (1969)*.

[479] *Kearns v. Minnesota Mut. Life Ins. Co., 75 F. Supp. 2d 413 (E.D. Pa. 1999)*.

The mistaken party may void the contract if the mistake is regarding a material term or the mistaken party may enforce the contract so that the other party for whose benefit the contract was performed will not be unjustly enriched.—*Lapio v. Robbins, 729 A.2d 1229 (Pa. Super. Ct. 1999)*.

McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A.2d 283 (1969).

Appel Media, Inc. v. Clarion State College, 15 Pa. Commw. 635, 327 A.2d 420 (1974).

Clarke Mortg. Co. v. First Federal Sav. & Loan Asso., 42 Pa. D. & C.2d 251 (1967).

[480] *Saligman v. United States, 56 F. Supp. 505 (D. Pa. 1944)*.

party receiving the bid or offer for the contract knows or has reason to know, because of the amount of the bid or otherwise, that the bidder has made a mistake, the contract is voidable by the bidder.[481]

It is generally accepted that a mistake as to value cannot be the basis of an action for rescission or similar suits.[482]

A unilateral mistake that is not caused by the party not mistaken, but by the negligence of one now claiming mistake, affords no basis for relief from an agreement.[483]

Consequences of bargain. The law demands of every person who bargains with another that he or she should do so only after due reflection of the possible consequences of his or her bargain, and if he or she misjudges the consequences that could have been expected by a reasonably intelligent person, he or she cannot rely on the law to remedy his or her fecklessness.[484]

Mistake of law. On the one hand, a mistake in a matter of law,[485] or a mistake because of ignorance of the law,[486] not induced by the party seeking to take advantage of it, will not affect the validity of a contract executed on one

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[481] *Saligman v. United States, 56 F. Supp. 505 (D. Pa. 1944)*.

Bethel Plumbing & Heating Co. v. General State Authority, 32 Pa. D. & C.2d 533 (1963).

[482] *United States v. Goldberg, 159 F. Supp. 151 (D. Pa. 1956)*.

[483] *Peterson v. Ratasiewicz, 48 Pa. D. & C.4th 214 (C.P. 2000)* (knowledge of contents of agreement shown).

[484] *Design & Development, Inc. v. Vibromatic Mfg., Inc., 58 F.R.D. 71 (E.D. Pa. 1973)*.

New Charter Coal Co. v. McKee, 411 Pa. 307, 191 A.2d 830 (1963).

[485] *Pittsburg Valve, Foundry & Constr. Co. v. Klingelhofer, 210 Pa. 513, 60 A. 161 (1904)*.

Fry v. National Glass Co., 207 Pa. 505, 56 A. 1063 (1904).

Windle v. Crescent Pipe-Line Co., 186 Pa. 224, 40 A. 310 (1898).

Villani v. Italian Workingmen Bldg. & Loan Ass'n, 129 Pa. Super. 330, 195 A. 476, 1937 Pa. Super. LEXIS 345 (1937).

[486] *Clark v. Lehigh & Wilkes-Barre Coal Co., 250 Pa. 304, 95 A. 462 (1915)*.

Light v. Light, 21 Pa. 407 (1853).

Note containing waiver

A note containing a waiver of the statute exemption of $300 worth of property from execution for debt was sued, execution issued on the judgment and land levied on. Defendant then claimed the exemption. Plaintiff did not assert his rights under the waiver, but entered into a new arrangement, agreeing to leave a part of the land as a home to defendant and wife, and they, in consideration thereof, indorsed a waiver of the exemption on the writ. The new agreement, though made in ignorance of the law, was binding on the plaintiff.—*Beegle v. Wentz, 55 Pa. 369 (1867)*.

Right to maintain lines

Where a turnpike company granted a telegraph and telephone company the right to maintain its lines over the turnpike for 99 years for a certain rental, the latter cannot, after paying rent for 11 years, rescind on the ground that it might have located its lines upon the turnpike without consent of the company.—*Berks & Dauphin Turnpike Road v. American Tel. & Tel. Co., 240 Pa. 228, 87 A. 580 (1913)*.

side. On the other hand, a mistake of law when coupled with misrepresentations is a ground for avoiding a contract.[487]

P.L.E.

End of Document

[487] *Estate of Potter, 6 Pa. Super. 627 (1898)*.

§ 84. —Mutual Mistake

Generally, a contract made under a mutual mistake as to an essential fact which formed the inducement to the agreement may be rescinded on discovery of the mistake.

Library References

Dunlap-Hanna, Pennsylvania Forms

LexisNexis® CD—Dunlap-Hanna, Pennsylvania Forms (CD-ROM)

LexisNexis® CD—Pennsylvania Transaction Guide: Legal Forms (CD-ROM)

Pennsylvania Civil Practice, 5th Ed.

Pennsylvania Transaction Guide: Legal Forms

Shepard's Pennsylvania Citations

Shepard's Atlantic Reporter Citations

Computer Contracts

Commercial Law and Practice Guide

Construction Law

Corbin on Contracts

Entertainment Industry Contracts

Forms and Procedures Under the UCC

Government Contracts: Law, Administration and Procedure

Corbin on Pennsylvania Contracts

Transactional Skills: Contract Preparation and Negotiating (What to Do—and What Not to Do)

Accounting for Government Contracts: Federal Acquisition Regulation

Pratt's Government Contracting Law Report

Contracts: Law in Action, Volume I: The Introductory Course

Contracts: Law in Action: Volume II: The Advanced Course

The doctrine of mutual mistake of fact serves as a defense to the formation of a contract and occurs when the parties to the contract have an erroneous belief as to a basic assumption of the contract at the time of formation that will have a material effect on the agreed exchange as to either party. A mutual mistake occurs when the written instrument fails to set forth the true agreement of the parties. The language of the instrument should be interpreted in the light of the subject matter, the apparent object or purpose of the parties, and the conditions existing when it

was executed.[501] Mutual mistake occurs when a fact in existence at the time of the formation of the contract, but unknown to both parties, will materially affect the parties' performance of the contract.[502]

Generally, a contract made under a mutual mistake as to an essential fact that formed the inducement to the agreement may be rescinded on discovery of the mistake,[503] provided the parties can be placed in their former position with reference to the subject matter of the contract.[504] Thus, equity has so far contented itself with relief in cases of mutual mistake of legal rights where it was possible to restore both parties to *status quo*. If that cannot be fully done, equity will not assist one party to unload the burdens on the other.[505]

To justify reformation or invalidation of a contract by reasons of mistake, it is essential that the mistake be mutual.[506] It is also necessary that the mistake be an essential inducing fact of the contract, or that it go to the essence of the contract.[507]

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[501] *Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005)*.

Owens v. Ross Tp., 114 P.L.J. 271 (1966) (a "mutual mistake of fact" is a clear impression in the minds of the parties as to the existence of a material fact, sufficient in importance to influence and govern a man of ordinary intelligence, and upon which both parties relied and acted, which fact did not exist).

[502] The trial court properly reformed the severance benefits in the retiring township manager's agreement with the township because neither party knew that he would not continue to be eligible for the $375,000 group life benefit and the impracticality of performance rendered it necessary to set the benefits at the available $20,000 level. The appellate court noted that nothing prevented the parties from negotiating a new or supplemental agreement that provided the township manager with additional relief.—*Murray v. Willistown Twp., 169 A.3d 84, 2017 PA Super 265 (2017)*.

Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005).

[503] *CONRAIL v. Portlight, Inc., 188 F.3d 93 (3d Cir. Pa. 1999)*.

Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005).

Gocek v. Gocek, 417 Pa. Super. 406, 612 A.2d 1004 (Pa.Super. 1992).

Sanders v. Lawn Mut. Ins. Co., 194 Pa. Super. 491, 168 A.2d 758 (1961).

[504] *Vrabel v. Scholler, 369 Pa. 235, 85 A.2d 858 (1952)*.

Miners' & Merchants' Bank Case, 313 Pa. 118, 169 A. 85, 1933 Pa. LEXIS 618 (1933).

Hart v. Arnold, 884 A.2d 316 (Pa. Super. Ct. 2005).

Gocek v. Gocek, 417 Pa. Super. 406, 612 A.2d 1004 (Pa.Super. 1992).

Sanders v. Lawn Mut. Ins. Co., 194 Pa. Super. 491, 168 A.2d 758 (1961).

[505] *Fink v. Farmers' Bank, 178 Pa. 154, 35 A. 636, 1896 Pa. LEXIS 1146 (1896)*.

[506] *Thrasher v. Rothrock, 377 Pa. 562, 105 A.2d 600 (1954)*.

McFadden v. American Oil Co., 215 Pa. Super. 44, 257 A.2d 283 (1969).

Commonwealth, Dep't of Education v. Miller, 78 Pa. Commw. 1, 466 A.2d 791, 1983 Pa. Commw. LEXIS 2052 (1983).

Federal court

When parties to a contract have presupposed that some facts exist, or that they will thereafter exist, as the basis of their proceedings, which in truth do not exist, or are prevented from happening by unforeseen causes ending in mutual error, under circumstances material to their character and consequences, such a contract is inoperative and invalid.[508] However, underestimating damages or entering into a settlement before damages are adequately assessed is not a mutual mistake of fact.[509]

Where there is a mutual mistake as to the legal effect of an instrument, it will not be enforced so as to deprive one of the parties of rights which he or she did not intend to surrender.[510]

In summary, the doctrine of mutual mistake will apply only where the mistake: (1) relates to the basis of the bargain; (2) materially affects the parties' performance; and (3) is not one as to which the injured party bears the risk.[511]

End of Document

A contract may be reformed, where mutual mistaken belief, shared by the parties with respect to a material aspect of the agreement, prevents it from conforming to the true intention of the parties.—*Nationwide Mut. Fire Ins. Co. v. Salkin, 163 F. Supp. 2d 512 (E.D. Pa. 2001)*.

[507] *Vrabel v. Scholler, 369 Pa. 235, 85 A.2d 858 (1952)*.

[508] *Miles v. Stevens, 3 Pa. 21 (1846)*.

[509] *CONRAIL v. Portlight, Inc., 188 F.3d 93 (3d Cir. Pa. 1999)*.

Emery v. Mackiewicz, 429 Pa. 322, 240 A.2d 68 (1968).

Klein v. Cissone, 297 Pa. Super. 207, 443 A.2d 799 (1982).

[510] *Perry Ross Coal Co. Leasehold Condemnation, 48 Pa. D. & C.2d 771 (1970)*.

[511] *CONRAIL v. Portlight, Inc., 188 F.3d 93 (3d Cir. Pa. 1999)*.

16 Summ. Pa. Jur. 2d Commercial Law § 1:84 (2d ed.)

Summary of Pennsylvania Jur | October 2022 Update

Commercial Law

Part One. Contracts

Chapter 1. Nature and Requisites of Contracts

Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

IV. Validity of Contract

B. Grounds of Invalidity of Contract

2. Effect of Mistake on Contract

§ 1:84. Effect of unilateral mistake on contract

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Contracts 93(1)

A.L.R. Library

- Negligence as Precluding Rescission of Purchase Agreement for Unilateral Mistake, 43 A.L.R.7th Art. 5

As a general rule, a court will not afford relief for an unilateral mistake.[1] A unilateral mistake in the formation of a contract may bar the mistaken party from relief, thus preserving the benefit of the bargain for the nonmistaken party.[2] A contract is voidable on the basis of unilateral mistake only if the mistake is a basic assumption on which the contract was made and has a material effect on the agreed exchange of performances.[3] Moreover, the mistaken party must not bear the risk of the mistake, and the effect of the mistake must be such that enforcement would be unconscionable.[4] If a unilateral mistake is not due to the fault of the party not mistaken but to the negligence of the one who acted under the mistake, it affords no basis for relief in rescinding a contract.[5]

However, there exists an exception to this rule where the nonmistaken party knows or has reason to know of the unilateral mistake and if the mistake, as well as the actual intent of the parties, is clearly shown.[6] In such a case, relief will be granted to the same extent as a mutual mistake.[7] Thus, a party who knowingly causes a written instrument to fail to embody the intent of

the other party is estopped from relying on the defect in the instrument. Moreover, where the first party knows what the other party actually intended, the instrument will be reformed to conform to that intention. [8] In other words, when there is mistake on one side and fraud on the other, relief from the contract is available. [9]

Irrespective of actual fraud, if a party to a contract knows or has reason to know of a unilateral mistake by the other party, and mistake, as well as the actual intent of the parties, is clearly shown, relief will be granted to the same extent as if a mutual mistake existed. In such instances, the mistaken party may void the contract if the mistake is regarding a material term, or the mistaken party may enforce the contract so that the other party for whose benefit the contract was performed will not be unjustly enriched. [10] Where a unilateral mistake is due not to the fault of the party not mistaken but rather to the negligence of the party seeking to rescind, relief will not be granted unless the party not mistaken has good reason to know of the unilateral mistake. [11]

Furthermore, a mistake by only one party to a contract is considered a mutual mistake where the nonmistaken party knows of the mistaken party's erroneous belief and does not correct the misapprehension. However, the erroneous belief must relate to the facts as they exist at the time of the making of the contract. A party's prediction or judgment as to events to occur in the future, even if erroneous, is not a mistake. [12]

Footnotes

1 In re Allegheny Intern., Inc., 954 F.2d 167 (3d Cir. 1992) (applying Pennsylvania law); Lanci v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989).

2 Valley Forge Sewer Authority v. Hipwell, 121 A.3d 1164 (Pa. Commw. Ct. 2015).

3 Lanci v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989).

4 Lanci v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989).

5 Teva Pharmaceutical Industries, Ltd. v. United Healthcare Services, Inc., 341 F. Supp. 3d 475 (E.D. Pa. 2018), appeal dismissed, 2019 WL 2385192 (3d Cir. 2019); Vonada v. Long, 2004 PA Super 212, 852 A.2d 331 (2004); A.S. v. Office for Dispute Resolution (Quakertown Community School Dist.), 88 A.3d 256, 303 Ed. Law Rep. 323 (Pa. Commw. Ct. 2014).

6 In re Allegheny Intern., Inc., 954 F.2d 167 (3d Cir. 1992) (applying Pennsylvania law); RegScan, Inc. v. Con-Way Transp. Services, Inc., 2005 PA Super 176, 875 A.2d 332, 57 U.C.C. Rep. Serv. 2d 533 (2005); Lanci v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989).

7 In re Allegheny Intern., Inc., 954 F.2d 167 (3d Cir. 1992) (applying Pennsylvania law); Kramer v. Schaeffer, 2000 PA Super 127, 751 A.2d 241 (2000); Lanci v. Metropolitan Ins. Co., 388 Pa. Super. 1, 564 A.2d 972 (1989); Welsh v. State Employees' Retirement Bd., 808 A.2d 261 (Pa. Commw. Ct. 2002).

As to mutual mistake, see § 1:83.

8 Line Lexington Lumber & Millwork Co., Inc. v. Pennsylvania Pub. Corp., 451 Pa. 154, 301 A.2d 684 (1973).

9 § 1:79.

10 Lapio v. Robbins, 1999 PA Super 106, 729 A.2d 1229 (1999).

11 Cobaugh v. Klick-Lewis, Inc., 385 Pa. Super. 587, 561 A.2d 1248 (1989); Com., Dept. of Educ. v. Miller, 78 Pa. Commw. 1, 466 A.2d 791, 14 Ed. Law Rep. 133 (1983).

12 IMAX Corporation v. Capital Center, 156 F. Supp. 3d 569, 88 U.C.C. Rep. Serv. 2d 742 (M.D. Pa. 2016).

End of Document

16 Summ. Pa. Jur. 2d Commercial Law § 1:83 (2d ed.)

Summary of Pennsylvania Jur | October 2022 Update

Commercial Law

Part One. Contracts

Chapter 1. Nature and Requisites of Contracts
Eleanor L. Grossman, J.D., of the staff of the National Legal Research Group, Inc.

IV. Validity of Contract

B. Grounds of Invalidity of Contract

2. Effect of Mistake on Contract

§ 1:83. Effect of mutual mistake on contract

Topic Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Contracts 93(1), 93(5)

A.L.R. Library

- Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 A.L.R.3d 1188
- Concealment, misrepresentation, or mistake as regards identity of person for whom property is purchased as ground for cancellation of deed, 6 A.L.R.2d 812
- Relief by way of rescission or adjustment of purchase price for mutual mistake as to quantity of land, where the sale is in gross, 1 A.L.R.2d 9

Treatises and Practice Aids

- Std. Pa. Prac. 2d § 27:36 (Generally—Form of averment of mistake)

Forms

- Am. Jur. Pleading and Practice Forms, Contracts § 85 (Answer—Defense—Mutual mistake as to subject matter of contract)

The doctrine of mutual mistake of fact serves as a defense to the formation of a contract. A mutual mistake occurs when the parties to the contract have an erroneous belief as to a basic assumption of the contract at the time of formation which will have a material effect on the agreed exchange as to either party so that the written instrument fails to set forth the true agreement of the parties.[1] A contract made under a mutual mistake as to an essential fact that forms the inducement to enter into the contract may be rescinded on the discovery of the mistake if the parties can be placed in their former position with reference to the subject matter of the agreement.[2] Alternatively, if the same conditions are met, courts can reform a contract entered under mutual mistake.[3] Courts can reform a contract entered under mutual mistake if (1) the misconception entered into the contemplation of both parties as a condition of assent, and (2) the parties can be placed in their former position regarding the subject matter of the contract.[4]

Practice Tip:

The proof of mistake must be clear, precise, and convincing.[5] Clear, precise, and convincing evidence of mutual mistake will be found if the witnesses are found to be credible, the witnesses distinctly remember the facts to which they testify and narrate the details exactly and in their proper order, and the testimony is so clear, direct, weighty, and convincing as to enable the jury to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue.[6]

In order for a contract to be voidable by the adversely affected party due to a mutual mistake, (1) the mistake must relate to a basic assumption on which the contract was made, (2) the party seeking avoidance must show that the mistake has a material effect on the agreed exchange of performances, and (3) the mistake must not be one as to which the party seeking relief bears the risk.[7] In other words, the mistake must relate to the basis of the bargain, it must be material, and the mistaken fact must not have been a risk contemplated by the contract and placed on the injured party.[8] In determining whether a mutual mistake had occurred, as a defense to the formation of a contract, the language on the instrument should be interpreted in the light of subject matter, the apparent object or purpose of the parties and the conditions existing when it was executed.[9]

A mutual mistake will be found only where both parties to the contract are mistaken as to existing facts at the time of execution.[10] However, the fact that one of the contracting parties denies that a mistake was made does not prevent a finding of mutual mistake.[11]

Illustration:

Where landowners claimed that they had a mutual understanding with a construction company that, before waste was to be deposited upon their land, the construction company would remove the topsoil and then pile it on the waste, and where such an agreement was supported by evidence that the construction company began to remove topsoil in accordance with such an agreement, the construction company's denial that there had been any mistake in not placing the alleged agreement in the written contract would not prevent the court from reforming the contract to reflect the agreement. [12]

Not every mistake will enable a party to avoid a contract. The mistake must be of the essence or the sine qua non of the contract. [13]

Illustration:

Where the assignors of a valuable leasehold interest warranted to the assignees that the leasehold interest was tax exempt for three years based on a letter from the city on which both parties relied, the assignors were unable to avoid their warranty on the basis of mutual mistake where the interest turned out not to be exempt because it was the leasehold interest and not the warranty that was the basic premise on which the contract was formed and because the assignors bore the risk that the land was not exempt, given their better situation to determine the condition of the property. [14]

A party is generally not entitled to equitable relief based on a mistake of law where the party had full knowledge of all the material facts in entering into a contract. [15] Furthermore, a mistake cannot be mutual, as a defense to the formation of a contract, where party A relies on party B's expertise and party B makes a mistake in the exercise of its expertise. [16]

CUMULATIVE SUPPLEMENT

Cases:

The doctrine of mutual mistake of fact serves as a defense to the formation of a contract and occurs when the parties to the contract have an erroneous belief as to a basic assumption of the contract at the time of formation which will have a material effect on the agreed exchange as to either party; "mutual mistake" occurs when the written instrument fails to set forth the true agreement of the parties. Turns v. Dauphin County, 273 A.3d 66 (Pa. Commw. Ct. 2022).

[END OF SUPPLEMENT]

Footnotes

1 Murray v. Willistown Township, 2017 PA Super 265, 169 A.3d 84 (2017); Allen-Myland, Inc. v. Garmin Intern., Inc., 2016 PA Super 107, 140 A.3d 677, 89 U.C.C. Rep. Serv. 2d 899 (2016); Voracek v. Crown Castle USA Inc., 2006 PA Super 232, 907 A.2d 1105 (2006); Hart v. Arnold, 2005 PA Super 328, 884 A.2d 316 (2005); Step Plan Services, Inc. v. Koresko, 12 A.3d 401 (Pa. Super. Ct. 2010).

2 Murray v. Willistown Township, 2017 PA Super 265, 169 A.3d 84 (2017); Hart v. Arnold, 2005 PA Super 328, 884 A.2d 316 (2005); Vrabel v. Scholler, 369 Pa. 235, 85 A.2d 858 (1952); Step Plan Services, Inc. v. Koresko, 12 A.3d 401 (Pa. Super. Ct. 2010); Gocek v. Gocek, 417 Pa. Super. 406, 612 A.2d 1004 (1992).

As to fraudulent inducement, see § 1:81.

3 Murray v. Willistown Township, 2017 PA Super 265, 169 A.3d 84 (2017).

4 Allen-Myland, Inc. v. Garmin Intern., Inc., 2016 PA Super 107, 140 A.3d 677, 89 U.C.C. Rep. Serv. 2d 899 (2016).

5 West Conshohocken Restaurant Associates, Inc. v. Flanigan, 1999 PA Super 211, 737 A.2d 1245 (1999); Central Transp., Inc. v. Board of Assessment Appeals of Cambria County, 490 Pa. 486, 417 A.2d 144 (1980); Thrasher v. Rothrock, 377 Pa. 562, 105 A.2d 600 (1954); Gocek v. Gocek, 417 Pa. Super. 406, 612 A.2d 1004 (1992); A.S. v. Office for Dispute Resolution (Quakertown Community School Dist.), 88 A.3d 256, 303 Ed. Law Rep. 323 (Pa. Commw. Ct. 2014); Yanssens v. Municipal Authority of Tp. of Franklin, Beaver County, 139 Pa. Commw. 624, 591 A.2d 335 (1991).

6 Mellish v. Hurlock Neck Duck Club, Inc., 886 A.2d 1151 (Pa. Commw. Ct. 2005).

7 RegScan, Inc. v. Con-Way Transp. Services, Inc., 2005 PA Super 176, 875 A.2d 332, 57 U.C.C. Rep. Serv. 2d 533 (2005); Step Plan Services, Inc. v. Koresko, 12 A.3d 401 (Pa. Super. Ct. 2010).

8 Transportation Services, Inc. v. Underground Storage Tank Indemnification Bd., 67 A.3d 142 (Pa. Commw. Ct. 2013).

9 Allen-Myland, Inc. v. Garmin Intern., Inc., 2016 PA Super 107, 140 A.3d 677, 89 U.C.C. Rep. Serv. 2d 899 (2016).

10 Felix v. Giuseppe Kitchens & Baths, Inc., 2004 PA Super 120, 848 A.2d 943 (2004); A.S. v. Office for Dispute Resolution (Quakertown Community School Dist.), 88 A.3d 256, 303 Ed. Law Rep. 323 (Pa. Commw. Ct. 2014); Transportation Services, Inc. v. Underground Storage Tank Indemnification Bd., 67 A.3d 142 (Pa. Commw. Ct. 2013); Mellish v. Hurlock Neck Duck Club, Inc., 886 A.2d 1151 (Pa. Commw. Ct. 2005).

11 West Conshohocken Restaurant Associates, Inc. v. Flanigan, 1999 PA Super 211, 737 A.2d 1245 (1999); Bollinger v. Central Pennsylvania Quarry Stripping & Const. Co., 425 Pa. 430, 229 A.2d 741 (1967).

12 Bollinger v. Central Pennsylvania Quarry Stripping & Const. Co., 425 Pa. 430, 229 A.2d 741 (1967).

As to consideration of the construction placed on an agreement by the parties as evidence of their true intentions, see § 1:112.

As to the effect of reducing a contract to a writing, see §§ 1:128 to 1:132.

13 Vrabel v. Scholler, 369 Pa. 235, 85 A.2d 858 (1952).

14 Loyal Christian Ben. Ass'n v. Bender, 342 Pa. Super. 614, 493 A.2d 760 (1985).

15 Wilson Area School Dist. v. Skepton, 860 A.2d 625, 193 Ed. Law Rep. 276 (Pa. Commw. Ct. 2004), order aff'd, 586 Pa. 513, 895 A.2d 1250, 207 Ed. Law Rep. 1000 (2006).

16 Allen-Myland, Inc. v. Garmin Intern., Inc., 2016 PA Super 107, 140 A.3d 677, 89 U.C.C. Rep. Serv. 2d 899 (2016).

End of Document

5 Standard Pennsylvania Practice 2d § 27:35

Standard Pennsylvania Practice 2d | November 2022 Update

Chapter 27. Answer in Contract Action
Francis C. Amendola, J.D.; and Judith Nichter Morris, J.D.

II. New Matter and Affirmative Defenses

B. Particular Affirmative Defenses

7. Mistake

§ 27:35. Pleading of mistake as affirmative defense in contract action, generally

Summary | Correlation Table | References

West's Key Number Digest

- West's Key Number Digest, Contracts 338
- West's Key Number Digest, Pleading 18, 87

A.L.R. Library

- Measure and elements of damages recoverable from vendor where there has been mistake as to amount of land conveyed, 94 A.L.R.3d 1091
- Vendor and purchaser: mutual mistake as to physical condition of realty as ground for rescission, 50 A.L.R.3d 1188
- Right of bank certifying check or note by mistake to cancel, or avoid effect of, certification, 25 A.L.R.3d 1367

Forms

- Am. Jur. Pleading and Practice Forms, Bills and Notes § 18 (Answer—Defense—Partial want of consideration—Mutual mistake in amount of note)

- Am. Jur. Pleading and Practice Forms, Contracts § 85 (Answer—Defense—Mutual mistake of fact as to subject matter of contract as defense)

Averments of mistake must be set forth with particularity in an answer;[1] a general averment of mistake is insufficient.[2] A defendant seeking to be relieved from a written contract upon the ground of mutual mistake should specifically allege facts from which the mistake may be clearly and indubitably inferred.[3] The answer must disclose such equitable grounds as will relieve the defendant of the contract; that is, it must narrate such facts as would bring knowledge of the mistake to the plaintiff, or at least sustain an inference to that effect.[4] Averments of unilateral mistake not alleged to have been caused by the plaintiff are insufficient.[5] A mere averment that there was a mistake and that the plaintiff knew it[6] or a bald assertion of error and mistake in new matter is insufficient.[7]

Illustration:

The Board of Claims should not have applied the doctrine of mistake to a contractor's claim for additional compensation under a contract with the Department of Transportation where mistake was never specifically pleaded by either party.[8]

Footnotes

1 Pa.R.Civ.P. 1019(b).

2 Lefkowitz v. Hummel Furniture Co., 385 Pa. 244, 122 A.2d 802 (1956); Shiroff v. Weiner, 299 Pa. 176, 149 A. 175 (1930).

3 Farmers' & Breeders' Mut. Reserve Fund Live Stock Ins. Co. v. Beck, 66 Pa. Super. 528, 1917 WL 3287 (1917).

4 Owen M. Bruner Co. v. Standard Lumber Co., 63 Pa. Super. 283, 1916 WL 4548 (1916).

5 Reilly v. Daly, 159 Pa. 605, 28 A. 493 (1894).

6 Owen M. Bruner Co. v. Standard Lumber Co., 63 Pa. Super. 283, 1916 WL 4548 (1916).

7 Herman v. Stern, 419 Pa. 272, 213 A.2d 594 (1965).

8 Com., Dept. of Transp. v. Burrell Const. & Supply Co., Inc., 111 Pa. Commw. 590, 534 A.2d 585 (1987).

End of Document

368 Pa. 33
Supreme Court of Pennsylvania.

BETTA
v.
SMITH et al.
BETTA
v.
SMITH.

June 27, 1951.

Synopsis

Americo Betta sued Leroy L. Smith and another, executors under the last will and testament of Leroy W. Smith, deceased, and others, to recover damages paid to the Commonwealth for having removed coal from Commonwealth's land as result of decedent's representations that he had made arrangements with the state under which plaintiff as decedent's lessee might remove coal from the Commonwealth's land, and in the alternative to recover royalties paid decedent. By separate suit, plaintiff also sued Winifred Smith, devisee and widow, for royalties paid her. The jury returned verdicts in the first case for $10,680.80 and in the second case for $2,288, and the Court of Common Pleas of Clearfield County, to No. 141, March term, 1948, and No. 38, August term, 1949, F. Cortez Bell, J., rendered a final order refusing to set aside verdicts non obstante veredicto and entered judgment on the verdicts, and defendants appealed. The Supreme Court, No. 130 and No. 145, January term, 1951, Ladner, J., held that the decedent's representation resulted in a 'mistake of law' for which plaintiff could recover, and regardless of the possibility that plaintiff might have discovered mistake by pursuing an independent investigation of records or availing himself of media of knowledge at hand.

Judgment affirmed.

West Headnotes (3)

[1] **Payment** What Constitutes, and Character of Payment

A "mistake of fact" as ground for recovery of money paid means any mistake except a "mistake of law", which is a mistake as to legal consequences of an assumed state of facts.

11 Cases that cite this headnote

[2] **Payment** Payment on Contract

Mineral lessor's representation that he owned right to remove coal from Commonwealth's adjoining land by arrangements with the Commonwealth, and hence lessee could remove coal therefrom, was a representation of fact of ownership and resulted in "mistake of fact" for which lessee could recover royalties paid to landowner and his widow, after Commonwealth had compelled lessee to pay damages.

4 Cases that cite this headnote

[3] **Payment** Diligence and Waiver

Mineral lessee had right to rely upon lessor's positive statement of ownership of right to remove minerals from Commonwealth's adjoining land, and fact that lessee might have discovered mistake by pursuing an independent investigation of records for availing himself of media of knowledge at hand was no defense in lessee's action to recover royalties paid.

4 Cases that cite this headnote

Attorneys and Law Firms

***34** ****538** Walter M. Swoope, A. R. Chase, F. Cortez Bell, Jr. and Chase, Swoope & Bell, all of Clearfield, for appellant.

Dan P. Arnold and Chaplin & Arnold, all of Clearfield, B. R. Coppolo, Alvin B. Coppolo and Driscoll, Gregory & Coppolo, all of St. Marys, for appellees.

Before DREW, C. J., and STERN, STEARNE, JONES, BELL, LADNER and CHIDSEY, JJ.

Opinion

****539** LADNER, Justice.

This is an appeal from the refusal of the court below to enter judgment n. o. v.

L. W. Smith was the fee simple owner of 1100 acres of land in Jay Township, Elk County, known as Warrant No. 4895. He leased the coal underneath to the plaintiff at a royalty of ten cents a ton. Contiguous to Smith's warrant was land of the Commonwealth of Pennsylvania, known as Warrant No. 5283. Plaintiff drove his heading beyond Smith's land into the land of the Commonwealth, having been told by Smith that he, plaintiff, might remove the coal beneath the Commonwealth's warrant as he, Smith, had made arrangements with the state to do so. Relying upon Smith's statement, he removed 110,700 tons of coal from the Commonwealth's land from March 2, 1942, until Smith ***35** died on January 27, 1947, and paid Smith in royalties $11,070.00.

In 1947 the Commonwealth's Department of Forests and Waters, learning of the removal of its coal, compelled plaintiff to pay $21,481.80 as damages for the coal removed from its warrant. Plaintiff then brought suit against Smith's Estate to recover the damages paid to the Commonwealth and in the alternative to recover back the royalties $11,070.00 paid Smith.

Plaintiff, by separate suit, also sued Winifred Smith, Devisee, and widow of Smith, for royalties paid her on her demand after Smith's death which amounted to $2,265.10. By agreement both suits were tried together and the jury returned a verdict against Smith's Estate for $10,680.80 and against Winifred Smith for $2,288.00. These were the exact amounts which counsel for the parties agreed had been paid by the plaintiff to decedent Smith and to Winifred Smith. The defendants filed motions for new trial and for judgment n. o. v. The motions for new trial were subsequently withdrawn. The court below refused to set aside the verdicts non obstante veredicto and entered judgment on the verdicts from which we have this appeal.

The complaint in this case pleaded two alternative causes of action: The first was in the nature of deceit and charged that the defendants' decedent had falsely and fraudulently misrepresented that he had the right to remove the coal in the Commonwealth's land and directed plaintiff to remove it. The other claim was pleaded in the alternative and based on the right to recover back royalties paid in the mistaken belief of both plaintiff and defendants' decedent that the latter owned the right to remove the coal from Commonwealth's land. The Pennsylvania Rules of Civil Procedure Nos. 1020(c) and 1021, 12 P.S. Appendix, permit causes of action and defenses to be pleaded and relief to be had in the alternative.

***36** The jury under proper instructions from the learned trial judge in effect found that there had been no false and fraudulent misrepresentation by the defendants' decedent and rejected the plaintiff's claim on this cause of action for damages in the sum of $21,481.80 paid to Commonwealth. However, by the verdicts in favor of the plaintiff for royalties actually paid to the decedent and his wife, it was found the payments were made under mistake of fact.

[1] **[2]** **[3]** The appellants now contend this issue should not have been submitted to the jury because the evidence even though taken as true established at the most a mistake of law, not of fact, and monies so paid could not be recovered back. '* * * a 'mistake of fact' means any mistake except a mistake of law. A 'mistake of law' means a mistake as to the legal consequences of an assumed state of facts.' Restatement of Law of Restitution, Section 7. For example had the decedent here produced to the plaintiff a document which he incorrectly interpreted as conveying the right to remove coal, that would have been a mistake of law, the assumed fact being the document, the mistake being in its interpretation. But here the representation of the defendants' decedent that he owned the right to remove the coal from the commonwealth's land was clearly a representation of the fact of ownership just as much as the representation in McKibben v. Doyle, 1896, 173 Pa. 579, 34 A. 455, where the defendant claimed ownership of a whole party wall which representation led the plaintiff to pay compensation for the ****540** use which this court permitted to be recovered back. Nor is it any defense to such action that plaintiff might have discovered otherwise had he pursued an independent investigation of records, or availed himself of media of knowledge at hand. He had a right to rely on the positive statement of ownership by the decedent, and having done so, the defendants cannot assert that plaintiff ***37** should not have believed him. Kunkel v. Kunkel, 1920, 267 Pa. 163, 110 A. 73; Potter v. Lehigh Valley R. R. Co., 1922, 80 Pa.Super. 237.

Judgments affirmed.

All Citations

368 Pa. 33, 81 A.2d 538

71 Pa.Cmwlth. 286
Commonwealth Court of Pennsylvania.

COMMONWEALTH of Pennsylvania,
DEPARTMENT OF GENERAL SERVICES, Plaintiff,
v.
COLLINGDALE MILLWORK COMPANY, Defendant.

Argued Sept. 13, 1982.
|
Decided Jan. 21, 1983.

Synopsis

State agency awarded contract to contractor who subsequently defaulted, and completion of contract was undertaken by bonding company. Judgment creditor of contractor on debt unrelated to state contract filed praecipe for writ of execution in attachment and summons against agency as garnishee. Over objection of bonding company, who claimed right to all funds of contractor in possession of agency, agency paid creditor in full amount. Agency then claimed that payment of sum was mistake, as funds properly belonged to bonding company, and requested repayment from creditor. When creditor refused, agency brought action in assumpsit and filed amended complaint in equity, and both agency and creditor moved for summary judgment. The Commonwealth Court, No. 1277 C.D. 1979, Blatt, J., held that: (1) doctrine of custodia legis did not apply; (2) court of common pleas had jurisdiction over ancillary attachment proceeding against state agency; (3) unilateral **mistake** of **fact** did not, in and of itself, bar restitution; but (4) as creditor was entitled to sum paid it by agency, it was not unjustly enriched, and agency was not entitled to restitution, regardless of whether agency had made **mistake** of **fact**.

Agency's motion for summary judgment denied; judgment creditor's cross motion for summary judgment granted.

Procedural Posture(s): Motion for Summary Judgment.

West Headnotes (8)

[1] **Judgment** Absence of issue of fact
Judgment Presence of question of law

Summary judgment may be entered when no genuine issue of material fact exists, and movant is entitled to judgment as matter of law.

[2] **Creditors' Remedies** Property held under judicial process

Where public purpose for which funds were held by state agency had been completed, and only step left was distribution of funds, agency was not rendered immune from attachment proceedings by doctrine of custodia legis.

3 Cases that cite this headnote

[3] **Creditors' Remedies** Jurisdiction

Where court of common pleas has jurisdiction over creditor's claim against debtor, it also has jurisdiction over state or local agencies for purpose of ancillary attachment proceedings. Rules Civ.Proc., Rules 3101–3260, 42 Pa.C.S.A.

[4] **Equity** Of law
Equity Of **fact**

Equitable relief will generally not issue to correct **mistake** of law, but may issue to rectify **mistake** of **fact**, i.e., any **mistake** except **mistake** of law.

2 Cases that cite this headnote

[5] **Contracts** Mutual mistake

Unilateral mistake in formation of contract will generally bar equitable relief requested by party who has made mistake.

4 Cases that cite this headnote

[6] **Implied and Constructive Contracts** Reception by defendant by mistake

Where there was no contract between judgment creditor and state agency which was garnishee, and therefore no contract bargain expectation of which creditor could be deprived, unilateral **mistake** of **fact** on part of agency did not, in and of itself, bar equitable restitution of sum paid by agency to creditor.

4 Cases that cite this headnote

[7] **Payment** **Mistake** of **Fact**

Money voluntarily paid to one entitled to receive it cannot be recovered back even though made under **mistake** of **fact**.

2 Cases that cite this headnote

[8] **Implied and Constructive Contracts** Unjust enrichment

Where judgment creditor had valid judgment against state agency which was garnishee, and was entitled to sum paid it by agency on behalf of debtor, and creditor made no misrepresentations to agency as to nature of debt, creditor was not unjustly enriched, and agency was not entitled to restitution of sum, regardless of whether agency made **mistake** of **fact** as to nature of debt owed creditor by debtor.

4 Cases that cite this headnote

Attorneys and Law Firms

****1177** ***287** Arnold L. Wainstein, Acting Chief Counsel, Henry J. Costa, Jr., Asst. Counsel, Dept. of Gen. Services, Harrisburg, Thadeus A. Tanski, Chief Gen. Litigation Unit and Anthony P. Krzywicki, Chief Counsel, for plaintiff.

Alan V. Vaskas, Hepburn, Ross, Willcox & Putnam, Jeffrey L. Pettit, Philadelphia, for defendant.

Before CRUMLISH, President Judge, and BLATT and MacPHAIL, JJ.

OPINION

BLATT, Judge.

[1] Before us is the motion of the Department of General Services (DGS) and also the cross-motion of Collingdale Millwork Company (Collingdale) for summary judgment. [1]

The stipulation of facts submitted by the parties reveals the following complicated chronology of ***288** events. The plaintiff, DGS, formerly the General State Authority, awarded a contract to Atoms Construction Corporation (Atoms) on July 25, 1974 for the performance of general construction in erecting a garage and maintenance building at Cheyney State College, Cheyney, Pennsylvania. On or about April 1, 1976, Atoms was declared in default of the aforesaid contract and completion of the contract was undertaken by Atoms' bonding company, United States Fidelity and Guaranty Company (USF & G). Unrelated to the Cheyney State contract, defendant Collingdale had supplied material to Atoms during the period of March 31 to April 14, 1975, for work being performed at the 12th Floor, Lewis Tower Building, Philadelphia, Pennsylvania. Atoms failed to pay Collingdale for such materials supplied and Collingdale consequently instituted an action in assumpsit against Atoms to collect the $2,391.51 unpaid balance plus tax and interest in the Court of Common Pleas of Philadelphia County. Collingdale obtained a judgment against Atoms in the sum of $2,788.63 which was soon docketed. Believing that the DGS held a sum of money payable to Atoms, it then filed in the aforesaid court of common pleas a praecipe for a writ of execution in attachment and summons against the DGS as a garnishee on July 21, 1976.

Collingdale then served interrogatories in attachment to DGS which the DGS answered. Subsequently Collingdale served supplemental interrogatories upon the DGS which were not answered. Collingdale's counsel and counsel for the DGS agreed that Collingdale would refrain from entering judgment against the DGS for failing to respond provided the payment of judgment against Atoms plus accrued interest was paid to Collingdale on or before January 15, 1979. Counsel for the DGS then advised Collingdale's counsel ***289** that, of the $50,000 which had been set aside to be paid to Atoms, $3,000 would be held to satisfy Collingdale's judgment against Atoms. In furtherance of this conversation, counsel for the DGS instructed the comptroller's office to place a “hold” on the funds of Atoms, by reason of a claim by Collingdale, Atoms' subcontractor. On January 19, 1979, a different DGS attorney advised the comptroller's office that all funds due and owing under the contract between Atoms and the DGS were the property of USF & G, as completing surety, and, on the same day, the first-mentioned DGS counsel (the one who had dealt with Collingdale) informed Atoms by letter that the DGS intended to satisfy Collingdale's judgment against Atoms. On March 6, 1979, upon a praecipe ****1178** filed by Collingdale, the prothonotary of Philadelphia County entered judgment against the DGS in the amount of $4,990.19, and, in response to a request by the DGS as to evidence of Collingdale's claim, Collingdale's counsel forwarded a copy of the docket entries to the counsel for the DGS. He also

advised that judgment had been entered. The counsel for the DGS then directed the comptroller to issue a check to Collingdale from Atoms' account in the amount of $4,990.19. Subsequently, Collingdale's counsel sent a copy of the complaint to the comptroller of the DGS. On March 19, 1979, counsel for Collingdale forwarded the complaint, the judgment, and a copy of the January 19, 1979 letter (from the counsel for the DGS to Atoms) to counsel for USF & G. By letter dated March 21, 1979 counsel for USF & G then advised the counsel for the DGS that the funds which Collingdale sought were those of USF & G pursuant to its obligation to complete the Cheyney State contract as a surety for Atoms, and that Collingdale had not supplied ***290** materials to Atoms at the Cheyney State project, and therefore, was not entitled to payment from USF & G funds. Nevertheless, a check dated March 29, 1979 was forwarded by counsel for the DGS in the amount of $4,990.19, payable to Collingdale, to Collingdale's counsel by certified mail on March 30, 1979. Counsel for the DGS then, by letter of April 17, 1979, advised counsel for Collingdale that the transmission of the check was in error because the funds owed to Atoms should have been paid to USF & G as completing surety and requested the return of the sum paid inasmuch as Collingdale had not supplied any materials to Atoms at the Cheyney State project. Neither Collingdale nor its counsel returned any sum of money to the DGS subsequent to the receipt of the April 17, 1979 letter. The DGS commenced this action to recover the funds paid to Collingdale by filing a complaint in assumpsit in this Court and has filed an amended complaint in equity.

The DGS, in seeking restitution of the sum paid to Collingdale, argues first that the Court of Common Pleas of Philadelphia County lacked jurisdiction to enter a default judgment against them, that jurisdiction more properly rests with this Court in such a matter, and that, therefore, inasmuch as the judgment obtained by Collingdale had no legal effect and was unenforceable, the sum paid should be returned. Collingdale counters, however, that, because the court of common pleas had jurisdiction over Collingdale's claim against Atoms, it also had jurisdiction over all ancillary enforcement proceedings as specified in Pa.R.C.P. Nos. 3101–3260, and that the judgment against the DGS was consequently valid.

[2] **[3]** Our review of the case-law indicates that, in considering whether or not a state or local agency should be immune from attachment proceedings under the ***291** doctrine of *custodia legis,* [2] it has been implicitly ****1179** recognized that the court of common pleas has jurisdiction over such agencies for the purpose of ancillary attachment proceedings. *See* *Central Contracting Co. v. C.E. Youngdahl & Co.,* 418 Pa. 122, 209 A.2d 810 (1965); *Weicht; Buchholz; Wheatcroft.* This argument by the DGS must, therefore, fail.

The DGS next argues, however, that it is entitled to equitable relief: namely, the restitution of the sum paid to Collingdale. It claims that such payment was made pursuant to a mistaken factual belief that Collingdale was Atoms' subcontractor in the Cheyney State contract. Collingdale argues on the other hand ***292** that such relief should not issue here because: it was entitled to receive the payment in satisfaction of the valid judgment against the DGS and therefore there was no requisite unjust enrichment; there was no mutual **mistake** of **fact**; and, in the alternative, because the stipulated **facts** show that the DGS knew before payment occurred that Collingdale was not a subcontractor on the Cheyney State contract.

[4] **[5]** **[6]** For the DGS to recover the sum it paid to Collingdale, two elements of the remedy of restitution must be found to exist: (1) a requisite mistake, and (2) consequent unjust enrichment. [3] It is well-settled that equitable relief will generally not issue to correct a mistake of law but may issue to rectify a **mistake** of **fact** which has been defined by our Supreme Court as "any mistake except a mistake of law." *Betta v. Smith,* 368 Pa. 33, 36, 81 A.2d 538, 539 (1951) (adopting such definition from Section 7 of the Restatement of the Law of Restitution (1937)). Here the DGS alleges that, in making the payment to Collingdale, it had the mistaken factual belief that Collingdale was Atoms' subcontractor or completing surety in the Cheyney State project. Collingdale maintains, however, that such mistaken factual belief is not a "requisite mistake" in that it was a unilateral as opposed to a mutual mistake. We believe, however, that although it is true that a unilateral mistake *in the formation of a contract* will generally bar equitable relief requested by the party who has made the mistake, there is no contract here and therefore no contract bargain expectation of which Collingdale can be deprived. This preservation of the benefit of the bargain for the non-mistaken party is the primary ***293** purpose of the rule for barring relief where a unilateral mistake occurs. [4] Thus, as in the situation where one party overpays another money, [5] a unilateral **mistake** of **fact** in and of itself will not bar restitution here. [6]

Turning to Collingdale's alternative argument that the DGS knew before payment occurred that Collingdale was not the

subcontractor or completing surety on the Cheyney State contract, we believe this argument to maintain that there was in **fact** no **mistake** at all. The stipulation of **facts** entered into by the parties indicates that counsel for the USF & G, by letter dated March 21, 1979, advised counsel for the DGS that the funds which Collingdale sought were those of USF & G pursuant to its obligation to complete the Cheyney State contract as surety for Atoms, and that Collingdale had not supplied materials to Atoms at the Cheyney State project. Nevertheless, a check dated March 29, 1979 was forwarded by the said counsel for the DGS ****1180** in the amount of $4,990.19, payable to Collingdale, to Collingdale's counsel by certified mail on March 30, 1979. This, we believe, suggests that there may not have been a mistake.

[7] **[8]** Even assuming arguendo, however, that a **mistake** of **fact** did occur, we believe that the DGS has failed to establish that Collingdale was not entitled to the funds and therefore unjustly enriched. The ***294** Restatement of the Law of Restitution, § 14(1) (1937), a treatise often cited [7] by the courts of this Commonwealth, provides as follows:

> § 14 DISCHARGE FOR VALUE
>
> (1) A creditor of another or one having a lien on another's property who has received from a third person any benefit in discharge of the debt or lien, is under no duty to make restitution therefor, although the discharge was given by mistake of the transferor as to his interests or duties, if the transferee made no misrepresentation and did not have notice of the transferor's mistake.

The rationale for this rule is that the judgment creditor who by definition has an entitlement, is a bona fide purchaser for value in giving up his claim and is therefore not unjustly enriched. *See* Dobbs, Remedies § 4.7. Here, it is clear that Collingdale did have a valid judgment against the DGS. [8] And our careful review of the record and stipulations in this matter indicates no misrepresentation by Collingdale nor does it show that it had notice that the DGS believed that it was the surety on the Cheyney State project. Rather, the record and the stipulations show that Collingdale, upon request of the DGS, sent a copy of its complaint in the court of common pleas to the DGS's comptroller's office and that paragraph three of the said complaint indicates that the materials supplied ***295** to Atoms by Collingdale were for use at an office renovation project on the 12th floor of the Lewis Tower Building, Philadelphia, Pennsylvania.

Believing that this matter is controlled by Section 14 of the Restatement, that Collingdale is entitled to judgment as a matter of law, and that no genuine issue of material fact remains, we will therefore deny the DGS's motion for summary judgment and grant Collingdale's cross-motion.

ORDER

AND, NOW, this 21st day of January, 1983, the motion of the plaintiff for summary judgment in the above-captioned matter is denied and the defendant's cross-motion for summary judgment is hereby granted.

All Citations

71 Pa.Cmwlth. 286, 454 A.2d 1176

Footnotes

1 Summary judgment may be entered when no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. *Burd v. Department of Transportation,* 66 Pa. Commonwealth Ct. 129, 443 A.2d 1197 (1982).

2 The doctrine of *custodia legis*

> generally provides that funds in the possession of the Commonwealth or one of its political subdivisions, owing to individuals, are not subject to attachment under the public policy that the government should be free from the annoyance and uncertainty arising out of disputes between the individuals to whom the

money is owed and those claiming a right to the same funds by garnishment. *Buckley* [*Bulkley*] *v. Eckert* [3 Pa. 368], Id; *Commonwealth v. Mooney,* 172 Pa.Super. 30, 92 A.2d 258 (1952).

Buchholz v. Cam, 288 Pa.Superior Ct. 33, 36, 430 A.2d 1199, 1200 (1981). However, recognizing the "unfairness of the rule" in certain situations, *Wheatcroft v. Smith,* 239 Pa.Superior Ct. 27, 31, 362 A.2d 416, 418 (1976), courts have allowed exceptions to the doctrine "when the public purpose for which the funds were held has been achieved, and the money, or even property, merely awaits distribution to the judgment debtor, the policy underlying the doctrine of custodia legis is not frustrated by permitting garnishment." *Buchholz,* 288 Pa.Superior Ct. at 36, 430 A.2d at 1200. *See also Weicht v. Automobile Banking Corp.,* 354 Pa. 433, 47 A.2d 705 (1946); *Wheatcroft; Ostroff v. Yaslyk,* 204 Pa.Superior Ct. 66, 203 A.2d 347 (1964), *rev'd on other grounds,* 419 Pa. 183, 213 A.2d 272 (1965). Here, the facts as stipulated to by the parties, discloses that the public purpose for which the funds were held, i.e., the Cheyney State construction, had been completed and the only step left was the distribution of the funds. We believe, therefore, that the doctrine of *custodia legis* should not apply here. *Buchholz.*

3 Dobbs, Remedies § 11.7 (1973). *See* Restatement of the Law of Restitution § 1; *National Maritime Union of America v. Paschaledes,* 192 Pa.Superior Ct. 362, 161 A.2d 646 (1960).

4 Dobbs, Remedies § 11.7.

5 *See, e.g.,* Dobbs, Remedies § 11.7.

6 Our Supreme Court in *Gilberton Fuels, Inc. v. Philadelphia & Reading Coal & Iron Co.,* 342 Pa. 192, 196, 20 A.2d 217, 219 (1941), stated that the

> [d]efendant has gone to some length to cite cases which show that the general rule in this state is, when one makes a payment under a **mistake** of **fact**, he may recover back the amount of such payment. With this proposition we agree ....

7 *See, e.g., Yohe v. Yohe,* 466 Pa. 405, 353 A.2d 417 (1976); *Betta; Sarver v. North Side Deposit Bank,* 289 Pa.Superior Ct. 472, 433 A.2d 902 (1981); *Reiver v. Safeguard Precision Products, Inc.,* 240 Pa.Superior Ct. 572, 361 A.2d 371 (1976); *National Maritime Union of America.*

8 "Money voluntarily paid to one *entitled* to receive it cannot be recovered back even though made under a **mistake** of **fact**." *T & L Leasing Corp. v. General Electric Credit Corp.,* 516 F.Supp. 1131, 1133, fn. 2 (E.D.Pa.1981) (emphasis added).

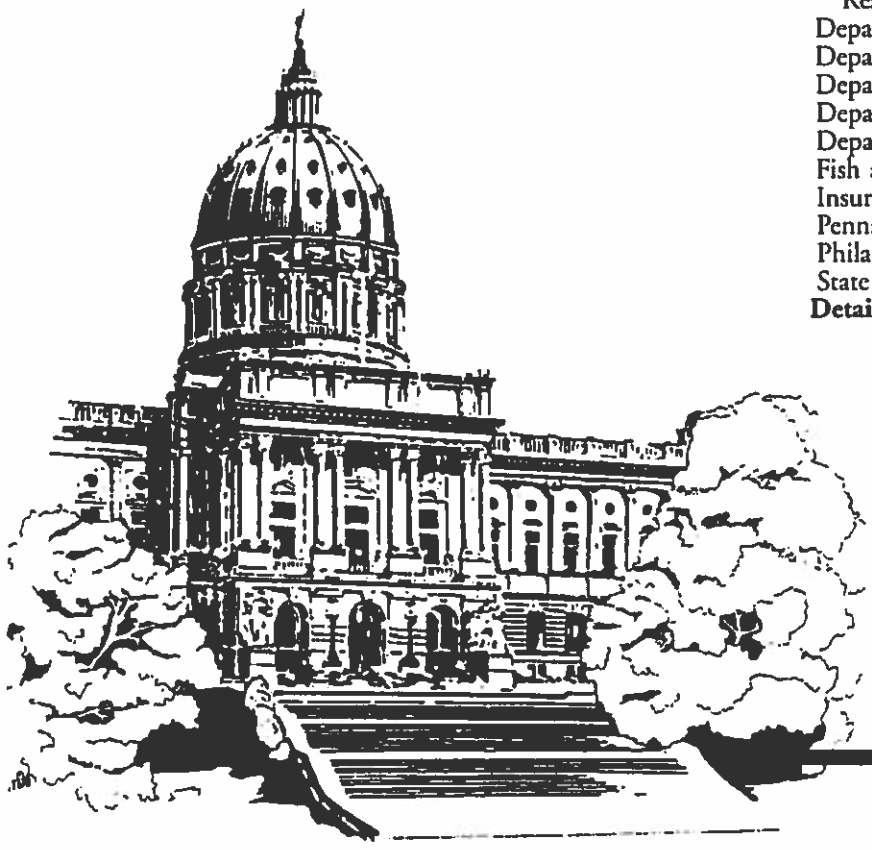
PENNSYLVANIA BULLETIN

Volume 52 Number 33
Saturday, August 13, 2022 • Harrisburg, PA
Pages 4903—5108

See Part II page 5049
for the Rules and Regulations

Part I

Agencies in this issue
The General Assembly
The Courts
Department of Agriculture
Department of Banking and Securities
Department of Conservation and Natural Resources
Department of Environmental Protection
Department of Health
Department of Human Services
Department of Revenue
Department of Transportation
Fish and Boat Commission
Insurance Department
Pennsylvania Public Utility Commission
Philadelphia Parking Authority
State Board of Medicine
Detailed list of contents appears inside.



The Committee considered whether the qualifier for an interlocutory appeal pursuant to Pa.R.A.P. 311(b)(2), *i.e.*, "substantial issue," should be retained or altered to more closely hew to that found in 42 Pa.C.S. § 702(b), *i.e.*, "a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the matter." *See also* Pa.R.A.P. 1312(a)(5)(ii). The Committee believes that maintaining the existing qualifier is preferable rather than introducing a new qualifier into the analysis.

All comments, concerns, and suggestions regarding this proposal are welcome.

[Pa.B. Doc. No. 22-1203. Filed for public inspection August 12, 2022, 9:00 a.m.]

Title 252—ALLEGHENY COUNTY RULES

ALLEGHENY COUNTY

Civil Division Local Rules of the Court of Common Pleas; No. AD-2022-251-PJ Rules Docket

Order of Court

And Now, this 3rd day of August, 2022, it is hereby *Ordered* that the following Allegheny County Civil Division Local Rules, adopted by the Board of Judges on June 10, 2022, shall be effective thirty (30) days after publication in the *Pennsylvania Bulletin*.

Local Rule 212.1	Pre-Trial Procedure for All Actions in the Civil Division of the Court of Common Pleas of Allegheny County. Notice of Earliest Trial Date. Time for Completing Discovery and Filing Pre-trial Statement
Local Rule 212.7	Mandatory Mediation
Local Rule 1303	Arbitration Hearing. Notice.

It is further *Ordered* that Local Rule 1901 is rescinded in its entirety.

By the Court

KIM BERKELEY CLARK,
President Judge

Additions to the rules are shown in bold and are underlined.

Deletions from the rules are shown in bold and are bracketed.

Local Rule 212.1. Pre-Trial Procedure for All Actions in the Civil Division of the Court of Common Pleas of Allegheny County. Notice of Earliest Trial Date. Time for Completing Discovery and Filing Pre-Trial Statement.

(1) Pa.R.C.P. 212.1 through 212.3 and Local Rules 212.1 through 212.3 apply to all civil actions, both jury and non-jury, to be tried in the Civil Division; appeals from Compulsory Arbitration shall be exempt unless such cases include a demand for a jury trial, and under such circumstances parties involved in such a case must comply with Local Rules 212.1 through 212.3.

(2) *Definitions.* In these rules, the following words shall have the following meanings:

(a) *"pre-trial conference"*—a conference scheduled by the Court in accordance with Pa.R.C.P. 212.3 in which, in addition to matters set forth in Pa.R.C.P. 212.3, the Court shall:

(i) determine whether the parties have complied with this local rule; and

(ii) attempt an amicable settlement of the case.

(b) *"Conciliating Judge"*—the Judge assigned to conduct the pre-trial conference.

(3) *Notice of Earliest Trial Date. Time for Completing Discovery and Filing Pre-Trial Statement.* Notices required by Pa.R.C.P. 212.1 shall be given by publication in the *Pittsburgh Legal Journal*, and notice shall be provided to unrepresented parties and to those out-of-county counsel identified in paragraph 6 of the Praecipe to Place the Case at Issue (see FORM 214w).

Note: As soon as there is a published trial list, trial dates appear as docket entries in each individual case on the trial list. Docket entries are available online at: https://dcr.alleghenycounty.us/ and click on Civil/Family Division, then "Case Search" (in upper right corner) and enter the docket number. Additionally, published trial lists are also available on the Civil Division's website at: www.alleghenycourts.us.

Trial lists are generally published in the *Pittsburgh Legal Journal* 6 months prior to commencement of the trial term. Pre-trial deadlines are generally as follows: 16 weeks prior to commencement of the trial term for the close of discovery; 14 weeks prior to commencement of the trial term for plaintiffs' pre-trial statements; 12 weeks prior to commencement of the trial term for all other parties' pre-trial statements; and 45 days prior to the commencement of the trial term for completion of mediation pursuant to Local Rule 212.7. The general schedule set forth in this Note is only advisory and may vary from the controlling dates and deadlines published in the *Pittsburgh Legal Journal*.

Local Rule 212.7. Mandatory Mediation.

(1) All parties shall participate in a formal mediation process no later than 45 days prior to commencement of the assigned trial term, as published in the *Pittsburgh Legal Journal* pursuant to Local Rule 212.1(3). This requirement shall apply unless:

(a) The Calendar Control Judge excuses the case from mediation upon motion and good cause shown; or

***Note*: At the discretion of the Calendar Control Judge, "good cause" may include, but is not limited to, the expense of mediation relative to a party's perceived valuation of the case, as well as a party's inability to afford the expense of mediation.**

(b) All parties agree to waive mediation and file a Certification pursuant to Section (3)(a)(iii) of this rule.

***Note*: The mediation requirement set forth herein may be satisfied at any time prior to 45 days before**

commencement of the assigned trial term. This is intended to provide the parties with maximum flexibility in determining when mediation would be most effective.

(2) Except by agreement of all parties, all parties with a financial interest and all non-parties with a financial interest (such as insurers) shall attend mediation with full authority to settle the case. Parties without a financial interest need not attend.

(3) *Certification.*

(a) Within 7 days of completing mediation or agreeing to waive mediation pursuant to Section (1)(b) of this rule, the plaintiff shall file a Certification indicating that:

(i) The case was mediated and all claims have been or soon will be resolved;

(ii) The case was mediated, but all or some claims remain pending for trial; or

(iii) The parties have agreed in writing to waive mediation.

(b) Upon filing of the Certification required by this rule, the plaintiff shall serve a copy of the Certification upon the Calendar Control section of the Civil Division via electronic mail to CivilCalendarControl@alleghenycourts.us. Should the plaintiff fail to timely serve a Certification, any other party may do so.

(c) If the Calendar Control Judge excuses a case from mediation under Section (1)(a) of this rule, the moving party shall within 7 days serve a copy of the Order of Court upon the Calendar Control section of the Civil Division via electronic mail to CivilCalendarControl@alleghenycourts.us.

(4) The Calendar Control Judge may, upon motion, impose such sanctions as are deemed appropriate against counsel and/or the parties for failure to comply with this rule in good faith.

(5) This rule does not apply to arbitration appeals, asbestos cases, or landlord-tenant cases.

Local Rule 1303. Arbitration Hearing. Notice.

(1) The Department of Court Records shall assign the date, time and place of hearing before a Board of Arbitrators as follows:

(a) for complaints filed by presenting to the Department of Court Records, placing said information on the Complaint which is filed and on the copies of the Complaint which are to be served upon all other parties, and

(b) for Complaints filed through the electronic filing system, the Department of Court Records shall give notice to the filing party of the date, time and place of hearing before a Board of Arbitrators through the electronic filing system.

(c) The filing party shall notify the parties to be served with copies of the Complaint of the date, time and place of hearing before a Board of Arbitrators; which notice shall be served with the copy of the Complaint.

(2) Every Complaint (except for Small Claims—see Local Rule 1320(2)) filed in Compulsory Arbitration, whether filed by a plaintiff against a defendant or by a defendant against an additional defendant, shall contain a Notice of Hearing Date, Notice to Defend and Notice of Duty to Appear at Arbitration Hearing (FORM 1303) (see subsection (4) below). The Notice of Hearing Date and Notice of Duty to Appear shall immediately follow the Notice (to Defend) which is required by Pa.R.C.P. 1018.1(b).

(3) Immediately before the time set for hearing, an Arbitration Clerk shall assign cases to each Board of Arbitrators and shall designate the room in which the cases are to be heard. An Arbitration Clerk shall designate the order in which cases shall be heard from those listed in the published daily Arbitration List, in addition to cases listed specially by a Judge.

FORM 1303 Notice of Hearing Date, Notice to Defend and Notice of Duty to Appear at Arbitration Hearing

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

_____ ARBITRATION DOCKET

_____ NO. _____

Plaintiff,

vs. HEARING DATE _____

_____

_____

Defendant,

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the [**attached copy of the suit papers**] following pages, YOU MUST [**complete and detach two of the copies of the attached "Notice of Intention to Appear." One completed copy of the "Notice of Intention to Appear" must be filed or mailed to the Department of Court Records, First Floor, City—County Building, 414 Grant Street, Pittsburgh, PA 15219 and the other completed copy must be mailed to: _____**] take action within TWENTY (20) days [**from the**

ALLEGHENY COUNTY

CIVIL AND FAMILY COURT RULES

(Amended September 13, 2022)

Compulsory Arbitration

Local Rule 1301 Scope.

(1) The following civil actions shall first be submitted to and heard by a Board of Arbitrators:

(a) Civil actions, proceedings and appeals or issues therein where the demand is for $50,000 or less (exclusive of interest and costs);
(b) Replevin without bond and replevin with bond once bond has been set by the Court;
(c) Appeals from final judgments of Magisterial District Judges; and
(d) Matters transferred to Compulsory Arbitration by the Court even though the original demand may have exceeded $50,000.

(2) The following civil actions are not subject to Compulsory Arbitration as set forth, above:

(a) Actions seeking only an accounting;

Note: In an action seeking both money damages and an accounting, a Board of Arbitrators may award money damages but may not order an accounting.

(b) Actions seeking only equitable relief; and

Note: In an action seeking both money damages and equitable relief, a Board of Arbitrators may award money damages but may not order equitable relief.

(c) Actions in which the Commonwealth is a party defendant or an employee of the Commonwealth is a party defendant under the provisions of 42 Pa.C.S., Chapter 85B (relating to actions against Commonwealth parties).

(3) A Board of Arbitrators may not enter an award in favor of any party in excess of $50,000 (exclusive of interest and costs).

Note: While a Board of Arbitrators may hear a lawsuit in which any party claims an amount in excess of $50,000, the award of the Board of Arbitrators to any party may not exceed $50,000 (exclusive of interest and costs). However, with the agreement of all parties, a Board of Arbitrators may award up to the amount agreed upon in excess of $50,000 if all parties also agree that the arbitration award is final and cannot be appealed to Court.

(4) If a party files a counterclaim or a cross-claim seeking an award in excess of $50,000 (exclusive of interest and costs), any party may file a petition to transfer the entire case to the General Docket. At the discretion of a judge, such a counterclaim or cross-claim may be severed and transferred to the General Docket.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006. Amended November 29,

2021, effective January 11, 2022.

Local Rule 1301.1 Discovery in Compulsory Arbitration Proceedings (Except SmallClaims).

(1) For any personal injury claim filed in Compulsory Arbitration, the plaintiff may serve arbitration discovery requests (see FORM 1301.1A) (see subsection (8)(a) below) eithertogether with the copy of the Complaint served on the defendant or thereafter.

(2) The defendant shall furnish the information sought in the discovery requests within thirty (30) days of receipt of the discovery requests.

(3) For any personal injury claim filed in Compulsory Arbitration, any defendant may servearbitration discovery requests (see FORM 1301.1B) (see subsection (8)(b) below) either together with a copy of the Answer served on the plaintiff or thereafter.

(4) The plaintiff shall furnish the information sought in the discovery requests within thirty (30) days of receipt of the discovery requests.

(5) (a) A party may not seek additional discovery through interrogatories or requests for production of documents until that party has sought discovery through the arbitration discovery requests described herein.

(b) A party may not include any additional interrogatories or requests for productionof documents in the arbitration discovery requests provided for in this local rule.

(6) This local rule applies to additional defendants.

(7) The local rule does not apply to claims that do not exceed the sum of $3,000.00 (exclusive of interest and costs) wherein the parties' right to discovery for Small Claimsshall be governed by Local Rule 1320.

*Note***:** While this local rule does not bar additional discovery in arbitration proceedings, it is anticipated that depositions, additional interrogatories or additional requests for the production ofdocuments will be unreasonably burdensome in most arbitration proceedings involving personal injury claims.

*Note***:** This local rule does not affect the right to discovery provided by Pa.R.C.P. 4001-4020 forCompulsory Arbitration cases which are appealed pursuant to Pa.R.C.P. 1308-1311.

(8) (a)

FORM 1301.1A Plaintiff's Arbitration Discovery Requests for Personal Injury Claims

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

_____, Plaintiff	)	AR _____
vs.	)	
_____, Defendant	)	

PLAINTIFF'S ARBITRATION DISCOVERY
REQUESTS FOR PERSONAL INJURY CLAIMS

These discovery requests are directed to _____

_____.

Within thirty (30) days of service of these discovery requests, you shall provide the information sought in these discovery requests to every other party to this lawsuit.

IDENTITY OF DEFENDANT(s)

1. Set forth you full name and address. _____

_____

INSURANCE

2. (a) Is there any insurance agreement that may provide coverage to you for this incident?

Yes_____No_____

(b) If so, list the name of each company and the amount of protection that may be available.

_____

_____

WITNESSES

3. List the names, present addresses, and telephone numbers (if known) of any persons who witnessed the incident (including related events before and after the incident) and any relationship between the witness and you.

STATEMENTS AND OTHER WRITINGS

4. (a) Do you have any written or oral statements from any witness, including any plaintiff?

Yes_____No_____

(b) If you answered yes, attached any written statements signed, adopted or approved by any witness, attach a written summary of any other statements (including oral statements), and identify any witness from whom you obtained a stenographic, mechanical, electrical or other recording that has not been transcribed. (This request does not cover a statement by a party to that party's attorney.)

I have_____have not_____fully complied with request 4(b).

(c) Do you have any photographs, maps, drawings, diagrams, etc. that you may seek to introduce at trial or that may otherwise pertain to this lawsuit?

Yes_____No_____

(d) If you answered yes, attach each of these writings.

I have_____have not_____fully complied with request 4(c).

MEDICAL DOCUMENTS

5. (a) Do you have any medical documents relating to the plaintiff?

Yes_____No_____

(b) If you answered yes, attach each of these documents.

I have_____have not_____fully complied with request 4(b).

CRIMINAL CHARGES

6. (a) Were any felony or misdemeanor criminal charges filed against you or any of your agents as a result of the incident that is the subject of this lawsuit?

Yes_____No_____

(b) If you answered yes, list each felony or misdemeanor charge that is pending and each felony or misdemeanor conviction.

_____

_____

_____

Defendant verifies that the statements made herein are true and correct. Defendant understands that false statements herein are made subject to the penalties of 18 Pa. C. S. § 4904 relating to unsworn falsifications to authorities.

Date:_____ _____
Defendant

(b)

FORM 1301.1B Defendant's Arbitration Discovery Requests for Personal Injury Claims

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

_____, Plaintiff	)	AR _____
vs.	)	
_____, Defendant	)	

DEFENDANT'S ARBITRATION DISCOVERY
REQUESTS FOR PERSONAL INJURY CLAIMS

These discovery requests are directed to _____

_____.

Within thirty (30) days of service of these discovery requests, you shall provide the information sought in these discovery requests to every other party to this lawsuit.

IDENTITY OF PLAINTIFF(s)

1. Set forth you full name and address, age, employer and type of employment.

_____

_____

_____

WITNESSES

2. List the names, present addresses, and telephone numbers (if known) of any persons who witnessed the incident (including related events before and after the incident) and any relationship between the witness and you.

_____

_____

STATEMENTS AND OTHER WRITINGS

3. (a) Do you have any written or oral statements from any witnesses, including any defendant?

Yes_____No_____

(b) If you answered yes, attach any written statements signed, adopted or approved by any witness, attach a written summary of any other statements (including oral statements), and identify any witness from whom you obtained a stenographic, mechanical, electrical or other recording that has not been transcribed. (This request does not cover a statement by a party to that party's attorney.)

I have_____have not_____fully complied with request 3(b).

(c) Do you have any photographs, maps, drawings, diagrams, etc. that you may seek to introduce at trial?

Yes_____No_____

(d) If you answered yes, attach each of these documents.

I have_____have not_____fully complied with request 3(c).

MEDICAL INFORMATION CONCERNING PERSONAL INJURY CLAIM

4. (a) Have you received inpatient or outpatient treatment from any hospital for any injuries or other medical conditions for which you seek damages in this lawsuit?

Yes_____No_____

(b) If you answered yes, list the name of the hospitals, the names and addresses of the attending physicians, and the dates of the hospitalizations.

_____

_____

(c) Have you received any chiropractic treatment for any injuries or other medical conditions for which you seek damages in this lawsuit?

Yes_____No_____

(d) If you answered yes, list the names and addresses of each chiropractor and the dates of treatment.

_____

_____

(e) Have you received any other medical treatment for any injuries or other medical conditions for which you seek damages in this lawsuit?

Yes_____No_____

(f) If you answered yes, list the name and address of each physician or other treatment provider and the dates of the treatment.

_____

_____

(g) Attach complete hospital and office records covering the injuries or other medical conditions for which you seek damages for each hospital, chiropractor, and other medical provider identified in 4(b), 4(d), and 4(f) or authorizations for these records.

I have_____have not_____fully complied with request 4(g).

OTHER MEDICAL INFORMATION

5. (a) List the name and address of your family physician for the period from five years prior to the incident to the present date. _____

_____

_____

_____

(b) Have you received inpatient or outpatient treatment for injuries or physical problems that are not part of your claim in this lawsuit from any hospital within the period from five years prior to the incident to the present date?

Yes_____No_____

(c) If you answered yes, attach a separate sheet which lists the name of the hospital, the date of each treatment, the reason for the treatment, and the length of the hospitalization.

(d) Have you received chiropractic treatment for injuries or physical problems that are not part of you claim in this lawsuit within the period from five years prior to the incident to the present date?

Yes_____No_____

(e) If you answered yes, attach a separate sheet which lists the dates of the treatment, the reasons for the treatment, and the chiropractor's name and address.

(f) Within the period of from five years prior to the incident to the present date, have you received any other medical treatment for injuries that are not part of your claim in this lawsuit?

Yes_____No_____

(g) If you answered yes, attach a separate sheet which lists the dates of the treatment, the reasons for the treatment, and the name and address of the treatment provider.

I have_____have not_____fully complied with request 5(b), 5(c), and 5(f).

WORK LOSS

6. (a) Have you sustained any injuries which resulted in work loss within the period from five (5) years prior to the incident to the present date?

Yes_____No_____

(b) If you answered yes, for each injury list the date of the injury, the nature of the injury, and the dates of the lost work.

7. If a claim is being made for lost income, state the name and address of your employer at the time of the incident, the name and address of your immediate supervisor at the time of the incident, your rate of pay, the dates of work loss due to the injuries from this accident and the total amount of your work loss claim.

REQUESTS 8 AND 9 APPLY ONLY TO PERSONAL INJURY CLAIMS ARISING OUT OF A MOTOR VEHICLE ACCIDENT.

8. (a) If you are raising a claim for medical benefits or lost income, have you received or are you eligible to receive benefits from Workmen's Compensation or any program, group contract, or other arrangement for payment of benefits as defined by 75 P.S. § 1719(b)?

(b) If you answered yes, set forth the type and amount of these benefits.

INSURANCE INFORMATION

9. (a) Are you subject to the "Limited Tort Option" or "Full Tort Option" as defined in 75 P.S. § 1705(a) and (b)?

____Limited Tort Option (no claim made for non-monetary damages)

____Limited Tort Option (claim is made for non-monetary damages because the injuries fall within the definition of serious injury or because one of the exceptions set forth in 75 P.S. § 1705(d)(I)-(3) applies)

____Full Tort Option

(b) (Applicable only if you checked "Full Tort Option.") Describe each vehicle (make, model, and year) in your household.

(c) (Applicable only if you checked "Full Tort Option".) Attach a copy of the Declaration Sheet for the automobile insurance policy covering each automobile in your household.

I have_____have not_____fully complied with request 9(c).

Plaintiff verifies that the statements made herein are true and correct. Plaintiff understands that false statements herein are made subject to the penalties of Pa. C. S. § 4904 relating to unsworn falsifications to authorities.

Date:_____ _____

Plaintiff

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

Local Rule 1302 List of Arbitrators. Appointments to Board. Oath.

(1) Subject to approval by the Calendar Control Judge of the Civil Division of the Court, lawyers who are actively engaged in the practice of law inAllegheny County shall be appointed to serve as arbitrators.

(2) Only lawyers who are "active" on the rolls of The Disciplinary Board of the Supreme Court of Pennsylvania are to be treated as lawyers "actively engaged in the practice of law" for purposes of subsection (1).

(3) An Arbitration Clerk shall appoint to each Board of Arbitrators three (3) lawyers summoned from the list of approved lawyers, according to the directions of the Calendar Control Judge of the Civil Division.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

Local Rule 1303 Arbitration Hearing. Notice.

(1) The Department of Court Records shall assign the date, time and place of hearing before a Board of Arbitrators as follows:

(a) for complaints filed by presenting to the Department of Court Records**,** placing said information on the Complaint which is filed and on the copies of the Complaint which are to be served upon all other parties, and

(b) for Complaints filed through the electronic filing system, the Department of Court Records shall give notice to the filing party of the date, time and place of hearing before a Board of Arbitrators through the electronic filing system.

(c) The filing party shall notify the parties to be served with copies of the Complaint of the date, time and place of hearing before a Board of Arbitrators; which notice shall be served with the copy of the Complaint.

(2) Every Complaint (except for Small Claims—see Local Rule 1320(2)) filed in Compulsory Arbitration, whether filed by a plaintiff against a defendant or by a defendant against an additional defendant, shall contain a Notice of Hearing Date, Notice to Defend and Notice of Duty to Appear at Arbitration Hearing (FORM 1303) (see subsection (4) below). The Notice of Hearing Date and Notice of Duty to Appear shall

immediately follow the Notice (to Defend) which is required by Pa.R.C.P. 1018.1(b).

(3) Immediately before the time set for hearing, an Arbitration Clerk shall assign cases to each Board of Arbitrators and shall designate the room in which the cases are to be heard. An Arbitration Clerk shall designate the order in which cases shall be heard from those listed in the published daily Arbitration List, in addition to cases listed specially by a Judge.

(4)

FORM 1303 Notice of Hearing Date, Notice to Defend and Notice of Duty to Appear at Arbitration Hearing

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

_____ ARBITRATION DOCKET

_____ NO. _____

Plaintiff

vs. HEARING DATE _____

_____

_____

Defendant

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, YOU MUST take action within TWENTY (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so, the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE
The Allegheny County Bar Association
400 Koppers Building
436 Seventh Avenue
Pittsburgh, Pennsylvania 15219
Telephone: (412) 261–5555
www.getapittsburghlawyer.com

HEARING NOTICE

YOU HAVE BEEN SUED IN COURT. The above Notice to Defend explains what you

must do to dispute the claims made against you. If you file the written response referred to in the Notice to Defend, a hearing before a board of arbitrators will take place in Courtroom Two, Seventh Floor, City–County Building, 414 Grant Street Pittsburgh, Pennsylvania, on_____, _____at 9:00 A.M. **IF YOU FAIL TO FILE THE RESPONSE DESCRIBED IN THE NOTICE TO DEFEND, A JUDGMENT FOR THE AMOUNT CLAIMED IN THE COMPLAINT MAY BE ENTERED AGAINST YOU BEFORE THE HEARING**.

DUTY TO APPEAR AT ARBITRATION HEARING

If one or more of the parties is not present at the hearing, **THE MATTER MAY BE HEARD AT THE SAME TIME AND DATE BEFORE A JUDGE OF THE COURT WITHOUT THE ABSENT PARTY OR PARTIES. THERE IS NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.**

NOTICE: YOU MUST RESPOND TO THIS COMPLAINT WITHIN TWENTY (20) DAYS OR A JUDGMENT FOR THE AMOUNT CLAIMED MAY BE ENTERED AGAINST YOU BEFORE THE HEARING. IF ONE OR MORE OF THE PARTIES IS NOT PRESENT AT THE HEARING, THE MATTER MAY BE HEARD IMMEDIATELY BEFORE A JUDGE WITHOUT THE ABSENT PARTY OR PARTIES. THERE IS NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006. Amended December 27, 2019, effective February 19, 2020.

Local Rule 1303(a)(2) Failure to Appear for Hearing.

(1) If a party fails to appear for a scheduled arbitration hearing, the matter may, if all present parties agree, be transferred immediately to a Judge of the Court of Common Pleas for an ex parte hearing on the merits and entry of a non-jury verdict, from which there shall be no right to a trial de novo on appeal.

*Note***:** This local rule results in the loss of the right to a trial de novo on appeal, as described in the local rule. A dismissal or judgment which results from this local rule will be treated as any other final judgment in a civil action, subject to Pa.R.C.P. 227.1.

(2) A non-jury verdict entered at a hearing held pursuant to Local Rule 1303(a)(2)(1) shall not exceed $25,000 (exclusive of interest and costs) to any party.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

Local Rule 1304.1. Housing Court Mediation

(1) When a Housing Court matter is scheduled for an arbitration hearing, the parties will have the opportunity to participate in mediation prior to the arbitration hearing on the day of the scheduled hearing upon mutual consent of both parties. Mediation is not mandatory.

(2) Upon checking in with the Arbitration Clerk, the parties will advise the Arbitration Clerk of their desire to have the dispute mediated before a landlord tenant arbitrator mediator, and at that time the parties will execute an Agreement to Mediate;

(3) If the mediation is successful, the parties will immediately enter into a Consented to

Order of Court outlining the terms of the parties' Settlement;

(4) If the mediation is unsuccessful, the parties will proceed to an arbitration which shall be heard by a panel of arbitrators that does not include the mediator on that same day;

(5)

Form 1304.1 Housing Court Agreement to Mediate.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

PLAINTIFF,	ARBITRATION DOCKET
VS.	NO. _____ - _____ - _____
DEFENDANT	HEARING DATE: _____

AGREEMENT TO MEDIATE

This_____, day of _____, 20_____, Plaintiff and Defendant identified in the above captioned action,agree to make every effort to in good faith resolve their dispute involving the property located at _____ _____, through mediation (an effort by an unbiased person to help the parties reach a settlement).

Both Plaintiff and Defendant voluntarily enter into this Agreement to Mediate.

_____ _____

Editor's Note: Adopted December 27, 2019, effective February 19, 2020.

Local Rule 1306 Award. Delay Damages.

Any party seeking damages under Pa.R.C.P. 238 (relating to award of damages for delay in an action for bodily injury, death or property damage) shall submit a photocopy of any written offer of settlement made by a party against whom damages are demanded or set forth in writing the fact that no written offer has been made and shall seal the photocopy of the written offer or the written statement that no offer has been made in an envelope bearing the caption and number of the case being arbitrated and shall deliver the same to the arbitrators and opposing counsel at the conclusion of the hearing. The arbitrators shall not open said envelope until they have reached their basic award. The envelope and the writing contained therein shall be filed with the papers in the case.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

Local Rule 1308 Appeal. Arbitrators' Compensation. Notice.

(1) In addition to satisfying the requirements of Pa.R.C.P. 1308(a), a party appealing an award shall also pay to the Department of Court Records any fee required for filing the appeal.

(2) A member of a Board of Arbitration who has signed an award or filed a minority report in each of the cases heard before that Board shall receive compensation of $150 per diem after the filing of that member's reports/awards. In cases requiring hearings of unusual duration or involving questions of unusual complexity, the Calendar Control Judge of the Civil Division, on petition of the members of the Board and for cause shown, may allow additional compensation.

Editor's Note: Adopted October 4, 2006, effective December 4, 2006. Amended November 29, 2021, effective January 11, 2022.

Local Rule 1320 Small Claims Procedure.

The following procedure shall govern Small Claims, which include appeals from Magisterial District Judges where the damages claimed do not exceed the sum of $3,000 (exclusive of interest and costs), and civil actions where the damages claimed do not exceed the sum of $3,000 (exclusive of interest and costs).

(1) The Complaint may be simplified to contain only the names and addresses of the parties, a statement indicating concisely the nature and amount of the claim, the signature of the plaintiff or the plaintiff's attorney (Pa.R.C.P. 1023), an endorsement (Pa.R.C.P. 1025), a Notice of Hearing Date and three copies of a Notice of Intention to Appear as set forth in subparagraph (3) hereof.

(2) Every Complaint filed in Compulsory Arbitration as a Small Claim, whether filed by a plaintiff against a defendant or by a defendant against an additional defendant, shall contain a Notice of Hearing Date, Notice to Defend, and Notice of Duty to Appear at Arbitration Hearing (FORM 1320A) (see subsection (9)(a) below). The Notice of Hearing Date and Notice of Duty to Appear shall immediately follow the Notice (to Defend) which is required by Pa.R.C.P. 1018.1(b).

(3) The filed Notice of Intention to Appear shall be a sufficient answer to the Complaint (FORM 1320B) (see subsection (9)(b) below)

(4) A counterclaim which qualifies as a "Small Claim" as defined herein may be set forth in either the filed Notice of Intention to Appear or a separate pleading, by a statement indicating concisely the nature and amount of same. The counterclaim filed as a separate pleading shall be in substantially the same form as the Complaint, without the Notice of Hearing or Notice of Intention to Appear.

(5) No reply to a counterclaim shall be required. If one is filed, it may be limited to a general denial.

(6) The provisions of Local Rules 212.1, 212.2 and 212.3 shall not apply to actions involving only Small Claims as defined herein.

(7) Except as otherwise provided by order of the Discovery Motions Judge upon good cause shown, in Small Claims proceedings, there shall be no discovery by deposition upon oral examination or upon written interrogatories under Pa.R.C.P. 4005 and 4007 or requests for admissions under Pa.R.C.P. 4014.

(8) The Department of Court Records, on praecipe of the plaintiff accompanied by a certificate as required by Pa.R.C.P. 237.1(a)(2), shall enter judgment against the defendant for failure to file either a responsive pleading or a copy of the Notice of Intention to Appear within twenty (20) days from service thereof, with damages to be assessed in the manner provided by the rules.

(9) (a)

FORM 1320A Notice of Hearing Date, Notice to Defend and Notice of Duty to Appear at Arbitration Hearing

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA
CIVIL DIVISION

ARBITRATION DOCKET

_____ No._____

Plaintiff,

vs. HEARING DATE: _____

_____

Defendant.

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the attached copy of the suit papers, YOU MUST complete and detach two of the copies of the attached "Notice of Intention To Appear."

One completed copy of the "Notice of Intention to Appear" must be filed or mailed to Department of Court Records, First Floor, City-County Building, 414 Grant Street, Pittsburgh, PA 15219 and the other completed copy must be mailed to:

_____

_____

within TWENTY (20) days from the date these papers were mailed. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lost money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE, The Allegheny County Bar Association
4th Floor Koppers Building, 436 Seventh Avenue
Pittsburgh, Pennsylvania 15219
Telephone: (412) 261-5555

HEARING NOTICE

YOU HAVE BEEN SUED IN COURT. The above Notice to Defend explains what you must do to dispute the claims made against you. If you file the written response referred to in the Notice to Defend, a hearing before a board of arbitrators will take place in the Arbitration Assembly Room, Courtroom Two, Seventh Floor City-County Building, Pittsburgh, PA 15219, on _____, _____ (insert date and year) at 9:00 A.M. IF YOU FAIL TO FILE THE RESPONSE DESCRIBED IN THE NOTICE TO DEFEND, A JUDGMENT FOR THE AMOUNT CLAIMED IN THE COMPLAINT MAY BE ENTERED AGAINST YOU BEFORE THE HEARING.

DUTY TO APPEAR AT ARBITRATION HEARING

If one or more of the parties is not present at the hearing, THE MATTER MAY BE HEARD AT THE SAME TIME AND DATE BEFORE A JUDGE OF THE COURT WITHOUT THE ABSENT PARTY OR PARTIES. THERE IS NO RIGHT TO A TRIAL DE NOVO ON APPEAL FROM A DECISION ENTERED BY A JUDGE.

NOTICE: You must respond to this complaint within twenty (20) days or a judgment for the amount claimed may be entered against you **before the hearing**.

If one or more of the parties is not present at the hearing, the matter may be heard immediately before a judge without the absent party or parties. **There is no right to a trial de novo on appeal from a decision entered by a judge.**

(b) **FORM 1320B Notice of Intention to Appear**

NOTICE OF INTENTION TO APPEAR

(Three copies required)

To the Plaintiff or the Plaintiff's Attorney

Case Caption _____

Hearing Date _____

I intend to appear at the hearing scheduled for the above date and defend against the claim made against me.

I do not owe this claim for the following reasons:

_____

_____

_____

I certify that I have mailed a copy of this Notice to the Plaintiff or the Plaintiff's attorney.

Date: _____ Sign here: _____

Address: _____

_____

Editor's Note: Adopted October 4, 2006, effective December 4, 2006. Amended November 29, 2021, effective January 11, 2022.

Local Rule 1321. Housing Court Procedures.

The following procedures shall govern all claims filed with or transferred to the Housing Court (see Local Rule 76 for definition of Housing Court), including appeals from Magisterial District Judges involving Landlord and Tenant issues.

1. **Service of Notice of Appeal and Other Papers**: see Local Magisterial District Court Rule 1005 regarding service of Notice of Appeal and, if appellant was the tenant before the Magisterial District Judge, of the Complaint.
2. **Complaint**: The Complaint may be simplified by filing a "short form" Landlord Tenant Complaint available at the Housing Court Help Desk. All Complaints shall contain a signature of the plaintiff or the plaintiff's counsel (Pa.R.C.P. 1023), an endorsement (Pa.R.C.P. 1025), a Notice of Hearing Date, Notice to Defend, and Notice of Duty to Appear at Arbitration Hearing (Form 1320A) and three copies of a Notice of Intention to Appear (Form 1320B) hereof, and must have the following attached to it:

(a.) A copy of the written Lease, if any, that exists between the parties and which is the subject of the appeal; and,

(b.) A copy of the written Notice to Quit or Notice of Lease Termination, if any, that was served upon to the Tenant.

3. **Arbitration**: At the time the Complaint is filed, an arbitration hearing date is assigned by the Housing Court Clerk, and the case will be heard before an arbitration panel. See local rules 1301-1308 for arbitration procedures.

4. **Notice of Intention to Appear (Form 1320B)**: the filed Notice of Intention to Appear shall be a sufficient answer to the Complaint.

5. A counterclaim may be set forth in either the filed Notice of Intention to Appear or a separate pleading, by a statement indicating concisely the nature and amount of same. No reply to a counterclaim shall be required. If one is filed, it may be limited to a general denial.

6. For Motion and Petition Practice, including requests for in forma pauperis, related to Housing Court Matters see Local Rules 206.4(c)(5), 208.3(a)(7), 1028(c)(3), and 1034(a)(3).

Note: See Forms 1320A and 1320B.

Editor's Note: Adopted December 27, 2019, effective February 19, 2020.

Local Rule 1331 Consumer Credit Transaction.

The agency to be named in any notice required by Pa.R.C.P. 1328(b) and 1329(3)(2) shall be:

Lawyer Referral Service
Allegheny County Bar Association
11th Floor Koppers Building
436 Seventh Avenue
Pittsburgh, PA 15219
Telephone: (412) 261-5555

Editor's Note: Adopted October 4, 2006, effective December 4, 2006.

Judicial Administration

Local Rule 1901. Prompt Disposition of Matters; Termination of Inactive Cases – Civil Division Matters Only

Local Rule 1901 is rescinded in its entirety effective September 13, 2022.

Actions for Support

Local Rule 1910.5 Complaint. Order of Court

(1) The complaint shall be on a pre-printed form provided by the Intake Office of the Domestic Relations Section of the Court, substantially in the form provided by

District Court of the Western District of PA
Local Civil Rules of Court
LCvR 16.2 ALTERNATIVE DISPUTE RESOLUTION

A. **Effective Date and Application**. LCvR 16.2 shall govern all actions as the Board of Judges shall determine, from time to time, commenced on or after June 1, 2006, with the exception of Social Security cases and cases in which a prisoner is a party. Cases subject to LCvR 16.2 also remain subject to the other Local Rules of the Court.

B. **Purpose.** The Court recognizes that full, formal litigation of claims can impose large economic burdens on parties and can delay resolution of disputes for considerable periods. The Court also recognizes that an alternative dispute resolution ("ADR ") procedure can improve the quality of justice by improving the parties' understanding of their case and their satisfaction with the process and the result. The Court adopts LCvR 16.2 to make available to litigants a broad range of Court-sponsored ADR processes to provide quicker, less expensive and potentially more satisfying alternatives to continuing litigation without impairing the quality of justice or the right to trial. The Court offers diverse ADR services to enable parties to pursue the ADR process that promises to deliver the greatest benefits to their particular case. In administering these Local ADR Rules and the ADR program, the Court will take appropriate steps to assure that no referral to ADR results in an unfair or unreasonable economic burden on any party.

C. **ADR Options.** The Court-sponsored ADR options for cases include:
    1. Mediation
    2. Early Neutral Evaluation
    3. Arbitration

D. **ADR Designation.** At the Rule 26(f) "meet and confer" conference, the parties are required to discuss and, if possible, stipulate to an ADR process for that case. The Rule 26(f) written report shall (1) designate the specific ADR process that the parties have selected, (2) specify the time frame within which the ADR process will be completed, and (3) set forth any other information the parties would like the Court to know regarding their ADR designation. The parties shall use the form provided by the Court. When litigants have not stipulated to an ADR process before the Scheduling Conference contemplated by LCvR 16.1, the assigned Judge will discuss the ADR options with counsel and unrepresented parties at that conference. If the parties cannot agree on a process before the end of the Scheduling Conference, the Judge will make an appropriate determination and/or selection for the parties.

E. **ADR Practices and Procedures.** The ADR process is governed by the ADR Policies and Procedures, as adopted by the Board of Judges for the United States District Court for the Western District of Pennsylvania, which sets forth specific and more detailed information regarding the ADR process, and which can be accessed either on the Court's official website (www.pawd.uscourts.gov) or from the Clerk of Court.

ADR Policies and Procedures

Effective: January 2, 2019

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ALTERNATIVE DISPUTE RESOLUTION POLICIES AND PROCEDURES

Contents

1. DEFINITIONS

1.1 **"Mediation"** refers to a nonadjudicative, third-party intervention wherein an impartial neutral, selected by the parties, facilitates negotiations between the parties to help them reach a mutually acceptable agreement. The parties are responsible for negotiating a settlement. The neutral's role is to assist the process in ways acceptable to the disputants.

1.2 "**Early Neutral Evaluation**" refers to a nonadjudicative, third-party intervention by an impartial experienced attorney, selected by the parties, with subject matter expertise. After reviewing concise presentations of the parties' claims, the neutral provides a non-binding evaluation of the case and thereafter is available to assist the parties in reaching an agreement.

1.3 "**Arbitration"** involves the referral of a dispute to an impartial third party (or a panel of three), selected by the parties, who, after giving the parties an opportunity to present evidence and arguments, renders a non-binding determination in settlement of the claim(s). Arbitration in the federal district court is further defined in 28 U.S.C. § 654. Parties may agree to be bound by the arbitrator's decision which is non appealable.

1.4 Other ADR Processes. See Section 7.

2. GENERAL PROVISIONS

2.1 **Staff and Responsibilities.** An ADR Coordinator will oversee the Court's ADR programs and must have expertise in ADR procedures. The ADR Coordinator is responsible for designing, implementing, administering and evaluating the Court's ADR programs. These responsibilities include educating litigants, lawyers, Judges, and Court staff about the ADR program and rules. In addition, the ADR Coordinator must be responsible for overseeing, screening and orienting neutral

arbitrators, mediators and evaluators (hereinafter "neutrals") to serve in the Court's ADR programs.

2.2 ADR Internet Site. www.pawd.uscourts.gov, contains information about the Court's ADR processes, information about neutrals and their fees, answers to frequently asked questions, various forms approved by the Court, and information about becoming a neutral in the Court's programs.

2.3 Contacting the ADR Coordinator

The ADR Coordinator's contact information is:

ADR Coordinator
United States District Court
For the Western District of PA
700 Grant Street
Pittsburgh, PA 15219
Telephone: (412) 208-7500
E-Mail: ADRCoordinator@pawd.uscourts.gov

The Court encourages litigants and counsel to consult the ADR Internet site (**www.pawd.uscourts.gov**) and to contact the ADR Coordinator to discuss the suitability of ADR options for their cases or for assistance in tailoring an ADR process to a specific case.

2.4 ADR Judge

The Court has appointed a United States District Judge (who serves as the Chair of the Court's Standing Committee on Case Management and ADR) to serve as the ADR Judge. The ADR Judge is responsible for overseeing the ADR program,

consulting with the ADR Coordinator on matters of policy, program design and evaluation, education, training and administration. When necessary, the Chief District Judge may appoint another Judicial Officer of this Court to perform, temporarily, the duties of the ADR Judge.

If a party files a motion with the court alleging matters such as bad faith or requesting enforcement of a settlement reached as a result of the ADR process, the assigned judicial officer may adjudicate the motion or may elect to request another judge to do so. Should the latter occur, the matter will be referred internally to another judge who is a member of the Case Management and ADR Committee, to decide the motion.

2.5 Neutrals

A. Panel. The ADR Coordinator must maintain a panel of neutrals serving in the Court's ADR programs. Neutrals will be selected from time to time by the Court from applications submitted by lawyers willing to serve or by other persons as set forth in section B(1)(b) below.

B. Qualifications and Training. Each person serving as a neutral in a Court ADR program must be a member of the bar of this Court, a member of the faculty of an accredited law school, or be approved by this Court to serve as a neutral and be determined by the ADR Judge to be competent to perform the applicable duties, and must successfully complete initial and periodic training sessions as required by the Court and be a registered user of the Electronic Case Filing (ECF) system for the United States District Court, Western District of Pennsylvania. (**All neutrals, including those who are retained privately, are required to be registered users of the Court's ECF system**.) Additional minimum requirements for serving on the Court's panel of neutrals, which the Court may modify in individual circumstances for good

cause, are as follows:

1. Mediators.

a. Attorney Mediators. Mediators who are attorneys must have been admitted to the practice of law for at least seven years and must have:

i. substantial experience with civil litigation in federal court;

ii. completed 40 hours of mediation training, including training in the facilitative method of mediation. At least 16 hours of mediation training must be participating in simulated facilitative mediations;

iii. strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

b. Non-attorney Mediators. Non-attorney mediators may be appointed to a case only with the consent of the parties. Mediators who are not attorneys may be selected to serve on the Court's panel of mediators if they are knowledgeable about civil litigation in federal courts and have:

i. appropriate professional credentials in another discipline;

ii. 40 hours of mediation training, including training in the facilitative method of mediation;

iii. experience mediating at least five cases; and

iv. strong mediation process skills and the temperament and training to listen well, facilitate communication across party lines and assist the parties with settlement negotiations.

c. **All Mediators**. All mediators must adhere to the Model Standards of Conduct for Mediators as last adopted or amended by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, as well as any other applicable standards of professional conduct which may be required by the Court. (Available athttp://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.)

2. **Early Neutral Evaluators**. Evaluators must have been admitted to the practice of law for at least 15 years and must have:

a. substantial experience with civil litigation in federal court;

b. substantial expertise in the subject matter of the cases assigned to them; and

c. the temperament and training to listen well, facilitate communication across party lines and, if called upon, assist the parties with settlement negotiations.

d. agreed to adhere to the Model Standards of Conduct for Mediators as last adopted or amended by the American Arbitration Association, American Bar Association and Association for Conflict Resolution, as well as any other applicable standards of professional conduct which may be required by the Court.

(Available at http://www.abanet.org/dispute/documents/model_standards_conduct_april2007.pdf.)

3. **Arbitrators**. Arbitrators must have been admitted to the practice of law for at least 10 years and must have:

   a. For not less than five years, committed 50% or more of their professional time to matters involving litigation; or

   b. Substantial experience serving as a neutral in dispute resolution proceedings; and

   c. agree to adhere to the Model Standards of Conduct for Arbitrators. (Available at http://www.abanet.org/dispute/commercial_disputes.pdf.)

C. **Immunities**. All persons serving as neutrals in any of the Court's ADR programs are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

2.6 Evaluation of ADR Programs

Congress has mandated that the Court's ADR programs be evaluated. Neutrals, counsel and parties must promptly respond to any inquiries or questionnaires from persons authorized by the Court to evaluate the programs. Responses to such inquiries will be used for research and monitoring purposes only and the sources of specific information will not be disclosed to the assigned Judicial Officer in any report.

2.7 Attendance at Session

A. Parties. Each party must attend the selected ADR process session unless excused under paragraph D below. This requirement reflects the Court's view that the principal values of Alternate Dispute Resolution include affording litigants an opportunity to articulate their positions and to hear, first hand, both their opponent's version of the matters in dispute and a neutral assessment of the merits of the case.

1. Corporation or Other Entity. A party other than a natural person (e.g., a corporation or an association) satisfies this attendance requirement if represented by a decision maker(s) (other than outside counsel) who has full settlement authority and who is knowledgeable about the facts of the case.

2. Government Entity. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extend feasible, full settlement authority, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. If the action is brought by the government on behalf of one or more individuals, at least one such individual also must attend.

3. Any party who fails to have physically in attendance the necessary decision maker(s) will be subject to sanctions.

B. Counsel. Each represented party must be accompanied at the selected ADR process session by the lawyer who will be primarily responsible for handling

the trial of the matter. If a party is proceeding pro se, a request may be made to the Court to name a pro bono attorney to represent the pro se litigant at the selected ADR process session.

C. Insurers. Insurer representatives, including, if applicable, risk pool representatives, are required to attend in person unless excused under paragraph D below, if their agreement would be necessary to achieve a settlement.

D. Request to be Excused. A person who is required to attend the selected ADR process session may be excused from attending in person only after a showing that personal attendance would impose an extraordinary or otherwise unjustifiable hardship. A person seeking to be excused must file a motion with the assigned Judicial Officer, no fewer than 15 days before the date set for the session, simultaneously copying the Arbitration Clerk (if applicable), all other counsel and unrepresented parties and the neutral(s). The motion seeking excuse from the selected ADR process session must:

1. Set forth with specificity all considerations that support the request;
2. State realistically the amount in controversy in the case;
3. Indicate whether the other party or parties join in or object to the request; and
4. Be accompanied by a proposed order.

E. Participation by Telephone. A person excused from attending the selected ADR process session in person must be available to participate by telephone.

2.8 Good Faith Definition

It is the expectation of the court that all parties ordered to mediation shall attend

with full and complete settlement authority and shall participate in good faith. "Good faith" shall refer to the duty of the parties to meet and negotiate with a willingness to reach agreement, full or partial, on matters in dispute. If parties and/or party representatives with full settlement authority participate, consider and respond to the proposals made by each other, and respect each other's role by not acting in a manner which is arbitrary, capricious or intended to undermine the mediation process, the parties are deemed to be acting in good faith.

In good faith negotiations, neither party is required to make a concession or agree to any proposal, nor are they precluded from seeking the best possible resolution for their own interests. If a party is attending a mediation session with the intent not to make any demand or offer of settlement, or if they intend to wait until the disposition of certain motions to engage in settlement discussions, they shall explicitly inform the mediator and all other parties in writing no later than 15 calendar days prior to the mediation session. A refusal to make an offer or a demand shall not exempt ADR participation. The parties may either elect to move forward with the mediation session or proceed to Early Neutral Evaluation (ENE).

If the parties elect to move forward with the mediation session knowing that no demand or offer of settlement may be made, there is no violation of good faith.

2.9 Motion for Sanctions

All ADR Motions for Sanctions must be consistent with the process outlined in Attachment A.

3. MEDIATION

3.1 Description

Mediation is a flexible, non-binding, confidential process in which a neutral person (the mediator), selected by the parties, facilitates settlement negotiations. Generally, mediation will utilize a facilitative approach, but the mediator should be prepared to provide evaluative assessments if requested by all parties. The mediator improves communication across party lines, helps parties articulate their interests and understand those of their opponent, probes the strengths and weaknesses of each party's legal positions, identifies areas of agreement and helps generate options for a mutually agreeable resolution to the dispute. The mediator generally does not give an overall evaluation of the case. A hallmark of mediation is its capacity to expand traditional settlement discussion and broaden resolution options, often by exploring litigant needs and interests that may be formally independent of the legal issues in controversy.

3.2 Eligible Cases

Appropriate civil cases may be referred to mediation by order of the assigned Judicial Officer.

3.3 Mediators

A. Referral. No later than the Initial Case Management Conference (Rule 16) the parties are to choose a mediator who is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the mediator's services must be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the neutral's fee schedule filed with the Court. In a case with third-party

defendants, the cost must be divided into three equal shares. A neutral must not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and, if necessary, enter an Order modifying the fee. Compensation must be paid directly to the neutral upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the mediator. Failure to pay the mediator must be brought to the Court's attention.

C. **Fee Waiver.** A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint a mediator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

3.4 Timing and Scheduling the Mediation

A. **Scheduling by Mediator.** Promptly after being chosen to mediate a case, the mediator shall, after consulting with all parties, fix the date and place of the mediation within the deadlines set by paragraph B below, or the order referring the case to mediation.

B. **Deadline for Conducting Mediation**. Unless otherwise ordered or extended by the Court for good cause shown pursuant to Section 3.5 infra, the mediation shall be held within 60 days after the initial scheduling conference (see LCvR 16.1.A.2). This is a presumptive timeline for the ADR proceeding, subject to adjustment by the Court to meet the needs of the case.

3.5 Request to Extend the Deadline

A. **Motion Required.** Requests for extension of the deadline to conduct a

mediation must be made as soon as practicable or when a conflict is first known in a motion directed to the assigned Judicial Officer, with a copy to the other parties and the mediator.

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;
2. Indicate whether the other parties concur in or object to the request; and
3. Be accompanied by a proposed order setting forth a new deadline by which the mediation will be held.

3.6 Telephone Conference Before Mediation

The mediator must schedule a brief joint telephone conference with counsel and any unrepresented parties before the mediation session to discuss matters such as the scheduling of the mediation, the procedures to be followed, the nature of the case, and which client representatives will attend.

3.7 No Written Mediation Statements Required

Written mediation statements are not required for mediations.

3.8 Procedure at Mediation

A. Procedure. Presumptively the mediation will employ a facilitative method. Mediators and parties have discretion to structure the mediation so as to maximize the benefits of the process.

B. Separate Caucuses. The mediator may hold separate, private caucuses with

each side or each lawyer or, if the parties agree, with the parties only. The mediator may not disclose communications made during such a caucus to another party or counsel without the consent of the party who made the communication.

3.9. Follow Up

At the close of the mediation session, the mediator and parties shall jointly determine whether it would be appropriate to schedule any additional ADR activity. Additional ADR activities to which the parties may agree include, but need not be limited to: written or telephonic reports by the parties to one another or to the mediator; exchange of specified information; another mediation session; or asking the Court for a settlement conference.

3.10 Report of the Neutral

Within five (5) days of the conclusion of the mediation, the mediator must electronically file the "Report of Neutral" which includes the caption and case number, the date of the mediation, whether any follow up is scheduled, whether the case resolved in whole or in part, and any stipulations the parties agree may be disclosed.

4. EARLY NEUTRAL EVALUATION

4.1 Description

In Early Neutral Evaluation (ENE) the parties and their counsel, in a confidential session, make compact presentations of their claims and defenses, including key evidence as developed at that juncture, and receive a non-binding evaluation by

an experienced neutral lawyer, selected by the parties, with subject matter expertise. The evaluator also helps identify areas of agreement, offers case-planning suggestions and, if requested by the parties, settlement assistance.

4.2 Eligible Cases

Subject to the availability of an evaluator with subject matter expertise, appropriate civil cases may be referred to ENE by order of the assigned Judicial Officer.

4.3 Evaluators

A. Referral. No later than the Initial Case Management Conference (Rule 16) the parties are to choose an evaluator who has expertise in the subject matter of the lawsuit, is available during the appropriate period and has no apparent conflict of interest.

B. Compensation. Unless otherwise agreed by all parties or ordered by the Court, one-half the cost of the evaluator's services must be borne by the plaintiff(s) and one-half by the defendant(s) at the rate contained in the evaluator's fee schedule filed with the Court. In a case with third-party defendants, the cost must be divided into three equal shares. An evaluator must not charge or accept in connection with a particular case a fee or thing of value from any source other than the parties. The Court may review the reasonableness of the fee and, if necessary, enter an Order modifying the fee.

Compensation must be paid directly to the evaluator upon the conclusion of the ADR process, or as otherwise agreed to by the parties and the evaluator. Failure to pay the evaluator must be brought to the Court's attention.

C. Fee Waiver. A party who demonstrates a financial inability to pay all or part of that party's *pro rata* share of the neutral's fee may request the Court to appoint an evaluator who has agreed to serve *pro bono*. The Court may waive all or part of that party's share of the fee. Other parties to the case who are able to pay the fee must bear their *pro rata* portions of the fee.

4.4 Timing and Scheduling the Early Neutral Evaluation (ENE)

A. Scheduling by Evaluator. Promptly after being appointed to a case, the evaluator must, after consulting with all parties, fix the date and place of the ENE within the deadlines set by paragraph B below, or the order referring the case.

B. Deadline for Conducting Session. Unless otherwise ordered or extended by the Court for good cause shown pursuant to Section 4.5 infra, , the ENE shall be held within 60 days after the initial scheduling conference (see LCVR 16.1.A.2), This is a presumptive timeline for the ADR proceeding, subject to adjustment by the Court to meet the needs of the case.

4.5 Requests to Extend Deadline

A. Motion Required. Requests for extension of the deadline for to conduct an ENE session must be made as soon as practicable or when a conflict is first known, in a motion directed to the assigned Judicial Officer, with a copy to the other parties and the evaluator.

B. Content of Motion. Such motion must:

1. Detail the considerations that support the request;
2. Indicate whether the other parties consent or object to the request; and
3. Be accompanied by a proposed order setting forth a new deadline by which the ENE will be held.

4.6 *Ex Parte* Contact Prohibited

Except with respect to scheduling matters, there must be no *ex parte* communications between parties or counsel and the evaluator, including private caucuses to discuss settlement, until after the evaluator has either delivered orally his or her evaluation or, if so requested by the parties, has committed his or her evaluation to writing, or all parties have agreed that *ex parte* communications with the evaluator may occur.

4.7 Telephone Conference Before Early Neutral Evaluation

The evaluator must schedule a brief joint telephone conference with counsel before the ENE to discuss matters such as the scheduling, the procedures to be followed, the nature of the case, and which client representatives will attend.

4.8 Written Statements

A. Time for Submission. No later than 10 calendar days before the ENE, each party must submit directly to the evaluator, and must serve on all other parties, a written Statement.

B. Prohibition Against Filing. The Statements constitute confidential information, must not be filed and the assigned Judicial Officer must not have access to them.

C. Content of Statement. The Statements must be concise and should include any information that may be useful to the evaluator, for example:

1. Identify, by name and title or status:

a. The person(s) with decision-making authority, who, in addition to counsel, will attend the ENE as representative(s) of the party, and

b. Persons connected with a party opponent (including an insurer representative) whose presence might substantially improve the utility of the ENE or the prospects for settlement;

2. Describe briefly the substance of the suit, addressing the party's views of the key liability issues and damages and discussing the key evidence;

3. Address whether there are legal or factual issues whose early resolution would reduce significantly the scope of the dispute or contribute to settlement negotiations;

4. Identify the discovery that is necessary to equip the parties for meaningful settlement negotiations;

5. Describe the history and status of any settlement negotiations; and

6. Include copies of documents out of which the suit arose (*e.g.*, contracts), or whose availability would materially advance the purposes of the evaluation session, *(e.g.*, medical reports or documents by which special damages might be determined).

4.9 Procedure at an Early Neutral Evaluation

A. Components of Early Neutral Evaluation

Unless otherwise agreed to by the parties and evaluator, the evaluator must:

1. Permit each party (through counsel or otherwise), orally and through documents or other media, to present its claims or defenses and to describe the principal evidence on which they are based;

2. Help the parties identify areas of agreement and, where feasible, enter stipulations;

3. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain the reasoning that supports these assessments;

4. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

5. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will equip them as expeditiously as possible to enter meaningful settlement discussions or to position the case for disposition by other means;

6. Help the parties assess litigation costs realistically; and

7. If the parties are interested, help them, through private caucusing or otherwise, explore the possibility of settling the case; and

8. Determine whether some form of follow up to the session would contribute to the case development process or to settlement.

B. Process Rules. The session must be informal. Rules of evidence must not apply. There must be no formal examination or cross-examination of witnesses and no recording of the presentations or discussion must be made.

C. Evaluation. The evaluation must be presented to the parties orally. The recipients of any oral presentation should include party representatives, insurers and risk pool representatives, as applicable. The parties should determine in advance whether the oral evaluation will be delivered in a joint or separate session. In the event that the parties cannot agree, the oral evaluation shall be delivered in separate sessions. Any party's evaluation may be reduced to writing and provided to that party upon their request. Any evaluation, oral or written, constitutes confidential information which shall not be disclosed to the assigned Judicial Officer or anyone else except as provided in Section 6.D., infra.

Comment: See Prohibition Against Disclosing ENE Communications to Settlement Judges, 494 F. Supp. 2d 1097 (N.D. CA. 2007).

D. Settlement Discussions. At any point during the ENE, if all parties agree, they may proceed to mediation and/or discuss settlement.

4.10 Follow Up

At the close of the ENE session, the neutral evaluator and parties shall jointly determine whether it would be appropriate to schedule any additional ADR activity. Additional ADR activities to which the parties may agree include, but

need not be limited to: written or telephonic reports by the parties to one another or to the neutral evaluator; exchange of specified information; a mediation session; or asking the court for a settlement conference.

4.11 Limitation on Authority of Evaluator

Evaluators have no authority to compel parties to conduct or respond to discovery or to file motions. Nor do evaluators have authority to determine what the issues in any case are, to impose limits on parties' pretrial activities, or to impose sanctions.

4.12 Report of the Neutral

Within five (5) days of the conclusion of the ENE, the evaluator must electronically file "Report of Neutral which includes the caption and case number, the date of the session, whether any follow up is scheduled, whether the case resolved in whole or in part, and any stipulations the parties agree may be disclosed.

5. COURT SPONSORED ARBITRATION (in accordance with 28 U.S.C. §651.)

(For private arbitration, see Section 7.)

5.1 Description

Arbitration is an adjudicative process in which an arbitrator or a panel of three arbitrators, selected by the parties, issues a non-binding judgment ("award") on the merits after an expedited, adversarial hearing. Either party may reject the non-binding award and request a trial *de novo*. An arbitration occurs earlier in the life of a case than a trial and is less formal and less expensive. Because testimony is taken under oath and is subject to cross-examination, arbitration can be especially useful in cases that turn on credibility of witnesses. Arbitrators do not

facilitate settlement discussions.

5.2 Eligible Cases

A case may be referred to arbitration by order of the assigned Judicial Officer.

5.3 Arbitrators

A. **Selection**. After entry of an order referring the case to arbitration, the parties must choose an arbitrator from the Court's panel or, if the parties cannot decide, an arbitrator must be randomly selected by the Arbitration Clerk. The parties have the option of choosing a panel of three arbitrators. If the parties cannot agree upon the panel of three, one or more arbitrators may be selected by the Arbitration Clerk.

B. **Notification by Clerk**. The Arbitration Clerk must promptly notify the person or persons who is selected to serve. If any person so selected is unable or unwilling to serve, the Arbitration Clerk will secure another arbitrator after conferring with the parties. When the requisite number of arbitrators has agreed to serve, the Arbitration Clerk must promptly send written notice of the selections to the arbitrator(s) and to the parties. When a panel of three arbitrators is selected, the Arbitration Clerk must designate the person to serve as the panel's presiding arbitrator.

C. **Compensation**. Arbitrators are paid by the Court $250, per Judicial Conference Policy, per day or portion of each day of hearing in which they serve as a single arbitrator or $100 for each day or portion of each day in which they serve as a member of a panel of three. No party may offer or give the arbitrator(s) any gift. No compensation is permitted for preparation time on the case.

D. **Payment and Reimbursement**. When filing an award, arbitrators must submit a voucher on the form prescribed by the Arbitration Clerk for payment of compensation and for reimbursement of any reasonable transportation expenses necessarily incurred in the performance of duties. No reimbursement will be made for any other expenses.

5.4 Timing and Scheduling the Hearing

A. **Scheduling by Arbitrator**. Promptly after being appointed to a case, the arbitrator(s) must arrange for the pre-session phone conference and, after consulting with all parties, must fix the date and place for the arbitration within the deadline fixed by the assigned Judicial Officer, or if no such deadline is fixed, within 90 days after the notice of appointment. Counsel and unrepresented parties must respond promptly to and cooperate fully with the arbitrator(s) with respect to scheduling the pre-session phone conference and the arbitration hearing. The hearing date must not be continued or vacated except for emergencies as established in writing and approved by the assigned Judicial Officer. If the case is resolved before the hearing date, or if due to an emergency a participant cannot attend the arbitration, counsel or an unrepresented party must notify the arbitrator(s) immediately upon learning of such settlement or emergency.

B. **Place and Time**. The hearing may be held at any location within the Western District of Pennsylvania selected by the arbitrator(s), including a room at a federal courthouse, if available. In selecting the location, the arbitrator(s) must consider the convenience of the parties and witnesses. Unless the parties agree otherwise, the hearing must be held during normal business hours.

5.5 *Ex Parte* Contact Prohibited

Except with respect to scheduling matters, there must be no *ex parte* communications between parties or counsel and an arbitrator.

5.6 Written Arbitration Statements

A. **Time for Submission**. No later than 10 calendar days before the arbitration session, each party must submit directly to the arbitrator(s), and must serve on all other parties, a written Arbitration Statement.

B. **Prohibition against Filing**. The statements must not be filed and the assigned Judicial Officer must not have access to them.

C. **Content of Statement**. The statements must be concise and must:

1. Summarize the claims and defenses;

2. Identify the significant contested factual and legal issues, citing authority on the questions of law;

3. Identify proposed witnesses; and

4. Identify, by name and title or status, the person(s) with decision-making authority, who, in addition to counsel, will attend the arbitration as representative(s) of the party.

D. **Modification of Requirement by Arbitrator(s).** After jointly consulting counsel for all parties and any unrepresented parties, the arbitrator(s) may modify or dispense with the requirements for the written Arbitration

Statements.

5.7 Telephone Conference Before Arbitration

The arbitrator(s) must schedule a brief joint telephone conference with counsel and any unrepresented parties before the arbitration to discuss matters such as the scheduling of the arbitration, the procedures to be followed, whether supplemental written material should be submitted, which witnesses will attend, how testimony will be presented, including expert testimony, and whether and how the arbitration will be recorded.

5.8 Authority of Arbitrators and Procedures at Arbitration

A. Authority of Arbitrators. Arbitrators must be authorized to:

1. Administer oaths and affirmations;

2. Make reasonable rulings as are necessary for the fair and efficient conduct of the hearing; and

3. Make awards.

B. Prohibition on Facilitating Settlement Discussions. Arbitrators are not authorized to facilitate settlement discussions. If the parties desire assistance with settlement, the parties or arbitrator(s) may request that the case be referred to mediation (see Section 3 above), or a settlement conference before the Court.

C. Presumption against Bifurcation. Except in extraordinary circumstances, the arbitrator(s) must not bifurcate the arbitration.

D. **Quorum.** Where a panel of three arbitrators has been named, any two members of a panel must constitute a quorum, but the concurrence of a majority of the entire panel must be required for any action or decision by the panel, unless the parties stipulate otherwise.

E. Testimony.

1. **Subpoenas.** Attendance of witnesses and production of documents may be compelled in accordance with F.R.Civ.P. 45.

2. **Oath and Cross-examination.** All testimony must be taken under oath or affirmation and must be subject to such reasonable cross-examination as the circumstances warrant.

3. **Evidence.** In receiving evidence, the arbitrator(s) must be guided by the Federal Rules of Evidence, but must not thereby be precluded from receiving evidence which the arbitrator(s) consider(s) relevant and trustworthy and which is not privileged.

F. **Transcript or Recording.** A party may cause a transcript or recording of the proceedings to be made but must provide a copy to any other party who requests it and who agrees to pay the reasonable costs of having a copy made.

G. **Default of Party.** The unexcused absence of a party must not be a ground for continuance, but damages must be awarded against an absent party only upon presentation of proof thereof satisfactory to the arbitrator(s).

5.9 Award and Judgment

A. Form of Award. An award must be made after an arbitration under this Rule. Such an award must state clearly and concisely the name or names of the prevailing party or parties and the party or parties against which it is rendered, and the precise amount of money, if any, awarded. It must be in writing and (unless the parties stipulate otherwise) be signed by the arbitrator or by at least two members of a panel. No arbitrator must participate in the award without having attended the hearing. Costs within the meaning of F.R.Civ.P. 54 and Civil LR 54.1 may be assessed by the arbitrator(s) as part of an arbitration award.

B. Filing and Serving the Award. Within 10 days after the arbitration hearing is concluded, the arbitrator(s) must deliver the award to the Arbitration Clerk in an unsealed envelope with a cover sheet stating: "Arbitration Award." The cover sheet also must list the case caption, case number and name(s) of the arbitrator, but must not specify the content of the award. The Clerk must note the entry of the arbitration award on the docket and promptly serve copies of the arbitration award on the parties.

C. Sealing of Award. Each filed arbitration award must promptly be sealed by the Clerk. The award must not be disclosed to any Judicial Officer who might be assigned to the case until the Court has entered final judgment in the action or the action has been otherwise terminated, except as necessary to assess costs or prepare the report required by Section 903(b) of the Judicial Improvements and Access to Justice Act.

D. Entry of Judgment on Award. If no party has filed a demand for trial *de novo* (or a notice of appeal, which must be treated as a demand for trial *de novo*) the Clerk must enter judgment on the arbitration award in accordance

with F.R.Civ.P. 58. A judgment so entered must be subject to the same provisions of law and must have the same force and effect as a judgment of the Court in a civil action, except that the judgment must not be subject to review in any other court by appeal or otherwise.

5.10 Trial *De Novo*

A. **Time for Demand.** If any party files and serves a demand for trial *de novo* within 14 days of entry of the filing of the arbitration award, no judgment thereon must be entered by the Clerk and the action must proceed in the normal manner before the assigned Judicial Officer. Failure to file and serve a demand for trial *de novo* within this 14-day period waives the right to trial *de novo*.

B. **Limitation on Admission of Evidence.** At the trial *de novo* the Court must not admit any evidence indicating that there has been an arbitration proceeding, the nature or amount of any award, or any other matter concerning the conduct of the arbitration proceeding, unless:

1. The evidence would otherwise be admissible in the trial under the Federal Rules of Evidence, or

2. The parties have otherwise stipulated.

C. **Award Not to be Attached.** A party filing a demand for a trial *de novo* must not attach the arbitration award.

5.11 Stipulation to Binding Arbitration

At any time before the arbitration hearing, the parties may stipulate in writing to waive their rights to request a trial *de novo.* Such stipulation must be submitted to

the assigned Judicial Officer for approval and must be filed. In the event of such stipulation, judgment must be entered on the arbitration award after the award is received by the Arbitration Clerk.

5.12 Federal Arbitration Act

Nothing in these ADR Policies and Procedures Rules limits any party's right to agree to arbitrate any dispute, regardless of the amount, pursuant to Title 9, United States Code, or any other provision of law.

6. CONFIDENTIALITY

A. **General Rule.** Except as provided in subsection D of this Section 6, this Court, the ADR Coordinator, all neutrals, all counsel, all parties and any other person who participates (in person or by telephone) in (i) any ADR process described in Sections 1 through 5 of these Policies and Procedures, or (ii) any private ADR process pursuant to Court order, shall treat as "confidential information" (i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all "communications in connection with" the ADR process.

B. "Communications in connection with" any ADR process include nonverbal, oral and written communications made by, between, or among (i) a party, (ii) counsel for a party, (iii) a neutral, (iv) a member of the neutral's staff, (v) the ADR Coordinator, or (vi) any other person present to further the ADR process, when the communication occurs (x) during any ADR process, or (y) before or after any ADR process and is made by or to the neutral, a member of the neutral's staff, or the ADR Coordinator.

C. "Confidential information":

1. shall only be disclosed to those involved in the ADR process, and shall not be disclosed to any other person, specifically including the assigned Judicial Officer or his or her staff;

2. shall not be used for any purpose, including impeachment, in any pending or future proceeding.

D. Limited Exceptions to Confidentiality. This Section 6 does not prohibit:

1. Disclosure of any confidential information the neutral is required to report to the Court pursuant to (a) Sections 3.3B or 4.3B hereof, both of which provide that a failure to pay the neutral must be brought to the Court's attention, or (b) Sections 3.10 or 4.12 hereof, both of which address the mandatory report of the neutral.

2. Disclosure to the Court in writing of the failure of any party, party representative, insurer or risk pool representative to appear as required pursuant to Sections 3.8, 4.9 or 5.8 of these Policies and Procedures and as designated in a Court Order. The disclosure permitted by this exception is only that the party, party representative, or insurer or risk pool representative failed to appear and does not include any portion of any communication in connection with the ADR process relating to the failure to appear.

3. Disclosure of specifically identified confidential information when all parties agree in writing that such specifically identified information may be disclosed.

4. Disclosure of confidential information by the neutral to the extent that

such disclosure is necessary for the neutral to respond to, or defend against, a claim or allegation of professional misconduct or malfeasance.

5. Disclosure of a written settlement document signed by the parties in an action or proceeding to enforce the settlement agreement expressed in the document, unless the settlement document by its terms states that it is unenforceable or not intended to be legally binding.

6. To the extent that the communication or conduct is relevant and admissible evidence in a pending criminal proceeding, as determined by a court, disclosure of:

a. a threat of bodily injury;
b. a threat to damage real or personal property under circumstances constituting a felony; or
c. conduct causing direct bodily injury.

7. Disclosure of a fraudulent communication made during a mediation or ENE process to the extent that such communication is relevant and admissible evidence in a pending action to enforce or set aside an agreement reached in the mediation or ENE process as a result of that fraudulent communication.

8. Disclosure of any document which, although referenced or used in an ADR process, exists independently of the ADR process.

9. Disclosure of an arbitration award if no party timely files a demand for trial de novo (or a Notice of Appeal) as provided in Section 5.11.A of these Policies and Procedures.

E. Miscellaneous

1. The neutral shall not be called to testify as to what transpired in an ADR process.

2. No one shall make any recording or transcript of any ADR session or proceeding without the prior written consent of all parties and other person participating in the ADR session.

3. A mediator or neutral evaluator shall: (a) ask the parties to sign an agreement to mediate or to engage in ENE; (b) ask all persons participating in a mediation or ENE to sign a confidentiality agreement, as part of the mediation or ENE agreement or as a separate document; and (c) clarify by agreement or engagement letter (i) that he or she serves only as a neutral and not as legal counsel for any participant and (ii) all fees and expenses that will be charged and payment terms.

7. OTHER ADR PROCESSES

7.1 Private ADR

There are numerous private sector providers of ADR services including arbitration, mediation, fact-finding, neutral evaluation and private judging. Private providers may be lawyers, law professors, retired judges or other professionals with expertise in dispute resolution techniques. Virtually all private sector providers charge fees for their services. The Court is willing to refer cases to private providers with the stipulation of the parties. The assigned Judicial Officer will take appropriate steps to assure that a referral to private ADR does not result in an imposition on any party of an unfair or unreasonable economic burden. At the conclusion of the private ADR session, with the exception of

private arbitration, the neutral is to complete and file the Report of the Neutral, indicating that the session was held and if the session resulted in a settlement. At the conclusion of the private arbitration, the arbitrator is to file a report only indicating the date that the arbitration was held.

7.2 Special Masters.

The Court may appoint special masters to serve a wide variety of functions, including, but not limited to: discovery manager, fact finder or host of settlement negotiations. Generally the parties pay the master's fees.

7.3 Non-binding Summary Bench or Jury Trial.

A summary bench or jury trial is a flexible, non-binding process designed to promote settlement in complex, trial-ready cases headed for protracted trials. The process provides litigants and their counsel with an advisory verdict after a short hearing in which the evidence may be presented in condensed form, usually by counsel and sometimes through witnesses. This procedure, as ordinarily structured, provides the litigants an opportunity to ask questions and hear the reactions of the Judicial Officer or jury. The Judicial Officer's or jury's non-binding verdict and reactions to the legal and factual arguments are used as bases for subsequent settlement negotiations.

APPENDIX A

NEW PROCESS – ADR MOTION FOR SANCTIONS

1. Prior to the filing of any motion for sanctions regarding the ADR session, the moving party shall serve on opposing counsel a file-ready copy of their proposed motion.

2. Within 14 days of service of the proposed motion for sanctions, the parties or their counsel shall engage in thorough discussions in an attempt to resolve the issue(s) being raised.

3. If the parties reach a resolution of the underlying issue(s), no further action is required.

4. If the parties are unable to reach a resolution of the underlying issue(s), and adjudication by the court is required, counsel shall proceed as follows:

    a. Prepare a certificate:

        i. attesting that the parties met and discussed, either in person or by telephone, the content of the proposed motion for sanctions;

        ii. attesting that the parties were unable to resolve the issue(s) raised in the proposed motion after thorough discussions, and;

        iii. stating whether they agree (or disagree) that confidential information may be implicated in the resolution of the proposed motion.

    b. Moving party shall file a "Notice of Intent to File Motion for Sanctions" (in the form attached), attaching the certificate described in subsection a. Both the notice and the certificate shall refrain from making any references to the specific factual predicate of the alleged breach and shall maintain the confidentiality of the ADR process.

5. Once the "Notice of Intent to File Motion for Sanctions" is filed, the assigned judge has the discretion to decide whether they will handle the motion for sanctions or refer it to the ADR Judge, or a designee, for resolution, per ADR P&P 2.4.

6. Once a determination is made concerning which judge will handle the motion for sanctions, that judge shall schedule a conference in an attempt to resolve the issue prior to the filing of the proposed motion. No motion for sanctions may be filed until leave is granted through entry of an order by the judge handling the dispute.

7. If leave to file the motion for sanctions is granted, the order granting same will also set forth the dates for the filing of the motion and supporting documents, as well as the response. If any part of the motion will reveal confidential information as defined in Section 6 of the ADR Policies and Procedures ("Confidential Information"), the movant must request leave of court to file such parts under seal. The content of communications or documents in the public domain or otherwise available or communicated outside of the mediation process will not be deemed confidential for these purposes solely because they were further communicated during the mediation process.

8. No additional briefing, replies and/or sur-replies will be allowed without leave of court.

9. If a hearing is necessary to resolve the motion for sanctions, after notice by the Court, said proceedings, or any portion thereof may be held under seal on *in camera* if, in the discretion of the judge resolving the motion, it is determined that the proceedings will reveal Confidential Information

10. The judge resolving the motion (either assigned or ADR) shall enter an order on the court's docket terminating the motion for sanctions.

11. Should an opinion be issued supplementing the court's resolution of the motion for sanctions, and should that opinion refer to any Confidential Information in doing so, the Court will take all reasonable steps to minimize the dissemination and/or reference to such Confidential Information in the opinion.

12. If any document is sealed during this process, the judge should specify in the order resolving the motion for sanctions, a date by which the seal of that document will be

lifted, or state that the document will be sealed permanently. If neither is provided, then three months from the date of termination of the case, or receipt of the mandate, the Clerk's Office will generate a notice advising the parties that the documents will be unsealed within 14 days of the notice, unless the parties file a motion at Miscellaneous No. 13-69, requesting that the seal remain in place. The Judge of the Joint IT Committee will adjudicate motions filed at Miscellaneous No. 13-69.

NOTICE OF INTENT TO FILE MOTION FOR SACTIONS FORM

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

)
)
)
) CIVIL ACTION NO.
)
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NOTICE OF INTENT TO FILE MOTION FOR SANCTIONS

PLEASE TAKE NOTICE that _____(Name of Moving Party)_____ intends to present to this Honorable Court a Motion for Sanctions regarding the ADR session in the above captioned case. Attached to this notice is a certificate that the parties have met and conferred, either in person or by telephone, and were unable to resolve the issue(s) giving rise to the forthcoming motion.

The parties stipulate that the issue(s) raised in the Motion for Sanctions (check one)

☐ will require the disclosure of confidential information

☐ will not require the disclosure of confidential information

☐ no agreement was reached on the disclosure of confidential information

Dated: _____, 20__ Signature of Counsel _____