

Civil Litigation Section

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To submit ideas for articles, please contact editor Bridget Gillespie at (412) 288-4017 or send her an e-mail at bgillespie@psmn.com.

Civil Litigation



Update

Summer 2010

Expert Discovery Rules Amended

By Steven F. Baicker-McKee

On December 1, 2010, the latest amendments to the Federal Rules of Civil Procedure will go into effect. These amendments most significantly affect Rule 56, the summary judgment rule, which will be completely overhauled from start to finish, and Rule 26 as it pertains to expert discovery. This article will focus on the amendments to the expert discovery provisions of Rule 26, which will change the way that federal court practitioners communicate with their experts.

Communications with Experts

Under the current version of Rule 26(a)(2) and 26(b)(4), virtually all communications with experts are discoverable. This includes both written and oral communications, neither of which can be protected from discovery as trial preparation materials.

Consequently, careful practitioners are very circumspect in their communications with their experts. In particular, counsel must be very measured in what they say in their e-mails and written correspondence with experts, as both will end up in

the hands of opposing counsel and potentially provide ammunition for cross-examination.

As a result, while e-mail is often an extremely efficient method of communication, many attorneys are reluctant to use e-mail to communicate with experts. Any communications about sensitive issues are conducted by telephone, and sometimes in-person meeting. While such communications are also discoverable, they would not be obtained by document request, but rather only by deposition. If the expert is deposed, typically many months after such oral communications, the expert is unlikely to remember the details of the communications. At the same time, conducting all the communications with an expert orally can be



Steven Baicker-McKee

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less efficient and more costly, and can slow the process down.

The 2010 amendments to Rule 26 remedy this situation. After December 1, 2010, the only communications with experts that will be discoverable under amended Rule 26(b)(4)(C) will be those that fall into the following three categories:

- i. Communications relating to the compensation to be paid to the expert;
- ii. Communications that identify the facts or data that the attorney provided to the expert and the expert considered in forming his or her opinions; or
- iii. Communications that identify assumptions that the attorney provided to the expert and the expert considered in forming his or her opinions.

Thus, any communications about the legal aspects of the case or strategy issues will soon be shielded from discovery, and attorneys can use whatever method of communication with their testifying experts that is most appropriate under the circumstances without fear of discovery.

Draft Reports

The 2010 amendments also address problems created by draft expert reports. Under the current rules and settled case law interpretation, draft reports are clearly discoverable. On cross-examination, counsel can ask questions regarding the nature of each change between each draft, suggesting that such changes reflect the preferences and thought processes of counsel, not the true opinions of the expert.

The specter of such questions has led careful practitioners to avoid creating any preliminary drafts of the expert report. Sometimes practitioners will travel to the expert's office to review the report while it is still a work-in-progress on the expert's computer, so that they can talk through revisions without creating a draft document that would need to be produced. Sometimes, experts will read their in-progress report to counsel over the telephone, with the same objectives in mind. Sometimes, counsel will use one of the computer applications that allows one person to see what is displayed on another person's computer monitor over the Internet. All of these machinations are designed to avoid the generation of a discreet draft report that would need to be produced during discovery.

The present rules also inhibit the revision of draft reports in a different context. Experts are typically hired for their expertise in a particular discipline, rather than for their writing skills. Many engineers chose their profession, and possibly their college, specifically to avoid taking classes in the humanities. Consequently, it is not uncommon to receive an expert report that is less than clear in its expression of the expert's analysis and opinions. Attorneys may be reluctant to make even non-substantive, clarifying revisions out of fear that opposing counsel will somehow be able to create an issue out of the revision.

The 2010 amendments resolve these issues by specifically providing under Rule 26(b)(4)(B) that draft reports are no longer discoverable, ending the need to jump through hoops to avoid creating a draft report.

Non-Retained Experts

The rules have, for a long time, treated experts who were specially retained to testify differently from witnesses who have expert qualifications, and who might be called upon to provide testimony as to opinions they have formed, but who have not been specially retained. Treating physicians are one common example of such experts. They have the education, training, and experience that would qualify them as expert witnesses. During the course of their treatment of the plaintiff, they may have formed various opinions regarding issues like diagnosis, prognosis, and etiology. But, they typically have not been retained by the plaintiff and may not be willing or interested in writing an expert report.

Accordingly, the current version of Rule 26(a)(2) governing expert disclosures imposes differing obligations with respect to retained and non-retained experts. Under Rule 26(a)(2)(A), parties must disclose the identity of all experts whom they may call to support their claims or defenses, retained or non-retained. However, Rule 26(a)(2)(B) only requires parties to provide expert reports for expert witnesses who are "retained or specially employed to provide expert testimony." The current expert disclosure provisions do not require disclosure of any information whatsoever about the nature of the testimony to be provided by non-retained experts.

Amended Rule 26(a)(2)(C) remedies this problem. Under this new provision, parties must disclose the "subject matter" about which the expert is expected to testify and a "summary of the facts and opinions to which the expert is expected to testify." Thus,

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Report from the Legislative Committee

By Jay N. Silberblatt

The PBA Civil Litigation Section continues to monitor proposed legislation and rules changes with the assistance of PBA Legislative liaison, Steve Loux. The Board of the Civil Litigation Section reviews, debates and then votes on whether it is appropriate for the Section to take a position on proposed legislation or rules changes that impact civil litigation.

Recently, the Section supported HB 1998 dealing with increasing juror compensation. HB 1998 would amend Title 42 to generally increase juror compensation, but in a different manner. The bill initially places the responsibility for compensating employed jurors on employers by requiring employers to pay a person summoned for juror duty their regular wage or salary while they are serving on a jury. The ultimate responsibility for compensating jurors would rest with the commonwealth, however, by granting employers a tax credit equal to the wages paid to jurors, there-

by shifting the expense of juror compensation to the commonwealth's budget. The Civil Litigation Section's endorsement of HB 1998 received the support of the PBA House of Delegates at its May 2010 meeting.

The Section is currently reviewing HB 2246 which would amend the Vehicle Code by permitting counsel to submit arguments at trial as to specific amounts of recoverable damages for past and future economic damages and non-economic damages. This amendment would also authorize an argument by counsel that an award of zero damages is appropriate.

The Civil Litigation Section has often reviewed legislative proposals that grant discrete immunities from civil liability. Presently under review is HB 1181 which provides civil immunity to employees of insurance companies for their activities in investigating possible fraudulent insurance claims.

Within the past year, the Section has also considered

proposed amendments to Rules 1020, 4014, and 212 of the Pennsylvania Rules of Civil Procedure as proposed by the Supreme Court of Pennsylvania, Civil Procedural Rules Committee. The proposed changes to Rule 1020 would permit "splitting" of causes of action for property damage and personal injuries. The proposed changes to Rule 4014 would have changed the procedure for Requests for Admission and made them more similar to the use of Interrogatories. The changes sought for Rule 212 would provide the court with more authority in setting pre-trial conferences and requiring the attendance of litigants and insurers. ■



Jay N. Silberblatt

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PBA Committee & Section Day

Nov. 18

Holiday Inn East, Harrisburg

Going Paperless, Part II

The results of our survey with respect to the format of the Civil Litigation Update — print or electronic — were overwhelmingly in favor of going paperless. This change is in keeping with society's focus on sustainable resources, conservation and recycling.

The environment has been particularly in focus this year. The disaster in the Gulf with the failure of the oil well is reported as the largest environmental disaster this country has seen. Its impact was not limited to physical damage to the ocean, beaches and water life. It had a profound effect on many types of businesses and individuals, from tourism to the local fisherman to what was available in local restaurants and fish markets throughout the country. And, of course, a disaster of that size creates litigation.

Here in Pennsylvania, we've been focused on a different aspect of the environment — drilling in the Marcellus Shale. While safety and environmental concerns are in the news, so are the legal and economic aspects of such drilling. Companies, property

owners and mineral rights owners are discussing jobs, leases and compliance with drilling laws and regulations. Litigation has already occurred involving the Marcellus Shale.

These two examples provide a good example of how society, the environment and the law are interconnected and how one's actions can have ripple effects on others. The effects can be foreseen or unforeseen, intended or unintended, beneficial or detrimental. Civil litigation often ensues, whether it be due to personal injury or commercial disputes.

Litigation itself can have an effect on the environment. The PBA House of Delegates recently approved the Environmental and Energy Law Section's efforts to encourage environmental responsibility in the legal community. The Pennsylvania Lawyers United for Sustainability (PLUS) Program promotes energy savings, paper reduction, recycling, transportation and sustainable purchasing by offering guidelines and a pledge form. The

program is voluntary and self-monitored. The guidelines, pledge form and other information regarding the PLUS Program can be found on the PBA's website.



Bridget M. Gillespie

Circling back around to our Section's Update, we attempt to provide information and articles on a wide range of topics that can impact a civil litigation practice, both substantive and procedural. As we go paperless, we will experiment with some changes to the content. Feel free to provide feedback in the form of suggestions and whether you like or dislike any changes that are made. If you have interest in submitting an article for a future issue, please contact me in advance to ensure that the topic will fit into the newsletter and for information regarding deadlines and format. ■

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while you do not get the full detail provided in an expert report under Rule 26(a)(2)(B), you do learn the general nature of the testimony

to be provided by non-retained experts.

The next issue of the Civil Litigation Update will contain an article discussing the amendments to the summary judgment procedures under Rule 56. ■

Opinions from the Pennsylvania Courts



Amy L. Groff, Pennsylvania Case Notes Editor

SUPREME COURT

Pennsylvania Supreme Court Clarifies Plaintiff's Burden of Proving Causation in Asbestos Cases

In consolidated appeals, the Pennsylvania Supreme Court has clarified the plaintiff's burden of proving causation in asbestos cases. In so doing, the Court reversed summary judgment entered in favor of the defendants and reaffirmed the fact-finding function of the jury in asbestos litigation. See *Summers v. Certaineed Corp.*, 997 A.2d 1152 (Pa. July 21, 2010) (Opinion by Baer, J.) The Court found that it is for the jury, not the courts, to resolve competing health conditions in asbestos claims supported by expert medical opinion.

Summers involved separate cases brought on behalf of Fredrick Summers and Richard Nybeck, both of whom were exposed to asbestos but in different settings and different circumstances. Summers and Nybeck were both diagnosed with asbestos-related lung diseases, both were limited in their life activities due to extreme shortness of breath, and both had a lengthy history of smoking cigarettes resulting in obstructive lung disease. Notwithstanding the diagnostic complexities of these

competing medical conditions, Dr. Jonathan L. Gelfand concluded with a reasonable degree of medical certainty that Summers's and Nybeck's asbestos-related diseases were substantial factors in their debilitating conditions.

The trial court granted the defendants' motions for summary judgment in both the Summers and Nybeck claims. The trial court reasoned that, under the Superior Court's ruling in *Quate v. American Standard*, 818 A.2d 510 (Pa. Super. 2003), neither Summers nor Nybeck could meet their burden of proof as to the cause of their conditions since they both suffered from asbestos-related and non-asbestos-related lung diseases. Nybeck and Summers appealed to the Superior Court, which consolidated the two cases and heard oral argument *en banc*. However, former Judge Michael Joyce recused himself, and the remaining eight member court evenly split, resulting in affirmance of the trial court's order granting summary judgment. See *Summers v. Certaineed Corp.*, 886 A.2d 240 (Pa. Super. 2005). Half of the Superior Court relied on *Quate* and found that Summers and Nybeck could not meet their burden of proving that asbestos exposure created impairment or disability regardless of Dr. Gelfand's expert opinions. The other half of the

Court would have reversed the trial court because Summers and Nybeck established *prima facie* claims under all of the differing standards articulated by the Superior Court in asbestos cases.



Amy L. Groff

The Supreme Court reversed, first observing that the Superior Court applied an incorrect standard of review to the trial court's summary judgment ruling. The Court repeated the long-established principle that, when considering a motion for summary judgment, the trial court must view all facts of record in the light most favorable to the non-moving party. The Supreme Court observed that the Superior Court opinion affirming the trial court evaluated the trial court's decision by the abuse of discretion standard and, therefore, afforded the trial court improper deference regarding the existence of a factual dispute. Instead, the Supreme Court held that a trial court's decision regarding the existence of genuine issues of material fact must be evaluated by a *de novo* review. On such a review, the Supreme Court held that the trial court and Superior Court opinion in support of affirmance erroneously rejected

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Dr. Gelfand's expert opinions, which should have been submitted to and evaluated by a jury.

After noting the weight that should have been afforded to the expert's opinions, the Supreme Court then addressed broader issues "that surround not just the instant litigation, but also the scores of asbestos-related cases that continue to daunt the courts of this Commonwealth." Specifically, the Court disapproved of the Superior Court's holding in *Quate* that the existence of asbestos-related and non-asbestos-related medical conditions prevent plaintiffs from establishing their burden of proof on causation. The Supreme Court first noted the existence of confusion from multiple standards applied by the Superior Court in evaluating whether a plaintiff has a compensable asbestos-related claim. However, the Court did not view this case as the appropriate opportunity to clarify that confusion because, regardless of the standard chosen, both Summers and Nybeck suffered compensable injuries. The Court held that a jury must be left to resolve "any conflict between competent, competing medical evidence" regarding the cause of those injuries. In so holding, the Court disapproved of the Superior Court's holding in *Quate* and noted that "[u]nder this Commonwealth's jurisprudence, where it is clear that reasonable minds could differ on the issue of causation, precluding asbestos litigants from pursuing causes of action, supported by competent medical evidence, merely because of the existence of competing health conditions, is unsustainable."

Justice Eakin dissented, writing largely to express his position that courts have an obligation to

examine an expert's conclusions, "not merely accept them as inviolate on their face." Justice Eakin believed it was appropriate for the trial court to examine and find that Dr. Gelfand's opinions inadequately address the relationship between the medical symptoms and asbestos exposure. Although Justice Eakin believed that such an examination is appropriate in the context of a summary judgment motion, the majority suggested that those decisions are more appropriately addressed in the context of a motion *in limine* or a *Frye* hearing.

--Contributed by Jonathan B. Stepanian, Esq., McQuaide Blasko, Hershey; JStepanian@mqlblaw.com.

Canned Computer Software Is Tangible Personal Property Subject to State Sales Tax

Purchases of "canned" computer software are subject to sales tax under the Tax Reform Code, 72 P.S. § 7201 *et seq.*, because such software constitutes tangible personal property according to the Pennsylvania Supreme Court in *Dechert LLP v. Commonwealth*, 998 A.2d 575 (Pa. July 20, 2010) (Opinion by Todd, J.). Canned computer software is software that is not customized for the original purchaser. Although the Court observed that the statutory definition of "tangible personal property" subject to state sales tax could be clearer, it nonetheless found the definition sufficiently specific to encompass the purchase of canned computer software licenses.

Dechert sought a refund of \$211,394.70 in state sales tax that it paid between November 2000 and December 2003 in connection with its purchase of canned software

licenses. After being unsuccessful in its administrative appeals, Dechert filed a petition for review with the Commonwealth Court, arguing that a license to use canned computer software is not tangible personal property subject to sales tax. The Commonwealth Court disagreed in both a panel and *en banc* opinion, holding that canned software is tangible personal property and that the plain language of the Tax Reform Code subjects the purchase of licenses to use such property to taxation. See *Dechert LLP v. Commonwealth*, 922 A.2d 87 (Pa. Cmwlth. 2007) (*Dechert I*); *Dechert LLP v. Commonwealth*, 942 A.2d 210 (Pa. Cmwlth. 2008) (*Dechert II*). Dechert subsequently filed an appeal of right with the Pennsylvania Supreme Court, arguing that purchasing a canned software license does not involve the transfer of any tangible property but instead involves the purchase of intangible intellectual property rights.

The Supreme Court looked to the statutory definition of "tangible personal property" within § 7201(m) of the Tax Reform Code, which defines property subject to sales tax as "[c]orporeal personal property" and includes several examples. Corporeal property generally has a physical or material existence, leading the Court to observe that the statutory definition was inherently confusing and unclear inasmuch as it identifies electricity and cable service as examples of tangible property subject to tax. However, the Court did not find the statute so ambiguous that it had to be construed in Dechert's favor as the taxpayer. Instead, by looking at the former statute and legislative and administrative interpretations, the Court found that the legislature

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intended for canned computer software to be subject to tax. With regard to the legislative history, the Court noted that prior to 1997 the Tax Code specifically taxed “computer programming services” such as custom software programming and programs, but made no mention of canned computer programs. Although the legislature repealed that particular provision of the Tax Code in 1997, it again made no mention of canned software, leading the Court to believe that legislature always intended it to be taxed.

Justice Saylor concurred in the Court’s opinion, remarking that “this is a very close case.” He observed that the Tax Code’s “definition of tangible personal property is prolix, non-cohesive, and, at times, counterintuitive” but believed the majority reached the correct decision through its examination of the Code’s legislative history.

Justice Eakin dissented, opining that canned software is not a physical thing but rather “a set of instructions to the computer in the form of binary pulses configured in the computer’s memory....” He analogized the software at issue to golf, where a player might buy new clubs –tangible property – to improve their game. Alternatively, a golfer may take a lesson to improve their swing. Like a golfer after a lesson, when his or her “preexisting muscles simply initiate a modified series of actions consistent with the golf pro’s instruction,” computers accept new direction from software but the directions themselves never “transform...into tangible personal property.”

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Insurer Must Demonstrate Prejudice Due to Insured’s Failure to Notify of “Phantom Vehicle” Accident

In *Vanderhoff v. Harleysville Insurance Company*, 997 A.2d 328 (Pa. July 6, 2010) (Opinion by Baer, J.), the Supreme Court of Pennsylvania reversed the Superior Court’s decision that an insurer can deny benefits without first showing that prejudice resulted from the insured’s failure to provide notice of accident caused by an unidentified vehicle. The Supreme Court concluded that circumstances of this case were governed by its decision in *Brakeman v. Potomac Insurance Co.*, 371 A.2d 193 (Pa. 1977), which addressed the private interests of an insurance company, in holding that, to deny benefits, an insurer must demonstrate prejudice resulting from the insured’s failure to provide notice.

While in the course of his employment, Appellant Forester Vanderhoff was involved in a motor vehicle collision between a truck that he was driving and a vehicle driven by a third party. Over eight months after the accident, Vanderhoff filed a claim for uninsured motor vehicle benefits with Appellee Harleysville Insurance Company (Harleysville), notwithstanding a provision in the insurance policy requiring prompt notice and § 1702 of the Motor Vehicle Financial Responsibility Law (MVFRL). In light of a dispute as to whether the third party stopped to avoid an unidentified car, or “phantom vehicle,” Harleysville commenced a declaratory judgment action. The trial court held a hearing to

determine whether an uninsured vehicle was involved in the accident and whether Vanderhoff satisfied the notification requirements of his policy and the MVFRL. At the hearing, Vanderhoff testified that the phantom vehicle existed, while the third party denied it. The trial court found in favor of Vanderhoff, finding his testimony more credible.

Thereafter, Harleysville appealed to the Superior Court, contesting the trial court’s conclusions that a phantom vehicle existed and that Vanderhoff provided proper notice to Harleysville and to the police of an accident involving a phantom vehicle. The Superior Court reversed the trial court’s decision relative to its conclusion that Vanderhoff provided notice to Harleysville. The Superior Court reasoned that the record did not support the trial court’s finding that Vanderhoff notified Harleysville of the facts surrounding the collision, including the phantom vehicle, as soon as practicable. The court noted that Vanderhoff’s assertion that he believed Harleysville was aware of the facts did not constitute proper notice. The Superior Court specifically rejected Vanderhoff’s argument that, under *Brakeman*, even if he failed to provide sufficient notice, Harleysville was precluded from denying him benefits due to that failure unless it could establish that it suffered prejudice. Instead, the Superior Court relied on *State Farm Mutual Automobile Insurance Co. v. Foster*, 889 A.2d 78 (Pa. 2005), in concluding that the prejudice requirement under *Brakeman* is inapplicable to the notice provisions of § 1702 of the MVFRL.

The Supreme Court granted allowance of appeal to address

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the issue of whether an insurance carrier, to deny benefits, must demonstrate prejudice resulting from the untimely notice to the carrier of an accident involving an unidentified vehicle, when the accident was timely reported to law enforcement officials. The Court first acknowledged that the decision in *Foster* does not require the carrier to demonstrate such prejudice based on failure to notify police under § 1702. However, the Court noted that *Foster* emphasized the public interest in preventing fraud relative to phantom vehicles, as notification of the police allows for its investigation of such claims. The Court observed that the issue in this case is controlled by the MVFRL's definition of uninsured motor vehicle in § 1702, which provides for notice to the insurer but does not indicate a consequence for untimely notice. Noting that § 1702 was enacted with *Brakeman* as the controlling precedent, the Court concluded that the statutory definition's silence as to prejudice therefore renders the *Brakeman* prejudice requirement controlling in this case.

The Supreme Court then distinguished this case from *Foster*, in which the Court had addressed the failure of an insured to notify the police of an accident involving a "phantom vehicle." In *Foster*, the insured had argued that, under *Brakeman*, the insurance company was required to show prejudice resulting from the insured's failure to notify the police. The Supreme Court here observed that the *Foster* Court rejected this argument, distinguishing *Brakeman*, which addressed the notice requirements of an insurance policy, from *Foster*, which involved the requirements of a statute and "a directive related

to law enforcement." In doing so, the Supreme Court here noted that the purpose of the notice provision in § 1702 is the protection of the public's interest in affordable automobile insurance by enabling the police to timely investigate potential fraudulent claims. On the other hand, the Court noted that the purpose of the notice requirement in *Brakeman* was to protect the private interests of an insurer. As a result, the Court observed that *Foster* "did not overrule *Brakeman*, but instead, carefully distinguished it." Therefore, the Court concluded that an insurer must demonstrate prejudice resulting from the failure of an insured to notify the insurer of a phantom vehicle before it may deny uninsured motorist benefits arising from a phantom vehicle accident. Accordingly, the Court reversed the Superior Court's decision and remanded the case to the trial court for a determination of whether the insurer was prejudiced by the untimely notice in this case.

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Negligence Action Against Ski Resort for Lift Accident Barred by Skier's Responsibility Act and Release

In *Chepkevich v. Hidden Valley Resort, L.P.*, No. 22 WAP 2007, 2010 Pa. LEXIS 1311 (Pa. June 21, 2010) (Opinion by Castille, C.J.), the Supreme Court of Pennsylvania held that a skier's negligence action against a ski resort for injuries sustained while boarding a ski lift is barred by the Skier's Responsibility Act and a release executed by the skier.

The plaintiffs, a skier and

her spouse, brought an action against Hidden Valley Resort, L.P. (Hidden Valley), a ski resort, for negligence, seeking to recover damages for injuries the skier allegedly sustained in a fall from a ski lift. According to the plaintiff skier, a chair lift operator agreed to stop the otherwise continuously-moving lift so the skier's nephew could more easily board it, but failed to do so, causing the skier to fall and sustain a dislocated shoulder and fractured hip. Hidden Valley moved for summary judgment, arguing that the plaintiffs' lawsuit was barred by the doctrine of assumption of the risk applicable to downhill skiing by virtue of Pennsylvania's Skier's Responsibility Act (the "Act"), as well as a release that the skier had signed when she purchased her season pass to ski at the resort. The trial court granted Hidden Valley's motion for summary judgment on the basis of the release, reasoning that the terms of the release expressly exempted Hidden Valley from liability for the negligent acts of its employees. However, the trial court concluded that summary judgment was inappropriate under the Act, distinguishing this case from *Hughes v. Seven Springs Farm, Inc.*, 762 A.2d 339 (Pa. 2000), which held that the assumption of the risk doctrine barred a skier's lawsuit for injuries arising out of a collision with another skier, a risk determined to be inherent to the sport of downhill skiing.

On appeal, the Superior Court of Pennsylvania reversed and remanded the case for further proceedings. The Superior Court concluded that the Act and *Hughes* were inapplicable in this case because of certain factual distinctions from *Hughes*, distinctions that, on further

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appeal, the Supreme Court found to be insignificant. Further, noting that the release did not define or give examples of “negligence,” the Superior Court held that the release was “arguably” an adhesion contract.

The Supreme Court granted Hidden Valley’s petition for allowance of appeal. On appeal, the Court first considered the Act vis-à-vis the common law doctrine of assumption of the risk. The Court noted that the doctrine was largely eliminated in Pennsylvania with the enactment of the Comparative Negligence Act. Shortly thereafter, however, the General Assembly enacted the Skier’s Responsibility Act, which explicitly preserved the assumption of the risk doctrine as applied to claims arising from downhill skiing. The Court further observed that, under the principles of common law, the assumption of risk defense has been described as a “no-duty” rule which applies to ski resort operators such that they have no duty to protect skiers from risks that are “common, frequent, and expected,” and therefore, “inherent” to downhill skiing. The Court further noted that, under *Hughes*, downhill skiing entails more than merely skiing but also activities “directly and necessarily incident” and therefore inherent thereto, including boarding a ski lift. Based upon the Act and these principles, the Court held that the plaintiff skier’s fall from the ski lift here was an inherent risk that she assumed and for which Hidden Valley owed no duty of protection.

With respect to the applicability of the release, the Supreme Court rejected the Superior Court’s conclusion that the release was an invalid contract of adhesion.

The Supreme Court observed that voluntary participation in recreational activities “does not easily lend itself” to the contention that an exculpatory agreement such as a release for such activity is an unenforceable adhesion contract. Based upon existing precedent, the Court reasoned that the plaintiff skier was not under any compulsion to participate in the activity or sign the release because neither related to “essential services.” The Court further noted that the mere fact that the plaintiff would not have been permitted to ski at Hidden Valley had she not signed the release did not render the release a contract of adhesion because it relates to a recreational activity in which she was free to engage or not. Finally, with respect to the argument that the release did not define “negligence,” the Supreme Court recognized that Pennsylvania courts have consistently held that even exculpatory clauses that do not mention “negligence” have been found to bar lawsuits; thus, the mere failure to define “negligence” therein did not render it invalid. Accordingly, the Court concluded that the Superior Court’s reversal of the trial court’s grant of summary judgment on the basis of the release was in error. Therefore, the Supreme Court reversed the order of the Superior Court and reinstated the order of the trial court granting summary judgment in favor of Hidden Valley.

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Municipal Ordinance Regulating Tobacco Use Cannot Apply to Act 111 Police Union Without Collective Bargaining

In *Borough of Ellwood City v. Pennsylvania Labor Relations Board*, 998 A.2d 589 (Pa. July 21, 2009) (Opinion by Todd, J.), the Pennsylvania Supreme Court held that under Act 111, a municipality cannot forbid its police officers from using tobacco products in non-public areas of the workplace without first engaging in collective bargaining.

In 2006, the Ellwood City Borough adopted an ordinance prohibiting the use of all tobacco products, including smokeless tobacco, in borough-owned buildings and vehicles. The union representing the borough’s police officers filed a charge of unfair labor practice with the Pennsylvania Labor Relations Board, claiming that the unilateral banning of tobacco products violated the borough’s duty to collectively bargain. The Hearing Examiner decided in favor of the union, and the Labor Relations Board affirmed.

On appeal, the Commonwealth Court reversed. In an opinion by Judge Doris Smith-Ribner, the Commonwealth Court distinguished prior case law holding that workplace tobacco regulations were bargainable. Unlike the tobacco policies in those cases, which were internal policies applicable only to municipal employees, the Ellwood City tobacco ban was an exercise of the borough’s general police power to declare certain areas tobacco-free. Since the interest of the borough in protecting the general health and welfare of its citizens “overcomes the interest of the employees” in maintaining the prior tobacco policy, the Commonwealth Court found that the tobacco ban was not subject to mandatory collective bargaining.

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The Board and the union appealed the Commonwealth Court's decision, arguing that a municipality cannot avoid its duty to collectively bargain simply by passing an ordinance. Any matter is bargainable, the Board argued, if it bears a "rational relationship" to employee duties. The municipality has a "managerial prerogative" that allows it to avoid collective bargaining only where its interests *substantially* outweigh the employees' interests. The union argued that the tobacco ban was not a managerial prerogative because it was not essential to the efficient functioning of the police department.

In response, the borough argued only that the appeal was mooted by the enactment of the Clean Indoor Air Act of 2008, passed after Commonwealth Court's decision. The Act prohibited smoking in workplaces, public areas, and vehicles of mass transit.

The Supreme Court reversed the Commonwealth Court. It rejected the borough's argument that the Clean Indoor Air Act of 2008 mooted the appeal, since the Act did not regulate the use of smokeless tobacco or smoking in vehicles not used for mass transit.

The Court agreed with the Board that a ban on tobacco is a bargainable working condition, since workplace tobacco usage bears a "rational relationship" to employees' duties and is at least "germane" to the working environment.

Although the Court found that tobacco use was a working condition, it went on to consider whether Ellwood City's tobacco ban was nevertheless a managerial prerogative not subject to collective

bargaining. Although the Court admitted that Act 111 does not address what issues are managerial prerogatives, and "no clear test has evolved," the Court concluded that "the proper approach is to inquire whether collective bargaining over the topic would unduly infringe upon the public employer's essential managerial responsibilities." Tobacco use, the Court found, is not an "inherently managerial" matter because it is unlike "core entrepreneurial topics" including "programs of the employer, standards of service, overall budget, use of technologies, organizational structure, and selection and direction of employees."

Finally, the Court rejected the Commonwealth Court's distinction between exercising general police powers and setting policies for employees. Although the ordinance was an exercise of the borough's general police power, the Court pointed out, Act 111 and the Pennsylvania Labor Relations Act were also exercises of the police power. If exercise of the police power precluded mandatory collective bargaining, municipalities could "eviscerate the very essence of statutorily-mandated collective bargaining" simply by legislating.

In a concurring opinion, Justice McCaffery objected to the majority's use of the managerial prerogatives test, a concept borrowed from the Pennsylvania Labor Relations Act, in the context of an Act 111 labor dispute. Since Act 111 does not permit appeals from arbitration decisions, he asserted, the Court should not adopt a test that will invite litigation over whether municipal ordinances implicate managerial prerogatives.

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SUPERIOR COURT

Strict Liability Design Defect Claims Against Pharmaceutical Manufacturers Are Not Recognized But Do Not Preclude Negligent Design Defect Claims

In *Lance v. Wyeth*, 2010 PA Super 137 (Pa. Super. Aug. 2, 2010) (Opinion by Allen, J.), the Superior Court declined to recognize a strict liability design defect claim against a pharmaceutical manufacturer, but allowed a negligent design defect claim to proceed.

Carol Ruth Lance ingested Redux, a prescription obesity drug, for approximately four months and died about seven years after discontinuing her use of the drug. The administratrix for Lance's estate filed a complaint containing numerous products liability claims against Wyeth, the manufacturer of Redux, although the cause of death is disputed. The trial court granted summary judgment in favor of Wyeth, finding that the plaintiff failed to state a cognizable claim under Pennsylvania law. On appeal, the Superior Court analyzed the plaintiff's complaint and the various potentially cognizable products liability claims contained therein.

The plaintiff presented three legal claims. First, she asserted a claim for "Unreasonable Marketing of a Dangerous Drug" on the basis that "Redux was so unreasonably dangerous and defective in design that it never should have been on the market." *Id.* at *3. Second, she asserted a claim for negligent failure to timely remove Redux from the market. Third, she raised

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a standard negligence claim based on Wyeth allegedly breaching the standard of care for “designing, developing, inspecting, testing, and preparing Redux.” *Id.*

The court first noted that the Pennsylvania Supreme Court has adopted the Restatement (Second) of Torts § 402A, governing products liability actions. *Id.* (citing *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (Pa. 1966)). In another Supreme Court case, *Hahn v. Richter*, 673 A.2d 888 (Pa. 1996), the Court adopted comment k of § 402A. Comment k prohibits strict liability for unavoidably unsafe products, such as prescription drugs, that contain proper warnings and are properly prepared and marketed. Here, the Superior Court interpreted plaintiff’s “unreasonably dangerous” claim as an attempt to assert a strict liability design defect claim. “For purposes of strict liability and § 402A, a drug cannot be deemed unreasonably dangerous, even if it is defectively designed, so long as the drug is manufactured properly and contains adequate warnings.” *Id.* at *4. Thus, the trial court correctly granted summary judgment in favor of Wyeth on plaintiff’s “unreasonable marketing” claim.

The plaintiff also asserted a negligent, as opposed to strict liability, design defect claim. The court noted that § 395 of the Restatement (Second) of Torts, providing for negligent design of products claims, does not contain any exemption or special protection for prescription drug manufacturers. Relying on cases from other jurisdictions, the court found that a negligent design defect claim is distinct from a strict liability design defect claim. *Id.* at *5 (citing *Toner v. Lederle Labs.*,

112 Idaho 328, 732 P.2d 297, 309-10 (Idaho 1987), and *Artiglio v. Superior Court*, 22 Cal.App.4th 1388, 1393, 27 Cal.Rptr.2d 589 (Cal. Ct.App. 4th Dist.1994)). Thus the plaintiff could proceed with her negligent design defect claim, and the court reversed the trial court’s grant of summary judgment in favor of Wyeth on this claim.

The court next turned to plaintiff’s claim that Wyeth negligently failed to withdraw or recall Redux. The Superior Court had previously refused to recognize a duty to retrofit a product, which hints at the direction of other jurisdictions that have “decided not to impose a common law duty to recall on a manufacturer.” *Id.* at *6 (citing *Lynch v. McStome & Lincoln Plaza Assoc.*, 548 A.2d 1276, 1281 (Pa. Super. 1998)) (additional citations omitted). Furthermore, the FDA had approved Redux as “safe and effective” and continued to approve the drug until after the plaintiff stopped ingesting it. The court deferred to the federal regulatory scheme and the FDA’s decision, holding that “any decision to expand a drug manufacturer’s post-sale duty to warn into the arena of a duty to recall/withdraw is left to the FDA.” *Id.* at *7.

The court briefly addressed two additional issues. Plaintiff asserted a claim for “negligent failure to withdraw,” which the court found akin to a failure to inspect or test claim. The court reasserted Pennsylvania law holding that there is no independent tort for negligent failure to test. *Id.* at *8 (citing *Viguers v. Philip Morris USA, Inc.*, 837 A.2d 534, 541 (Pa. Super. 2003), *aff’d* 881 A.2d 1262 (Pa. 2005)). Such claims would be subsumed within design defect or failure to warn claims. Finally, the plaintiff raised a claim under the Restatement (Third) of Torts:

Products Liability § 6(c). The court rejected this claim as the Pennsylvania Supreme Court has never adopted the Third Restatement and *Hahn, supra*, adopting the Second Restatement § 402A, is controlling law in Pennsylvania.

Thus, the court affirmed the trial court’s entry of summary judgment in favor of Wyeth except as to Plaintiff’s negligent design defect claim.

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Job Performance Evaluations Communicated Prior to Suspension Are Subject to Conditional Privilege

In an action for wrongful termination of medical staff privileges, the Superior Court held that statements of a hospital’s corporate counsel to the director of corporate risk management pertaining to a peer review were conditionally privileged and could not be subject to a defamation action. *See Foster v. UPMC Southside Hospital*, 2010 PA Super 143 (Pa. Super. Aug. 6, 2010) (Opinion by Bowes, J.).

After a hospital performed its investigation pertaining to the competency of an orthopedic surgeon, it was determined by UPMC to suspend the orthopedic surgeon’s medical staff privileges. The orthopedic surgeon subsequently filed suit on several grounds including defamation pertaining to communications between hospital corporate counsel, corporate risk manager and a staff physician of the hospital. The trial court dismissed

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the plaintiff's defamation claim that information within a memorandum summarizing a hospital's staff physician reviewer was defamatory. The trial court ruled that the communication was a statement of opinion made in a peer review setting and therefore is not defamatory. Plaintiff's counsel, on appeal, contended that statements made within the memorandum were "statements of fact," not opinion. In upholding the trial court's decision, the Pennsylvania Superior Court concluded that the statement in question was subject to a conditional privilege applicable to communications made by employees concerning matters of discipline and termination with respect to another employee.

The Superior Court confirmed that the Uniform Single Publication Act, 42 Pa.C.S. §§ 8341-8345 sets forth the elements of a prima facie case in a defamation action. Citing *Daywalt v. Montgomery Hospital*, 573 A.2d 116 (Pa. Super. 1990), the Superior Court recognized a conditional privilege when the speaker and recipient share a common interest in the subject matter and both are entitled to know the information. They held that conditional privilege is applicable when an employer's workers communicate with each other in connection with the discipline, including termination, of a fellow employee as long as the workers relaying the purportedly defamatory information are involved in the disciplinary matter at hand.

In reviewing the case, the Superior Court held that despite the fact the statement within the memorandum was conveyed one

month prior to the suspension, it was considered privileged because the statement was conveyed during the time frame pertinent to the suspension of the orthopedic surgeon's privileges. Further, the suspension was taken based on missteps that occurred two months prior to the memorandum at issue. Because the representation from the hospital physician was disseminated to a risk management employee of the hospital and its counsel during a period that the orthopedic surgeon was committing the errors that resulted in his suspension from that organization, the information could not be used in the defamation claim. Thus, in the absence of an allegation of abuse of privilege, communications relevant to job performance evaluations occurring during a time period at issue shall not be permitted to be used in a subsequent defamation action because they are subject to a conditional privilege.

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Superior Court Finds Nursing Home and Its Parent Company Liable for Corporate Negligence in Wrongful Death Case

In *Scampone v. Grane Healthcare Company*, 2010 PA Super 124 (Pa. Super. July 15, 2010) (Opinion by Bowes, J.), the Superior Court held that nursing homes, like hospitals, may be held liable for negligence under a corporate liability theory.

In 2005, the estate of Madeline Scampone filed a negligence and wrongful death action against Highland Park Care Center (Highland Park), the nursing home where Ms. Scampone had

been living, as well as Grane Healthcare Company (Grane), the parent company of the nursing home. The complaint alleged that Ms. Scampone died as a result of receiving substandard care at Highland Park, and that the defendants were liable under both vicarious and corporate liability. The plaintiff sought compensatory and punitive damages.

At trial, the court granted Grane's motion for compulsory nonsuit and found the evidence insufficient to submit the question of punitive damages to the jury. The jury found in favor of Ms. Scampone, and both parties appealed.

On appeal, Highland argued that a claim for corporate negligence cannot be asserted against a nursing home. The Superior Court disagreed. Corporate liability theory allows a plaintiff to hold a corporate party liable without having to prove the negligence of a third party, where there is proof that the corporation was responsible. Corporate negligence was first recognized as a basis for a claim against a hospital in *Thompson v. Nason Hospital*, 591 A.2d 703 (Pa. 1991). The Superior Court allowed corporate liability claims against a health maintenance organization in *Shannon v. McNulty*, 718 A.2d 828 (Pa. Super. 1998), and a medical professional corporation in *Hycza v. West Penn Allegheny Health System, Inc.*, 978 A.2d 961 (Pa. Super. 2009), reasoning that these institutions, like hospitals, assume the responsibility of arranging the total health care of patients. The Superior Court did not allow corporate negligence claims against a doctor's outpatient office in *Sutherland v. Monongahela Valley Hospital*, 856 A.2d 55 (Pa. Super.

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2004), reasoning that a physician's practice group does not assume such a role.

The court found that "a nursing home is analogous to a hospital in the level of its involvement in a patient's overall health care." Although Highland did not employ doctors, its nurses ensured that "all doctor-ordered testing was performed." Thus, the degree of involvement in patients' health at a nursing home "bears little resemblance to the sporadic care offered on an out-patient basis in a physician's office."

The court also rejected Highland's argument that allegations of understaffing do not support a claim for corporate negligence. The court pointed to *Welsh v. Bulger*, 698 A.2d 581 (Pa. 1997), where the Supreme Court held that a *prima facie* claim of corporate negligence could be established by a claim that a hospital failed to staff a delivery room with a surgeon.

Highland's parent company, Grane, argued that the trial court was right to grant its motion for compulsory nonsuit because there was no evidence of Grane's involvement in the nursing home facility, other than its corporate involvement, and no involvement in the treatment of Ms. Scarpone.

The Superior Court disagreed. It pointed out that Grane employed nurse consultants who supervised the nursing staff at Highland. In addition, Grane administered a quality assurance program, recommended an operating budget for Highland, hired the registered nurses who worked at Highland, and appointed the directors of nursing at Highland. Furthermore, at the end of every month, the money remaining in

Highland's bank account was transferred to Grane. Based on this evidence, the Superior Court found that Grane had "control over the total health care of the residents" of the nursing home and was, therefore, subject to corporate liability.

Finally, the Superior Court reversed the trial court's finding that the evidence was insufficient to send the question of punitive damages to the jury. The trial court had ruled that the evidence of substandard treatment was not causally connected to any specific injury sustained by Ms. Scampone. The Superior Court rejected this reasoning, finding that evidence about the operation of the facility in general relates to all the residents of the facility, including Ms. Scampone. Since there was evidence of willful and outrageous conduct, including the alteration of patient records, the question of punitive damages should have gone to the jury.

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Release of Agent Does Not Necessarily Release Principal

In a case involving the issue of vicarious liability, the Pennsylvania Superior Court in *Ross v. Foremost Insurance Co.*, 998 A.2d 648 (Pa. Super. June 11, 2010) (Opinion by Ott, J.), upheld the express terms of a settlement release dismissing a principal and permitting a plaintiff to pursue his action against its principal's agent.

The plaintiff, Mr. Ross, filed suit against Foremost Insurance Company (Foremost) and Sentry Services, Inc. alleging negligence in violation of the Unfair Trade Practices and Consumer Protection

Law (UTPCPL) pertaining to his purchase of insurance for a travel trailer in 2001. It was undisputed that the plaintiff at no time read the specifics of the policy or the declaration sheet. The policy clearly excluded loss caused by flood and actually referred the plaintiff to the National Flood Insurance Program. In September, 2004, Mr. Ross's travel trailer suffered flood damage and he submitted a claim to Foremost for the damage which was ultimately denied because the policy did not cover flood loss.

In the course of the litigation against Foremost and Sentry Services, Inc., which was an insurance agent for Foremost, the plaintiff and Foremost entered into a settlement agreement. The settlement release between the plaintiff and Foremost expressly indicated that the plaintiff reserved the right to make a claim against any and every other person and/or entity and more specifically Sentry Insurance Services. After the release was disclosed, Sentry filed summary judgment on the basis that the release of its principal, Foremost, effectively dismissed plaintiff's claim against them as an agent. The trial court granted summary judgment and the plaintiff appealed.

On the issue of prior release, the Superior Court was guided by the Pennsylvania Supreme Court's decision in *Maloney v. Valley Med. Facilities, Inc.*, 984 A.2d 478 (Pa. 2009), which was decided after the trial court's decision. The Superior Court determined that the factual scenario from *Ross* was similar to *Maloney* in that the plaintiff expressly reserved a right to proceed against an agent after settling with the principal. In holding that Sentry was not

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entitled to summary judgment because of the prior release, the court expressly held “that the parties to a settlement should be afforded latitude to effectuate their express intentions.” Therefore, Sentry was excluded from the effects of the release even though it may have been acting as an agent for Foremost.

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Despite Liquor Liability Exception, Insurer Must Defend Insured Establishment in Negligence Action for Ejecting Clearly Intoxicated Patrons

In *Penn-America Insurance Co. v. Peccadillos, Inc.*, 2010 PA Super 130 (Pa. Super. July 16, 2010) (Opinion by Colville, J.), the court held that an insurer must defend its insured, an establishment accused of negligently ejecting two clearly intoxicated patrons without controlling them or summoning the police, where the ejected patrons then caused a fatal drunk driving collision.

The survivors of two women killed in a drunk driving automobile collision filed suit against the estate of the drunk driver and the establishment that served him prior to the collision. Two men, Jacob Latta and Matthew Maisner, visited a number of bars on March 17, 2006. In the afternoon or evening they went to Peccadillos where they continued to consume alcohol. Following intoxicated and rowdy behavior, including a physical altercation, the bar made

them leave the premises. The two then got in Latta’s car and Latta began driving while extremely intoxicated. He lost control of his vehicle and crossed the center line, striking the car in which the plaintiffs were travelling, killing both of the plaintiffs, Latta and Maisner.

Penn-America Insurance Company insured Peccadillos, and filed a complaint seeking declaratory judgment with the trial court, and eventually seeking summary judgment. Specifically, the insurance company denied liability coverage and sought an order declaring that the insurance company is not required to defend or indemnify the bar or its owner. Penn-America claimed a liquor liability exception, excluding coverage where the “insured may be held liable by reason of . . . [c]ausing or contributing to the intoxication of any person,” precluded coverage and its duty to defend. The trial court denied Penn-America’s summary judgment motion and granted summary judgment in favor of the bar and its owner.

On appeal, the Superior Court noted some of the guiding principles in analyzing insurance contract coverage. In particular, interpreting the existence of coverage is generally an issue of law determined by the court, and the insurer’s duties to defend and indemnify are triggered by the allegations in the third party plaintiffs’ pleadings. *Id.* at *4 (citing *Donegal Mut. Ins. Co. v. Baumhammers*, 938 A.2d 286, 290-91 (Pa. 2007)) (internal citations omitted).

The complaint included some allegations that were clearly covered by the liquor liability exception, such as “continuing to serve alcoholic beverages to visibly intoxicated [] Latta.” However,

the Superior Court noted that the complaint also alleged that the defendants were negligent for “ejecting Latta from the premises after the physical altercation rather than by taking him in charge or summoning the police.” As the court explained, “liability under this claim does not turn on whether Peccadillos caused or contributed to Latta’s intoxication.” *Id.* at *5. The complaint alleged that the defendants were negligent in serving the clearly intoxicated patrons “and” ejecting them. The court found that the allegations before and after the “and” should be treated in the disjunctive. Thus, the ejection could be viewed as unrelated to serving alcohol to clearly intoxicated patrons. Even under the court’s interpretation of the complaint, Penn-America argued that the claim based on ejecting the patrons was meritless. The court held, however, that “regardless of the merits of the claim, Penn-America is required to defend Peccadillos.” *Id.* at *6.

The court accordingly held that Penn-America has a duty to defend Peccadillos under their insurance contract. This holding “carries with it a conditional obligation to indemnify in the event the insured is held liable for a claim covered by the policy.” *Id.* (quoting *General Acc. Ins. Co. of America v. Allen*, 692 A.2d 1089, 1095 (Pa.1997)). The Superior Court thus affirmed the order of the trial court.

Judge Bowes filed a dissenting opinion in which she argued that the complaint did not state a claim potentially covered by the insurance policy. She believed the plaintiffs’ allegations that the bar negligently served the patrons “and” ejected them must be read together. As such, the service of alcohol “contribute[ed] to the intoxication” of Mr. Latta and the

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whole allegation, including the portion regarding the ejection, falls under the liquor liability exception.

Additionally, Judge Bowes asserted that the establishment had no duty to control Mr. Latta or protect the underlying plaintiffs and therefore the complaint did not state a cognizable claim under Pennsylvania law. Judge Bowes

would have reversed the trial court's order.

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Third Circuit Affirms District Court's Post-Trial Rulings in Intellectual Property Dispute

In *Mon Cheri Bridals, Inc. v. Wu*, Nos. 09-1239 and 09-1321, 2010 U.S. App. LEXIS 11378 (3rd Cir. June 4, 2010) (opinion by J. Cowen), the Third Circuit issued a non-precedential opinion under Rule 5.7 of its internal operating procedures in which it addressed the propriety of a district court's post-trial rulings in a breach of contract, copyright infringement, unfair competition and passing off action. Plaintiff, Mon Cheri Bridals, Inc. (Mon Cheri), designs and sells wedding and other formal dresses for which it has obtained various copyrights and trademarks. Mon Cheri had reason to believe that Wen Wu, acting through

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various entities that he controlled (collectively "Wu Defendants"), had copied certain dresses and sold them as Mon Cheri dresses. Mon Cheri later learned that Wu and another retailer, Bernie Kaitz, had conspired to copy all of Mon Cheri's Montage line. Mon Cheri filed suit against the Wu Defendants, as well as Kaitz and his company, Mirage Collections, Inc. (collectively the "Mirage Defendants"). Mon Cheri sought damages and injunctive relief for the passing off of its Montage dress line.

Mon Cheri settled with the Mirage Defendants and proceeded to trial against the Wu Defendants on its breach of contract, copyright infringement and passing off claims. The jury found in favor of Mon Cheri on each claim, and it awarded Mon Cheri \$324,000 in compensatory damages and \$375,000 in punitive damages. However, the district court vacated the punitive damages award and denied Mon Cheri's request for treble damages and attorneys' fees. On appeal, the Wu Defendants asserted that the trial court committed a number of errors, and Mon Cheri likewise appealed the district court's decisions on damages. As its first issue on appeal, the Wu Defendants asserted that Mon Cheri could not establish a claim of copyright infringement because it could not establish the ownership of a valid copyright, nor could it show an authorized

copying of original elements of its work. As to the validity of Mon Cheri's copyrights, the Wu Defendants maintained that they were invalid because Mon Cheri defrauded the Copyright Office and because the copyrighted material lacked originality. However, the Third Circuit found that the Wu Defendants failed to establish the affirmative defense of fraud on the Copyright Office because they could not show that Mon Cheri had knowingly or intentionally failed to disclose a material fact in applying for the copyrights at issue. At most, Mon Cheri had inadvertently failed to disclose that its designer derived one of her patterns from another drawing. The court reasoned that this inadvertent withholding did not rise to the level of fraud, nor did it undermine the viability of the patent. Along those lines, the court found that the jury had properly concluded that Mon Cheri's works, for which it sought copyrights, were sufficiently original. Although the designer had been inspired by many sources, including a particular flower and vine drawing, she had rearranged the two common elements and changed their size, color and frequency to create a sufficiently original work under copyright law.

The court also held that there was ample evidence to establish that the Wu Defendants had engaged in unauthorized copying

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of Mon Cheri's work. A plaintiff must show that the defendant had access to a copyrighted work and that there were substantial similarities between the two works. In this instance, the Wu Defendants had access to the copyrighted material (specifically the embroidery patterns applied to various Montage dresses) through a variety of public sources, including Mon Cheri's website, Mon Cheri's catalogs, wedding magazines, advertisements and dresses on display. Moreover, there was evidence that Wu had obtained Montage catalogs to copy Mon Cheri's work. Several witnesses also testified that the Montage and Mirage dresses were either exactly alike or substantially similar.

Next, the Wu Defendants asserted that Mon Cheri could not establish the passing off claim against the Wu Defendants based upon an affidavit in the settlement agreement between Mon Cheri and the Mirage Defendants. The affidavit from Kaitz confirmed that Wu and the Wu Defendants did not have any ownership interest in Mirage. As such, the Wu Defendants maintained that the district court had erred in failing to order Mon Cheri to produce the settlement agreement prior to trial. Further, the Wu Defendants asserted that the district court improperly denied their motion for a new trial after Mon Cheri had linked them to Mirage during trial without revealing the settlement agreement and accompanying affidavit. The court, however, rejected the Wu Defendants' argument. In so doing, the court found it to be significant that:

(1) the Wu Defendants had not diligently pursued the settlement agreement during discovery; (2) Mon Cheri's trial tactics in connecting the Wu Defendants to the Mirage Defendants was evident in its pretrial disclosures; and (3) the Wu Defendants had not objected to the jury charges on Mon Cheri's theories of direct, contributory and vicarious liability against the Wu Defendants.

The Wu Defendants also contended that the jury instructions propounded by the district court were improper in various respects. However, the court found that the Wu Defendants had failed to raise these issues during the charging conference or during the jury charge, and thus, these issues were waived pursuant to Rule 51.

Both parties appealed the damage award determined by the district court. The Third Circuit, however, affirmed the award in all respects. The court concluded that the Wu Defendants' profits were an appropriate measure of Mon Cheri's damages for breach of contract, as well as its damages for copyright infringement and passing off. As to Mon Cheri's claim for treble damages, punitive damages and attorneys' fees, the court concluded that Mon Cheri had not established an intentional or willful violation of the Lanham Act to support an award of treble damages and that Mon Cheri's evidence was not sufficiently convincing to support an award of punitive damages or attorneys' fees.

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Sole Supplier of Track Tires Dodges Damages in Antitrust Action

The Third Circuit recently affirmed the Western District's decision to dismiss antitrust allegations in *Race Tires America, Inc. v. Hoosier Racing Tire Corp.*, No. 09-3989, 2010 U.S. App. LEXIS 15233 (3d Cir. July 23, 2010) (opinion by J. Cowen). Race Tires and Hoosier competed to supply racing tires used in various dirt track auto-racing circuits. Race Tires alleged that Hoosier obtained and preserved an illegal monopoly by convincing the various regional circuits to sign contracts that required cars in circuit-sponsored races to use tires supplied by Hoosier. The district and appellate courts both agreed that Hoosier did exactly that, but neither felt that it violated the antitrust laws. Race Tires's claims failed because: a) Race Tires had pioneered the idea of convincing regional circuits to adopt "single tire" contracts; b) Race Tires still had some success in winning such contracts (exclusive contracts are acceptable if there is competition to obtain them); and c) such contracts had benefits for the racing industry (races turned more on drivers' skill if all drivers used the same tires).

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District Court Upholds Jury Verdict Finding Doctrine of Unclean Hands Barred Defendant's Attempted Enforcement of Forbearance Agreement

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The court upheld a jury award in favor of Plaintiffs Mente Chevrolet Oldsmobile, Inc, Mente Chrysler Dodge, Inc. and Donald Mente (Plaintiffs) and against Defendant GMAC (GMAC) for breach of contract in *Mente Chevrolet Oldsmobile Inc. v. GMAC*, Case No. 08-2403, 2010 U.S. Dist. LEXIS 74390 (E.D. Pa. July 23, 2010) (opinion by J. Sanchez).

Pursuant to franchise agreements with General Motors (GM) and financial arrangements known as “floor plans” with GMAC, Mente operated Chevrolet Oldsmobile and Chrysler Dodge dealerships. The Wholesale Supply Agreement (WSA) governed the relationship between GMAC and Mente. The WSA called for repayment by Plaintiffs to GMAC “faithfully and promptly.” If Plaintiffs failed to pay “faithfully and promptly,” GMAC could declare Plaintiffs to be “out of trust.” Importantly, the WSA failed to define the phrase “faithfully and promptly,” and this was an issue in the litigation.

In 2006, GM began decreasing the number of GM dealerships. GMAC subsequently requested Plaintiffs reduce their line of credit by half within thirty days. Mente responded that it could not comply with this request. After Plaintiffs refused to sign any agreement to pay down its credit, GMAC audited the Chevrolet Dealership and demanded immediate payments for vehicles not on the lot. Because the sole person in charge of the financial records was on vacation, Plaintiffs sought additional time to provide the records and checks for payment. GMAC refused and instead declared the dealerships

“out of trust,” and took control of the dealerships’ open accounts. GMAC also billed Plaintiffs for the costs associated with GMAC’s actions. Following negotiations, the parties executed a Forbearance Agreement drafted by GMAC in which GMAC would return the amount of funds seized from Plaintiffs, if Plaintiffs waived their right to sue GMAC.

Once the forbearance period ended, Plaintiffs sued GMAC for breach of the WSA. The jury awarded Plaintiffs \$4 million in damages, finding the dealerships were not “out of trust” and that GMAC breached the WSA. GMAC subsequently filed a renewed motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b) and a motion for a new trial under Federal Rule 59. In an effort to overturn the jury’s verdict, GMAC argued that: “(1) the Forbearance Agreement was valid and barred Plaintiff’s suit; (2) Plaintiffs ratified the Forbearance Agreement by accepting the return of the funds from GMAC; (3) Plaintiffs’ measure of damages was too speculative for the jury to award any amount; (4) Plaintiffs lacked standing to obtain relief; and (5) the WSA was unambiguous and should not have been submitted to the jury for interpretation.”

The court first had to determine whether the parties to the Forbearance Agreement “knowingly and voluntarily” waived their rights in order for the agreement to be valid. In deciding whether the waiver was voluntary and with knowledge, the court examined the following factors pursuant to the totality of the circumstances test: “(1) the clarity and specificity of the release language; (2) the plaintiff’s education and business experience; (3) the amount of time plaintiff had for deliberation about the release

before signing it; (4) whether plaintiff knew or should have known his rights upon execution of the release; (5) whether plaintiff was encouraged to seek, or in fact received benefit of counsel; (6) whether there was an opportunity for negotiation of the terms of the Agreement; and (7) whether the consideration given in exchange for the waiver and accepted by the employee exceeded the benefits to which the employee was already entitled by contract or law.” Consideration, a necessary element for an enforceable contract, was the main point of contention. Plaintiffs contended that because they were not “out of trust,” GMAC had no legal right to the money it had returned to Plaintiffs. GMAC argued that those funds represented the consideration. Although the court found that no consideration existed, it ruled that the majority of the above factors weighed in GMAC’s favor. As a result, the court found that Plaintiffs “knowingly and voluntarily” signed the Agreement and overturned the jury’s finding to the contrary.

Nevertheless, the Court upheld the jury’s finding that the Forbearance Agreement was unenforceable under the doctrine of unclean hands. Pennsylvania courts apply the doctrine to bar a party’s claim “when (1) a party seeking affirmative relief (2) is guilty of conduct involving fraud, deceit, unconscionability, or bad faith (3) directly related to the matter in issue (4) that injures the other party and (5) affects the balance of equities between the litigants.” The jury had determined that the dealerships were not “out of trust,” that GMAC’s seizure of the dealership’s finances and property was in bad faith and that GMAC’s actions induced

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Plaintiffs to sign the Forbearance Agreement. As a result, the court found sufficient evidence that the doctrine of unclean hands barred GMAC's attempts to enforce the Forbearance Agreement.

GMAC was also unsuccessful on its ratification argument. The court found that GMAC failed to raise ratification as an affirmative defense and failed to specify it in a Rule 50(a)(2) motion. Thus, GMAC was barred from raising the ratification defense in its Rule 50(b) motion. However, the court determined that even if GMAC had properly raised the defense, it was inapplicable. The jury did not find fraud or duress, which was a prerequisite to finding the Agreement voidable and the ratification defense applicable.

On the issue of damages, Plaintiffs had presented several experts who testified regarding the impact of GMAC's breach of the WSA, the impact of when a dealership is declared "out of trust" and the diminished value of Plaintiffs' properties. Pennsylvania courts allow "some uncertainty in calculating damages, but the plaintiff must introduce sufficient facts upon which the jury can determine the amount of damages without conjecture." The court determined that the jury's award of \$4 million in damages was appropriate given the evidence and testimony presented.

While the court did not expressly address whether Plaintiffs had standing, the upholding of the jury's conclusion indicates that Plaintiffs had standing to bring a claim for breach of contract.

Further, the court rejected

GMAC's argument that the WSA was unambiguous and should not have been submitted to the jury for interpretation without discussion.

The court also rejected GMAC's arguments purportedly supporting that GMAC was entitled to a new trial under Federal Rule of Civil Procedure 59. The court found that the exclusion of GMAC's expert witnesses and documents relating to Plaintiffs' account statement was proper given GMAC's failure to adhere to Federal and local rules. The court also found no error in allowing Plaintiffs' experts to testify since GMAC had an opportunity to cross-examine the experts, and GMAC was not prejudiced by their testimony. Finally, GMAC disagreed with the jury instruction regarding the parties' alleged waiver through a release and the instruction including the term "undue influence." However, GMAC only objected generally to the instruction and failed to state the specific grounds for its objection as required by Federal Rule of Civil Procedure 51(c)(1). Thus, the issue was waived.

After finding the jury's award of \$4 million was in fact proper, the court denied GMAC's renewed motion for judgment as a matter of law and its motion for a new trial.

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Expert Evidence Lacking in Lumberyard Lawsuit

Judge Sylvia Rambo of the Middle District went some of the way toward resolving a commercial contract dispute in *Rock Creek Lumber Co. v. Valley Machine Works, Ltd.*, No. 08-cv-967,

2010 U.S. Dist. LEXIS 73313, at *1 (M.D. Pa. July 21, 2010).

Plaintiff Rock Creek had contracted with Defendant Valley Machine to supply a custom-built sawmill system that would measure wood, calculate the most efficient way to cut it and then cut and edge it. Valley Machine supplied the system's mechanical components and subcontracted with Co-Defendants Concept Systems and USNR Corp. (the "Subcontractor Defendants"), who respectively supplied the system's software and optical measuring components. The sawmill system never worked as quickly or as well as promised. Consequently, Rock Creek sued all Defendants for negligence and breach of contract. Defendants returned the favor with counterclaims, alleging that they had not been paid what they were owed.

After Rock Creek took a default judgment against Valley Machine and its owner, the Subcontractor Defendants sought summary judgment, which the court granted in part. The court dismissed Rock Creek's claims on the basis that Rock Creek failed to present expert evidence, which the court said was required. It found that lay factfinders would be unable to determine what duties were owed or what services the contract called for given: a) the sawmill system's complexity; and b) the difficulty of determining each Subcontractor Defendant's level of fault for the failure of the integrated system to perform as promised. The court declined, however, to grant the Subcontractor Defendants summary judgment on their counterclaims. The court held that while the Subcontractor Defendants had proved that they had sent Rock Creek invoices, which Rock Creek had not fully paid,

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the Subcontractor Defendants did not come forward with sufficient evidence that they were owed the amounts stated in the invoices.

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Declaratory Judgment Action Dismissed Based upon Duplicative State Court Litigation

In *Selective Ins. Co. of South Carolina v. Custom Building Systems, LLC*, No. 4:09-CV-2178, 2010 U.S. Dist. LEXIS 77089 (M.D. Pa. July 30, 2010) (opinion by J. Jones), Plaintiff, Selective Insurance Company of South Carolina (Selective), filed suit against its insured, Custom Building Systems, LLC (CBS), seeking a coverage determination under the Declaratory Judgment Act, 28 U.S.C. § 2201, et. seq. CBS filed a motion to dismiss in response.

By way of factual and procedural background, CBS is a manufacturer of modular homes. Kenneth and Anne Reaver (Reavers) filed suit in a Mississippi state court against CBS, alleging that their home was not constructed properly under theories of negligence, professional liability, breach of contract, misrepresentation and breach of warranties. Selective had issued two commercial general liability policies to CBS. CBS's motion to dismiss was based upon Selective's failure to join the Reavers as parties in the Middle District action. Two months after CBS filed its motion

to dismiss, Selective was added as a defendant in the Reavers' underlying Mississippi state court action to determine Selective's coverage obligation to CBS, if any.

Before ruling on CBS's motion to dismiss, the Middle District issued an order requiring the parties to file objections to the Middle District's intention to dismiss the action as duplicative, given the simultaneous litigation in Mississippi. Upon review of the parties' briefs, the matter was dismissed. Relying on the Third Circuit's seminal case of *State Auto Ins. Co. v. Summy*, 234 F.3d 131 (3d Cir. 2000) and the three "relevant considerations" to determine if a federal court should hear a declaratory judgment action, the court held that Selective's coverage obligations should be determined solely in the underlying suit filed by the Reavers in Mississippi. The three "relevant considerations" discussed were: 1) a general policy of restraint when the same issues are pending in a state court; 2) an inherent conflict of interest between an insurer's duty to defend in a state court and its attempt to characterize that suit in federal court as falling within the scope of a policy exclusion; and 3) avoidance of duplicative litigation. The Middle District also noted that "[i]f the litigation were to pursue here, it essentially proceeds in a vacuum, while the Mississippi action is all-inclusive." The action was dismissed pursuant to *Summy* to "promote judicial economy by avoiding duplicative and piecemeal litigation."

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Genuine Issues of Material Fact Preclude a Determination That All Asserted Patent Claims Are Invalid Under Anticipation and Obviousness

In *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Products, LLC*, No. 1:CV-09-1685, 2010 U.S. Dist. LEXIS 77063 (M.D. Pa. July 29, 2010) (opinion by J. Caldwell), a patent infringement case, Defendants First Quality Baby Products, LLC, et al. (First Quality) moved for summary judgment against Plaintiff Kimberly-Clark Worldwide, Inc. (KC) seeking the invalidity of the asserted claims of a certain patent under the theories of anticipation and obviousness. Specifically, First Quality asserted that the claims were invalid because the alleged invention was disclosed in an earlier patent.

Under the general principles of invalidity, a patent is presumed valid and the presumption can only be overcome by clear and convincing evidence. A court must first construe the claim terms in dispute and then compare those terms to the prior art to determine whether a patent is invalid.

With respect to claim construction, the court summarized the critical points of law before construing the disputed claim terms. Claim construction is a matter of law. The claims of a patent define the invention to which a patentee is entitled the right to exclude, and the words of the claims must be given their ordinary and customary meaning. The meaning of the terms is determined through intrinsic evidence, i.e., the claim language, the specification and the prosecution history. Also, extrinsic evidence, i.e., dictionaries, treatises and expert testimony, may be

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considered, but extrinsic evidence is less significant than the intrinsic evidence and is unlikely to result in a reliable interpretation of a claim unless considered in the context of the intrinsic evidence. Sometimes the ordinary meaning of a claim term as understood by a person of skill in the art may be apparent on its face even to lay persons; however, sometimes a patentee may act as his own lexicographer and use terms in a manner different than their ordinary meaning. The specification or file history (intrinsic evidence), however, must support a special definition of the term.

In this case, the parties disagreed on the meaning of four phrases found in the claim terms of the patent at issue, and the court construed each claim term based on the claim construction briefs submitted by the parties and the arguments presented by the parties during the claim construction hearing. For the first term in dispute, the court determined that KC proposed a construction that expanded the disputed claim term beyond what was found in the claims and the specification and agreed with First Quality that the ordinary and customary meaning should be given to the term, and thus, no construction was necessary. The court applied this same analysis to the second term in dispute and concluded that the specification and unambiguous claim language supported First Quality's contention that the disputed term needed no construction. Specifically, the court determined that KC's proposed construction expanded the scope of the claim language beyond

what the claim language provided in the patent at issue. With respect to the third and fourth terms in dispute, the court agreed with First Quality that construction was not necessary and the phrases were to be given their ordinary and customary meanings. The court concluded that KC's proposed construction for the third term placed a limitation into the claim without proper intrinsic support, and KC's proposed construction for the fourth term impermissibly broadened the scope of the invention beyond what the inventor intended for the invention.

Following claim construction, the court determined whether the invention was anticipated by the earlier patent. Pursuant to 35 U.S.C. § 102(b), an invention is anticipated if it was patented or described in a publication in this or a foreign country or in a public use or on sale in this country, more than one year prior to the date of the application for patent in the United States. In order for invalidity by anticipation to apply to a patent, the four corners of a single prior art reference must describe every element of the claimed invention, either expressly or inherently such that it enables one of ordinary skill in the art to make the invention without undue experimentation. Based on the evidence presented by First Quality, the court determined that First Quality failed to meet its burden by clear and convincing evidence that claim 1 of the patent at issue was anticipated by the earlier patent. The parties each submitted expert testimony to support their positions, and the court concluded that the competing expert testimony created a genuine issue of fact as to whether the earlier patent anticipated the patent at issue.

Also, the court determined whether the invention was obvious in comparison to the earlier patent. Pursuant to 35 U.S.C. § 103, a patent is invalid if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person of ordinary skill in the art to which the subject matter pertains. Once a patent challenger makes a prima facie case showing of obviousness, the patent holder may rebut by showing that the claimed invention exhibits some superior property or advantage that a person of ordinary skill would find surprising or unexpected. In this regard, the court cited *Graham v. John Deere Co. of Kansas City*, 383 U.S. 1 (1966), which discussed various factors to apply in such a factual inquiry: (1) the scope and content of the prior art; (2) the differences between the claimed invention and the prior art; (3) the level of ordinary skill in the art; and (4) any relevant secondary considerations. In addition to these factors, the court stated that common sense and logic may also be included in an obviousness analysis. Ultimately, the court concluded that a factual dispute existed on the scope and content of the prior art and the differences between the claimed invention and the prior art, thereby requiring the court to deny First Quality's motion for summary judgment.

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Absent Breach of Contract by Defendant, Plaintiff Not Entitled to Cancel Contract

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Relating to Sale of Goods

In *Howard Industries, Inc. v. Allegheny Ludlum Corporation*, 10-cv-0104, 2010 U.S. Dist. LEXIS 74830 (W.D. Pa. July 26, 2010) (opinion by J. Schwab), Plaintiff Howard Industries, Inc. (Howard) and Defendant Allegheny Ludlum Corporation, doing business as ATI Allegheny Ludlum (Allegheny Ludlum) filed cross-motions for summary judgment relating to a contract dispute for the sale of goods.

Howard had a long-standing business relationship with Allegheny Ludlum, a producer of specialty metals, including grain oriented electrical steel (GOES). Howard used GOES in its transformers. From late 2005, Howard and Allegheny Ludlum negotiated Supply Agreements for Allegheny Ludlum to supply GOES to Howard beginning in 2006. Following execution of the 2006 and 2008 Supply Agreements, the parties entered into a 2009 Supply Agreement (Agreement) in March of 2008. The Agreement provided that Howard would purchase a specified volume of GOES on a "take or pay" basis. It also provided the amount of GOES which Allegheny Ludlum would supply to Howard on a weekly basis over four years. Following a decrease in Howard's business and temporary deferment by Allegheny Ludlum on supplies, Howard requested that Allegheny Ludlum cancel part of the 2010 supply. Allegheny Ludlum refused but agreed to consider further deferments. Howard sent Allegheny Ludlum a letter in July of 2009 advising that it was canceling the Agreement effective July 2010

under the terms of the Agreement. The focus of the litigation was on whether Howard's cancellation was effective.

Because the Agreement was one for the sale of goods, Article 2 of the Uniform Commercial Code (UCC) and Pennsylvania's interpretation of the Code applied. The UCC distinguishes cancellation from termination. "[T]ermination occurs when either party pursuant to a power created by agreement or law puts an end to the contract otherwise than for its breach." As a result, "all obligations which are still executory on both sides are discharged." On the other hand, "cancellation occurs when either party puts an end to the contract for breach by the other and its effect is the same as that of 'termination' except that the canceling party also retains any remedy for breach of the whole contract or any unperformed balance."

When interpreting a contract, the critical inquiry is the intent of the parties. In determining that intent, the court had to consider that Howard and Allegheny Ludlum were "merchants" and that the Agreement was executed "between merchants" under the UCC. Thus, the parties were held to understand the UCC's "special and clear rules."

Looking at the Agreement at issue, only the Terms and Conditions clause touched on cancellation. Under the UCC, this clause allowed Howard to end the contract only if Allegheny Ludlum breached the Agreement. Since the Agreement was for a definite period of time and Howard did not allege Allegheny Ludlum breached the Agreement, Howard could not cancel the contract. As a result, the court granted Allegheny Ludlum's motion for summary judgment, and denied Howard's motion for summary judgment.

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Western District Decision Highlights Gist of the Action and Economic Loss Doctrines

In *Tennis v. Ford Motor Co.*, 2010 U.S. Dist. LEXIS 74827 (W.D. Pa. July 26, 2010) (opinion by J. McVerry), Plaintiffs filed suit against Ford Motor Company (Ford) arising from a fire that spontaneously ignited from a 1997 Ford Expedition (the "Expedition") on December 23, 2007. The Expedition was parked inside a warehouse leased by Plaintiffs, and Plaintiffs maintained that the fire caused them to suffer a loss of income, an interruption of their business, business relocation expenses, and real and personal property damage.

In the Complaint, Plaintiffs maintained that the fire was caused by a defect in the Expedition's Speed Control Deactivation Switch (Switch). In short, Plaintiffs asserted that the fire originated at the Switch due to an electrical short or failure of the Switch and/or its associated circuitry. The heat generated by the electrical problem was purportedly sufficient to ignite the surrounding combustibles within the vehicle's engine compartment. In several paragraphs throughout the Complaint, Plaintiffs painstakingly detailed the mechanics of the Switch failure, as well as Ford's knowledge of such potential failures in other vehicles and alternative methods by which the issues could have been addressed. Based upon these allegations, Plaintiffs asserted causes of action for strict liability,

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negligence, breach of implied warranty of merchantability, fraud, negligent misrepresentation, fraud by non-disclosure, breach of contract, *res ipsa loquitur* and punitive damages.

In response to the Complaint, Ford moved to strike 81 paragraphs of the Complaint pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, as it maintained that those paragraphs contained scandalous and impertinent information. Additionally, Ford moved to dismiss the fraud, negligent misrepresentation and fraud by non-disclosure claims (collectively the "Fraud Claims") pursuant to Rule 12(b)(6) under Pennsylvania's "gist of the action" doctrine. Ford also moved to dismiss the counts of strict liability and negligence based upon the economic loss doctrine. Finally, Ford moved to dismiss the *res ipsa loquitur* and the punitive damages claims for failure to state a claim upon which relief could be granted. Ford did not, however, challenge Plaintiffs' claims for breach of implied warranty of merchantability or breach of contract.

As to the motion to strike, Ford argued that the subject paragraphs were devoid of any relevant information in that the paragraphs addressed different makes and models of Ford vehicles rather than the subject Expedition. Plaintiffs countered that the averments were relevant and material and that they demonstrated Ford's knowledge of the alleged defect. Although the court recognized Ford's concerns, it noted that motions to strike under Rule 12(f) are not favored and are usually denied unless

the allegations have no possible relation to the controversy and may cause prejudice to one of the parties or unless the allegations confuse the issues in the case. The court found that the subject paragraphs were not unduly prejudicial or scandalous to Ford. Thus, it denied the motion to strike.

As to the motion to dismiss, the court began by highlighting the heightened pleading standards mandated by the Supreme Court in *Twombly* and clarified in *Iqbal*, which provide that civil complaints must set out sufficient factual matter to show that asserted claims are facially plausible. With respect to the Fraud Claims, Plaintiffs maintained that Ford intentionally concealed from and/or failed to disclose to Plaintiffs and others that the Switches were defective. Ford countered that these claims were barred by the gist of the action doctrine in that the Fraud Claims arose from a contract and that Plaintiffs could not recast those claims as tort claims. Plaintiffs replied that the gist of the action doctrine did not bar fraud claims that stemmed from a fraudulent inducement to enter into a contract.

In analyzing the parties' positions, the court recognized that a tort claim is barred by the gist of the action doctrine if: (1) it arises from a contract between the parties; (2) the duties allegedly breached were created and grounded in the contract itself; (3) the liability stems from a contract; or (4) the tort claim essentially duplicates a breach of contract claim or the success of the claim is wholly dependent on the terms of the contract. In the fraud context, a court must determine whether the source of the duties breached were intertwined with the obligations under the contract or if they were

merely collateral. That is, the gist of the action doctrine may, under certain circumstances, bar fraudulent-inducement claims. Because the court found that Plaintiffs' allegations of fraud were "intertwined" with the alleged failure of Ford to perform under the terms of the contract by providing a suitable vehicle for its intended use, the court granted Ford's motion to dismiss the Fraud Claims. In short, the court found that the Fraud Claims essentially duplicated the breach of contract claims.

Ford similarly asserted that Plaintiffs' claims of negligence and strict liability must be dismissed under the economic loss doctrine. Under the economic loss doctrine, no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage. That is, where a product fails to conform and the only resultant economic losses are to the product itself, the economic loss doctrine provides that the recovery for economic losses should be limited to an action on that contract and no additional recovery in negligence or strict liability is permitted. In so asserting, Ford maintained that Plaintiffs could not recover for damage to real and personal property because they did not own the warehouse that was destroyed by the fire. Although Plaintiffs did not own the warehouse and acknowledged that they could not recover for the loss of the warehouse, they nonetheless maintained that they lost personal property contained within the warehouse that was destroyed by the fire. The economic loss doctrine does not prohibit recovery for such damages. Accordingly, the court denied Ford's motion to dismiss

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the negligence and strict liability claims.

Finally, as to the Plaintiffs' independent claims of *res ipsa loquitur* and punitive damages, Ford asserted that neither was an actual claim; rather, the former

was a rule of evidence, while the latter was merely a form of relief. The court agreed that they did not constitute independent claims for relief and granted Ford's motion to dismiss these counts.

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