November 3, 2011
COMMERCE PROGRAM OPINIONS

A

ABANDONMENT – ***The fact that a property is not used for a certain period of time is only evidence of intent to abandon. Once the property owner rebuts this presumption by showing there was no intent to abandon, the burden shifts back to the party trying to prove actual abandonment.***

> **Yorkwood, L.P and Radicchio, LLC v. Kee Corporation, November Term 2002, No. 1703 (Cohen, J.)(April 13, 2004 - 14 pages).**

ABSOLUTE JUDICIAL PRIVILEGE - ***Because all of the wrongful conduct ascribed to Defendants in Complaint are alleged to have taken place in connection with the certain bankruptcy proceeding, claim fails as a matter of law because it is well settled that private witnesses, as well as counsel, are absolutely immune from liability for testimony, even if false, given or used in connection with judicial proceedings. The doctrine of absolute judicial privilege applies to statements, including averments in pleadings and other submissions to the court, made in the "regular course of judicial proceedings" which are "pertinent and material" to the litigation, regardless of the tort claimed.***

> **Bell v. George, April Term 2003, No. 03225 (Sheppard, J.) (September 24, 2003– 8 pages).**

ABUSE OF PROCESS – To establish a claim for Abuse of Process, a plaintiff must show that the defendant: (1) used a legal process against the plaintiff; (2) primarily to accomplish a purpose for which the process was not designed; and (3) harm has been caused to the plaintiff. It is not enough that the defendant had bad or malicious intentions or acted with an ulterior motive. Plaintiff must establish that there has been a perversion of the process.

> **Fischer v. Dawley, June Term, 2006, No. 00508 (February 6, 2007) (Sheppard, J. 5 pages).**

ABUSE OF PROCESS - ***By filing a third party complaint in the underlying action in order to shift the blame to plaintiff, defendants did not use civil process for a purpose for which it was not designed and did not pervert the process.***

> **Malcolm G. Chapman v. Oceaneering International, Inc., March**

Term, 2006, No. 04257 (November 30, 2006) (Sheppard, J., 6 pages)

ABUSE OF PROCESS - ***In order to assert claim for abuse of process, it is not enough that the defendant had bad or malicious intentions or that the defendant acted from spite or with an ulterior motive. Rather there must be an act or threat not authorized by the process, or the process must be used for an illegitimate aim, such as extortion, blackmail, or to coerce or compel the plaintiff to take some collateral action.***

Polydyne v. City of Philadelphia, February Term, 2001, No. 3678 (June 7, 2005) (Abramson, J., 6 pages).

ABUSE OF PROCESS - ***A cause of action for abuse of process requires some definite act or threat not authorized by the process; there can be no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. Plaintiffs were unable to state a cause of action for abuse of process where they failed to plead facts which, if taken as true, would demonstrate that defendant used the process "primarily for an improper purpose."***

Iama, Inc. and Louise Milanese v. Law Offices of Peter Meltzer, et. al., September Term, 2002, No. 4141 (Jones, J.)(March 17, 2003 - 8 pages)

ABUSE OF PROCESS/CIVIL CONSPIRACY/ INTENTIONAL INFLICTION OF EMOTIONAL STRESS –

GPM Investments, LLC v. Shahina Enterprises, LLC, August Term, 2010, No. 0905 (February 28, 2011 – 10 pages) (Bernstein, J.)

ABUSE OF PROCESS/WRONGFUL USE OF CIVIL PROCEEDINGS - ***Wrongful use of civil proceedings arises when a party institutes a lawsuit with a malicious motive and without probable cause. Abuse of process, on the other hand, is concerned with a perversion of the process after it has issued and occurs when the legal process is utilized to accomplish some unlawful purpose for which it was not designed. Another essential difference between these two causes of action are their geneses. Abuse of process is a state common law claim. However, allegations of malicious prosecution invoke Pennsylvania's statutory law in the form of the wrongful use of civil proceedings statute, also known as the "Dragonetti Act," 42 Pa.C.S.A. §§ 8351-8355.***

Iama, Inc. and Louise Milanese v. Law Offices of Peter Meltzer, et. al., September Term, 2002, No.4141 (Jones, J.)(March 17, 2003 - 8 pages)

ACCIDENT; OCCURRENCE; ROOF; INSURANCE COVERAGE

Certain Underwriters at Lloyd's London v. Berzin, September Term, 2009, No. 01263 (June 28, 2010) (Bernstein, J., 3 pages)

ACCOUNTANT/CLIENT PRIVILEGE - *Accountant/Client Privilege did not Attach Where Heir to Shareholder Subpoenaed Documents in the Possession of Closely-Held Corporation's Accountant - Accountant/Client Privilege is not as Broad as Attorney/Client Privilege - Stockholders have Right to View Corporate Records to Determine Mismanagement and Valuation of Stock Pursuant to 15 Pa.C.S.A. § 1508 - C.P.A. Law, 63 P.S. § 9.1, Supports Request by Estate of Deceased Shareholder for Access to Accountant's Records Where Shareholder's Stocks Were Required to be Sold Back to the Corporation after his Demise Pursuant to a Buy-Sell Agreement - Under C.P.A. Law, Estate would Qualify as Heir or Successor to Deceased Client*

Wolfington v. Wolfington Body Company, Inc., et al., February 2000, No. 3417 (Herron, J.)(August 8, 2000 - 14 pages)

ACCOUNTING - *Pennsylvania Law Does Not Permit Equitable Accounting In the Absence of Allegations of a Fiduciary Duty, Fraud or Misrepresentation, Mutual or Complicated Accounts or Lack of Adequate Remedy at Law*

First Union National Bank et al. v. Quality Carriers, April 2000, No. 2634 (Sheppard, J.)(October 10, 2000 - 49 pages)(Shareholders are entitled to an accounting where they allege that accounts at issue are mutual and complicated)

Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(April 30, 2001 - 8 pages)(Complaint alleges facts to support request for an accounting)

Poeta v. Jaffe et al., November 2000, No. 1357 (Sheppard, J.)(May 30, 2001 - 9 pages)(where partners who have withdrawn from law firm are alleging breach of contract, they have an adequate remedy of law and are not entitled to an accounting)

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)(Claim for Accounting by Employee Based on Employer's Use of Marketing Idea Is Viable Where Other Substantive Claims Survive Demurrer)

ACCOUNTING - *An Accounting Will Not Be Granted When Plaintiff Fails to Allege that Defendant Wrongfully Possesses Anything that Belongs to Plaintiff - An Accounting Will Not Be Granted Merely Because Defendant Requests Information that Could be Obtained Through Discovery*

> **Shared Communications Servs. v. Greenfield, May 2001, No. 3417 (Herron, J.)(November 19, 2001 - 9 pages)**

ACCOUNTING - *Plaintiffs Have Set Forth All the Prerequisites For An Accounting As to Monies Paid to Defendants In Reponse to Allegedly Misleading Closing Costs Estimates*

> **Koch v. First Union Corp. et al., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)**

ACT 68 – *The Quality Healthcare Accountability and Protection Act, 40 P.S. §§ 991.201, et seq., ("Act 68") requires out-of-network private managed care organizations, such as Americhoice, to pay the out-of-network medical emergency providers, such as UPHS, the "reasonably necessary costs" of all emergency medical emergency services provided to participants enrolled in a private managed care plan. "Reasonable necessary costs" are neither the predetermined Medicaid rates nor the provider's full published rates. The actual costs "reasonably necessary" to provide all services provided, must be factually proven at trial.*

> **Trustees of the University of Pennsylvania v. Americhoice of Pennsylvania, Inc., August Term 2005, No. 4392 (Bernstein, J.)(January 23, 2007 – 12 pages).**

ACTUAL AND CONSTRUCTIVE NOTICE AS PROVIDED BY RECEIPT OF UNRECORDED INSTRUMENT (FINDINGS-OF-FACT AND CONCLUSIONS-OF-LAW).

> **Commonwealth United Mortgage v. John A. Bennett and Kadir Gencer, November Term, 2009, No. 2269 (Bernstein, J.) (August 9, 2011 - 5 pages).**

ADEQUATE REMEMDY AT LAW—*To bar an equitable action on the grounds that a prior lawsuit provided an adequate remedy at law, the two matters must cover the same issues.*

> **Monroe Court Homeowner's Association v. Southwark Realty Company, et al., October Term 2004, No. 777 (Abramson, J.) (August 11, 2005 – 8 pages).**

ADEQUATE REMEDY AT LAW - *Complaint Seeking Declaratory Judgment Is Dismissed Because It Alleges, inter alia, that Plaintiff Had Satisfied a Judgment that Was At Issue in a Prior Action So That Plaintiff Has an Adequate Remedy to Resolve this Dispute Through the Still Pending 1992 Prior Action*

Tyburn Railroad Co. v. Consolidated Rail Co., May 2001, No. 2805 (Herron, J.)(October 26, 2001 - 8 pages)

ADVISORY OPINIONS – ***It is impermissible for courts to render purely*** *advisory* ***opinions.***

- A court should not render advisory decisions on hypothetical facts.

M. Kelly Tillery, Esq. v. Leonard & Sciolla, LLP, June Term 2005, No. 3085 (Sheppard, J.) (October 11, 2006 – 4 pages)

ADVISORY OPINIONS/ MOOTNESS – ***Any action may not be employed to determine rights in anticipation of events which may never occur or for consideration of moot cases or as a medium for the rendition of an*** *advisory* ***opinion which may prove to be purely academic.***

M. Kelly Tillery, Esq. v. Leonard & Sciolla, LLP, June Term 2005, No. 3085 (Sheppard, J.) (October 11, 2006 – 4 pages)

AMENDMENTS/COMPLAINT– ***Amendments are to be liberally permitted except where surprise or prejudice to the other party will result or where the amendment is against a positive rule of law. Leave to amend will not be granted where the initial pleadings reveal that the prima facie elements of the claim cannot be established and that the complaint's defects are so substantial that amendment is not likely to cure them.***

- A new rule of law will not be applied retroactively to permit plaintiff to amend the complaint if the proposed amendment did not relate back to the original complaint, was barred by the statute of limitations and would unfairly affect those person who have justifiably relied upon judicial decisions in the past.

Crossing Construction v. Delaware River Port Authority, July Term 2003 No. 2699 (August 31, 2005 – 7 pages)

AMENDMENT - ***Amendment to complaint permitted where no evidence of prejudice was presented by defendant which compelled the court to rule otherwise.***

Price v. Perry Square Realty, August Term, 2002, No. 01529 (Jones, J.)(May 6, 2003 - 2 pages)

ADMINISTRATIVE REMEDY - Tax Code Provides Adequate Administrative Remedy for Refund of Sales Tax Such That Court Must Dismiss Class Action for Lack of Subject Matter Jurisdiction.

Heaven v. Rite Aid Corporation, January Term 2000, No. 0596 (Herron, J.) (October 27, 2000- 10 pages).

ADMISSIONS/MOTION FOR SUMMARY JUDGMENT - ***Plaintiff's requests for admissions deemed admitted pursuant to Rule 4014 (d), where defendant failed to respond or object to the requests or move to withdraw or amend the admissions. However, plaintiff was not entitled to judgment as a matter of law where admitted facts alone did not warrant summary judgment insofar as a genuine issue of material fact existed regarding viability of defenses. Preclusion of defenses at trial would more appropriatly be determined via motion in limine, rather than in connection with motion for summary judgment.***

> **Mapil S.A. v. Green Stripe, Inc., et. al., July Term, 2002, No. 5029 (Jones, J.)(March 31, 2003 - 4 pages)**

ADMISSION/JUDICIAL - ***An Admission in a Pleading Constitutes a Judicial Admission that Has the Effect of Withdrawing a Fact From Issue and Dispensing Wholly with the Need for Proof of the Fact***

> **James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority, February 2000, No. 453**

REQUEST FOR ADMISSIONS – FAILURE TO RESPOND - ***Pa. R.C.P. 4014(b) - If the party from whom the admissions were sought fails to respond, by either answering or objecting thereto, within the established time frame, that party runs the risk of having those facts deemed admitted. Once these matters are admitted pursuant to Rule 4014(b), Rule 4014(d) states that such matters are "conclusively established unless the court on motion permits withdrawal or amendment of the admission."***

> **Guarantee Title & Trust Co. v. Security Search & Abstract Co., May Term 2007, No. 1345 (August 4, 2008) (Bernstein, J., 7 pages)**

AGENCY - ***Agent Is Not Relieved From Tort Liability by Virtue of His Employment or Agency Relationship But an Authorized Agent of a Disclosed Principal Generally Is Not Personally Liable Under Breach of Contract Theory - Employment or Agency Relationship Cannot Protect Defendants from Tort Claims Asserted Against Them***

> ***Advanced Surgical Services, Inc. v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(January 12, 2000)***

AGENCY LIABILITY – ***Where the owner of a construction site explicitly contracts with a general contractor to make the general contractor the agent of the owner, the owner may be held liable for any sub-contractual breaches by the general contractor of subcontracts held with subcontractors.***

Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).

AGENCY/DUTY OF LOYALTY - *Preliminary Injunction Is Denied on Claim of Breach of Duty of Loyalty Where There Is no Evidence that Employee Competed with Employer During Period of Employment or Used Trade Secrets*

Medical Resources Inc. v. Bruce Miller and Northeast Open MRI, Inc., November 2000, No. 2242 (Sheppard, J.)(January 29, 2001 - 14 pages)

AIDING AND ABETTING - *Aiding and abetting fraud and breach of fiduciary duty are recognized causes of action in Pennsylvania. Substantial assistance is one of two requisite elements of a claim for aiding and abetting tortious conduct. The claim also requires either that the defendant knew of the other party's wrongdoing that it was assisting, or that the defendant have committed a separate, concurrent tort against the plaintiff.*

Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).

ALTER EGO –

Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)

ALTER EGO LIABILITY - *Alleging that the CEO of a company used that company as a "sham" to perpetuate fraud is not enough by itself to overcome the strong presumption against piercing the corporate veil in Pennsylvania.*

Driscoll / Intech II v. Scarborough, IBCS, and FMB, August Term 2007 No. 1094 (February 12, 2008 – 11 pages) (Sheppard, J.).

American Rule - *Under the "American Rule," a party may not recover attorneys' fees from its adversary absent an express statutory or contractual provision allowing for such a recovery.*

Staples v. Assurance Company of America, October Term, 2003 No. 1088 (Sheppard, J., 4 pages) (June 14, 2004)

AMERICAN RULE/ATTORNEY FEES - *In Breach of Contract Claim, Attorney Fees Incurred in Litigation Cannot Be Recovered By Any Party Absent a Clear Agreement Between the Parties Providing Such or Where Litigation Was in Breach of a Court Adjudicated Settlement Agreement - An Agreement Not to Sue Which May Imply an Obligation*

to Assume Litigation Costs by Party Initiating Litigation Must Meet Strict Standards and Clearly Indicate the Intent of the Parties to Waive Their Right to Sue - Where Parties Entered Into an Agreement in an Effort to Conclude Differences Amicably, They Have Not Clearly Agreed Not to Sue if Such Effort Fails.

Carol E. Albert, and Colleen Ward v. Lucy's Hat Shop LLC, and Avram Hornik, June 2001, No. 0914 (Sheppard, J.) (December 31, 2002 - 16 pages)

ANTICIPATORY BREACH / GIST OF ACTION / STATUTE OF LIMITATION – ***Pursuant to a Motion to Reconsider defendants' Motion for Summary Judgment, the court held that plaintiffs' tort claims were barred by the applicable Statute of Limitations. The date that defendants notified plaintiffs that they were terminating the Agreement, a date that was premature under the contract, was an "anticipatory breach". At that point, plaintiffs had the choice of bringing their action against defendants, or waiting until defendants terminated their services according to their notice. "The plaintiff should not be penalized for leaving to defendant an opportunity to retract his wrongful repudiation . . .." Consequently, the date when defendants terminated their services in violation of the Agreement, triggered the Statute of Limitations. As plaintiffs brought their action more than two years after that date, their tort claims are barred by the Statute of Limitations.***

Plaintiffs' claim that the torts were ongoing in nature contrasted with the facts as pled. These "continuous torts" were, in reality, "ill effects from an original violation." David E. Poplar, Comment, Tolling the Statute of Limitations for Victims of Domestic Abuse, 101 Dick. L. Rev. 161, 186 (1993).

In addition, plaintiffs' claims for fraud and misrepresentation, as well as their claim for conspiracy to commit fraud are barred by the Gist of the Action Doctrine as the claims were wholly dependant on the Agreement.

CBG Occupational Therapy, Inc. v. Bala Nursing and Retirement Center, Ltd., April Term, 2003, No. 1758 (January 27, 2005 – 12 pages).

APPEAL; LEGAL MALPRACTICE; DAMAGES; CONSTRUCTION DELAY DAMAGES

LVI Environmental Services, Inc. v. Duane Morrris, L.P., April Term, 2008, No. 00498 (May 10, 2010) (Sheppard, J., 6 pages)

APPEAL/MOTION FOR SUMMARY JUDGMENT/RESPONSE- ***Allegations of fact contained in a motion for summary judgment must be substantively***

and appropriately responded to except for limited circumstances in which the factually true responsive answer is unknown.

-When responding to motions for summary judgment, the adverse party may not rest upon the mere allegations or denials of the pleadings but must file a response within thirty days after service of the motion. According to the local rule, the response to the motion is to be divided into numbered paragraphs. The responding party is to admit or deny each allegation and provide the factual reasons for the denial and the record supporting the denial or dispute must be attached.

- Where a plaintiff fails to respond to any of the numbered paragraphs of the motion for summary judgment, the facts alleged are admitted for purposes of considering the motion for summary judgment.

Sandler v. Nunez, December Term 2007 No. 5045 (September 22, 2009;5 Pages) (Bernstein, J.).

APPEAL OPINION/POST TRIAL/EVIDENTIARY RULINGS- ***An appellate court's review of a trial court's evidentiary determination is very narrow; the appellate court will only reverse upon a finding that the trial court abused its discretion or committed an error of law. Evidentiary rulings that do not affect the verdict will not provide a basis for disturbing the jury's judgment.***

Brodie v. Morgan, Lewis & Bockius, LLP, February Term 2004 No. 2004 No. 2004 (May 28, 2009 – 16 pages)(Sheppard, J.).

APPEAL OPINION/POST TRIAL/EVIDENTIARY RULING/HEARSAY- ***A witnesses testimony which consisted of a description of his regular practice when he becomes involved in a white-collar criminal investigation and conversations he had with prosecutors about plaintiffs which was subsequently conveyed to plaintiffs does not constitute hearsay since the testimony was offered to show the effect of the statements on the listener, that the statements were in fact made and to demonstrate notice.***

Brodie v. Morgan, Lewis & Bockius, LLP, February Term 2004 No. 2004 No. 2004 (May 28, 2009 – 16 pages)(Sheppard, J.).

APPEAL OPINION/POST TRIAL/EVIDENTIARY RULING/JURY INSTRUCTION- ***Where the jury never decided the question of causation, any alleged error in the causation instruction is harmless.***

Brodie v. Morgan, Lewis & Bockius, LLP, February Term 2004 No. 2004 No. 2004 (May 28, 2009- 16 pages)(Sheppard, J.).

APPEAL/POST TRIAL MOTION/EJECTMENT- ***In an ejectment action, where the plaintiff failed to act upon their rights until after the townhouses were constructed and sold, the court utilized its equitable powers to fashion relief according to the equities of***

the case.

consentable lines- The doctrine of consentable lines is a rule of repose for the purpose of quieting title and discouraging confusing and vexatious litigation. Under this doctrine, a boundary is established through consentable lines by dispute and compromise or by recognition and acquiescence.

- The doctrine of consentable lines fails where the property in dispute is owned and continuously dedicated for public purpose.

Narducci v. Regis Development, et. al., March Term 2005, No. 0109 (November 24, 2008 - 7 pages) (Sheppard, J.).

APPEAL – TIME FOR FILING - ***The May 10th Judgment was a final order from which appeal could be taken because it disposed of all remaining claims and parties in this action. Defendant had until June 9th to file his Notice of Appeal with this court. He filed his first Notice of Appeal on May 30th, but the Superior Court quashed it. His second Notice of Appeal, filed August 9, 2006, was two months late and is, therefore, untimely.***

United National Specialty Ins. Co. v. Gunboat, Inc., December Term, 2004, No. 03045 (November 20, 2006) (3 pages, Bernstein, J.)

APPEAL – WAIVER - ***Issues not raised in post-trial motions are waived. Furthermore, an objection to trial testimony must be made at the time the testimony is elicited, or it is waived.***

Allied Construction Services, Inc. v. Roman Restoration, Inc., March Term, 2004, No. 02271 (June 19, 2007) (Bernstein, J., 10 pages).

APPEAL/WRONGFUL USE OF CIVIL PROCESS/PROBABLE CAUSE AND GROSS NEGLIGENCE/IMPROPER PURPOSES/JURY INSTRUCTIONS

Winner Logistics, Inc. v. Labor & Logistics, Inc., *et al.* October Term, 2006; No. 2164- Superior Court Docket Nos. 2017EDA2010 & 1727EDA 2010) (March 25, 2011 – 23 pages) (Bernstein, J.)

APPELLATE JURISDICTION –

Coalition of Restaurant Owners for Liquor Control Fairness, *et al.* v. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, June Term, 2010, No. 2422 (September 1, 2010 – 4 pages) (New, J.)

APPELLATE RULE – ***Pa. R. App. P. 2744 specifically sets out that an appellate court may award the costs, and that an***

appellate court may remand the case to the trial court to determine these damages.

> **L.A.D. Presidential I, LP and L.A.D. Presidential II, LP v. L.A.D. Presidential III, LP, George A. David, Sr. and George A. David, Jr., July Term 2003, No. 3524 (Abramson, J.) (August 2, 2006 - 7 pages).**

APPRAISAL; VACATE ARBITRATION; COMMERCIAL LEASE; RENT VALUATION

> **TRO Avenue of the Arts, L.P. v. The Art Institute of Philadelphia, LLC, August Term, 2009, No. 02305 (May 14, 2010) (New, J., 4 pages)**

APPRAISER; PARTNERSHIP DISPUTE; ARBITRATION CLAUSE; PETITION TO VACATE ARBITRATION DECISION-

> **Spencer v. Spencer, August Term 2007 No. 2066, April 13, 2010 – 4 pages) (New, J.)**

ARBITRATION –

> **Premier Magnesia, LLC v. Thomas M. Miller, September Term, 2010, No. 2567 (December 21, 2010 – 4 pages) (New, J.)**

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision. The court stayed all remaining claims pending the resolution of the aforementioned arbitration.*

> **AAV, Inc. v. Dav El Reservations Systems, Inc., et al, August Term 2006, No. 1525 (Sheppard, J.)(April 2, 2007 – 5 pages).**

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision.*

> **Clark v. Weber, Gallagher, Simpson, Stapleton, Fires & Newby, LLP January Term 2006, No. 4118 (Abramson, J.)(October 17, 2006 – 6 pages).**

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision.*

Delta/B.J.D.S. v. Williard, A Division of Limbach Company, LLC, et al.., November Term 2005, No. 3242 (Abramson, J.)(April 3, 2006 - 5 pages)

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision.*

Majestic Steel Construction Co. v. Market Street Constructors, *et al*., July Term 2005, No. 3408 (Jones, J.)(12/29/05 – 4 pages).

ARBITRATION—*An arbitration provision should be strictly construed.*

American Special Risk Ins. Co. v. Factory Mut. Ins. Co., November Term 2004, No. 3833 (Abramson, J.) (June 30, 2005 – 4 pages).

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision.*

Delta/B.J.D.S. v. St. Paul Fire & Marine Ins. Co., et al., September Term 2004, No. 1521(Sheppard, J.)(June 10, 2005 - 5 pages)

ARBITRATION—*A non-signatory to a contract containing an arbitration clause may be bound by the clause pursuant to common law principles of contract and agency law.*

BDO Seidman, LLP v. Kader Holdings Co., et al., May Term 2004, No. 973 (Jones, J.) (March 11, 2005 – 7 pages).

ARBITRATION—*A valid arbitration agreement may be found void if there is a confidential relationship between the parties and the party seeking to uphold the agreement cannot demonstrate that the agreement is fair and beyond the reach of suspicion.*

Janco v. First Union Capital Markets, Corp., et al., June Term 2004, No. 560 (Jones, J.) (March 14, 2005 – 6 pages).

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. The dispute at bar did not fall within the "intellectual property" exception to the arbitration clause because it did not involve matters arising in connection the validity, registration or misappropriation of the mark itself, rather the dispute related to Defendants'*

alleged breach of the Franchise Agreement, including their alleged failure to pay fees due and owing pursuant to the agreement, their failure to operate the franchise in a manner consistent with Bassett's standards (as set forth in the agreement) and their failure to permit Bassett's representatives access to inspect the franchise (as required by the agreement). The fact that this breach also included Defendants' apparent failure to cease using the Bassett's trademark in light of the foregoing breaches is incidental to its breach of contract action.

Bassett Expansion Corp. v. TDK Holdings, et al., September Term 2003, No.0315 (Jones, J.)(December 18, 2003 – 5 pages).

ARBITRATION – *Complaint dismissed and case sent to arbitration in accordance with agreement between the parties. In doing so, the court found that valid agreement to arbitrate existed between the parties and that the dispute involved was within the scope of the arbitration provision.*

Atlantic Concrete Cutting, Inc. v. Turner Construction Co., et al., June Term 2004, No. 0830 (Jones, J.)(January 5, 2005 – 4 pages).

ARBITRATION - *Judicial inquiry in determining whether a suit must proceed to arbitration requires a determination as to whether: (1) a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision.*

- It is well-settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide.

- Despite the fact that the law favors settlement of disputes by arbitration, a court must be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of the parties as manifested by the writing itself.

- Because arbitration is a matter of contract, a particular issue cannot be arbitrated absent an agreement between the parties to arbitrate that issue.

Margolis Edelstein v. Jeffrey K. Martin, April Term, 2007, No. 1849 (March 18, 2008) (Abramson, J., 6 pages)

ARBITRATION – *Judicial inquiry in determining whether a suit must proceed to arbitration requires a determination as to whether: (1) a valid agreement to arbitrate exists between the parties and, if so, (2) whether the dispute involved is within the scope of the arbitration provision.*

Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575

(*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)

ARBITRATION – CONTRACT INTERPRETATION - *It is well-settled that the issue of whether a particular dispute falls within a contractual arbitration provision is a matter of law for the court to decide. The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties. A court must be careful not to extend an arbitration agreement by implication beyond the clear, express and unequivocal intent of the parties as manifested by the writing itself. Indeed, because arbitration is a matter of contract, a particular issue cannot be arbitrated absent an agreement between the parties to arbitrate that issue.*

Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575 (*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)

ARBITRATION – VACATION OF ARBITRATOR'S AWARD - *Pennsylvania's common law arbitration statute states that "the award of an arbitrator in a nonjudicial arbitration…is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award."*

Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575 (*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)

ARBITRATION – VACATION OF ARBITRATOR'S AWARD – IRREGULARITY - *An irregularity refers to the process employed in reaching the result of the arbitration, not the result itself.*

- Since the arbitrator ruled on an issue that arose out of an agreement that did not provide for arbitration of disputes arising under that agreement, he exceeded his authority. Since this constituted an irregularity, the arbitration award was vacated pursuant to 42 Pa. C.S.A. § 7341.

Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575 (*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)

ARBITRATION – ARBITRATOR'S AUTHORITY - *The arbitrator's authority*

is restricted to the powers the parties have granted him in the arbitration agreement.

> **Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575 (*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)**

ARBITRATION AGREEMENTS - ***Under New York law, if plaintiff's sole arbitrable claim against defendant is inextricably intertwined with its non-arbitrable claims against the other defendants, then this court must retain jurisdiction over the arbitrable claim. - Under the Federal Arbitration Act, which trumps contrary state law that interferes with contractually agreed upon arbitration, the court must send plaintiff's arbitrable claim to arbitration and stay the non-arbitrable claims pending the outcome of that arbitration.***

> **One Beacon Ins. Group Inc. v. Liberty Mut. Ins. Co., August Term, 2004, No. 02670 (January 21, 2005) (Cohen, J., 4 pages)**

ARBITRATION – CLAIM PRECLUSION - ***Normally, when claims raised in litigation are arbitrable, the court must order the parties to proceed with arbitration and stay the litigation pending the outcome of such arbitration. However, where the parties have already submitted their claims to arbitration, and the claims were dismissed by the arbitrator, it would be improper and wasteful to order the parties to re-arbitrate such claims. Instead, the previously arbitrated claims must be dismissed by the court.***

> **Advantage Systems, Inc. v. Bentley Systems, Inc., October Term, 2005, No. 4908 (September 19, 2006) (Sheppard, J., 4 pages)**

ARBITRATION – CONTRACT INTERPRETATION - ***The fundamental rule in construing a contract is to ascertain and give effect to the intention of the parties. In order to determine the meaning of the agreement, the court must examine the entire contract, taking into consideration the surrounding circumstances, the situation of the parties when the contract was made and the objects they apparently had in view and the nature of the subject matter.***

> **Margolis Edelstein v. Jeffrey K. Martin, April Term, 2007, No. 1849 (March 18, 2008) (Abramson, J., 6 pages)**

ARBITRATION/ INTERPRETATION OF CONTRACT- ***Where the parties contractually agreed to place limits on the types of damages an arbitrator can award, the arbitrator is limited to act only on***

those issues and to fashion a remedy which the agreement itself permits.

- a contractual provision which places a limit on the types of damages an arbitrator may award does not act as an exclusion of the types of claims and disputes which are to be arbitrated under the Licensing Agreement.

Proscape Technologies, Inc. v. InfoLogix, March Term 2004 No. 1902 (August 12, 2005) (Abramson, J.)

ARBITRATION – ARBITRATORS' QUALIFICATIONS- Generally, an arbitration proceeding can be challenged only after it is finished and an award has been made. Where the parties have contractually agreed to let their arbitrators choose a third arbitrator based on certain criteria, the parties may not ask the court to second guess the arbitrators' decision regarding the neutral's qualifications until the arbitration has concluded. - An arbitrator who feels he is unable to be neutral must recuse himself, but if he believes he can be neutral, he is not subject to removal by a court.

One Beacon Ins. Group Inc. v. Liberty Mut. Ins. Co., August Term, 2004, No. 2670 (August 2, 2005) (Abramson, J., 2 pages)

ARBITRATOR'S AWARD – *will be vacated when arbitrator fails to follow damage formula set forth in the contract.*

Holmes School Limited Partnership and W.P., L.P. v. The Delta Organization, June Term, 2002, No. 3512 (Cohen, J.) June 10, 2004 – 3 pages)

ARBITRATORS' JURISDICTION TO DETERMINE ARBITRABILITY –

Premier Magnesia, LLC v. Thomas M. Miller, September Term, 2010, No. 2567 (December 21, 2010 – 4 pages) (New, J.)

ARBITRATION CLAUSE; PARTNERSHIP DISPUTE; APPRAISER, PETITION TO VACATE ARBITRATION DECISION-

Spencer v. Spencer, August Term 2007 No. 2066, April 13, 2010 – 4 pages) (New, J.)

ARBITRATION – JURISDICTION TO AFFIRM OR VACATE - *The Federal Arbitration Act does not vest the federal courts with exclusive jurisdiction to affirm or vacate an arbitration award made under the Federal Arbitration Act*

OneBeacon Insurance Group, Inc. v. Liberty Mut. Ins. Co., August Term, 2004, No. 02670 (March 11, 2008) (Abramson, J., 5 pages).

ARBITRATION/PETITION TO VACATE– ***An arbitration award may be vacated only if it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable or unconscionable award.***

- Irregularity refers to the process employed in reaching the result not the result itself.

- Where the arbitrator in rendering the award discussed the rationale behind his decision making process and the factors he took into consideration when allocating the fees, the decision making was not irregular.

Ominsky & Messa, Inc. v. Messa, et. al., January Term 2001 No. 3846; Superior Court Docket No. 3160 EDA 2007 (May 13, 2008 – 5 pages).

ARBITRATION – SELECTION OF ARBITRATORS - ***Plaintiffs' arguably late appointment of their arbitrator was not a material breach of the parties' agreement, and it does not otherwise prejudice defendants. The primary purpose of the arbitration selection provision in the parties' agreement, which permits each party to select an arbitrator and also provides for the appointment of a neutral arbitrator, is to ensure the fairness of the arbitration process and the parties' acquiescence in the results of that process. The court will not thwart this important purpose by strictly construing the contractual provision governing the time in which to select arbitrators where there has been only de minimus deviation from the terms of such provision.***

OneBeacon Insurance Group, Inc. v. Liberty Mut. Ins. Co., August Term, 2004, No. 02670 (March 11, 2008) (Abramson, J., 5 pages).

ARBITRATION – STAY OF ARBITRATION - ***Given that the parties agreed to arbitration in the hopes of saving both the time and the money it would take to litigate their disputes in court, the court would be doing them a disservice if it compelled them to continue wrangling over preliminary matters instead of letting them put the merits of their dispute before the arbitrators promptly. Therefore, it was appropriate to lift the stay of arbitration and let the parties resolve their dispute expeditiously as contemplated in their agreement.***

ARBITRATION – STAY OF COURT PROCEEDINGS - A trial court has discretion to stay or to litigate non-arbitrable claims. It was appropriate to stay further proceedings in the court action while

the arbitration was pending because 1) the efficiency gained by proceeding to arbitration is lost if the parties must continue to fight their battles on two fronts at once; and 2)since several of the claims in the court action are based on the same allegedly wrongful conduct as the arbitrable claim, the decisions of the court and of the arbitrators could end up being inconsistent.

> **OneBeacon Ins. Group LLC v. Liberty Mutual Ins. Co., August Term, 2004, No. 02670 (April 19, 2005) (Abramson, J., 4 pages).**

ARBITRATION/STAY/TRCTA- *An owner's claim that he will suffer severe harm and prejudice if an arbitration proceeding is not stayed will be denied since an arbitrator's jurisdiction is limited to compensation and not access to the premises under the Tenant's Right to Cable Television, 68 P.S. § 250.501- B 250.510-B.*

> **Summit Park East Associates and Hotwire Communications LTD v. Urban Cable Television of Philadelphia, September Term 2004 No. 0139 Superior Court Docket No. 1438EDA2006 (August 18, 2006 – 5 pages) (Sheppard, J.)**

ARBITRATION/STAY/TRCTA- An owner's claim that he will suffer severe harm and prejudice if an arbitration proceeding is not stayed will be denied since an arbitrator's jurisdiction is limited to compensation and not access to the premises under the Tenant's Right to Cable Television, 68 P.S. § 250.501- B 250.510-B.

> **Summit Park East Associates and Hotwire Communications LTD v. Urban Cable Television of Philadelphia, September Term 2004 No. 0139 (October 20, 2004 – 5 pages)(Sheppard, J.)**

> **Summit Park East Associates and Hotwire Communications, Ltd. v. Urban Cable Work of Philadelphia, September Term, 2004, No. 0139 (1/26/05 – 10 pages) Opinion to Superior Court**

ARBITRATION – TORT CLAIMS - *Claims for tortious interference with contract, fraud, and civil conspiracy arose out of and related to the terms of a contract between the parties, so the tort claims had to be arbitrated under the terms of the arbitration provision in the parties' contract.*

> **Advantage Systems, Inc. v. Bentley Systems, Inc., October Term, 2005, No. 04908 (September 19, 2006) (Sheppard, J., 4 pages)**

ARBITRATION/WAIVER- *Where the Superior Court concluded in a prior decision relating to the same matter that the defendant waived*

its right to arbitration as to the three plaintiff groups because it accepted legal process, this court found the reasoning of the Superior Court persuasive and determined that the defendant waived its right to arbitration.

- A party can waive its right to arbitration if it accepts legal process before the filing of a complaint by attempting to win favorable rulings from the trial court on pre complaint discovery motions.

GE Lancaster Investments, Inc. v. American Express Tax & Business Services, Inc., November Term 2004 No. 4311 – Superior Court Docket No. 599 EDA 2007 (May 27, 2008 – 5 pages)(Sheppard, J.).

ARBITRATION/WAIVER—*A party waives its right to assert arbitration as a defense by failing to raise it in its preliminary objections, answer, or reply.*

Nationwide Insurance Co. v. Henry et al., June Term 2004, No. 3064 (Cohen, J.) (February 9, 2005 – 3 pages).

ASSAULT AND BATTERY EXCLUSION – *In a declaratory judgment action concerning insurance coverage, a court must first determine the scope of coverage, and then examine the underlying action to ascertain if it triggers coverage.*

- If an insurer relies upon an Assault and Battery policy exclusion as a basis for denial of coverage, the insurer has asserted an affirmative defense, and bears the burden of proving the applicability of the exclusion.

- While an underlying action may be based on negligence principles, the court must consider the facts alleged, and not the cause of action pled when determining if coverage is appropriate pursuant to an Assault and Battery exclusion under an insurance policy.

Western Heritage Insurance Co. v. JGF Management Co. & Piji Club, t.a Club Deco and Concetta Motto, Administratrix of the Estate of Joseph Motto. December Term, 2007, No. 1079 (March 10, 2009) (Sheppard, Jr., J., 6 pages)

ASSESSMENT OF DAMAGES –

Resource America, Inc., *et al.* v. Certain Underwriting Members of Lloyd's, April Term, 2003, No. 2709 (Sheppard, J.) (February 25, 2005 – 4 pages).

ASSIGNED CLAIMS - *The first matter that a court must consider when ruling upon the viability of an assigned cause of action is whether the assignor has a cause of action against the defendant in the case. Where subcontractors had no cause of action against each other, and only had a claim against contractor, they had*

nothing to assign to contractor.

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).**

ATTORNEY-CLIENT PRIVILEGE; WORK PRODUCT PRIVILEGE; AUTHORITY FOR THE CREATION OF PRIVILEGE; STATUTORY CONSTRUCTION ACT; PLURALITY OPINION

> **Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)**

ATTORNEYS' CONTINGENT FEES: *QUANTUM MERUIT* [Findings of Fact, Conclusions of Law] - In Pennsylvania, an attorney hired under a contingent fee arrangement, but fired before the fee has ripened, may recover in *quantum meruit*.

> **Aaron Wesley Wyatt v. Ira Silverstein and Silverstein and Bellin, LLC, March Term, 2004, No. 5214 (January 11, 2007 – 11 pages) (Abramson, J.)**

ATTORNEY'S FEES –

> **The Law Office of Douglas T. Harris, *et al.* v. Philadelphia Waterfront Partners, L.P., June Term, 2007; No. 2576 (October 22, 2010 – 4 pages) (Bernstein, J.)**

ATTORNEY'S FEES - *The American Rule states that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception. The "common fund" exception is one such exception.*

> **Cutting Edge Sports, Inc v. Bene-Marc, Inc., March Term, 2003, No. 01835 (August 10, 2007) (Abramson, J., 4 pages).**

ATTORNEYS' FEES - *In determining whether a fee request is reasonable, a court should base its decision upon the "lodestar": that is, the total number of hours reasonably expended in the litigation by the reasonable hourly rate. Where counsel fees are specifically authorized by statute, a court should consider whether a fee award would promote the purposes of the specific statute involved. A court may not reduce a fee award in order to achieve proportionality with the size of the verdict.*

> **Champlost Family Practice v. State Farm Ins. Co., May Term, 2002, No. 1167 (July 10, 2007)(Sheppard J. 10 pages); State Farm Mutual Automobile Ins. Co. and State Farm Fire & Casualty Co. v. Champlost Family Practice, Inc. & Champlost Family Medical Practice, P.C. & Alexander S. Fine, M.D. & Oscar Katz, January Term, 2004, No. 2669 (July 10,**

2007)(Sheppard J. 10 pages).

ATTORNEYS' FEES - *Under the American Rule, the losing party is not liable for the prevailing party's attorneys fees unless there is an express statutory or contractual obligation to pay such fees.*

Allied Construction Services, Inc. v. Roman Restoration, Inc., March Term, 2004, No. 02271 (June 19, 2007) (Bernstein, J., 10 pages).

ATTORNEYS' FEES - In connection with a claim for wrongful use of civil proceedings, a plaintiff is entitled to collect the attorneys' fees that it reasonably incurred in defending itself in the underlying action. A plaintiff may not, however, receive attorneys' fees if it appeared *pro se* in the underlying action.

Malcolm G. Chapman v. Oceaneering International, Inc., March Term, 2006, No. 04257 (November 30, 2006) (Sheppard, J., 6 pages)

ATTORNEYS FEES *The parties to litigation are responsible for their own fees unless otherwise provided by statutory authority, agreement of the parties or some other recognized exception*

Lapensohn & Assoc., P.C. v. Richard Tomolo, December Term 2004 No. 2518(Jones, J.)(April 20,2005-4 pages).

ATTORNEYS FEES – *Court dismissed claim of plaintiff, an attorney, who filed action to recover attorney's fees and costs from defendant insurance company, for which he performed no work and which at no time requested or required his services. Such a claim may not lie under Pennsylvania law.*

Quinn v. The Hartford Ins. Co., September Term 2005, No. 1601 (Abramson, J.) (January 23, 2006 – 4 pages).

ATTORNEYS' FEES - *The general rule is that there can be no recovery of attorneys' fees from an adverse party, absent an express statutory authorization, a clear agreement by the parties, or some other established exception. A claim asserted pursuant to 42 Pa.C.S. § 2503 should be raised at the conclusion of the underlying action, utilizing the record and history in the underlying action as a basis to support the claim.*

Deve Development, Inc. v. Joseph J. Gargiulo, et al., June Term 2005, No. 969 (Abramson, J.) (January 3, 2006 - 7 pages).

ATTORNEY'S FEES—*Plaintiff's demand for attorney's fees shall be stricken where contract makes no reference to attorney's fees and no statutory authorization exists.*

Joseph M. Rafter and John T. Williams v. William Shaw a/k/a William Shaw, Jr., and Shaw, Inc., January Term 2004, No. 3756 (Jones, J.) (May 27, 2004 – 4 pages).

ATTORNEY'S FEES—*Plaintiff's demand for attorney's fees shall be stricken where contract makes no reference to attorney's fees and no statutory authorization exists.*

Joseph M. Rafter and John T. Williams v. William Shaw a/k/a William Shaw, Jr., and Shaw, Inc., January Term 2004, No. 3756 (Jones, J.) (May 27, 2004 – 4 pages).

ATTORNEY'S FEES – *Where plaintiff did not identify any contractual or statutory provision that would permit it to recover attorneys fees, plaintiff's request for such relief was dismissed.*

Comsup Commodities, Inc. v. Osram Sylvania, Inc., February Term, 2003, No. 01438 (December 3, 2002) (Cohen, J.)

ATTORNEYS' FEES -

Aaron Wesley Wyatt v. Richard G. Phillips, January Term, 2002. No. 4165 (March 29, 2004 – 7 pages) (Sheppard, Jr., J.

ATTORNEY'S FEES – COMMON FUND EXCEPTION - *Where many persons have a common interest in a trust property or fund, and one of them, for the benefit of all, at his own cost and expense, brings suit for its preservation or administration, the court of equity in which suit is brought will order plaintiff to be reimbursed his costs and expenses, including counsel fees, from the property of the trust, or order those benefited to contribute proportionately toward that expense*

- The "common fund" exception has traditionally been narrowly applied, and most often invoked where the attorney's efforts have protected or preserved an estate or fund from waste, dissipation or fraudulent claims. The doctrine has also been applied where the services created a fund or augmented it by new assets. Compensation for the services is then recovered from the fund itself, thereby spreading the costs amongst the beneficiaries

- Where the named plaintiffs prosecuted a class action for the benefit of all the members of the class, they are entitled to collect their counsel fees and costs from the damages fund they created through the settlement with defendants. Nothing in the "common fund" exception to the American Rule permits the court to direct defendants to pay plaintiffs' attorneys' fees in addition to any damages that the defendants may owe.

Cutting Edge Sports, Inc v. Bene-Marc, Inc., March Term,

2003, No. 01835 (August 10, 2007) (Abramson, J., 4 pages).

ATTORNEY FEES/CONTRACT– ***Where the Exclusive Agency Agreement between the parties plainly and unambiguously provides that the owner agrees be responsible to pay for the agent's expenses together with interest in a successful action to enforce the agreement and the agent succeeded in bringing such a claim, the agent is entitled to recover attorney's fees, interest and costs.***

Situs Properties v. Peter Roberts Enterprises, Inc., June Term 2003 No. 2119 (April 21 2006 – 4 pages) (Jones, II, J.).

ATTORNEY FEES/PREVAILING PARTY–***When a party is entitled to an award of attorney fees pursuant to a contract and the contract fails to define the term prevailing party, the court may construe the word in accordance with their natural, plain and ordinary meaning.***

- Thomas Jefferson University Hospital and Jefferson University Physicians are not entitled to attorney fees and costs since they were not declared a winner by a jury on their four counterclaims asserted against them by Dr. Wapner. The counterclaims were withdrawn before submission to a jury.

- Where the attorney fees and costs were paid by a third party, the prevailing party did not incur any expenses and there is no evidence of an indemnification agreement between the prevailing party and the third party, the prevailing party is not entitled to an award of attorney fees since such an award would constitute a windfall.

Attorney Fees/Prevailing Party/WPCL- Even though plaintiffs were the prevailing party on Dr. Levine's WPCL claim, they are not entitled to an award of attorney fees and cost since such an award would contravene the purpose of the WPCL.

Thomas Jefferson University Hospital, et. al. v. Dr. Ronald Wapner, *et.al.*, June Term 2001 No. 2507 (April 10, 2006)(Jones, II).

ATTORNEY MALPRACTICE - ***Where plaintiffs allege that defendant was unjustly enriched by the monthly retainer they paid him because he breached his fiduciary duties of confidentiality and loyalty to them by secretly working against them and for their adversary in connection with the transfer of their interests in real property, such allegations are, in substance, a claim that defendant committed legal malpractice.***

Harris v. Philadelphia Waterfront Partners, L.P., June Term, 2007, No. 02576 (Jan. 26, 2009) (Bernstein, J., 4 pages).

ATTORNEY MALPRACTICE – EXPERT TESTIMONY - ***Whether an attorney failed to exercise a reasonable degree of care and skill related***

to common professional practice in handling a real estate transaction is a question of fact outside the normal range of the ordinary experience of laypersons, so expert testimony is required to prove it.

Harris v. Philadelphia Waterfront Partners, L.P., June Term, 2007, No. 02576 (Jan. 26, 2009) (Bernstein, J., 4 pages).

ATTORNEY MALPRACTICE – BREACH OF FIDUCIARY DUTY – ***Where adversary made suggestion of malpractice at attorney's deposition, attorney did not breach her fiduciary duty to client, who was represented by other counsel at deposition, when attorney drafted memo to her firm's internal files regarding suggestion of malpractice and advised firm's malpractice insurer of suggestion of malpractice, but did not discuss suggestion of malpractice with client.***

Crown, Cork & Seal v. Montgomery McCracken Walker & Rhodes, LLP, December Term, 2002, No. 03185 (CN 112002) (May 25, 2005 – 5 pages) (Jones, J.)

ATTORNEY MALPRACTICE – BREACH OF CONTRACT – ***In order to prevail on its breach of contract claim against attorney, the client must prove that the attorney failed to represent the client in a manner that comported with the standards of the profession at large in light of well settled principles of law and the rules of practice which are of frequent application in the ordinary business of the profession.***

– EVIDENCE – ***Client was precluded from offering at trial the court's opinion in the underlying action in which court found that lease drafted by attorney was ambiguous and construed it against client. Attorney was not privy to the court's opinion in underlying action at the time that the attorney was drafting and interpreting the lease. An attorney can only be charged with knowledge of the law and legal practice that existed at the time she committed the professional acts that the client later claims were improper.***

Crown, Cork & Seal v. Montgomery McCracken Walker & Rhodes, LLP, December Term, 2002, No. 03185 (CN 111980) (May 25, 2005 – 5 pages) (Jones, J.)

ATTORNEY MALPRACTICE – BREACH OF CONTRACT - ***If a plaintiff demonstrates by a preponderance of the evidence that an attorney has breached his or her contractual duty to provide legal service in a manner consistent with the profession at large, then the plaintiff has successfully established a breach of contract claim against the attorney.***

Romy v. Burke, May Term, 2002, No. 01236 (December 27, 2004 – 7 pages) (Sheppard, J.)

ATTORNEY MALPRACTICE – CONFLICTS OF INTEREST - ***An attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest. An attorney's representation of a subsequent client whose interests are materially adverse to a former client in a matter substantially related to matters in which he represented the former client constitutes an impermissible conflict of interest actionable at law.***

- A former client seeking damages from a law firm that subsequently represents an adverse party has the burden of proving: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that the member of the law firm acquired knowledge of confidential information from or concerning the former client, actually or by operation of law; and (4) the former client was damaged thereby.

Romy v. Burke, May Term, 2002, No. 01236 (December 27, 2004 – 7 pages) (Sheppard, J.)

ATTORNEY MALPRACTICE – NEGLIGENCE - ***A plaintiff must establish three elements in order to recover in negligence for attorney malpractice: (1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that the attorney's failure to exercise the requisite level of skill and knowledge was the proximate cause of damage to plaintiff.***

Romy v. Burke, May Term, 2002, No. 01236 (December 27, 2004 – 7 pages) (Sheppard, J.)

AMICUS BRIEF - ***In the Absence of Specific Precedent, Filing an Amicus Brief with a Pennsylvania Trial Court is Permissive***

Milkman v. American Travelers' Life Ins. Co., June 2000, No. 3775 (Herron, J.)(November 26, 2001 - 224 pages)

APPEAL - ***An Order Dismissing Preliminary Objections as to Which Division Within the Court of Common Pleas Has Jurisdiction Does Not Involve a Controlling Question of Law Meriting Amendment of the Order to Permit Appeal***

Parsky v. First Union Corp., February 2000, No. 771 (Herron, J.)(August 23, 2000 – 6 pages)

APPEAL / ESCROW - In an action between law firms over disputed fees, an order requiring one litigant to escrow a percentage of the fees is an interlocutory order (not a collateral order under Pa.

R.A.P. 313). The amount ordered to be escrowed is discretionary, and in this instance, the court deemed it to be fair.

Ominsky & Ominsky P.C. v. Joseph Messa, Jr., et al., January Term 2001, No. 3846 (Sheppard, J.) (April 7, 2003 - 4 pages).

ARBITRATION - *Where Service Contract Included Broad Arbitration Clause, Court Will Not Resolve Entire Controversy Over Whether the Contract Expired to Stay Arbitration - Whether Arbitration Clause Survived Contract's Termination is Question of Scope - Contract Contained no Limiting Language as to the Time to Demand Arbitration Despite "Work Delay" Clause*

CGU Insurance Co. v. Pinkerton Compute Consultants, Inc., June 2000, No. 2178 (Sheppard, J.)(August 31, 2000 - 10 pages)

ARBITRATION - *Scope of Arbitration Agreement does not Extend to Nonparties - Premature Appeal Where Court has not acted on Petition for Preliminary Injunction - Appealability of Order Denying Arbitration*

Manchel, Esquire, Individually and as liquidating partner of Manchel, Lundy & Lessin v. Robert Hochberg, John Haymond, Haymond, Napoli & Diamond, P.C. and Marvin Lundy, December 1999, No. 1277 (Sheppard, J.)(March 31, 2000 - 10 pages)

ARBITRATION - *Where Partnership Agreement Provides for the Selection of a Liquidator by Arbitration, this Arbitration Provision Extends Only to the Selection of the Liquidator and Not to Disputes Over Interpretation of the Partnership Agreement Itself - A Liquidator's Award Is Not an Arbitrator's Award*

McClafferty v. Cohen, September 2000, No. 3321 (Herron, J.)(May 10, 2001 - 7 pages)

ARBITRATION - *Non-signatory to Arbitration Agreement Cannot Be Compelled to Arbitrate*

Thermacon Enviro Systems, Inc. v. GMH Associates, March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages)

ARBITRATION - Where Preliminary Objections Raise Arbitration Provision But Defendant Has Failed to Make a Request for Arbitration, the Objections Will Be Held Under Advisement for 30 Days to Allow Defendant Either to File a Motion to Compel Arbitration or to Initiate an Arbitration Procedure

4701 Concord, LLC v. Fidelity National Title Insurance Co. of New York, April 2001, No. 1481 (Herron, J.)(August 28, 2001 - 11 pages)

ARBITRATION - *Dispute Involving Consumer Fraud As To Home Equity Loan Is Beyond the Scope of an Arbitration Agreement for Construction Repairs On Plaintiffs' Homes*

> **Koch v. First Union Corporation et al., May 2001, No. 549 (Herron, J.)(January 10, 2001 - 26 pages)**

ARBITRATION - *Where Plaintiffs Allege that Fraud, Corruption or Some Other Irregularity Caused an Unjust Arbitration Award, a Court Does Not Lack Subject Matter Jurisdiction to Review the Award that Determined the Fee Allocation for Attorneys Who Prosecuted Claims Against the Tobacco Industry*

> **Levin, Esquire et al. v. Gauthier, Esq., May 2001, No. 374(Sheppard, J.)(January 14, 2002 - 10 pages)**

ARBITRATION - *Where Defendant's Preliminary Objection Asserted that Arbitration Should be Compelled, Court Sustained Objection Because A Valid Agreement to Arbitrate Existed Between the Parties and the Dispute Involved Fell Within the Scope of the Arbitration Provision*

> **Stern v. Prudential Financial, Inc. d/b/a Prudential Securities, Inc., January Term 2002, No. 0571 (Sheppard, J)(2/4/03 Opinion to Superior Court - 11 pages) *On Appeal to Superior Court***

ARBITRATION – *Plaintiff's request to inspect books and records under 15 Pa. C. S. A. § 1508(c) vests this court with exclusive jurisdiction to determine whether or not the person seeking inspection is entitled to the inspection sought notwithstanding the arbitration provision contained within the shareholders agreement.*

> **Marks v. Hopkins et. al., June Term 2003, 003618 (September 29, 2003) (Jones).**

ARBITRATION/AGENTS/WAGE PAYMENT AND COLLECTION LAW - *Where Corporation Is Bound by Arbitration Provision And Complaint Alleges that Defendants Are Agents and Employees of that Corporation, Then Defendants May Invoke Arbitration Provision - Assertion of a Claim Under the Wage Payment and Collection Law Does Not Prevent Invocation of Arbitration Provision*

> **Weiner v. Pritzker & DeRusso, April 2001, No. 2846 (Sheppard, J.)(December 11, 2001 - 7 pages)**

ARBITRATION - *Where Defendant's Preliminary Objection Asserted that Arbitration Should be Compelled, Court Declined to Enforce*

Arbitration Provision to Avoid Repetitive, Piecemeal Litigation, To Achieve an Efficient and Orderly Disposition of Claims and To Fulfill the Goal Underlying the Joinder of Certain Indispensable Parties Which Would Have Been Contravened Had the Parties Been Compelled to Arbitrate.

> **University Mechanical & Engineering Contractors, Inc. v. Insurance Company of North America, November 2000, No. 1554 (Sheppard, J.) (October 28, 2002 - 12 pages)**

ARBITRATION AWARD - ***Petition to Vacate Dismissed with Prejudice Where the Pleadings Failed to Establish with Legal and Factual Sufficiency that Petitioner was Denied a Full and Fair Hearing or that the Award was Tainted by Fraud, Misconduct or Bias or that the Award was Subject to an Irregularity Which Justified Vacating It - Preliminary Objections Asserting Lack of Jurisdiction, Prior Pending Action and Agreement for Alternative Dispute Resolution Which Purportedly Bar Court From Hearing the Petition are Overruled Where 42 Pa.C.S.A. § 7342 Has Consistently Been Held to Allow Pennsylvania Trial Courts to Hear Appeals of Arbitration Awards - Pa. R. Civ. P. 126 Permits the Court to Disregard Procedural Defects For Failure to Attach Verification to Petition or to Plead in Paragraphs Where Substantive Rights of Parties are Not Affected and No Harm Arises - Attorney Fees Not Warranted Despite Petitioner's Procedural Delays Because Such Delays Do Not Rise to the Level of Being Vexatious.***

> **Marvin Lundy, Esq. v. Donald F. Manchel, Esq., June 2002, No. 932 (Cohen, J.)(August 21, 2002 - 10 pages).**

ARBITRATION/COMPEL - ***Where Motion to Compel Arbitration Requires Choosing Between Arbitration Clauses in Two Different Agreements, the Court's Focus Is Limited to Determining Which Arbitration Provision Encompasses the Parties' Dispute - Substantive Determinations Concerning the Expiration of the Underlying Agreement Containing the Arbitration Provision Should Be Determined by the Arbitrators and Not the Court***

> **Taylor Hospital Corporation v. Blue Cross of Greater Philadelphia, April 2000, No. 923 (Herron, J.)(April 23, 2001 - 26 pages)**

ARBITRATION/COMPEL - Where Plaintiff Asserts that Arbitration Should Not Be Compelled Because Its President Did Not Recall Signing the Client Agreement Containing the Arbitration Provision, the Mere Lack of Recollection (As Opposed to Denial) Does Not Create a Material Issue of Fact as to Whether the Proferred

Signature is His - Arbitration Is Compelled Where the Claims of Negligence and Breach of Fiduciary Duty as to an Alleged Liquidated Brokerage Account Falls Within the Arbitration Provision

> **Children's Services Inc. v. Fullman and Salomon Smith Barney, Inc., July 2001, No. 1627 (Herron, J.)(October 24, 2001 - 5 pages)**

ARBITRATION/COMPEL - *Court has Subject Matter Jurisdiction Where Plaintiff Claims There Was No Agreement to Arbitrate - Where Arbitration Agreement is Triggered Exclusively by Party's Execution of an Agreement for Margin Trading and Plaintiff Establishes Fraud in the Execution of the Arbitration Agreement - The Agreement to Arbitrate is Void Where There Was No Clear and Express Intent of the Parties to Arbitrate.*

> **Marguerita Downes v. Morgan Stanley, September 2001, No. 2985 (Herron, J. (September 23, 2002 - 22 pages)**

ARBITRATION/COMPEL/CONFLICTING PROVISIONS - *Arbitration Agreement Will Not Be Enforced Where Employment Agreement Contains Conflicting Sections Providing for Arbitration and Injunctive Relief with Litigation of the Issues in Court*

> **Omicron Systems, Inc. v. Weiner, August 2001, No. 669 (Herron, J.)(March 14, 2002 - 14 pages)**

ARBITRATION/CONSTRUCTION CONTRACT - *Intent of Parties Unambiguously Limited Scope of Arbitration to Claims Not Exceeding $100,000 - Similarity of Standards for Arbitrability under the Federal Arbitration Act and Pennsylvania Uniform Arbitration Act - Policy Favoring Arbitration - Arbitration as a Contractual Matter - Specific Language Controls Over General.*

> **Zoological Society of Philadelphia v. Intech Construction, Inc., February 2000, No. 1008 (Sheppard, J.)(May 16, 2000 - 10 pages)**

ARBITRATION/WAIVER - *Although a Line of Pennsylvania Precedent Holds that a Mandatory Arbitration Provision Deprives a Court of Subject Matter Jurisdiction, Recent Precedent Recognizes that the Defense of Arbitration May Be Waived - Defendant Waived Arbitration By Engaging in Discovery, Participating in Court Sponsored Settlement Conference and Waiting Until a Week Before Scheduled Trial to Request Arbitration*

> **James J. Gory Mechanical Contracting, Inc. v. PHA, February 2000, No. 453 (Herron, J.)(April 10, 2001 - 5 pages)**

> **James J. Gory Mechanical Contracting, Inc. v. PHA, February 2000, No 453 (Herron, J.)(July 11, 2001 - 29 pages)**

ARBITRATION AWARD - Arbitration Award Involving Reinsurance Policy Will Not Be Vacated Where *Petitioner Fails to Demonstrate By Clear, Precise and Indubitable Evidence that It Was Denied a Fair Arbitration Hearing - Where Contract Specifies Arbitration Pursuant to the Pennsylvania Arbitration Act, the Arbitration Award Is Reviewed Under 42 Pa.C.S.A. §7314 - Arbitrators Did Not Refuse or Improperly Exclude Material Factual Evidence on Crucial Factual Issues - Petitioner Was Not Denied a Full and Fair Hearing on the Issue of Whether Four Policies Qualified as "Heating Degree Day" Policies Merely Because It Could Not Elicit Testimony Regarding Other Policies That Had Nothing to Do With the Parties or Their Controversy - Petitioner Was Not Denied a Full and Fair Hearing Because of Failure to Complete Cross-Examination of Key Witness Where A Substitute Witness Was Provided, Petitioner Was Permitted to Give an Offer of Proof as to the Incomplete Testimony, Deposition Testimony Might Have Been Referenced and It Was Allowed to Argue New Evidence in Its Closing - Manifest Disregard of the Law Standard for Vacating Arbitration Award Is Not Applicable*

> ***Republic Western Insurance Co. v. Legion Insurance Co.,* July 2000, No. 3342 (Sheppard, J.)(January 25, 2001 -32 pages)**

ARBITRATION AWARD - *Petition to Vacate Common Law Arbitration Award Is Denied Pursuant to 42 Pa.C.S.A. § 7341 Where Petitioners Fail To Present Adequate Transcript Evidence*

> **Lang Tendons, Inc. v. American Spring Wire Corp., November 2000, No. 2695 (Herron, J.)(February 5, 2001 - 6 pages)**

> **Lang Tendons, Inc. v. American Spring Wire Corp., November 2000, No. 2695 (Herron, J.)(March 6, 2001)(Denying Motion for Reconsideration)**

ARBITRATION AWARD - *Petition to Vacate Dismissed with Prejudice Where the Pleadings Failed to Establish with Legal and Factual Sufficiency that Petitioner was Denied a Full and Fair Hearing or that the Award was Subject to an Irregularity Which Justified Vacating It - Preliminary Objections Asserting Lack of Jurisdiction, Prior Pending Action and Agreement for Alternative Dispute Resolution Which Purportedly Bar Court From Hearing the Petition are Overruled Where 42 Pa.C.S.A.§7342 Has Consistently Been Held to Allow Pennsylvania Trial Courts to Hear Appeals of Arbitration Awards - Pa.R.CIV.P. 126 Permits the Court to Disregard Procedural Defects For Failure to Attach Vertification to Petition or to Plead in Paragraphs Where Substantive Rights of the Parties are Not Affected and No Harm Arises - Attorney Fees Not Warranted Despite Petitioner's Procedural Delays Because Such Delays Do Not Rise to the Level of Being Vexatious*.

Marvin Lundy, Esquire v. Donald F. Manchel, Esquire, June 2002, No. 0932 (Cohen, J.) (August 21, 2002 - 10 pages).

ARBITRATION - PETITION TO VACATE ***Petition to Vacate was Dismissed with Prejudice Where Petitioner Failed to Plead with Legal and Factual Sufficiency. Petitioner Sought Relief to Vacate the Arbitration Award on the Grounds that he was Denied a Hearing, and that the Lack of Hearing and Unconscionability of the Award Amounted to an Irregularity. Petitioner Also Alleged that the Award was Tainted by Bias and Fraud. Respondent's Request for Attorneys' Fees and Costs were Denied on the Ground that Petitioner's Procedural Strategy which Delayed Compliance With the Arbitration Award was not Vexatious.***

Zwiercan, et al. v. General Motors Corp., et al., June Term 1999, No. 3235 (Cohen, J.) (September 11, 2002) (16 pages)

ARBITRATION PROVISIONS -- ***Preliminary Objection Sustained and Complaint is Dismissed. An Addendum is Part of the Original Agreement and Parties to the Addendum are Bound by the Terms of the Original Agreement. Arbitration Provision Applies Where Subject Matter of the Compliant, and Addendum are Specifically Referenced in the Original Agreement.***

Barry Cohen and BCO Planning v. First Financial Planners, Inc., Steve Koenig and Kris Vandelict, April Term 2002, No. 1990 (Cohen, J.) (January 15, 2003 - 5 Pages)Appeal to Superior Court - (Arbitration Provisions)

ARBITRATION/ASSIGNMENT - ***The Intent of the Parties as They Enter into an Agreement to Arbitrate Is for the Court to Interpret - Where the Arbitration Clause in a Contract Purports to Bind the Signatory Parties and Their Assignees, the Assignee Contemplated by the Parties Is Someone Who Derives His Rights and Obligations from a Party's Death or Incapacity or from a Party Assigning It the Contract - A Contract for Personal Services May Not Be Assigned Without All of the Parties' Consent - A Contract for Attorney Services Is One for Personal Services Because a Lawyer's Work Involves Personal Skill, Trust or Confidence and May Not Be Evaluated in a Mechanical Manner - An Arbitration Clause Cannot Apply to Parties Who Were Assigned Certain Client Files Obtained by One Party to a Contract Forming a Law Firm and Containing an Arbitration Clause Without the Consent of the Other Party to the Contract.***

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No.

3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)

Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 EDA 2003(Sheppard, J.) (April 2, 2003 - 31 pages)

ARBITRATION/SCOPE - ***Where the Parties Entered into a Contract Containing a Valid Arbitration Clause, Which Encompasses All Disagreements Related to the Contract, Tort Claims Based on Violations of the Contract and Defenses Based on Rights Arising From the Contract Both Put the Complaint Within the Scope of the*** **AGREEMENT TO ARBITRATE** - ***Arbitrators May Dispense Equitable Relief Where the Parties' Agreement to Arbitrate Does Not Explicitly Except Equitable Claims and There Is No Imminent Irreparable Harm Absent an Injunction.***

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)
Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 Eds 2003(Sheppard, J.) (April 2, 2003 - 31 pages)

ARBITRATION/WAIVER - ***A Waiver of an Agreement to Arbitrate Should Not Be Inferred Lightly - Waiver Has Not Occurred Where a Party to the Agreement Filed a Counterclaim Which He Later Withdrew Before the Court Issued Any Rulings, Where That Same Party Promptly Filed a Motion to Stay Proceedings and Compel Arbitration and Did Not Engage in Any Discovery.***

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)
Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 Eds 2003(Sheppard, J.) (April 2, 2003 - 31 pages)

ASSIGNMENT - *No Pennsylvania Case Has Addressed Whether the Assignment of Contractual Rights Includes Assignment of Causes of Action Arising From Those Rights – Where Assignment Provided for the Unconditional Transfer of All Present and Future Rights in Notes and Mortgages and the Assignor's Conduct Implies that It Assigned Its Unjust Enrichment Claim Arising From Those Rights, There Is a Material Issue of Fact as to the Exact Extent of the Assignment*

Resource Properties XLIV v. PAID et al., November 1999, No. 1265 and March 2000, No. 3750 (Sheppard, J.)(June 5, 2001 – 13 pages)

ASSIGNMENT/INSURANCE - Even Though Express Language of Assignment Clause Required Insurer's Consent Prior to an Assignment, Insured's Assignment of Rights After Rendering of Jury Verdict is Valid Since Assignment Occurred After Insured Against Loss - Namely the Jury Verdict.

Patricia M. Egger, Administratrix of the Estate of Charles Egger v. Gulf Insurance Company, et al., May 2001, No. 1908 (Sheppard, J.) (September 11, 2002 - 16 pages)

ASSIGNMENT/REAL PROPERTY – Because Florida Law Implies a Warranty of Good Title in an Assignment of an Interest in Real Property, the Parcel that Is Assigned Would Grant Good Title to the Property –

Terra Equities V. First American Title Insurance Co., March 2000, No. 1960 (Sheppard, J.)(August 9, 2001 – 17 pages)

ASSIGNMENT OF LEASE- *A so-called "Management Agreement," whereby tenant transfers the right to manage and operate the leased premises to a third party, constitutes an assignment of a commercial lease.*

421 Willow Corp. et al. v. Callowhill Center Assoc. et al., MAY TERM, 2001, Nos. 1848 and 1851 (Cohen, J.) (May 23, 2003- 14 pages)

ATTORNEY/BREACH OF CONTRACT – *Breach of Contract Claim Against Attorney Is Legally Sufficient Where Complaint Alleges that*

Attorneys' Engagement Letter Stated Their Goal Was "to Deliver to You Quality Legal Services"

> **Red Bell Brewing Co. v. Buchanan Ingersoll, P.C. et al., May 2000, No. 1994 (Sheppard, J.)(March 13, 2001 - 16 pages)**

ATTORNEY-CLIENT PRIVILEGE; WORK PRODUCT PRIVILEGE; STATUTORY CONSTRUCTION ACT; PLURALITY OPINION; AUTHORITY FOR THE CREATION OF PRIVILEGE;

> **Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)**

ATTORNEY-CLIENT FILE/RETENTION OF COPY - *Law Firm May Retain Copy of Client File That Has Been Copied At the Law Firm's Expense*

> **Quantitative Financial Strategies, Inc. v. Morgan Lewis & Bockius,LLP, December 2001, No. 3809 (Herron, J.)(March 12, 2002 - 22 pages)**

ATTORNEY-CLIENT PRIVILEGE/AT-ISSUE EXCEPTION - *Privilege Does Not Apply to Identified Documents Where The Issue of Attorney's Involvement and Representation in Putative Class Action is At Issue With Respect to Class Certification Because Attorney is Married to Named Representative And Attorney's Involvement Could Give Rise to an Impermissible and Non-Waivable Conflict of Interest Which Would Negate the Adequacy of Representation Requirement - Plaintiffs Were Not Sufficiently Specific As to Which Documents Were Privileged And Other Documents Were Admittedly in the Record*

> **Gocial, et al. v. Independence Blue Cross and Keystone Health Plan East, Inc.,December 2000, No. 2148 (Herron, J.) (September 4, 2002 - 9 pages)**

ATTORNEY-CLIENT RELATIONSHIP - *Where individual plaintiff, who was majority shareholder, guarantor, creditor and/or manager of plaintiff corporations, sought legal advice on behalf of plaintiff corporations and plaintiff corporations paid for such advice, individual plaintiff did not have cause of action against attorneys for breach of any fiduciary duty under implied attorney-client relationship between attorneys and individual plaintiff.*

> **Romy et al. v. Burke et al., May Term 2002, No. 1236 (Sheppard, J.) (May 2, 2003- 14 pages).**

ATTORNEY/DISQUALIFICATION - *Pennsylvania Has Adopted the Advocate/Witness Rule Which Precludes an Attorney From Acting As An*

Advocate During a Trial When He Will Be Called as a Material Witness - This Rule Does Not Apply to Preclude An Attorney From Representing a Client During the Pre-Trial Stage -

> ***Golomb & Honik, P.C. v. Tareq H. Ajaj et al., November 2000, No. 425 (Herron, J.)(April 5, 2000 - 6 pages)***

ATTORNEY/DISQUALIFICATION - *Defendants' Motion to Disqualify Plaintiff's Counsel Due to Conflict of Interest Under Rule 1.9 Is Denied Where Defendants Failed to Demonstrate a Pre-existing Attorney-Client Relationship Between It and Plaintiff's Counsel - An Attorney Representing a Corporation Represents the Corporation and Not Its Shareholders - Determining Whether an Attorney-Client Relationship Exists By Implication Within a Closely-Held Corporation Requires Careful Factual Analysis - An Attorney's Access to Corporate Documents in the Course of Due Diligence Does Not, Alone, Create an Attorney-Client Relationship With the Corporation's Shareholders - Rule 3.7 Requires Disqualification of an Advocate-Witness at Trial Only So That a Motion to Disqualify Months Before the Trial Date Is Premature*

> ***First Republic Bank v. Steven Brand, August 2000, No. 147 (Herron, J.)(April 3, 2001 -20 pages)***

ATTORNEY/DISQUALIFICATION - Present Record Does Not Support Disqualification of *Attorney for Conflict of Interest Under Rule 1.7 Based on Allegation That He Is Materially Limited to Protecting His Own Interests Since He Was Involved in the Disputed Settlement Agreement for Money Rather Than the Desired Purchase of Property - Attorney Need Not Be Disqualified in Pre-Trial Stage Pursuant to Rule 3.7 Even If He Is Ultimately Shown To Be A Material and Necessary Witness At Trial -*

> **Albert M. Greenfield & Co., Inc. v. Wolf, Block,Schorr & Solis-Cohen et al., May 2000, No. 1555 (Herron, J.)(May 14, 2001 - 19 pages)**

ATTORNEY/DISQUALIFICATION-*Plaintiff's Attorney Is Not Disqualifed Because His Attorney-Wife Was Formerly Employed by Defendant Where Defendant Fails to Present Evidence That Pennsylvania Rules of Professional Conduct 4.2 or 1.8(i) Were Violated - Adoption of a Per Se Rule of Disqualification of an Attorney Based on the Former Employment of His Spouse Is Unsupported By Either Relevant Precedent or the Rules of Professional Conduct Invoked by Defendant*

> **ACE American Insurance Co. v. Columbia Casualty Co. et al., July 2001, No. 77 (Herron, J.)(November 26, 2002 - 27 pages)**

ATTORNEY/DISQUALIFICATION/CLOSE CORPORATION - *Ten Factors May Be Considered When Determining Whether an Attorney-Client Relationship*

Is Formed Between A Close Corporation's Attorney and a Minority Shareholder - Attorney-Client Relationship Is Alleged in Complaint by Assertions that Minority Shareholder Had No Separate Representation and He Sought Advice from the Corporation's Attorney on Individual Matters Related to his Dispute with Other Shareholders of the Close Corporation, Thereby Giving Attorney Information Unavailable to Other Persons. - Where Motion to Disqualify Counsel Raises Factual Issues, Additional Discovery Is Ordered

> ***Borrello v. Borrello,* April 2001, No. 1327 (Herron, J.)(August 28, 2001 - 23 pages)**

ATTORNEYS FEES; CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT -

> Colory Metal and Glass, Inc. v. 23S23 Construction, Inc., November Term, 2005, No. 01718 (April 21, 2010) (Abramson, J., 3 pages).

ATTORNEY'S FEES- ***In a negligence/medical monitoring claim, a request for attorneys fees is premature where a fund has not been created.***

> **Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).**

ATTORNEYS' FEES - ***Under the "American Rule" plaintiff could not recover attorneys fees as compensatory damages for defendant's breach of Settlement Agreement and/or Arbitration Agreement absent an express statutory or contractual provision permitting the recovery of such attorneys' fees.***

> **Axcan Scandipharm, Inc. v. American Home Products, October Term, 2002, No. 02167 (Sheppard, J.) (July 22, 2003- 9 pages).**

ATTORNEY FEE ISSUES

> **Weinstein v. Griffith, *et al.*, July Term, 2008, No. 1404 (Sheppard, J.) (FFCL - June 2, 2010 – 2 pages)**

ATTORNEY/MALPRACTICE - ***Attorney's Violation of Rule of Professional Conduct Does Not Support Malpractice Claim Against Him***

DeStefano & Associates, Inc. v. Roy S. Cohen et al., June 2000, No. 2775 (Herron, J.)(April 9, 2001 - 10 pages)

ATTORNEY MALPRACTICE/BREACH OF FIDUCIARY DUTY - - ***Where Client A Is the Manager and a Principal of Clients B and C, Client C Was Not Harmed by the Attorney's Alleged Conflict of Interest in Representing Clients A and B Because the Attorney Could Not Have Disclosed Any Confidential Information to Clients A and B That They Did Not Already Know about Client C.***

- - Attorney Was Not Liable for Breach of Fiduciary Duty to Client C by Representing Clients A and B, Where Attorney's Representation of Clients A and B Took Place Prior to Attorney's Limited Representation of Client C.

- - Attorney's Incorporation of Client B, Which Then Went into Competition with Client C, Did Not Give Rise to Claim for Breach of Attorney's Fiduciary Duty to Client C Because Incorporation Alone Did Not Cause Client C Any Harm.

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (February 11, 2003- 10 pages).

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (April 2, 2002 - 11 pages) (Appeal to Superior Court; Docket No. 1009 EDA 2003).

ATTORNEYS' FEES - ***Although Under Pennsylvania Law, a Litigant Cannot Recover Attorneys' Fees From Adverse Party Absent Statutory Authorization, a Clear Agreement Among the Parties or Some Other Exception, the Remedy of Indemnity Is an Exception to the Rule Limiting Recoupment of Attorneys' Fees from an Adverse Party***

Treco Inc. v. Wolf Investments Corp., Inc., March 2000, No. 1765 (Herron, J.)(February 15, 2001 - 9 pages)

Waterware Corp. v. Ametek et al., June 2000, No. 3703 (Herron, J.)(April 17, 2001 - 15 pages)

ATTORNEY FEES - ***Where Breach of Contract Claim is Asserted, Attorney Fees May Not Be Claimed Absent Allegation that Contract or Statute Provided for Such Fees***

The Brickman Group, Ltd. v. CGU Insurance, July 2000, No. 909 (Herron, J.)(January 8, 2001)

ATTORNEY FEES - ***Claim for Attorney Fees is Stricken Where Plaintiff Fails to Cite Statute, Agreement or Recognized Exception Authorizing Such Award***

Baron v. Pritzker, Omicron Consulting, Inc., August 2000, No.

1574 (Sheppard, J.)(March 6, 2001 - 27 pages)(Because Shareholder's Claims Are Deemed Direct, Rather than Derivative, ALI § 7.18 Would Not Apply as a Basis for Attorney Fees)

Legion Insurance Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(May 21, 2001 - 19 pages)(Defendant fails to set forth valid claim for attorney fees)

ATTORNEY'S FEES - *Plaintiffs demand for attorney's fees was stricken where plaintiff cited no statute, agreement or recognized exception authorizing an award of attorney's fees.*

Arbor Associates, Inc. v. AETNA U.S. Healthcare, et. al., August Term, 2002, No. 03976(Jones, J.)(February 28, 2003 - 5 pages)

AUTHORITY FOR THE CREATION OF PRIVILEGE; ATTORNEY-CLIENT PRIVILEGE; WORK PRODUCT PRIVILEGE; STATUTORY CONSTRUCTION ACT; PLURALITY OPINION

Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)

- B -

MOTION TO AMEND/BAD FAITH– ***Plaintiffs amended complaint to add a claim of bad faith against an underwriter and the underwriter's managing agent is denied since the underwriter and the underwriter's agent do not satisfy the definition of insurer under 42 Pa. S.C. A. § 8371.***

> **Chau et. al. v. RCA Insurance Group et. al., January Term 2003, No. 06923 (March 23, 2004- 5 pages) (Sheppard, Jr., J.)**

BAD FAITH – *Bad faith claim may not be brought against an insurance adjustor, as it is not an "insurer" under 42 Pa. C.S.A. § 8371.*

> **Weiner v. Markel Ins. Co., et al., August Term 2005, No. 1045 (Sheppard , J.)(April 26, 2006 – 9 pages).**

BAD FAITH—*One not an insured under an insurance policy cannot bring an action for bad faith.*

> **Rouse Philadelphia, Inc. v. OneBeacon Insurance Company, June Term 2004, No. 4261 (Abramson, J.) (September 30, 2005 – 4 pages).**

BAD FAITH – ***42 Pa.C.S.A. § 8371, which governs bad faith actions, does not extend to claims raised by medical providers for treatment provided to persons injured in motor vehicle accidents.***

> **Silverman, et al. v. Rutgers Insurance Co., June Term 2003, No. 0363 (Jones, J.)(March 31, 2004 - 11 pages).**

BAD FAITH – *To succeed at trial on a bad faith claim, the plaintiff must prove bad faith by clear and convincing evidence. Under this heightened standard, the plaintiff must show that: 1) the insurer lacked a reasonable basis for denying benefits under the policy; and 2) that the insurer knew or recklessly disregarded its lack of a reasonable basis.*

– Where an insurance policy is susceptible to more than one reasonable interpretation, the fact that the policy is found to be ambiguous and therefore construed against the insurer alone is insufficient to establish bad faith.

– In a bad faith case, the insurer's decisions must be evaluated in light of the facts it knew or should have known at the time it actually denied coverage. Evidence which is obtained after the denial of coverage is irrelevant.

> **Egger v. Gulf Ins. Co., May Term 2001, No. 1908 (Sheppard , Jr., J.) (March 10, 2004 – 10 pages).**

BAD FAITH - ***The Only Basis for a Private Bad Faith Action Against an Insurer is 42 Pa.C.S.A. section 8371 - Failure to Renew an Insurance Policy or Failure to Abide by Alleged Agreement to Renew an Insurance Policy Does Not Fall within the Bad Faith Statute***

> **The Brickman Group, Ltd. v. CGU Insurance Co., July 2000, No. 909 (Herron, J.)(January 8, 2001 - 22 pages)**

BAD FAITH - ***Medical providers who are seeking payment pursuant to the Pennsylvania Motor Vehicle Responsibility Law (MVFRL) lack standing to bring a claim against an insurance company for bad faith under 42 Pa.C.S.A. § 8371. An action in bad faith is a remedy which is normally reserved for the insured; the MVFRL alone establishes both the rights, as well as the remedies available to medical providers.***

> **Glick, et. al., v. North Phila. Rehabilation Center, Inc., etal, March Term, 2002, No. 1179(Cohen, J.)(December 30, 2002 - 11 pages)**

BAD FAITH - ***Bad faith claim pursuant to 42 Pa.C.S.A. § 8371 may only be brought against "insurer"; adjuster was not an "insurer" under §8371 where plaintiff alleged that adjuster acted solely as the agent of the insurance company.***

> **Margaret Auto Body, et. al. v. Universal Underwriters Group, et. al., May Term, 2002, No. 1750 (Jones, J.)(January 10, 2002 - 4 pages)**

Bad Faith– ***A third party administrator is not an insurer as contemplated by 42 Pa. C.S. A. § 8371 since it does not issue policies, collect premiums or assumes the risks or contractual obligations in exchange for premiums.***

> **Kraevner, et. al. v. OneBeacon Insurance Company, et. al., April Term, 2003 No. 0940 (September 29th, 2003) (Sheppard).**

BAD FAITH/DAMAGES - ***If a Plaitiff Is Successfull in Asserting a Bad Faith Claim, a Court May Award Interest in the Amount of the Claim, Punitive Damages or Assess Court Costs - There Is No Basis for Referring a Matter to a State Agency Under Section 8371***

> **Trujillo v. State Farm Mutual Insurance Co., March 2001, No. 2047 (Herron, J.)(December 6, 2001 - 31 pages)**

BAD FAITH/STATUTE OF LIMITATIONS - ***Bad Faith Claim Is Both Tort-like and Contract-like in Nature - The 6 Year Catch-All Statute of Limitations Applies to a Bad Faith Claim, So That Plaintiff's Claim Is Not Barred - Dismissal of Contract Action Does Not Require Dismissal of Bad Faith Claim***

> **Trujillo v. State Farm Mutual Insurance Co., March 2001, No. 2047 (Herron, J.)(December 6, 2001 - 31 pages)**

BANK HOLDING COMPANY ACT ("BHCA") - ***Where Bank's Conduct Was Reasonable in Joining Transfer of the Creditor's Lease and the Remainder of its Assets Plaintiff Did Not Establish Its Claim for Violation of the BHCA***

> **Academy Industries Inc. v. PNC N.A. et al., May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 - 34 pages)**

BANKRUPTCY - ***Where Plaintiff filed for Bankruptcy on Same Day It Filed Complaint, Its Cause of Action Because the Property of the Bankruptcy Estate - Bankrupt Plaintiff May Not Prosecute Its Claims Merely Because Bankruptcy Court Appointed Law Firm to Represent Trustee - Trustee May Prosecute the Claims But, If He Abandons Them, Bankrupt Plaintiff May Then Pursue Them***

> **DeStefano & Assocs., Inc. v. Roy Cohen et al., July 2000, No. 2775 (Herron, J.)(July 1, 2001 - 2 pages)**

BANKRUPTCY/INDISPENSABLE PARTY - ***Corporate Plaintiff that Filed Bankruptcy Petition Is Not Indispensable Party to Individual Plaintiff's Contract and Tort Claims Because Corporation Lost Its Rights and Interests to These Claims When It Filed for Bankruptcy***

> ***DeStefano & Associates, Inc. v. Roy Cohen et al., June 2000, No. 2775 (Herron, J.)(April 9, 2001 - 9 pages)***

BANKRUPTCY/STAY - Absent Extraordinary Circumstances the Automatic Stay Provisions Afforded to Debtors Under 11 U.S.C. §362 Do Not Apply to Non-Debtor Third Parties - To Determine Whether the Narrow Exception of "Extraordinary Circumstances" Applies to the Nondebtor Defendant in this Case, Depositions Pursuant to Phila.Civil Rule *206.1(E) and Pa.R.C.P. 206.7 Are Ordered

> **Medline Industries, Inc. v. Beckett Healthcare, Inc. et al., September 2000, No. 295 (Herron, J.)(February 22, 2001 - 6 pages)**

BANKRUPTCY/STAY/STANDING - ***The Automatic Stay Incident to a Bankruptcy Petition Applies Only to Actions Against a Debtor and Not to Actions by a Debtor - Upon the Filing of a Bankruptcy***

Petition, the Debtor Loses Standing to Pursue Any Claims that May Have Accrued As of That Time And Instead the Bankruptcy Trustee Has Standing to Sue - If the Bankruptcy Trustee Formally Abandons a Claim, Standing Reverts to the Debtor to Bring Suit in His Own Name - Preliminary Objections to Complaint Filed by Debtor Corporation Are Sustained Where Plaintiff/Debtor Failed to Allege that Trustee Abandoned Claim

DeStefano & Associates, Inc. v. Roy Cohen et al., June 2000, No. 2775 (Herron, J.)(April 9, 2001 - 10 pages)

BANKRUPTCY/SUBJECT MATTER JURISDICTION - Where Disputed Property Was Transferred out of Bankruptcy Estate to Defendants, State Court May Exercise Jurisdiction Because the Dispute Is Generally Beyond the Limits of the Bankruptcy Court's Jurisdiction

Apria Healthcare, Inc. v. Tenet Healthsystem, Inc., February 2000, No. 289 (Herron, J.)(February 12, 2001 - 10 pages)

BID/BOND - *Bid Did Not Have a Fatal Defect to Justify the Issuance of an Injunction Where the Bond Was Executed by a Person Who Was Not Certified in Pennsylvania as an Insurance Agent*

Carr & Duff, Inc. v. SEPTA, February 2002, No. 4101 (Sheppard, J.)(April 12, 2002 - 9 pages)

BID: PUBLIC CONSTRUCTION CONTRACT - Philadelphia Taxpayer has Standing to Contest Alleged Violation of Competitive Bidding Laws Where School District Solicited Bids for a Public Contract - Contractor, who was also Disappointed Bidder, had Standing as a Taxpayer Where it Did Business in Philadelphia and Paid Philadelphia Business Privilege and Wage Taxes - Injunction Should be Granted Where Plaintiffs Establish that Contractor's Bid Failed to Comply With the Mandatory Bid Bond Requirements of the Bid Instructions - Handwritten or Typed Insertions to a Form Contract Are Construed to Reflect the Parties' Intent

Rogers and Devine Bros., Inc. v. The School District of Philadelphia, April 2000, No. 2387 (Herron, J.)(June 6, 2000 - 35 pages)

BID: PUBLIC CONSTRUCTION CONTRACT - *School District did not Abuse Its Discretion in Rejecting Bid that was not Signed and did not Include a Consent of Surety Letter as Required by the Bid Instructions - The Omissions in Plaintiff's Bid were Material Defects.*

MC Painting Corporation v. The School District of Philadelphia and AppleWood Enterprises, Inc., May 2000, No. 2265 (Herron, J.)(June 20, 2000 - 9 pages)

BID: PUBLIC CONSTRUCTION CONTRACT - *School District Did Not Abuse*

Its Discretion in Rejecting Contractor's Bid Where Contractor Did Not Meet the Five-Year Experience Requirement Set Forth in the Bidding Specifications

Zinn Construction, Inc. v. School District of Philadelphia, June 2000, No. 3369 (Herron, J.)(July 10, 2000 - 3 pages)

BID: PUBLIC CONSTRUCTION CONTRACT - Taxpayer's Petition to Enjoin the City from Awarding a Bid to a Contractor Is Granted Where the Bid Is Defective Because Post-bid Discussions Resulted in a Substantive Change that Would Violate the Competitive Bidding Laws

Buckley & Co., Inc. v. City of Philadelphia, July 2001, No. 833 (Herron, J.)(September 10, 2001 -23 pages)

BID: PUBLIC CONSTRUCTION CONTRACT- ***Taxpayer's Petition to Enjoin Publicly Bid Contract Is Granted Where It Is Shown that the Successful Bid, Though Facially Responsive, Was Materially Defective Where It Failed to Meet the 10% DBE Participation Goal Because the Purported "Regular Dealer" Could Not Be Considered a Regular Dealer in the Precast Concrete Copings for the Project - Absent an Injunction, the Defendant Contractor Would Obtain an Unfair Competitive Advantage that Offends the Purpose of Competitive Bidding - The Balance of Harm Weighs In Favor of Granting the Injunction to Protect the Taxpayer's Right to a Fair Bidding Process***

Buckley & Company, Inc.v. City of Philadelphia, et al., March 2002, No. 1894 (Herron, J.)(May 22, 2002 - 33 pages)

BID: PUBLIC CONSTRUCTION CONTRACT - ***Preliminary Objections Are Overruled Where Complaint Alleges that Public Bidding Requirements Where Violated Where Bid Requirements Limited Bidders to One Manufacturer's Product - Where Issues of Fact Are Raised as to the Legitimacy of Limiting the Selection to This Product, Additional Discovery Is Necessary***

International Fiber Systems, Inc. v. City of Philadelphia, October 2001, No. 968 (Sheppard, J.)(June 27, 2002 - 17 pages)

BIFURCATION – DAMAGES - ***The decision whether to bifurcate the liability and damages portions of a trial is entrusted to the sound discretion of the trial court, which is in the best position to evaluate the necessity for such measures. Since the court found that the evidence failed to present even a prima facie claim of liability, the court's decision to bifurcate, so as to eliminate days of trial testimony related solely to damages, could not have been prejudicial.***

Pennsylvania Business Bank v. Franklin Career Services, LLC, May Term, 2002, No. 02507 (January 14, 2008) (Bernstein, J., 11 pages)

BREACH OF CONTRACT – SPECIAL WARRANTY DEED – UNJUST ENRICHMENT

Albert Facchiano, Jr., and Jerold Feinstein v. Commonwealth Land Title Insurance Co., *et al.*, October Term, 2009, No. 0057 (New, J.) (June 20, 2011 – 3 pages)

BREACH OF CONTRACT

Dennis T.E. Glick, *et al.* v. Vale, *et al.*; December Term, 2004, No. 0347 (FFCL - February 4, 2010) Sheppard, Jr., J. 14 pages)

BREACH OF CONTRACT, BREACH OF CONTRACT, LIKELY TO SUCCEED ON THE MERITS-

Arc One Enterprises v. AV8, Inc., March Term 2010 No. 684 Sheppard, J.) (May 3, 2010, 7 pages).

BREACH OF CONTRACT; TORTIOUS INTERFERENCE WITH CONTRACT; REVERSION; BREACH OF DUTY OF GOOD FAITH; REFORMATION OF CONTRACT

Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (April 15, 2010) (Bernstein, J., 10 pages)

BREACH OF CONTRACT – *No contract existed where there was no "meeting of the minds" insofar as plaintiff conceded that he and defendant never discussed the specific amount of compensation plaintiff would receive in connection with the performed services and plaintiff had no expectation as to the amount.*

Williams v. Hopkins, et al., August Term 2005, No. 3953 (Bernstein, J.)(April 5, 2007 – 6 pages).

BREACH OF CONTRACT - DAMAGES *When there has been a breach of contract, damages are awarded in order to place the aggrieved party in the same economic position he would have been in had the contract been performed. The theory behind this philosophy is based on an attempt to make the non-breaching party whole again, not to provide him with a windfall. Insured would receive a windfall if it was permitted to recover its damages again from its agent, after already having received them from its insurer in settlement.*

Prima-Donna, Inc. v. Acono-Rate Ins. Agency, Inc., June Term, 2004, No. 02005 (October 24, 2006) (Bernstein, J. 6 pages).

BREACH OF CONTRACT – DAMAGES - *In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss. Plaintiff's*

contract claims were dismissed where its expert's equitable allocation method of calculating damages did not speak to the issue of causation of damages.

> **Powell v. PKF, December Term, 2007, No. 01839 (February 16, 2010) (Bernstein, J. 3 pages).**

BREACH OF CONTRACT - *In a breach of contract claim, recovery may follow only upon a showing that the breach caused the loss.*

> **Aaron Wesley Wyatt v. Grant Thornton LLP, March Term, 2003 No. 2070(November 14, 2006 – 5 pages)(Sheppard, J.)**

BREACH OF CONTRACT - *Pennsylvania does not recognize the applicability of a general liability insurance policy to a breach of contract claim because the purpose and intent of such a policy is to protect the insured from liability for essentially accidental injury to the person and property of another.*

> **Penn's Market I, Penn's Market II, Kurt L. McLaughlin and Herbert J. Farber Associates, Inc., v. Harleysville Insurance Company, Harleysville Mutual Insurance Company and Harleysville Group, Inc., February Term 2005, No. 0557 (May 3, 2006- 13 pages) (Abramson, J.)**

BREACH OF CONTARCT - *There is no basis in law or equity to justify the award damages for the breach of an alleged oral contingency fee agreement where the client did not recover any money.*

> **Hirsch v. Neufeld, et al., December Term 2004, No. 3181 (Sheppard , J.)(April 4, 2006 – 4 pages).**

BREACH OF CONTRACT—*To establish a cause of action for breach of contract, a party must plead the existence of a contract, including its essential terms, a breach of a duty imposed by the contract, and resultant damages.*

> **Estate of Rodgers v. Morris Chapel Missionary Baptist Church,October Term 2004, No. 1577 (Abramson, J.)(December 19, 2005 – 4 pages).**

BREACH OF CONTRACT – *In lieu of purchasing station WTVE outright, a deal which would run afoul of the FCC's regulations that the station could not be sold with a license renewal challenge pending, plaintiff and defendant entered into two contracts, a Time Brokerage Agreement ("TBA"), which gave plaintiff the right to program the television Station, and an Option Agreement, which allowed plaintiff to purchase approximately 40 percent of the of the Station's stock options upon the resolution of the license renewal challenge.*

The court held that, because the contracts referenced each

other and were effective on the same date, as well as plaintiff's intention to come as close as it could to purchasing the Station without violating the FCC regulations, the contracts must be read as one single transaction. Therefore, the court held that a breach of the Time Brokerage Agreement constituted a breach of the Option Agreement.

As the court found that defendant breached the Time Brokerage Agreement, the Option Agreement was also breached. Accordingly, the court awarded plaintiff lost profits in the amount of $6,938,224.00, as well $1,418,687.00 for a pro rata credit due on account of defendant's broadcasting at a low Effective Radiated Power, which credit was specified in the TBA. In addition, as a result of defendant breaching the Option Agreement, the court ordered that each side chose an appraiser who would select a neutral appraiser, so that the station would be assigned a value. After the Station has been appraised, the court ordered that plaintiff will receive the value of their stock options.

Philadelphia Television Network, Inc. v. Reading Broadcasting, Inc., August Term, 2001, No. 1663 (Sheppard, Jr., J.) July 14, 2005 – 81 pages).

BREACH OF CONTRACT- ***A settlement agreement agreed to between the parties and placed on the record before the court is a valid and enforceable contract.***

Todi v. J&C Publishing, Inc., d/b/a Commercial Reality Review, Henry J. Strusberg and Strusberg & Fine, Inc., June Term, 2002, No. 2969 (July 18, 2003- 13 PAGES) (Cohen, J).

BREACH OF CONTRACT – Statutory Violation - *Plaintiff may bring a breach of contract claim for violation of the Medical Records Act. The laws in force when the contract to copy medical records was entered into, including the Medical Records Act, became part of the obligation of the contract with the same effect as if expressly incorporated in the contract's terms.*

McShane v. Recordex Acquisition Corp., February Term, 2003, No. 01117 (November 14, 2003) (Jones, J.).

BREACH OF CONTRACT – BAD FAITH **- *In order to bring its claims for breach of insurance contract and bad faith, plaintiff had to identify an insurance policy, describe its terms, allege a loss that appeared to be covered, and further allege the insurance company's failure to pay on that loss.***

Staples v. Assurance Company of America, October Term, 2003 No. 1088 (Sheppard, J., 4 pages) (June 14, 2004)

BREACH OF CONTRACT/CAUSATION - In *order to recover damages pursuant to a breach of contract, the plaintiff must also show a causal connection between the breach and the claimed loss. Counterclaim Plaintiff's claim failed because it failed to set forth reasonable proof that it has suffered any damages as a result of Counterclaim Defendant's alleged conduct.*

> **Rapid Freight Systems, Inc. v. Ofer Express, October Term, 2001, No. 03304(Jones, J.)(February 28, 2003 - 6 pages)**

BREACH OF CONTRACT--CONTRACT CONSTRUCTION - *Case was Dismissed where the Court as a Matter of Law Found that the Plain Meaning of the Contract did not Support Plaintiff's Claim for Breach of Contract. Under Pennsylvania Law, where Contract Language is Unambiguous, a Court is Limited to a Review of the Plain Meaning of the Contract Language to Determine the Intent of the Parties. Parol Evidence may not be Considered to Interpret the Terms of an Unambiguous Contract.*

> **Trigen-Philadelphia Energy Corporation v. Drexel University, December 2001, No. 2160 (Sheppard, J.) (October 8, 2002 - 6 pages)- *ON APPEAL***
>
> **Trigen-Philadelphia Energy Corporation v. Drexel University, December 2001, No. 2160 (Sheppard, J.) (February 4, 2003 - Superior Court Opinion 6 pages)**

BREACH OF CONTRACT/DAMAGES – *The purpose of damages in a breach of contract case is to return the parties to the position they would have been in but for the breach. It is well-settled that "mere uncertainty as to the amount of damages will not bar recovery where it is clear that damages were the certain result of the defendant's conduct." In the instant case, it is obvious that Plaintiff's damages were the "certain result" of the Landlord's conduct. This court will not preclude recovery merely because the amount of the loss had to be estimated by the trial court based on the evidence produced by Plaintiff. Indeed, this is the traditional function of the fact finder.*

> **Café Parissa v. 1601 Associates, et. al, October Term 2001, No. 04272 (Jones, J.)(June 30, 2004– 12 pages).**

BREACH OF CONTRACT/FRAUDULENT INDUCEMENT/GIST OF THE ACTION/PAROL EVIDENCE - *Plaintiffs, buyers of three shopping centers brought an action against defendants, sellers of the properties, for fraudulent inducement and breach of contract. The fraudulent inducement claim was grounded on defendants allegedly inflating income, both present and future, and the alleged absence of*

information related to certain tenants' significant arrears and litigation histories. The court found that plaintiffs' met their burden in proving this claim.

- Plaintiffs' breach of contract claim was premised upon defendants' representing and warranting that there were no material tenant defaults and that the information provided to plaintiffs pre-contract was true. The court found that the facts underlying the alleged breach of the representations and warranties were synonymous to the allegations related to the fraudulent inducement claim and that this case was grounded in fraud. Therefore, plaintiffs' breach of contract claim was precluded under the gist of the action doctrine as the fraudulent misrepresentation claim was the "gist of the action", the breach of contract claim being collateral.

- Additionally, the court found that the parol evidence rule did not bar the introduction of pre-contractual misrepresentations that were consistent with the terms of the agreement. See Youndt v. First National Bank of Port Allegheny, 2005 PA. Super 42, 868 A.2d 539 (2005); Nicolella v. Palmer, 432 Pa. 502, 248 A.2d 20 (1968); Bardwell v. The Willis Company, 375 Pa. 503, 100 A.2d 102 (1953).

Academy Plaza L.L.C. 1, *et al.* v. Bryant Asset Management, *et al.*, May Term, 2002; No. 2774 (FFCL June 9, 2006 – 31 pages) (Sheppard, J.)

BREACH OF CONTRACT / IMPOSSIBILITY – *After non-jury trial, court held that defendant was not liable for breach of contract where contract's terms did not support a finding of breach and where contract was dissolved based on the doctrine of impossibility. (Court also held that defendant was not liable for promissory estoppel or breach of duty of good faith and fair dealing, and that plaintiff was not liable for tortious interference with contract or defamation.)*

Middletown Carpentry, Inc. v. C. Arena & Co., Inc., June Term 2001, No. 2698 (Sheppard, Jr., J.) (November 18, 2003 - 27 pages)

BREACH OF CONTRACT/MITIGATION OF DAMAGES—*General principles of contract law requiring mitigation of damages do not apply when a statute controls the bidding process for a public contract.*

BREACH OF CONTRACT/WAIVER—*To waive public contract provisions without formal action or express ratification undermines the integrity of the bidding process.*

The School District of Philadelphia v. Tri-County Associates Builders, Inc., et al., May Term 2001, No. 2183 (Jones, J. – (May 25, 2005 trial opinion – 26 pages).

BREACH OF CONTRACT/PIERCING THE CORPORATE VIEL/FRAUD (BREACH OF

PROMISE TO DO SOMETHING IN THE FUTURE –

TransWorld Systems, Inc. v. Berean Institute, *et al.*, March Term, 2010, No. 3345 (February 16, 2011 – 8 pages) (J. New).

BREACH OF CONTRACT/PRELIMINARY OBJECTIONS – ***Plaintiff's breach of contract claim failed because it failed to plead any actual damages. Plaintiffs claimed damages were contingent on whether it was found to be liable to another party at an arbitration which had not yet concluded at the time the complaint was filed. Thus, as of the filing of the complaint, Plaintiff had suffered no damages, rendering its contract claim unripe for disposition, as well as legally insufficient.***

Bancol Marketing Corp. v. Penn Warehousing & Distribution, Inc. et al., November Term 2004, No. 0830 (Jones, J.)(May 25, 2005 – 5 pages).

BREACH OF CONTRACT, QUANTUM MERUIT, UNJUST ENRICHMENT, EQUITABLE SUBROGATION, & NEGLIGENCE -- ***Preliminary Objections as to Breach of Contract and Equitable Subrogation Overruled where Claims were Supported by Terms of Bond and Independent Writing. Preliminary Objections as to Quantum Meruit, Unjust Enrichment and Negligence Sustained where Defendant Paid for Services Rendered and Plaintiff Could not Support Claim of Unjust Enrichment. Claim of Negligence Barred where Plaintiff did not Allege any Non-Economic Harm.***

Great American Alliance Insurance Co. v. JHE, Inc., etal., April Term, 2002, No. 2565 (Cohen, J.((November 21, 2002 - 2 Opinions, 6 pages each.

BREACH OF CONTRACT, TORTIOUS INTERFERENCE, & PROMISSORY ESTOPPEL -- ***Case Dismissed on Summary Judgment where Lease Required Landlord's Written Approval for Tenant's Sublease. Court Found that Landlord Did Not Give Written Approval, there was No Oral Modification of the Lease and that the Statute of Frauds would have Barred any Oral Modification of the Lease. Plaintiff's Claim that Landlord Interfered with its "Prospective Sublease" failed because the Sublease was Conditioned upon Landlord's Acceptance and Landlord Could Legally Withhold Approval of Sublease Where Proposed Sublease Would Have Required Zoning Variance. Plaintiff Could Not Support its Claim for Promissory Estoppel without Evidence of an Express Promise.***

Kane's Office v. Preferred Real Estate Investments, Inc., etal., March 2001, No. 1671 (Cohen, J. (November 21, 2002 - 9 pages).

BREACH OF COVENANT – ***A party may not maintain concurrently a claim based on breach of the covenant of good faith and fair dealing and one for breach of contract because the elements in the latter encapsulate those of the former.***

> **Penn's Market I, Penn's Market II, Kurt L. McLaughlin and Herbert J. Farber Associates, Inc., v. Harleysville Insurance Company, Harleysville Mutual Insurance Company and Harleysville Group, Inc., February Term 2005, No. 0557 (May 3, 2006- 13 pages) (Abramson, J.)**

BREACH OF DUTY GOOD FAITH; TORTIOUS INTERFERENCE WITH CONTRACT; REVERSION; BREACH OF CONTRACT;REFORMATION OF CONTRACT

> **Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (April 15, 2010) (Bernstein, J., 10 pages)**

BREACH OF DUTY OF GOOD FAITH - ***Borrowers' claim against Bank for breach of implied covenant of good faith and fair dealing must be dismissed as duplicative of their breach of contract claim.***

> **Nicholas A. Clemente, Esq. et al. v. Republic First Bank, December Term, 2002, No. 00802 (Jones, J.) (May 9, 2002)**

BREACH OF DUTY OF GOOD FAITH - ***Where plaintiff has asserted a claim against defendant for breach of contract, plaintiff's redundant claim for breach of the contractual duty of good faith and fair dealing must be dismissed.***

> **Street v. Siemens Medical Solutions Health Services Corp. et al., March Term, 2003, No. 0885 (Jones, J.) (July 8, 2003).**

BREACH OF FIDUCIARY DUTY -***Under Delaware law, a claim for Breach of Fiduciary Duty may not be maintained simultaneously with a Breach of Contract claim.***

> **Philip H. Behr v. W. Joseph Imhoff *et al.*, March Term, 2004, No. 0589 (March 5, 2007 – 4 pages), (Sheppard, J.)**

BREACH OF FIDUCIARY DUTY - ***Where the wrong allegedly committed by an insurer is its failure to pay on a claim, there is no separate tort-law cause of action against the insurer for breach of fiduciary duty; such claims must be brought in contract.***

> **Staples v. Assurance Company of America, October Term, 2003 No. 1088 (Sheppard, J., 4 pages) (June 14, 2004)**

BREACH OF FIDUCIARY DUTY– ***Plaintiff's cause of action for Breach of***

Fiduciary Duty was legally insufficient since plaintiff failed to allege sufficient facts qualifying the confidential relationship between plaintiff and defendant.

> **E.I. Fan Company, L.P. v. Angelo Lighting Co., et. al., April Term 2003, No.: 0327(August 18, 2003) (Sheppard).**

BREACH OF FIDUCIARY DUTY & FRAUD- ***Plaintiffs/consumers claim against drug manufacturer for breach of fiduciary duty and fraud are barred by the "learned intermediary doctrine."***

> **Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).**

BREACH OF IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING –
A claim for breach of the implied duty of good faith and fair dealing is merely a breach of contract claim and where the allegations of each in the complaint mirror one another, it is not a separate cause of action.

> **Driscoll / Intech II v. Scarborough, IBCS, and FMB, August Term 2007 No. 1094 (February 12, 2008 – 11 pages) (Sheppard, J.).**

BREACH OF PARTICIPATION AGREEMENT; FORECLOSURE; UNJUST ENRICHMENT; SET-OFF

> **LEM Funding XXXV, L.P. v. Sovereign Bank, September Term, 2009, No. 01296 (June 23, 1010) (Sheppard, J., 12 pages)**

BREACH OF WARRANTY - ***Fact that phone purchased by plaintiff did not work as he expected does not form the basis of a breach of warranty when the manufacturer and seller were not in any way informed by the consumer as to what he wanted and the plaintiff admits that the phone was not designed or manufactured to work as he wanted. Furthermore, it is not a defect in materials or workmanship when the phone worked as designed, manufactured and intended and the Plaintiff admitted that the phone worked when he used it as intended.***

> **Brandon Beckmeyer, on behalf of himself and others similarly situated v. AT& T Wireless and Panasonic Telecommunications Systems Company, Division of Matsushi Electronic Corporation of America, August Term 2002, No. 0469 (December 3, 2003) Jones, J.).**

BURDEN - *The burden is on the plaintiff to prove that the alleged agency relationship between the defendants existed.*

$.99 Stores, Inc. v. KDN Lanchester Corp., July Term 2005, No. 0728 (July 30, 2007)(Sheppard, J., 7 pages)

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CAPACITY TO SUE - ***Unregistered Foreign Limited Partnership Doing Business in Pennsylvania Lacks Capacity to Sue in Pennsylvania Courts - Foreign Limited Partnership Does Not Have to Register If It Does Not Conduct business in This State - Under the Foreign Business Corporation Law, Regularly Conducting Business Does Not Encompass the Regular Acquisition and Collection of Debts Even Through Offices and Agents Located in Pennsylvania***

WAMCO XVV Ltd. v. Gregg Desouza et al., July 2000, No. 4385 (Herron, J.)(March 15, 2001 - 34 pages)

CAPACITY TO SUE - ***Corporation's Name Change Does Not Eliminate Its Right to Enforce Restrictive Covenant Agreement Against Its Former Employee Where Plaintiff Disclosed Both Its Past and Present Corporate Names***

Omicron Systems Inc. v. Weiner, August 2001, No. 669 (Herron, J.)(March 14, 2002 - 14 pages)

CERTIFIED QUESTION; INSURANCE COVERAGE; LOSS PAYEE; INTERLOCUTORY APPEAL

ABC Bus Leasing, Inc. v. Certain Underwriters at Lloyds, London, May Term, 2008, No. 01815 (June 28, 2010) (Bernstein, J., 3 pages)

CHOICE OF LAW – ***Under Pennsylvania law, if there is no material difference between the laws of competing jurisdictions, there is a 'false conflict' and the court need not decide the choice of law issue.***

All Seasons Services, Inc. v. Newnam, October Term 2002, No. 2173(Sheppard , J.) (July 20, 2006 – 21 pages).

CHOICE OF LAW - ***A choice of law problem is not presented unless the determination of the case on the merits would vary according to which related jurisdiction supplies the governing internal substantive law. There was no choice of law problem where the courts of both states apply the same standards when interpreting insurance policies.***

Aetna, Inc. v. Lexington Ins. Co., May Term, 2003, No. 03076 (May 2, 2006) (Abramson, J., 22 pages).

CHOICE OF LAW – ***Where a Pennsylvania resident's insured automobile was involved in an accident in New York and the other driver's vehicle was insured in New York, the court held that Pennsylvania law applied to the insurers' claims.***

State Farm Mut. Auto. Ins. Co. v. Am. Indep. Ins. Co., et al., July Term, 2004, No. 3382 (Sheppard, J.)(July 11, 2005 — 4 pages).

CHOICE OF LAW - *Under Choice of Laws Principles, Delaware Law Applies Where Contracts Provide that Delaware Law Applies, the Relevant Transactions Bear a Reasonable Relation to Delaware, the Contracts Were Executed in Delaware, and Defendant's Performance Under the Contract Occurred in Delaware - While There Is No Appellate Pennsylvania Precedent on Whether Contractual Choice of Law Provision Extends to Tort Claims, Delaware Substantive Law Will Be Applied Pursuant to the Parties' Stipulation - Under Pennsylvania Law, A Pennsylvania Court Applies Pennsylvania's Evidentiary Sufficiency Standard and Procedural Rules Regardless of Which State's Substantive Law Applies*

Textile Biocides, Inc. v. Avecia, Inc., January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)

CHOICE OF LAW - *Under Pennsylvania Conflict of Law Rules, Pennsylvania's Evidentiary Sufficiency Standard Should Be Applied to a Claim Regardless of Which State's Substantive Law Applies - Where Substantive Law of Two States Conflict as to Standard for Establishing Defamation Against a Corporation, Choice of Laws Analysis Is Necessary - Pennsylvania Substantive Law Applies to Defamation Action Where Plaintiff/Corporation's Principal Place of Business is Pennsylvania because Pennsylvania Has the Greatest Interest in Protecting the Plaintiff's Reputation*

Hemispherex Biopharma, Inc. v. Asensio, July 2000, No. 3970 (Sheppard, J.)(September 6, 2001 - 17 pages)

CHOICE OF LAW - *In a Contract Action, To Determine the Applicable Law It Is Necessary As a Threshold Matter to Consider the Language of the Contract - Pennsylvania Courts Give Effect to the Choice of Law Provisions in a Contract - Under Pennsylvania's Conflict of Law Rules, a Pennsylvania Court Should Apply Pennsylvania Procedural Rules Even When Applying the Substantive Law of Another State*

Branca v. Conley, February 2001, No. 227 (Herron, J.)(October 30, 2001 - 11 pages)

CHOICE OF LAW - *If the Laws of Competing States Do Not Differ, No Choice of Law Analysis Is Required - Although Pennsylvania, Kentucky and Ohio Law Recognize the Right of a Consumer to Recover Economic Loss From a Manufacturer of a Defective Product, These Jurisdictions Differ As To The Requirement of Privity of Contract in Asserting Breach of Warranty Claims - Under Pennsylvania and Ohio Law Privity Is Not Required for A Claim of Breach of Warranty Based on Tort, But Under Kentucky Law Privity Is Required - Where Laws of Different Jurisdictions Conflict, A Choice of Law Analysis Is Required - There Is No Conflict of Law for Negligence, Strict*

Liability and Intentional Misrepresentation Claims Among Pennsylvania, Kentucky, and Ohio - These Jurisdictions Conflict as to Claims for Negliget Misrepresentation Because Ohio Law Requires a Plaintiff to Show Privity of Contract While Pennsylvania and Kentucky Law Do Not Require Privity

> **Teledyne Technologies Inc. v. Freedom Forge Corp., May 2000, No. 3398 (Sheppard, J.)(April 19, 2002 - 38 pages)**

CHOICE OF LAW– ***After applying the flexible government approach described in § 145 of the Restatement (Second) of Conflicts, New Mexico law should be applied to plaintiffs' claims for prima facie tort and malicious abuse of process.***

> **Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 030042 (August 6, 2003) (Jones)**

CIVIL CONSPIRACY – ***There is no requirement that the plaintiff plead with specificity the times, dates or places where the defendants conspired to cause actual legal harm to the plaintiff.***

> **John Burton v. Cristina Bojazi and John Bojazi, April Term 2005, No. 3551(Abramson, J.)(June 17, 2005 - 7 pages).**

CIVIL CONSPIRACY - *Commonwealth Sufficiently Set Forth Claim For Civil Conspiracy Because Parent Corporation and Its Subsidiary Are Treated as Separate Entities Absent Allegation That They Are "Alter Egos" - Respective Employees of Both Corporations May Be Liable for Civil Conspiracy*

> **Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)**

CIVIL CONSPIRACY - *Claim for Civil Conspiracy Premised on Alleged Conspiracy Between Corporation and Its Officers Is Dismissed Where Corporate Officers Allegedly Acted As Agents of Corporation Rather than For Their Own Individual Benefit*

> **First Republic Bank v. Brand, August 2000, No. 147 (Sheppard, J.)(June 4, 2001 - 20 pages)**

CIVIL CONSPIRACY - *An Action for Civil Conspiracy Requires Assertion of a Civil Cause of Action for a Particular Act - The Requisite Underlying Causes of Action for Civil Conspiracy Are Set Forth in the Claims for Rescission, Unjust Enrichment, Breach of Fiduciary Duty and Fraud*

> **Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)**

CIVIL CONSPIRACY - *Plaintiff Corporations' Civil Conspiracy Claim Against Two Defendants Involved in the Sale of Four Snow Removal Trucks Is Sufficiently Specific and Sets Forth All Elements of This Claim*

V-Tech Services, Inc. v. Murray Motors, et al., February 2001, No. 1291 (Herron, J.)(October 11, 2001)(2 opinions addressing distinct objections of each defendant)

CIVIL CONSPIRACY/PARENT CORPORATION AND WHOLLY OWNED SUBSIDIARY - *A Parent Corporation and Its Wholly Owned Subsidiary Do Not Automatically Constitute a Single Entity For the Purposes of a Civil Conspiracy So Summary Judgment May Not Be Entered Where There Are Material Issues of Fact As to Whether the Two Entities Are Distinct*

Advanced Surgical Services, Inc. v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(November 8, 2001 - 16 pages)

CIVIL CONTEMPT, COURT ORDERS

Trent Motel Associates, Inc. v. Bret Levy t/a Benny the Bums, September Term 2009 No. 794 (New, J.)(May 28, 2010, 6 pages).

CIVIL PROCEDURE – AMENDMENTS - *It is settled that motions to amend shall be considered based upon a liberal standard, however, amendments will not be permitted where surprise or prejudice to the other party will result.*
Warfield Philadelphia LP v. Trustees of the University of

Pennsylvania, et al. March Term, 2007, No. 0154 (May 28, 2009) (Sheppard, Jr., J., 9 pages)

CIVIL PROCEDURE – FAILURE TO ANSWER OR RESPOND - *Where defendant failed to respond to both the Fourth Amended Complaint and plaintiff's Motion for Summary Judgment, it admitted the facts supporting plaintiff's claim for unjust enrichment, and judgment was entered against defendant.*

- Defendant did not file an Answer to the Fourth Amended Complaint, but plaintiff never filed a praecipe or motion for default judgment against him. Defendant filed a response to the Motion for Summary Judgment in which he pointed to disputed issues of material fact regarding both his liability and damages, so summary judgment against him was denied.

- Defendant failed to file: 1) an Answer with Cross-Claims to the Fourth Amended Complaint's; 2) any response to another defendant's Cross-claims; and 3) any response to other defendant's Motion for Summary Judgment. Therefore, defendant admitted the facts supporting other defendant's claims and other defendant was entitled to judgment against defendant on its

claims for contribution and indemnity. In addition, defendant's claims for contribution and indemnity against other defendant were dismissed.

Dzwil v. Schaeffer, etal., January Term, 2007, No. 01635 (November 13, 2009 – 5 pages) (New, J.).

CIVIL RIGHTS - *A defendant employer will be held liable under 42 U.S.C. §1983 only if it is shown they have participated in violating plaintiff's rights, or that defendants directed others to violate them, or that defendants, as the person in charge had knowledge of and acquiesced in their subordinate's violations.*

As a matter of law, 42 U.S.C. §1983 does not apply to police departments because they are considered purely instrumentalities of the municipality with no separate identity; thus, they are not "persons" for purposes of §1983 and not capable of being sued under §1983.

Warfield Philadelphia LP v. Trustees of the University of Pennsylvania, *et al*. March Term, 2007, No. 0154 (May 28, 2009) (Sheppard, Jr., J., 9 pages)

CLAIMS; RECEIVERSHIP; DISTRIBUTION; CONTRACT INTERPRETATION-

GE Capital Business Asset Corporation v. R3 Foods Services, Inc., August Term 2009 No. 1661, April 20, 2010 (Bernstein, J.)(5 pages).

COMPOUND INTREST –

The Law Office of Douglas T. Harris, *et al*. v. Philadelphia Waterfront Partnrs, L.P., June Term, 2007; No. 2576 (October 22, 2010 – 4 pages) (Bernstein, J.)

CONSPIRACY – AGENTS CANNOT CONSPIRE WITH PRINCIPAL - *In order for a claim of civil conspiracy to proceed, a plaintiff must allege the existence of all elements necessary to such a cause of action. It must be shown that two or more persons combined or agreed with intent to do an unlawful act or to do an otherwise lawful act by unlawful means. A single entity cannot conspire with itself and, similarly, agents of a single entity cannot conspire among themselves.*

Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).

CONSPIRACY - *In order to state a cause of action for civil conspiracy, a plaintiff must show that two or more persons combined or agreed with intent to do an unlawful act or to do an*

otherwise lawful act by unlawful means. Proof of malice, i.e., an intent to injure, is essential in proof of a conspiracy. Although the plaintiff may be able to show that one defendant breached his fiduciary duty to the plaintiff and that another defendant concurrently breached the terms of a contract with plaintiff, such separate wrongs do not constitute a conspiracy without proof of collusion, which the plaintiff has not provided.

> **Orianna Assoc. LLC v. Transamerica Occidental Life Ins. Cos., August Term, 2003, No. 02250 (May 29, 2007 – 15 pages) (Sheppard, J.)**

CIVIL CONTEMPT AND SANCTIONS - *Motion for Civil Contempt Denied Where Petitioner Fails to Show that Defendant Volitionally Violated the Injunction Order - Defendant has Expressed an Intent to Tender Payments Pursuant to the Order But Was Thwarted by Plaintiff's Refusal to Post Additional Bond - Plaintiff Shall be Required to Post Additional Bond to Remove Obstacle to Defendant's Compliance with Order*

> **T.J.S. Brokerage & Co., Inc. v. Hartford Casualty Insurance Co. and Peterman Co., December 1999, No. 2755 (Herron, J.)(July 21, 2000 - 8 Pages)**

CIVIL EXTORTION - No such cause of action exists under Pennsylvania law

> **Buckeye Retirement Co., LLC. v. Michael W. Lloyd, December Term 2004, No. 3257(Abramson, J.)(September 1, 2005 - 7 pages).**

CIVIL RIGHTS - *In order to state a claim for deprivation of rights under § 1983, a plaintiff must allege that the defendant: (1) acted under color of state law, and (2) caused an injury to the plaintiff's constitutional or federal rights. Plaintiffs claim failed where they failed to demonstrate that defendants were acting under the color of state law.*

> **Bethany Builders, Inc., et., et. al. v. Dungan Civil Assoc., et. al., March Term, 2001, No. 002043 (Cohen, J.)(March 13, 2003 - 9 pages)**

CLASS ACTION – *Plaintiffs satisfied commonality requirement where facts alleged demonstrated a predominance of common issues shared by all the class members which could be justly resolved in a single proceeding, namely as to whether defendant insurance company's own records, which reflected the date each bill was received and paid, demonstrated a pattern and practice of "blanket denial of paying interest on overdue bills," as mandated by the Motor Vehicle Financial Responsibility Law.*

Glick v. Progressive Insurance Company, March Term 2002, No. 001179 (Cohen, J.)(October 1, 2003– 11 pages).

CLASS ACTIONS - ***Plaintiffs, who allegedly suffered food poisoning after attending party, had to prove causation of damages as element of their tort claims. Because their symptoms did not emerge for several days after the party, there existed various intervening and possibly superseding causes of their damages and liability could not be determined on a class wide basis. Because the issues of causation and amount of damages were different with respect to each potential class member, there were not sufficient common questions of law and fact to justify certifying case as a class action.***

- Proposed class of 18 potential plaintiffs, who allegedly suffered food poisoning after attending party, did not satisfy the numerosity requirement for class certification.

Kennedy v. Cannuli Bros., Inc., December Term, 2002, No. 01145 (Sheppard, J.) (October 3, 2003).

CLASS CERTIFICATION- ***One of the prerequisites for class certification is numerosity. Plaintiff need not plead or prove the actual number of class members, so long as he is able to "define the class with some precision" and provide "sufficient indicia to the court that more members exist than it would be practicable to join." Where a plaintiff had pled that more than 25 healthcare providers have been improperly underpaid by defendant and shown that a potential class of 300 non-contract healthcare providers whom PHS and the City paid the Medicare rate rather than the provider's billed rates, the requirement of numerosity is met.***

- The second prerequisite for class certification is commonality. Commonality exists where the facts surrounding each plaintiff's claim must be substantially the same so that proof as to one claimant would be proof as to all. When the proposed class members stand in a different relationship to the defendant, the value of the health care service varies depending upon the proposed class member and the proposed class consists of different types of health care providers, individualized issues of law and fact exist and commonality is not established.

Berkowitz v. Prison Health Services, et. al., July Term 2006 No. 4134 (January 20, 2009 – 13 pages)(Abramson, J.).

CLASS CERTIFICATION

– NUMEROSITY - ***Joinder of approximately 58 and 128 sub-class members would clearly be impracticable, so the numerosity requirement is met.***

– COMMONALITY - ***Where Bank's loan documents stated that "the Bank's prime rate of interest" was "the rate of interest publicly announced from time to time by Bank in Philadelphia,***

Pennsylvania as its 'Prime Rate'" and Bank allegedly re-defined its Prime Rate without publicly announcing those changes, then the Bank allegedly breached each of the class members' loan agreements and the issue of breach is a common question for the members of the class.

– TYPICALITY - ***Where plaintiff was a member of the first sub-class but not the second, he was not an appropriate representative of the second sub-class even though both sub-classes' common questions were similar to one another.***

– PREDMONINACE OF COMMON ISSUES - ***Alleged individual issues as to the application of statute of limitations will not defeat certification if there are other common issues.***

Clemente v. Republic First Bank, December Term, 2002, No. 00802 (February 18, 2005) (C. Darnell Jones, J., 9 pages)

CLASS ACTION/CERTIFICATION – ***The requirements of the Civil rule for certification were met.***

George Dearlove and Annaregina Roberts v. Genzyme Transgenics Corporation, November Term, 2001, No. 1031 (Sheppard, Jr., J.) (December 28, 2004 – 27 pages).

CLASS ACTION/CERTIFICATION - ***A Class Action Premised on Breach of Contract and Breach of Duty Is Certified for all Individuals and Other Business Entities Who Incurred Capital Gains Tax Liability Due to the Conversion of Nine (9) Common Trust Funds to an Evergreen Fund Where the Trustee by Letters Assured that No Tax Liability Would Thereby Be Incurred - Differences in the Underlying Trust Documents Would Not Defeat the Commonality Requirement for Class Certification Where Defendant Does Not Identify Specific and Significant Differences - Subclasses May be Created If Later Refinement of Issues Reveals that Different Contractual Provisions Merit Different Interpretations***

Parsky v. First Union Corporation, February 2000, No. 771 (Herron, J.)(May 8, 2001 - 29 pages)

CLASS ACTION/CERTIFICATION - Class Action by Homeowners Against Loan Broker Who Charged a Mortgage Broker Fee Cannot Be Certified Because Plaintiffs' Claims Do Not Present Predominating Common Questions of Fact and Law - A Private Class Action Plaintiff Asserting a Claim Under Section 9.2 of the UTPCPL Must Show a Causal Connection Between the Unlawful Practice and Plaintiffs'Loss - Proving that An Agency Relationship Existed Between the Class Members and Defendant Loan Brokers Raises Individual Factual Questions

Floyd v. Clearfield, February 2001, NO. 2276 (Herron, J.)(October 8, 2001 - 15 pages)

CLASS ACTION/CERTIFICATION - ***Where Class Action Complaint Raises***

Individual Questions as to the Class Members' Awareness of and Reliance on Saturn's Alleged Misrepresentation that the Upholstery in the 1996 Saturns Had Been Treated With a Fabric Protection Chemical, the Class May Not Be Certified Because the Complaint's Claims, inter alia, for Breach of the UTPCPL Does Not Present Questions of Fact and Law that Are Common to the Class -Claim for Breach of Express Warranty as to Whether the Upholstery Was Treated with Scotchgard Likewise Raises Issue of Individual Facts as to Whether Those Representations Formed a Basis of the Bargain for Plaintiff's Purchase of a Saturn Vehicle

Green v. Saturn Corp., January 2000, No. 685 (Herron, J.)(October 24, 2001 - 16 pages)

CLASS ACTION/CERTIFICATION - *Whether Class Certification Should Ultimately Be Granted Should Not Be Raised by Preliminary Objection*

Koch v. First Union Corp. et al., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)

CLASS ACTION/CERTIFICATION - *Class Action Is Certified As To Claims of Unjust Enrichment and Breach of Implied Warranty of Merchantability Under the UCC in the Marketing of Cold-Eeze*

Tesauro v. The Quigley Corp., August 2000, No. 1011 (Herron, J.)(January 25, 2002 -19 pages)

CLASS ACTION/CERTIFICATION - *Class Action by Providers and Subscribers, Seeking Reimbursement and/or Coverage for Purportedly Medically Necessary Chiropractic Treatment, and Setting Forth Otheriwse Viable Claims for Breach of Contract, Breach of the Implied Duty of Good Faith and Violations of the UTPCPL, Cannot be Certified Where Individual Questions of Fact As to the Threshold Determination of Medical Necessity Predominate Over the Over the Common Questions.*

Eisen, etal. v. Independence Blue Cross, etal. August 2000, No. 2705 (Herron, J.) (July 26, 2002 - 26 pages)

CLASS ACTION/CERTIFICATION – *A class consisting of surviving spouses of police officers and firefighters receiving survivor benefits as a result of pensions earned from the City of Philadelphia Police Officers and Firefighters who retired and began receiving benefits prior to January 1, 1985, and were receiving pension benefits as of January 1, 1989 and died subsequent to January 1, 1989 satisfied the requirements of class certification.*

Eleanor Baux, Ann Heller, and all other similarily situated v. City of Philadelphia Board of Pensions and Retirement and City of Philadelphia September Term, 2002, No. 0780 Sheppard, Jr., J.) (November 17, 2003 – 13 pages).

CLASS ACTION/CERTIFICATION/MOTOR VEHICLE REPAIRS - *Class Action Is Certified Consisting of All Persons in the United States Insured by Erie Insurance Company With a Claim After February 1994 for Vehicle Repairs Where Non-Original Equipment Manufacturer ("OEM") Crash Parts Were Specified For Their Repairs - The Quality of Non-OEM Parts Including the Contested Crash Parts Can Be Addressed* on a Class Wide Basis - *In Determining Whether the Contested Crash Parts and OEM Parts Are of "Like Kind and Quality" Under the Insurance Policy, A Court Must Consider The Design and Material of the Part Replaced -- Not Its Age, Condition or Use -- So That Valuation Issues May Be Addressed On a Class-Wide Basis -- Choice of Law Issues Among 12 Relevant Jurisdictions Can Be Resolved Through Certification of Sub-Classes -- Bad Faith Claim May Be Certified -- UTPCPL Claim Is Certified Based on the 1996 Amendment to the Catch-All Provision*

Foultz v. Erie Insurance Co., February 2000, No. 3053 (Herron, J.)(March 13, 2002 - 33 pages)

CLASS ACTION/CERTIFICATION/SETTLEMENT - *Certification Is Granted for a Class of Persons who Purchased from American Travelers Guaranteed Renewable Long Term Care and Home Healthcare from January 1989 until Present and Whose Premiums Were Increased by the Defendants - Class Action May Not Be Settled Without a Hearing and Judicial Consideration of Seven Factors*

Milkman v. American Travelers Life Insurance Co., June 2000, No. 3775 (Herron, J.)(November 26, 2001 - 24 pages)

CLASS ACTION/CONFLICT OF INTEREST - *Impermissible and Non-Waivable Conflict of Interest Exists Where Attorney Remains Counsel of Record According to Contingent Fee Agreements Which Have Not Been Terminated or Modified and Attorney is Married to Named Class Representative*

Gocial, et al. v. Independence Blue Cross and Keystone Health Plan East, Inc., December 2000, No. 2148 (Herron, J.) (September 4, 2002 - 9 pages)

CLASS ACTIONS - COMMON QUESTIONS REQUIREMENT - *With respect to both sub-classes, the only questions remaining for the jury are whether the contracts the members entered into were with defendant or another entity, what damages, if any, the members suffered as a result of the breach of contract, and/or whether defendant was unjustly enriched. Therefore, there clearly were common questions of law and fact with respect to each sub-class and the Class as a whole.*

Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc,

Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 – *CONTROL NO. 73062* (Cohen, J.) (9/28/04 – 4 pages).

CLASS ACTION/COMMUNICATION - *Class Action Plaintiffs' Petition for Preliminary Injuncition to Prevent Defendant Drug Company from Sending Medical Authorizations to Consumers Who Report Adverse Reactions to Baycol Is Denied - Defendants Have Not Violate Pennsylvania Rule of Professional Conduct 4.2 Which Prohibits Attorneys from Contacting Individuals Represented by Counsel Because Defendants Were Authorized By Law to Communicate with Consumers Who Make an Adverse Drug Report - These Communications Do Not Violate Pa.R.C.P. 1713*

Lewis v. Bayer A.G., August 2001, No. 2353 (Herron, J.)(June 12, 2002 - 25 pages)

CLASS ACTION/DISCONTINUANCE - *Class Action Suit May Not Be Discontinued Without Court Approval - Court Must Analyze Specific Factors to Protect Putative Members of the Class from Prejudicial and Binding Action by the Representative Parties*

Garner v. Chrysler Financial Corp., July 2000, No. 1585 (Herron, J.)(December 20, 2000 - 3 pages)

Greer v. Fairless Motors, Inc., May 2000, No. 4175 (Herron, J.)(December 20, 2000)(December 20, 2000 - 3 pages)

Smalls v. Gary's Barbera Dodgeland, August 2000, No. 2204 (Class Action Alleging that Automobile Dealer Induced Plaintiffs to Finance Purchases at Inflated Rates Due to a "Kick back" in form of "Dealer Reserve")

CLASS ACTIONS – FAIR REPRESENTATION REQUIREMENT - *Because of this conflicting litigation in which plaintiff is involved (by proxy), it cannot fairly and adequately represent the Class, and a new class representative must be found.*

Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc, Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 – *CONTROL NO. 73062* (Cohen, J.) (9/28/04 – 4 pages).

CLASS ACTION FINAL APPROVAL

Pennsylvania Orthopaedic Society on behalf of its members and all others similarly situated individuals v. Independence Blue Cross, *et al.* December Term 2002, No.0002 consolidated with Robert P. Good, M.D. on behalf of himself and all others

similarly situated v. Independece Blue Cross, *et al.*, December Term 2002, No. 0005
John R. Gregg, M.D. AND Vincent J. Distefano, M.D., on behalf of themselves and all others similarly situated v. Independence Blue Cross, *et al.*, December Term 2000, No. 3482 (Sheppard, J.) (9/7/04 – 7 pages) Opinion to Superior Court.

CLASS ACTION/MOTION TO DISMISS - *In order to determine whether a class action should be voluntarily dismissed, Pa. R. Civ. P. 1714 (b) requires the court to conduct a careful inquiry to determine whether the other members of the class will be prejudiced.*

Boyle, et. al. v. U-Haul International, Inc. and U-haul Co. of Pennsylvania, Inc., August Term 1998 No. 00840 (November 5, 2003) (Jones).

CLASS ACTION/NOTICE - *Notice in a Class Action Must Give a Fair Recital of the Subject Matter, the Proposed Terms and Inform the Class Members of an Opportunity To Be Heard*

Milkman v. American Travelers Life Insurance Co., June 2000, No. 3775 (Herron, J.)(November 26, 2001 - 24 pages)

CLASS ACTION/NOTICE - *Proposed Forms of Notice in Pending Class Actions are Deemed Insufficient and Vague Where They Fail to Give a Fair Recital of the Subject Matter and Proposed Terms - Form of Notice Should Provide More Detail and Should Be in Enumerated Paragraphs - Individual Notice by First-Class Mail May Be Accomplished to Class Members Readily Identifiable and Additional Notification through Print Media Outlets and the Internet - Publication of Notice on Defendants Website May Be prejudicial and is Not Warranted in this Instance to Minimize Plaintiffs' Expense for Providing Notice.*

Tesauro v. The Quigley Corp., August Term, 2000, No. 1011 (Sheppard, Jr., J.) (August 14, 2002 - 7 Pages).

CLASS ACTION/OPT OUT PROVISION - *Opt Out Procedure in Class Action Is Adopted for Pennsylvania Residents and Nonresidents in the Interest of Judicial Economy*

Milkman v. American Travelers Life Insurance Co., June 2000, No. 3775 (Herron, J.)(November 26, 2001 - 24 pages)

CLASS ACTION – PRELIMINARY OBJECTIONS – *Specificity in pleading – plaintiff's submissions contradict claim for relief – case dismissed.*

Weiss, *et al. v.* Wachovia Corporation, January Term, 2003, No.

1302 (Cohen, J.) (October 31, 2003).

CLASS ACTION - FINAL APPROVAL OF SETTLEMENT – ***In these three cases consolidated for purposes of settlement, upon the parties' motion, the court gave final approval of the class certification for purposes of settlement and rendered final approval of the settlement itself.***

> **Gregg v. Independence Blue Cross, December Term 2000, No. 3482; c/w**
> **Good v Independence Blue Cross, December Term 2002, No. 0005**
> **Pennsylvania Orthopaedic Society v. Independence Blue Cross, December Term 2002, No. 0002 (Sheppard, J.) (April 22, 2004 – 117 pages)**
>
> **Pennsylvania Orthopaedic Society on behalf of its members and all others similarly situated individuals v. Independence Blue Cross, *et al.* December Term 2002, No. 0002 consolidated with**
> **Robert P. Good, M.D. on behalf of himself and all others similarly situated v. Independece Blue Cross, *et al.*, December Term 2002, No. 0005**
> **John R. Gregg, M.D. AND Vincent J. Distefano, M.D., on behalf of themselves and all others similarly situated v. Independence Blue Cross, *et al.*, December Term 2000, No. 3482 (Sheppard, J.) (9/7/04 – 7 pages) Opinion to Superior Court.**

CLASS ACTION/SETTLEMENT/APPROVAL - ***Settlement of Class Action Involving Sale of Long-Term Care and Home Health Care Insurance Policies Is Entitled to Presumption of Fairness Since Four Threshold Criteria Are Met - Settlement Offers Individual Class Members a Moderate If Not Overwhelming Benefit - The Value of a Class Action Is Determined by the Benefit Obtained by the Class Not the Cost or Benefit to the Defendant - Settlement Is Approved Where It Is Limited to Actions Related to the Policies and Covers Only Those Claims Arising from the Factual Scenario Presented in the Complaint - The Settlement Satisfies the Seven Factors Required Under Pennsylvania Law - The Proposed Attorneys' Fees Met the Requirements of Rule 1716 And Are Appropriate Under the Lodestar Test - Incentive Award for Class Representatives Is Approved***

> **Milkman v. American Travelers Life Insurance Co., June 2000, NO. 3775 (Herron, J.)(April 1, 2002 -63 pages)**

CLASS ACTION/ APPROVAL SETTLEMENT/ DISCONTINUANCE CLASS –*In order to approve the settlement and discontinuance of a class action, Pa. R. Civ. P. 1714 (b) requires the court to conduct a careful inquiry to determine whether the other members of the class will be prejudiced.*

Lett v. Progressive Casualty Insurance Company, et. al., March Term 2003, No.: 0874 (December 18, 2003) (Jones).

CLASS ACTION/STANDING/SUMMARY JUDGMENT - ***Where Summary Judgment Is Granted Prior to Class Certification It Is Not Binding On the Putative Class But Only On the Named Parties - Rules of Standing Apply to Class Action Plaintiffs and Require a Causal Connection Between the Named Plaintiff and Named Defendant - Parent Corporation Is Not Normally Liable For Contractual Obligations of Its Subsidiary - Plaintiffs Do Not Have Standing to Sue Defendants Where They Have No Contractual Relationship - Summary Judgment Is Granted As to Those Defendants With Whom Plaintiffs Failed to Establish the Requisite Causal Connection***

Eisen et al. v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(May 6, 2002 - 14 pages)

CLASS ACTIONS –SUB-CLASSES – ***Where class members entered into 2 different form contracts both of which were breached but for which the damages calculation would be different, the court divided the class into two sub-classes.***

Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc, Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 – ***CONTROL NO. 73062*** **(Cohen, J.) (9/28/04 – 4 pages).**

CLASS ACTION/MOTION FOR SUMMARY JUDGMENT/ EXPRESS WARRANTY– ***An express warranty is statutorily defined as any affirmation of fact or promise made by the seller to buyer which relates to the goods, any description of the goods and any sample or model which is made part of the basis of the bargain. Where there is no evidence that plaintiffs saw, heard or in any way received any warranties, no warranty is created. Moreover, no warranty is created by the alleged fraud on the medical profession.***

Clark, et. al. v. Pfizer, Inc. et. al., June Term No. 2004 No. 1819 (February 9, 2009) (Bernstein, J.).

CLASS ACTION/MOTION FOR SUMMARY JUDGMENT/ MOTION FOR DECERTIFICATION/INDIVIDUAL QUESTIONS- ***When the record demonstrates that some class members have benefited from the use of Neurontin while other have not benefited individual questions of fact exist making the case unsuitable for class resolution.***

Clark, et. al. v. Pfizer, Inc. et. al., June Term No. 2004 No. 1819 (February 9, 2009) (Bernstein, J.).

CLASS ACTIONS – TYPICALITY REQUIREMENT - ***Typicality is not satisfied when the class representative has or is pursuing some***

other interest divergent from or adverse to the interests of the absent class members.

> **Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc, Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 – *CONTROL NO. 73062* (Cohen, J.) (9/28/04 – 4 pages).**

CLOSELY HELD CORPORATION/DEMAND REQUIREMENT - *Where Closely-Held Corporations Are Involved, Court Has Discretion to Treat Plaintiff/Shareholder's Claims -- Including those for Corporate Waste -- as Direct Claims for Which Demand Is Not Required*

> **Baron v. Pritzer, Omicron Consulting, Inc., August 2000, No. 1574 (Sheppard, J.)(March 6, 2001 - 27 pages)**

COLLATERAL ESTOPPEL, SUMMARY JUDGMENT, MORTGAGE FORECLOSURE, CONFESSION OF JUDGMENT

> **TD Bank v. Joint Theater Center, Inc. *et. al*., February 2009 No. 3713 (New, J.) (February 23, 2010, 5 pages)**
>
> **TD Bank v. Joint Theater Center, Inc., February Term 2009 No. 4008 (New, J.) (July 8, 2010, 5 pages).**

COLLATERAL ESTOPPEL *Collateral estoppel, also known as issue preclusion, operates to prevent a question of law or an issue of fact which has once been litigated and adjudicated finally in a court of competent jurisdiction from being relitigated in a subsequent suit.*

Collateral estoppel may be applied when the following requirements are met: (1) the issue decided in the prior case is identical to one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding and (5) the determination in the prior proceeding was essential to the judgment.

> **Fischer v. Dawley, June Term, 2006, No. 0508 (August 25, 2009)(Sheppard, Jr., J., 10 pages).**

COLLATERAL ESTOPPEL – IDENTITY OF PARTIES - *The doctrine of collateral estoppel operates to prevent a question of law or an issue of fact which has once been litigated in a court of competent jurisdiction from being relitigated in a subsequent proceeding. There is no requirement that there be an identity of parties in the two actions in order to invoke the bar. Collateral estoppel may be used as either a sword or a shield by a stranger to the prior action if the party against whom the doctrine is invoked was a party or in privity with a party to the prior*

action.

Ramos/Carson/DePaul v. Phillies, January Term, 2005, No. 02703 (November 24, 2008) (New, J., 8 pages).

COLLATERAL ESTOPPEL – *ARBITRATION - An arbitration award of damages may have collateral estoppel effect in subsequent court proceedings.*

Ramos/Carson/DePaul v. Phillies, January Term, 2005, No. 02703 (November 24, 2008) (New, J., 8 pages).

COLLATERAL ESTOPPEL – ELEMENTS - *Collateral estoppel applies if five elements are present: 1) the issue decided in the prior case is identical to the one presented in the later case; 2) there was a final judgment on the merits; 3) the party against whom the plea is asserted was a party or in privity with a party to the prior case; 4) the party against whom the doctrine is asserted or his privy has had a full and fair opportunity to litigate the issue in the prior proceeding; and 5) the determination in the prior case was essential to the judgment therein.*

Ramos/Carson/DePaul v. Phillies, January Term, 2005, No. 02703 (November 24, 2008) (New, J., 8 pages).

COLLATERAL ESTOPPEL - *The court's finding in the prior action that plaintiff had not proved its fraud claim against defendants was not necessary to the court's decision to dismiss the fraud claim as time-barred. Therefore, the finding was dicta, and it does not have preclusive effect in a subsequent action between the parties.*

First Republic Bank v. Brand, August Term, 2000, No. 00147 (October 7, 2005) (Abramson, J., 5 pages)

COLLATERAL ESTOPPEL - *Prior Order Denying Corporate Client's Motion to Disqualify Attorney From Representing Other Party Does Not Estop Corporate Client From Seeking to Disqualify Attorney From Representing It Due to Conflict of Interest*

Red Ball Brewing Co. v. Buchanan Ingersoll, P.C. et al., May 200, No. 1994 (Sheppard, J.)(March 13, 2001 - 16 pages

COLLATERAL ESTOPPEL - Court would give preclusive effect to arbitrator's order in which arbitrator ruled that he did not have jurisdiction over one of the claims presented to him.

Axcan Scandipharm, Inc. v. American Home Products, October Term, 2002, No. 02167 (Sheppard, J.) (July 22, 2003- 9 pages).

COLLATERAL ORDER DOCTRINE/CONFIDENTIALITY PROVISION OF THE PEER REVIEW ACT

The court submits that defendant's appeal was interlocutory and the collateral order doctrine is not applicable because the subject of the appeal, this court's Order denying defendant's Motion for a Protective Order regarding defendant's Credentialing Committee members, is not separable from the instant action as the process by which the Committee made its determination to deny plaintiff reinstatement to the Keystone network, the subject of the proposed depositions, has the potential to resolve issues in the litigation.

The confidentiality provision of the Peer Review Act does not apply to Independence Blue Cross because IBC is not a "professional health care provider". McClellan v. Health Maintenance Organization, 442 Pa. Super. 504, 660 A.2d 97 (1995).

Further, the Peer Review Act is not applicable to this case as plaintiff physician is challenging his own review. Hayes v. Mercy Health Corporation, 559 Pa. 21, 739 A.2d 114 (1999).

Andrew T. Fanelli, D.O., *et al.* v. Independence Blue Cross and Keystone Health Plan East, December Term, 2004, No. 1336, *Superior Court Docket No. 1724 EDA 2005* (Sheppard, Jr., J.) (October 11, 2005 – 11 pages)

COMMERCIAL DISPARAGEMENT - *Complaint Sets Forth Viable Claim For Commercial Disparagement by Alleging Damages as a Result of Defendant's False Statements of Fact Concerning Company's Ability to Perform Its Contract*

Levin v. Schiffman and Just Kidstuff, Inc., July 2000, No. 4442 (Sheppard, J.)(February 1, 2001 - 26 pages)

COMMERCIAL DISPARAGEMENT - Plaintiffs Set Forth Claim for Commercial Disparagement By Alleging That Defendants Published False Disparaging Statements About the Legal Services They Provide With the Intent to Damage Plaintiffs' Relationship With Their Clients and the Publications Caused Pecuniary Damage

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

COMMERCIAL DISPARAGEMENT - *Judicial Privilege Applies to Claims of Commercial Disparagement - Statements Made In the Regular Course of Judicial Proceedings Material to the Advancement of a Party's Interest Fall Within the Scope of Judicial Privilege and Cannot Serve as the Basis of Claims of Defamation*

Bocchetto v. Gibson, April 2000, No. 3722 (Sheppard, J.)(March 13, 2002 - 19 pages)

COMMERCIAL DISPARAGEMENT - *Commercial disparagement is a type of injurious falsehood, so where plaintiff plead both counts in a complaint and relied upon the same set of facts to support both claims, the injurious falsehood claim was stricken by the court*

as duplicative.

Czech v. Gordon, October Term 2002, No. 0148 (Cohen, J.) (October 2, 2003 – 7 pages).

COMMERCIAL LEASE; RENT VALUATION; APPRAISAL; VACATE ARBITRATION

TRO Avenue of the Arts, L.P. v. The Art Institute of Philadelphia, LLC, August Term, 2009, No. 02305 (May 14, 2010) (New, J., 4 pages)

COMMERCIAL LEASE – TERMINATION - ***In Pennsylvania we have consistently followed the strict common law rule that, unless a demand for rent is expressly waived by the terms of the lease, a demand by the lessor is absolutely essential to work a forfeiture thereof for nonpayment of rent.***

- with respect to a tenant's failure to perform a condition of the lease, such as the duty to maintain liability insurance, the landlord may not terminate the lease without first requesting that the tenant cure the default.

Jones v. Battista, May Term, 2004, No. 1396 (December 9, 2005) (Jones, J., 5 pages).

COMMERCIAL LEASE – OPTION TO PURCHASE - ***the law of Pennsylvania is clear that an option in a lease is treated as an entirely separate agreement and without express language in the contract that default in the lease shall prevent securing of specific performance of the option, such default will be no bar.***

Jones v. Battista, May Term, 2004, No. 1396 (December 9, 2005) (Jones, J., 5 pages).

COMMON LAW ARBITRATION – ***42 Pa. C.S.A. § 7341 provides that "the award of an arbitrator…is binding and may not be vacated or modified unless it is clearly shown that a party was denied a hearing or that fraud, misconduct, corruption or other irregularity caused the rendition of an unjust, inequitable, or unconscionable award."***

- It is well settled in Pennsylvania that if a party wishes to challenge an Arbitration Award, an appeal must be made in the Court of Common Pleas within thirty (30) days of the date of the Award.

L.A.D. Presidential I, LP and L.A.D. Presidential II, LP v. L.A.D. Presidential III, LP, George A. David, Sr. and George A. David, Jr., July Term 2003, No. 3524 (Abramson, J.) (August 2, 2006 - 7 pages).

COMMON LAW DEFINITION OF "TRADE SECRET" – ***An educational program, including its curriculum, does not qualify as a trade secret***

because it has been intentionally placed into the public domain.

> **Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages)(Sheppard, J.).**

COMPLAINT - ATTACHMENT OF WRITINGS - ***Plaintiff need not attach to the Complaint copies of writings that it alleges are in the possession of defendant.***

> **Street v. Siemens Medical Solutions Health Services Corp. et al., March Term, 2003, No. 0885 (Jones, J.) (July 8, 2003).**

COMPLAINT/AMENDMENT - ***Leave to Amend a Complaint May Be Denied Where It Would Violate A Positive Rule of Law - Complaint May Not Be Amended to Add A Plaintiff Who Lacks Standing to Assert a Breach of Contract Claim Because It Is Neither A Party to the Contract Nor an Intended Beneficiary***

> **Terra Equities Inc., v. First American Title Insurance Co., March 2000, No. 1960**

COMPLAINT, REDUNDANCY – ***Where two counts of a ten-count Complaint depend on the same alleged facts to prove, the two counts are redundant and only one count may survive preliminary objections.***

COMPLAINT, SPECIFICITY – ***Where a plaintiff does not separate different counts for each defendant, so long as each count of the Complaint alleges a different claim, there is no need to separate out those claims as to each defendant.***

> **Fibonacci Group, Inc. v. Finkelstein & Partners, et al., January Term 2005, No. 001399 (Abramson, J.)(June 30, 2005 – 12 pages).**

COMPARATIVE NEGLIGENCE ACT - ***A "loss to plaintiff's pocketbook" is not the type of injury contemplated by the Pennsylvania Comparative Negligence Act, and as a result, the doctrine of contributory negligence applied to plaintiff's claim for failure to procure flood insurance.***

> **Avondale Rentals, Inc. V. Roser & Einstein, Inc. etal, July Term, 2001, No. 2563(Cohen, J.) (December 18, 2002 - 3 pages).**

CONDEMNATION/EQUITABLE TITLE – ***Redeveloper held equitable title to land based upon Redevelopment Agreement, through which Redevelopment Authority agreed to sell land to Redeveloper after basic site improvements had been made. As such, Redeveloper is considered an equitable owner of the property in question and was therefore entitled to participate in an condemnation award.***

Redevelopment Authority of the City of Philadelphia v. New Eastwick Corp., et al., April Term 2003, No. 2087 (Sheppard, J.)(March 23, 2004 –11 pages).

CONDITION PRECEDENT - ***Court found that express condition precedent of the Warrant between plaintiffs and subsidiary of defendant was not satisfied where Warrant required an initial public offering of the stock of the subsidiary prior to the exercise of any rights under the Warrant, which did not occur. Court rejected plaintiff' argument that am "initial public offering" occurred as a result of the merger between the parent and its subsidiary, because the parent and subsidiary companies became one and the same and the surviving entity was a publicly traded company.***

Colburn, et al. v. eResearch Technology, et al., December Term 2003, No. 02521 (Jones, J.)(January 5, 2006 - 8 pages)

CONDOMINIUMS – LIMITED COMMON ELEMENTS – DECLARANT CONTROL

Metroclub Condominium Assoc. v. 201-59 North Eight Street Associates, L.P., July Term, 2010, No. 0279 (Bernstein, J.) (May 31, 2011 – 4 pages)

CONFESSED JUDGMENT – ATTORNEY'S FEES - ***Motion to Strike/Open confessed judgment was denied where attorney's fees in the amount of fifteen percent were specifically authorized by the warrant of attorney. Movant claimed that the amount of attorney's fees was excessive, but it provided no citation to any evidence of record to this effect and did not make any meaningful argument as to why the fees were excessive.***

RAIT Partnership, L.P. v. E Pointe Properties Ltd., May Term, 2007, No. 00005 (September 26, 2007) (Abramson, J., 4 pages)

CONFESSED JUDGMENT – MODIFICATION OF JUDGMENT - ***A warrant of attorney to confess judgment must be strictly construed and conform strictly with its terms. It may not be extended by implication or inference beyond the limits expressed in the instrument. However, if the judgment is entered for items clearly within the warrant, but for an excessive amount, the court, rather than strike, will modify the judgment and cause a proper judgment to be entered, unless (1) the judgment was entered for a grossly excessive amount and, hence, was an improper use of the authority given in the warrant; or, (2) the judgment entered shows on its face that unauthorized items were included.***

- Interest may be an 'unauthorized' item under a given warrant, but because it is not an item separate and apart from the substantive debt, its improper inclusion has not resulted in nullification of the entire judgment. The unauthorized inclusion of interest in the judgment thus did not compel invocation of the general rule requiring striking of the judgment where unauthorized items are included.

RAIT Partnership, L.P. v. E Pointe Properties Ltd., May Term, 2007, No. 00005 (September 26, 2007) (Abramson, J., 4 pages)

CONFESSION OF JUDGMENT, SUMMARY JUDGMENT, MORTGAGE FORECLOSURE, COLLATERAL ESTOPPEL

TD Bank v. Joint Theater Center, Inc., February Term 2009 No. 4008 (New, J.) (July 8, 2010, 5 pages).

CONFESSION OF JUDGMENT- ***To Open a Confessed Judgment, defendant must act promptly, allege a meritorious defense and present sufficient evidence of that defense to require submission of the issues of the issues to the jury. The evidence needs to be clear, precise and believable.***

- Where the defendant fails to present clear, precise and believable evidence to warrant the opening of a confession of judgment, defendant's motion is denied.

Brokerage Concepts, Inc. v. The Nelson Medical Group, August Term 2005 No. 4080 (November 28, 2005; 4 pages) (Abramson,J.

CONFESSION OF JUDGMENT - ***Criteria for Opening and Striking a Judgment - Order Opening Confessed Judgment Lacks Res Judicata Effect - Warrants of Attorney in Note and Guaranty Do Not Merge - Strict Construction of Warrants of Attorney to Confess Judgment - Technical Errors May be Amended - Partner May be Jointly and Individually Liable to Confession of Judgment where General Partner Signed Note on Behalf of Partnership - Exercise of Warrant of Attorney in a Note against Principal Obligor Does Not Exhaust the Warrant of Attorney in the Obligor's Separate Guaranty - Judgment Containing Excessive Attorney's Fees Should be Modified Not Stricken***

DAP Financial Management Co. v. Ciotti, January 2000, No. 1566 (Sheppard, J.)(May 16, 2000 - 21 pages)

CONFESSION OF JUDGMENT - ***Defendants Presented Meritorious Defense for Opening Judgment Confessed Against them Pursuant to a General Indemnity Agreement Where Surety Company Failed to Notify Defendants of Settlement of Bond Claims Prior to Paying those***

Claims Arising from Termination of Defendants' Construction Agreement

> **Mountbatten Surety Co., Inc. v. USA Con-Force Waterproofing Co., et al., May 2000, No. 1967 (Herron, J.)(August 9, 2000 - 5 pages)**

CONFESSION OF JUDGMENT -*Judgment Could Not Be Confessed Against Guarantors Where Guaranty Agreement Lacks Its Own Warrant of Attorney - Excessive Judgment May be Modified Rather than Stricken - Failure of Complaint to Allege that Judgment Has Not Been Previously Entered Is a Material Defect Requiring that Judgment Be Stricken*

> **Harbour Hospital Services, Inc. v. Gem Laundry, et al., August 2000, No. 207 (Herron, J.) (November 28, 2000 - 25 pages)**

CONFESSION OF JUDGMENT - *Where Corporate Vice President Signed Promissory Note Containing Confession of Judgment Provision, Judgment May Not Be Stricken Because He Had Apparent Authority to Bind Corporation - Judgment Could Not Be Opened Where Petitioner Fails to Present Sufficient Evidence that Corporate Vice President Lacked Authority to Sign Note - Where Warrant of Attorney Is Explicit and Unambiguous With No Condition or Limitation Upon the Entry of Judgment by Confession, No Jury Question Is Presented as to the Ambiguity of the Note*

> **Morrison v. Correctional Physician Services, October 2000, Nos. 3040, 3041, 3042 (Sheppard, J.)(December 20, 2000 -16 pages)**

CONFESSION OF JUDGMENT - *Where Deposition Testimony Concedes that Defendant Garage Door Manufacturer Defaulted on Note by Failing to Make Payment of Principal and Interest When Due Under Forbearance Agreement, It Failed to Present Meritorious Defense Necessary to Open Confessed Judgment - Fraud Defense Asserted by Guarantors Is Barred by Parol Evidence Rule Where Express Terms of Written Guaranty Contradict the Alleged Prior Assurances by Bank that It Would Not Sue the Guarantors Until the Assets of the Principal Debtor Had Been Exhausted - Parol Evidence rule Applies to Fraud in the Inducement But Not Fraud in the Execution - Excessive Attorney Commission Is Reduced Without Opening the Judgment*

> **PNC Bank, National Association v. Howard Snyder and Cathy Snyder, June 2000, No. 1342 (Sheppard, J.)(February 14, 2001 - 13 pages)**

CONFESSION OF JUDGMENT - *Petition to Strike Confessed Judgment Was Not Untimely Because Mandatory 30 Day Filing Period Does Not Commence Until Service of an Execution Notice - Petition Did Not Raise a Meritorious Defense of Inadequate Itemization Where Confession of Judgment Complaint Lists the Principal Balance Due,*

Interest Due and Attorneys' Fees - Alleged Violations of Equal Credit Opportunity Act Do Not Constitute A Meritorious Defense on Facts Alleged

Sovereign Bank v. Mintzer, July 2000, No. 1501 (Herron, J.)(November 15, 2000 - 8 pages)

CONFESSION OF JUDGMENT - *An Assignee of a Promissory Note May Exercise a Warrant of Attorney to Confess Judgment - Extension of Payment Period Is Not Grounds for Striking Off a Confessed Judgment Where Extension Documents Are Not Part of Record of the Confessed Judgment - Even if Lender Extends the Payment Period of the Note, That Extension Is Not a Ground for Opening the Confessed Judgment Where the Borrower Failed to Meet the Extended Deadlines for Payment - Plaintiff's Failure to Register to do Business in Pennsylvania When Required to Register Is Grounds for Opening a Confessed Judgment - Borrower Failed to Meet the Burden of Proof that Foreign Limited Partnership Lacked the Capacity to Sue Due to Failure to Register to Do Business in Pennsylvania Because Under the Foreign Business Corporation Law Regularly Conducting Business Does Not Encompass the Regular Acquisition and Collection of Debts Even Through Offices and Agents Located in Pennsylvania - Borrowers' Argument that Lender Waived Its Right to Demand Lump Sum Payment of Full Loan Balance Does Not Constitute Meritorious Defense to a Confessed Judgment Absent Evidence of Prejudice to the Borrower - Under Pa.R.C.P. 2959(a)(3), a Petition to Open a Confessed Judgment Must Be Denied as Untimely Unless Petitioner Can Show Compelling Reason for Delay in Filing and Mere Lack of Knowledge of Facts Underlying a Defense Is Not a Compelling Reason Absent Allegations That Would Explain Failure to Learn Discoverable Facts*

WAMCO XVV Ltd. v.Gregg Desouza et al., July 2000, No. 4385 (Herron, J.)(April 3, 2001)

CONFESSION OF JUDGMENT - Judgment Confessed Against Contractor and Surety Should Be Opened Where They Present Meritorious Defenses of Waiver of Deadlines and Lack of Default Supported by Evidence Sufficient to Require That These Issues Be Submitted to a Jury - Where Performance Bond Containing Warrant of Attorney Incorporates Default Provisions of Construction Contract, Confessed Judgment May Be Opened Where Contractor Produces Requisite Evidence That They Had Not Defaulted on Contract

Philadelphia School District v. GM Powers, Inc./Choice Construction and Aegis Security, July 2000, No. 3520 (Sheppard, A.)(July 12, 2001 - 26 pages)

CONFESSION OF JUDGMENT - *Tenant's Petition to Open or Strike Confessed Judgment Is Denied Where Petition Neither Presents Meritorious Defense Nor Points Out a Defect in the Complaint - Plaintiff Did Not Impermissibly Confess Judgment for Both*

Possession and Rent Where Plaintiff Abandoned the Premises In Disrepair

> **Nine Penn Center Associates, LP v. Coffees of the World, Corp., July 2001, No. 3249 (Herron, J.)(January 28, 2002 - 5 pages)**

CONFESSION OF JUDGMENT - *Motion to Strike Confessed Judgment On the Grounds that the Warrant Has Been Exhausted Is Denied Because a Warrant of Attorney May Be Used More Than Once If Parts of the Debt Are Still Outstanding - Claim that Confessed Judgment Should Be Opened Because of Fraud Is Denied Where Defendants Fail to Present Clear and Convincing Evidence of Fraud - Motion to Open Confessed Judgment Is Granted Where Defendants Present Sufficient Evidence that the Collateral Security Provision For a Loss Reserve of $1.1 Million Constitutes a Penalty*

> **The Mountbatten Surety Co. v. Landmark Construction Corp., October 2001, No. 3341 (Herron, J.)(9 pages - May 3, 2002)**

CONFESSION OF JUDGMENT - *Alternatively to its Equitable Subrogation Claim, Plaintiff May Recover on Its Confession of Judgment Claim Where the Respective Loan Documents Contained Confession of Judgment Clauses, Assignments to Plaintiff Was Proper and Assognor's Satisfaction of the Debt, Even if Faulty, Does Not Warrantr Ruling Otherwise.*

> **Resource Properties XLIV v. PAID et al., November 1999, No. 1265 and Resource Properties XLIV v. Growth Properties, Ltd., et al., March 2000, No. 3750 (Sheppard, J.)(August 2, 2002- 23 pages)**

CONFESSION OF JUDGMENT – ASSIGNMENT - *A judgment by confession may be entered only in the name of a holder or in favor of an assignee or other transferee.*

- Pennsylvania Rule of Civil Procedure 2952(a)(4) requires that a complaint in confession of judgment include a statement of any assignment of the instrument. While the rule does not require that an executed assignment be attached to the complaint in confession of judgment, a recital of the assignment is necessary.

- Although a judgment by confession may be entered in favor of an assignee, the facts which entitle a real party in interest, other than the original payee of the instrument, to confess judgment must appear in the complaint. If the facts which entitle a party to confess judgment as the real party in interest are not of record, the judgment should be stricken.

- When suit is brought against the defendant by a stranger to his contract, he is entitled to proof that the plaintiff is the owner of the claim against him. Otherwise, the defendant might find himself subjected to the same liability to the original owner of the cause of action, in the event that there

was no actual assignment.

BlueWater Funding, LLC v. 2nd Chance Realty, LLC, Keith Oxner, and Westbrook Arms, Inc., December Term 2007, No. 0429 (March 31, 2008) (Bernstein, J., 4 pages)

CONFESSION OF JUDGMENT – RIGHT TO CURE DEFAULT - *The filing of a lawsuit and an accompanying lis pendens constituted "Events of Default" under a Construction Loan Agreement. The Construction Loan Agreement did not require that the bank give the debtor any grace or cure period with respect to an "Event of Default" of that nature. Therefore, confession of judgment, which was filed immediately after bank gave notice of default to debtor, would not be stricken.*

Commerce Bank, N.A. v. Porterra, LLC, December, 2006, No. 02577 (March 7, 2008) (Abramson, J., 7 pages).

CONFESSION JUDGMENT/PETITION TO STRIKE- *A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record and may only be granted when there is an apparent defect on the face of the record.*

Rait Partnership v. Wilson et. al., October Term 2007 No. 1290 (April 7, 2008 – 10 pages) (Abramson, J.).

CONFESSION OF JUDGMENT – PETITION TO STRIKE - *A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record.*

- In considering the merits of a petition to strike, the court is limited to a review of only the record as filed by the party in whose favor the warrant is given, the complaint and the documents which contain confession of judgment clauses.

- A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.

BlueWater Funding, LLC v. 2nd Chance Realty, LLC, Keith Oxner, and Westbrook Arms, Inc., December Term 2007, No. 0429 (March 31, 2008) (Bernstein, J., 4 pages)

CONFESSION OF JUDGMENT/PETITION TO OPEN/TIMELINESS - *Petition to Open or Strike a Confessed Judgment Is Not Untimely Where the Parties Dispute Whether the Rule 2958.1 Notice Was Served on the Defendant/Surety and Where Plaintiff Failed to File an Affidavit of Service of the Rule 2958.1 Notice Until the Day Defendant Filed a Petition to Open or Strike the Confessed Judgment*

Philadelphia School District v. Tri-County Associates Builders, Inc. and Commonwealth Insurance Company, May 2001,

No. 2183(Sheppard, J.)(August 16, 2001 - 12 pages)

CONFESSED JUDGMENT—*To open a confessed judgment, a party must act promptly, allege a meritorious defense, and present clear, direct, precise, and believable evidence of the defense, such that it would require submission to a jury.*

PNC Bank, National Association v. Johnson, May Term 2005, No. 1386 (Abramson, J.) (October 19, 2005 – 4 pages).

CONFLICT OF INTEREST –FORMER CLIENT– *A Motion to Disqualify defense counsel is granted where the issues raised in the present litigation is substantially related to defense counsels prior representation of plaintiffs.*

Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 031219 (August 8, 2003) Jones).

CONNECTION BETWEEN SETTLEMENT AGREEMENTS AND CONTRACTS; CONTRACT INTERPRETATION; NEWLY DISCOVERED EVIDENCE

Barry Bernsten, *et al* v. Daniel Bain, *et al*, December Term, 2003, No. 00130 (April 30, 2009) (Sheppard, J., 9 pages).

CONSENT TO LEASE ASSIGNMENT - *Where commercial lease required that tenant obtain landlord's consent to assignment of lease to, or use of premises by, third party, and lease did not expressly require that landlord's refusal to consent be reasonable, landlord could refuse consent for any reason or no reason*.

421 Willow Corp. et al. v. Callowhill Center Assoc. et al., MAY TERM, 2001, Nos. 1848 and 1851 (Cohen, J.) (May 23, 2003- 14 pages)

CONSIDERATION - *Defendants May Not Challenge a Contract for Lack of Consideration Where They Failed to Raise Lack of Consideration as an Affirmative Defense*

First Republic Bank v. Brand, August 2000, No. 147 (Herron, J.)(January 8, 2002 - 8 pages)

CONSPIRACY - *It is improper to infer an unlawful agreement based merely upon the existence and timing of a telephone call, absent any other evidence of improper conduct. The mere fact that two or more persons, each with the right to do a thing, happen to do that thing at the same time is not by itself an actionable conspiracy.*

Phillips v. Selig, July Term 2000, No. 01550 (Sheppard,

J.)(February 8, 2007 – 11 pages).

CONSPIRACY - *Conspiracy count against two defendants must be dismissed where one of alleged co-conspirators was not among the class of entities that could be found liable under the statute it allegedly conspired to violate.*

Sigma Supplies Corp. v. Progressive Halcyon Insurance, August Term 2003, No. 02968 (May 21, 2004) (Sheppard, J.) Freedom Medical Supply, Inc. v. Nationwide Mutual Insurance Co., May Term, 2003, No. 03296 (May 21, 2004) (Sheppard, J.)

CONSPIRACY– *Plaintiff's complaint alleging conspiracy to commit fraudulent conveyance stated sufficient facts of intent to harm to overrule defendants preliminary objections.*

E.I. Fan Company, L.P. v. Angelo Lighting Co., et. al., April Term 2003, No.: 0327(August 18, 2003) (Sheppard).

CONSTRUCTION DELAY DAMAGES; LEGAL MALPRACTICE; DAMAGES; APPEAL

LVI Environmental Services, Inc. v. Duane Morris, L.P., April Term, 2008, No. 00498 (May 10, 2010) (Sheppard, J., 6 pages)

CONSTRUCTION BONDS – DELAY DAMAGES - *Delay damages are not recoverable under most payment bonds, except in the unlikely event that the bond expressly says delay damages are covered. In determining whether delay damages are covered under a payment bond, the bond is the proper place to start because the true intent and meaning of the instrument are the primary determinants of the extent of liability. It is the language of the bond that is determinative of the surety's obligation and not the underlying agreement between contractor and subcontractor.*

Samuel Grossi & Sons, Inc. v. United States Fidelity & Guaranty Co., September Term, 2004, No. 03590 (November 10, 2006) (Sheppard, J., 7 pages)

CONSTRUCTION/PAYMENT BOND– *The ninety day waiting period contained within a bond constitutes a condition precedent which must be satisfied before suit is instituted under the bond.*

Ferrick Construction Co. v. One Beacon Ins. Co., November Term 2001 No. 2344 (October 18, 2004 – 7 pages) (Jones, J.)

CONSTRUCTION - PERFORMANCE BONDS - *Where the "whereas" clause of a Performance Bond incorporated the Sub-Contract by reference, the surety's obligations under the Bond were not co-extensive with the sub-contractor's obligations under the Sub-Contract. The*

Performance Bond did not cover delay damages, nor did it require the surety to defend and indemnify the contractor, in the absence of an express provision creating such obligations.

- Where the language of a Performance Bond required the surety to complete the sub-contractor's performance or remedy the subcontractor's default, the surety was not responsible for anything more than finishing the construction work required under the Sub-Contract. The purpose of a Performance Bond is to see that the construction project gets completed, not necessarily to make the contractor whole.

Multi-Phase, Inc. v. United States Fidelity & Guaranty Co., July Term, 2005; No 2598 (June 27, 2007) (Abramson, J. – 4 pages)

CONSTRUCTION - PERFORMANCE BONDS ***- Where the "whereas" clause of a Performance Bond incorporated the Sub-Contract by reference, the surety's obligations under the Bond were not co-extensive with the sub-contractor's obligations under the Sub-Contract. The Performance Bond did not cover delay damages, nor did it require the surety to defend and indemnify the contractor, in the absence of an express provision creating such obligations.***

- Where the language of a Performance Bond required the surety to complete the sub-contractor's performance or remedy the subcontractor's default, the surety was not responsible for anything more than finishing the construction work required under the Sub-Contract. The purpose of a Performance Bond is to see that the construction project gets completed, not necessarily to make the contractor whole.

Samuel Grossi & Sons, Inc. v. United States Fidelity & Guaranty Co., September Term, 2004, No. 03590 (June 29, 2007) (Sheppard, J., 5 pages)

CONSTRUCTION/NOTICE REQUIREMENTS UNDER A BOND – ***Ferrick's failure to provide service to the Bond Company by registered mail is not of any legal significance in light of the fact that defendants acknowledged receipt of the notice. Notice that is actually received constitutes substantial compliance with the Bond.***

- Where a subcontractor files suit within the ninety day waiting period contained within the Bond from when work was last performed, the suit is premature since the subcontractor failed to satisfy the condition precedent of the Bond which required suit to be instituted after the ninety day waiting period.

Ferrick Construction Company, Inc. v. One Beacon Insurance Company, November Term 2001 No. 2344 (April 12, 2004) (Jones, J.).

CONSTRUCTIVE NOTICE/PAROLE EVIDENCE - ***The court found that the broker who represented the seller was a credible witness. The broker testified that he informed plaintiff at the open house***

that, although the condominium had originally been two separate units that were merged into one, the unit had only one parking space. Thus, this court found that plaintiff was on notice, prior to her purchasing the unit, that she was entitled to one parking space.

This court properly allowed the introduction of evidence related to the restriction regarding parking because this evidence was relevant and the parole evidence rule did not apply because there was no contract between the plaintiff and defendants. Yocca v. The Pittsburgh Steelers Sports, Inc., 578 Pa. 479, 498, 854 A.2d 425, 436 (2004).

Sara Feinstein v. Crumley, *et al.*, April Term, 2004; No. 6471, *Superior Court Docket No.2586EDA2005* (Sheppard,Jr., J.) (October 4, 2005 – 10 pages)

CONSTRUCTIVE EVICTION –***Coverage for the personal injury of constructive eviction is not triggered under a general liability insurance policy where the allegation of constructive eviction fails to show that the interference by the landlord with the tenant's enjoyment of the demised premises is a substantial nature and so injurious to the tenant as to deprive him of the beneficial enjoyment of a part or the whole of the demised premises.***

Penn's Market I, Penn's Market II, Kurt L. McLaughlin and Herbert J. Farber Associates, Inc., v. Harleysville Insurance Company, Harleysville Mutual Insurance Company and Harleysville Group, Inc., February Term 2005, No. 0557 (May 3, 2006- 13 pages) (Abramson, J.)

C**ONSTUTITIONAL LAW** - ***Statute requiring certain students in Philadelphia who have been adjudicated delinquent and returning from placement to attend a transition center for possible assignment to an alternate education school was a proper exercise of legislative power. The statute survived the Plaintiffs' challenges based upon Section 32 special legislation, equal protection and due process.***

Glasgow, *et al.* v. School District of Phila, *et al.*, September Term, 2002; No. 3675,(January 30, 2004- 43 pages) (Jones, J.)

CONTRACTS – ***In order to form a contract, there must be an agreement on the essential terms of the contract, offer, acceptance, and consideration or mutual meeting of the minds.***

– The law of this Commonwealth makes clear that a contract is created where there is mutual assent to the terms of a

contract by the parties with the capacity to contract. If the parties agree upon essential terms and intend them to be binding, a contract is formed even though they intend to adopt a formal document with additional terms at a later date.

- Failed negotiations do not result in an enforceable contract.

Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).

CONTRACTS – *Parties are bound by the terms of their own contract, and a court will not relieve a party from a bad bargain or a bargain improvidently made.*

The Partnership CDC v. Apple Storage Company, Inc., August 2004, No. 246 (Abramson, J.) (July 29, 2005 - 8 pages).

CONTRACT INTERPRETATION; RECEIVERSHIP; DISTRIBUTION; CLAIMS -

GE Capital Business Asset Corporation v. R3 Foods Services, Inc., August Term 2009 No. 1661, April 20, 2010 (Bernstein, J.)(5 pages).

CONSTRUCTION CONTRACT/CARDINAL CHANGE DOCTRINE - *The Cardinal Change Doctrine May Apply to Actions By Contractors Against Government Entities as a Tool of Contract Interpretation But Not as A Separate Claim*

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)

CONTRACT CONSTRUCTION -- *BREACH OF CONTRACT - Case was Dismissed where the Court as a Matter of Law Found that the Plain Meaning of the Contract did not Support Plaintiff's Claim for Breach of Contract. Under Pennsylvania Law, where Contract Language is Unambiguous, a Court is Limited to a Review of the Plain Meaning of the Contract Language to Determine the Intent of the Parties. Parol Evidence may not be Considered to Interpret the Terms of an Unambiguous Contract.*

Trigen-Philadelphia Energy Corporation v. Drexel University, December 2001, No. 2160 (Sheppard, J.) (October 8, 2002 - 6 pages)

CONTRACT INTERPRETATION; CONNECTION BETWEEN SETTLEMENT AGREEMENTS AND CONTRACTS; NEWLY DISCOVERED EVIDENCE

Barry Bernsten, *et al* v. Daniel Bain, *et al*, December Term, 2003, No. 00130 (April 30, 2009) (Sheppard, J., 9 pages).

CONTRACT INTERPRETATION - *The fundamental rule in contract interpretation is to ascertain the intent of the contracting parties. It is well-settled that the intent of the parties to a written contract is deemed to be embodied in the writing itself; when the words are clear and unambiguous, the intent is to be gleaned exclusively from the express language of the agreement. Further, under ordinary principles of contract interpretation, the agreement is to be construed against its drafter.*

Wachovia v. Heritage Village Ventures, III, Inc. (Appeal of Friends Rehabilitation Program, Inc.), January Term 2004, No. 0388- Superior Court Docket No 599 EDA 2008 (May 27, 2008- 5 pages) (Sheppard, J.)

CONTRACTS – INTERPRETATION - *Interpretation of an insurance policy is a question of law for the court to resolve. The intent of the parties to a written contract is deemed to be embodied in the writing itself; when the words are clear and unambiguous, the intent is to be gleaned exclusively from the express language of the agreement. Words of common usage in an insurance policy are to be construed in their natural, plain and ordinary sense, and the court may inform its understanding of these terms by considering their dictionary definitions.*

- The specific controls the general when interpreting a contract. Therefore, the general definition of "benefit period" in an insurance policy, which contained the words "and/or," was controlled by the specific definition of "benefit period" in the policy, which used only the word "and."

- To "mail" is to deposit a letter, package, etc. with the U.S. Postal Service; to ensure that a letter, package, etc. is properly addressed, stamped, and placed into a receptacle for mail pickup. Where insurance policy required that check be "mailed" before claim it represented was covered, a check put in the mail one week after policy expired was not covered.

Independence Blue Cross v. Air Liquide America, L.P., November, 2005, No. 00761 (October 31, 2007) (Sheppard, Abramson, Bernstein, J, 9 pages)

CONSTRUCTION CONTRACT DISPUTE – Methodology to quantify added costs of plaintiff due to unanticipated and inappropriate delays - - discussion of propriety and amount of charge-backs.

Shenandoah Steel Corporation v. Fletcher-Harlee Corp., and Shenandoah Steel Corporation v. Safeco Insurance Co of America, July Term, 2001, No. 4184 c/w 0212-3268. *Superior Court Docket Nos. 2415EDA2005 and 2570EDA2005* (Sheppard, Jr., J.)(October 24, 2005 – 4 pages).

CONTINGENT FEE –

> **The Law Office of Douglas T. Harris, *et al.* v. Philadelphia Waterfront Partnrs, L.P., June Term, 2007; No. 2576 (October 22, 2010 – 4 pages) (Bernstein, J.)**

CONTRACTS – AMBIGUITY - ***The court, as a matter of law, determines the existence of an ambiguity and interprets the contract whereas the resolution of conflicting parol evidence relevant to what the parties intended by the ambiguous provision is for the trier of fact. Since the modification of the parties' contract is ambiguous, the parties may offer parol evidence at trial as to their intentions.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 6 pages). (Control No. 091216).**

CONTRACTS – ESSENTIAL TERMS OF LEASE - ***A cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages. At the very least, in order to establish a binding lease agreement, the plaintiff must allege the particular term of years and specific rental amount for the leased premises.***

> **Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).**

CONTRACT INTERPRETATION - ***Where a provision in a contract provides that seller must indemnify buyer for inaccurate representations, and where the provision provides a procedure for the indemnification, seller's inaccurate representations are not material breaches of the contract as long as seller indemnifies buyer under the procedure specified in the agreement.***

> **Eileen Slawek and Joseph Slawek v. Accupac, Inc. and H.I.G. Capital, L.L.C., April Term 2005, No. 2847 (September 27, 2007), (Abramson, J.)**

CONTRACTS - MODIFICATION - ***An agreement that prohibits non-written modification may be modified by subsequent oral agreement if the parties' conduct clearly shows the intent to waive the requirement that the amendments be in writing. However, it is for the finder of fact to determine whether such an oral modification occurred.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004,**

No. 02166 (June 29, 2006) (Abramson, J., 6 pages). (Control No. 091216).

CONTRACT – THIRD PARTY BENEFICIARY – ***No third party beneficiary rights were created where plaintiff was named as one of several disadvantaged subcontractors in contract between City and prime contractor. The parties to the Contract explicitly disavowed an intention to create any third party beneficiaries of the Contract, and there was no indication that the parties otherwise intended to benefit plaintiff in particular, rather than disadvantaged subcontractors in general.***

Evans Suppliers and Communication Co., Inc. v. Elliot-Lewis Corp., March Term, 2005, No. 00469 (July 27, 2005) (Sheppard, J., 4 pages) Superior Court Docket No. 1660EDA2005

CONTRACT/DISREGARD OF CORPORATE ENTITY – ***Plaintiff's breach of contract, unjust enrichment and premises liability claims failed against individual defendant where plaintiff signed contract on behalf of corporation, which owned the property at issue and where plaintiff failed to plead specific facts to warrant a disregard of the corporate entity. However, court allowed fraud claim against individual defendant to proceed where plaintiff pled facts sufficient to proceed under a participation theory of liability.***

Banks v. Hanoverian, Inc., et al., January Term 2005, No. 2807 (Abramson, J.) (June 23, 2005 – 3 pages).

CONTRACT INTEGRATION - ***Although three separate agreements are integrated, that is, a subcontract, a performance and payment bond, and trust agreement, the individual parties to those agreements are not liable for obligations not contemplated by that party at the time of contract.***

Driscoll / Intech II v. Scarborough, IBCS, and FMB, August Term 2007 No. 1094 (February 12, 2008 – 11 pages) (Sheppard, J.).

CONTRACTS – INTERPRETATION - ***It is a general rule of contract law that where two writings relate to the same subject matter, they should be construed together and interpreted as a whole. There is no requirement that a contract be evidenced by a single instrument and if contracting parties choose, they may express their agreement in one or more writings and, in such circumstances, the several documents are to be interpreted together, each one contributing (to the extent of its worth) to the ascertainment of the true intent of the parties.***

Burman v. Burman, June Term 2006, No. 3902 (January 22, 2007 – 4 pages) (Sheppard, J.).

CONTRACTS – INTERPRETED IN CONFORMITY WITH STATUTE - ***Landlord did not breach its exclusive contract with satellite television provider when landlord entered into contract with cable television provider because at least one tenant requested cable television provider's services. The Tenants' Right to Cable Television Act requires landlord to enter into contract with cable television provider if tenant requests that provider's services, so the Act nullifies the exclusivity provisions of the satellite television provider's contract with landlord.***
- Landlord did not breach its exclusive contract with satellite television provider when landlord permitted cable television provider to install a cable system that served entire building rather than just apartment of tenant who requested cable provider's services. The Tenant's Right to Cable Television Act demonstrates a legislative preference for a single cable system installation.
- Landlord did not breach exclusive marketing provisions of its contract with satellite television provider nor did it tortuously interfere with satellite television provider's existing or prospective contracts with tenants when landlord allowed cable television provider to engage in installation activities mandated by the Tenants' Right to Cable Television Act and landlord did not assist in cable television provider's other normal competitive activities.

Viking Communications, Inc. v. SAS-1600 Arch Street, LLP, March Term, 2003, No. 02975 (May 3, 2006) (Bernstein, J., 8 pages).

CONTRACTS – PRIVITY - ***To the extent contractor was obligated to resolve claims brought by sub-contractors, the duty existed solely because of a provision in the contractor's contract with the owner. Architect, which was not in privity of contract with contractor, could not enforce contractual duty.***

DeSeta v. Goldner/Accord Ballpark, Inc., June Term, 2005, No. 02017 (January 10, 2006) (Sheppard, J., 6 pages)

CONTRACTS- ***The statute of frauds operates to bar the enforcement of an alleged oral agreement for the purchase of real property where there is insufficient proof of the terms of the alleged oral contract and the consideration paid.***

Nguyen, et al. v. Quach, November Term 2004 No. 3568 (Abramson, J.) (June 6, 2007 – 7 pages).

CONTRACT - ***Where Prime Contract between Owner and Contractor contained Contractor's promise to indemnify Owner for Contractor's and Sub-Contractor's negligence, and Sub-Contract contained language purporting to pass through Contractor's liability under Prime Contract to Sub-Contractor, Sub-Contract***

did not contain an unequivocally stated intention to have Sub-Contractor indemnify Contractor for Contractor's own negligence, so Sub-Contractor need not indemnify Contractor for Contractor's own negligence.

- Where Sub-Contract did not contain an express waiver of Sub-Contractor's Worker's Compensation Act immunity, and, instead, Sub-Contract attempted to pass through to Sub-Contractor the indemnification responsibilities outlined in the Prime Contract, which included what purported to be a waiver by Contractor of its and Sub-Contractor's WCA immunity vis-à-vis the Owner, the Sub-Contract's pass-through indemnification clause was not specific enough to create a waiver by Sub-Contractor of its own WCA immunity vis-à-vis Contractor.

Integrated Product Services v. HMS Interiors, Inc., March Term, 2001, No. 01789 (June 15, 2005 (Abramson, J., 5 pages)

CONTRACT—*Informal document that contains essential terms and is agreed to by both parties constitutes a valid contract.*

Joseph M. Rafter and John T. Williams v. William Shaw a/k/a William Shaw, Jr., and Shaw, Inc., January Term 2004, No. 3756 (Jones, J.) (May 27, 2004 – 5 pages).

CONTRACT—*Informal document that contains essential terms and is agreed to by both parties constitutes a valid contract.*

Joseph M. Rafter and John T. Williams v. William Shaw a/k/a William Shaw, Jr., and Shaw, Inc., January Term 2004, No. 3756 (Jones, J.) (May 27, 2004 – 5 pages).

CONTRACTS - *The laws in force when an insurance contract is entered into, including the Motor Vehicle Financial Responsibility Law, become part of the obligation of contract with the same effect as if expressly incorporated in the contract's terms.*

Sigma Supplies Corp. v. Progressive Halcyon Insurance, August Term 2003, No. 02968 (April 21, 2004 7-pages) (Sheppard, J.)

CONTRACT - *Court will not support an interpretation of a contract which was wholly unsupported by the record and which would effectuate an absurd result.*

Booth v. Zarzecki, October Term 2001, No. 4484 (Jones , J.) (February 4, 2004 – 8 pages).

CONTRACTS – BREACH OF THE DUTY TO NEGOTIATE IN GOOD FAITH - *Without determining whether a cause of action for breach of a duty to negotiate in good faith exists in Pennsylvania, it is evident that the facts as pleaded in this matter do not give rise to such a cause of action. A cause of action for breach of a*

duty to negotiate in good faith does not exist where no specific terms were agreed upon and the language of the letter upon which plaintiff relies did not reveal that the parties intended to be bound by any terms of the original contract.

John Pym. M.D. v. Einstein Practice Plan, Inc.,December Term 2003, No.3577 (Jones, J.) (7/21/04 – 4 pages)

CONTRACTS - GOOD FAITH - ***The implied covenant of good faith does not allow for a claim separate and distinct from a breach of contract claim. Rather, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself.***
- "Good faith" emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving "bad faith" because they violate community standards of decency, fairness or reasonableness.

- CONTRACTS – FORMATION – OFFER AND ACCEPTANCE - ***A reply to an offer which purports to accept it, but changes the conditions of the offer, is not an acceptance but is a counter-offer, having the effect of terminating the original offer.***
- Until accepted by the offeree in the mode and manner expressly provided by the terms of the offer, a document remains an unaccepted offer and cannot, in itself, be considered a binding contract.

CONTRACTS – FORMATION – COURSE OF PERFORMANCE - ***Subsequent performance of unsigned contract by the parties may give rise to a binding contract between them.***

Pennsylvania Business Bank v. Franklin Career Services, LLC, May Term, 2002, No. 02507 (March 14, 2005) (Jones, J., 2 Opinions 5 pages each).

CONTRACT INTERPRETATION—*A court must assume that a contract's language was not chosen carelessly nor that the parties were ignorant of the meaning of the language they used.*

Del Monte Fresh Produce N.A., Inc. v. Delaware River Stevedores, Inc., June Term 2004, No. 167 (Jones, J.) (September 30, 2005 – 7 pages).

CONTRACTS – INTERPRETATION - ***The interpretation of the terms of a contract, including an insurance contract, is a matter of law for the court. The intent of the parties to a written contract is deemed to be embodied in the writing itself; when the words are clear and unambiguous, the intent is to be gleaned exclusively from the express language of the agreement. Words of common usage in a contract are to be construed in their natural, plain and ordinary sense, and the court may inform its understanding of these terms by considering their dictionary definitions.***

- The terms "extended" and "extension" are regularly defined as the continuation of an existing thing and not the start of something new. Therefore, a one month "Extension" of a yearly insurance policy must be read as simply an elongation of the policy period; it does not create new or additional coverage.

- When a written contract is clear and unequivocal, its meaning must be determined by its contents alone. It speaks for itself and a meaning cannot be given to it other than that expressed. Where the intention of the parties is clear, there is no need to resort to extrinsic aids or evidence.

General Refractories Company v. Insurance Company of North America, April Term, 2004, No. 06351 (September 22, 2005) (Abramson, J., 4 pages)

CONTRACTS – INTERPRETATION - ***Interpretation of the terms of a contract is a matter of law for the court. The intent of the parties to a written contract is deemed to be embodied in the writing itself; when the words are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement. When a contract refers to a separate document, a court may examine the language of the other document to ascertain the intent of the parties.***

Integrated Project Services v. HMS Interiors, Inc., March Term 2001, No.1789 (Cohen, J.) (10/21/04 - 7 pages).

CONTRACT INTERPRETATION – ***In the absence of an express term in a contract, the law will imply an agreement by the parties to do and perform those things necessary in order to carry out the purpose for which the contract was made and to refrain from doing anything that would destroy or injury the other party's right to receive the fruits of the contract.***

Yorkwood, L.P and Radicchio, LLC v. Kee Corp., November Term 2002,No. 1703 (Cohen, J.)(April 13, 2004 - 14 pages).

CONTRACTS – OFFER - ***The court may determine, as a matter of law, whether the brochure constitutes an offer or an advertisement. A writing is an offer rather than a mere advertisement if it contains some language of commitment or some invitation to take action without further communication.***

Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc, Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 – ***CONTROL NO. 052277*** **(Cohen, J.) (9/28/04 – 4 pages)**

CONTRACTS - REASONABLE TIME TO PERFORM - ***Where no time is specified for performance of a contractual obligation, the court will require the obligation be performed within a reasonable time. However, without more evidence of the standards of the***

industry and other circumstances of the transaction, the court cannot determine, as a matter of law, what is a reasonable time within which to perform under the oral repair agreement before it.

> **Calbar, Inc. v. Andrews Sprinkler Co., October Term 2002, No. 00846 (Sheppard, J.) (August 29, 2003).**

CONTRACT – DUTY OF GOOD FAITH - *A duty of good faith and fair dealing is implied in every contract, and a breach of that duty is a breach of the contract.*

> **Robinson v. Berwind Financial LP, November Term, 2002, No. 00220 (January 12, 2004) (Jones, J.)**

CONTRACTS – SPECIFIC CLAUSES - *A "flow-through" or "conduit" clause that requires the subcontractor to stand in the shoes of the prime contractor with regards to the rights and obligations encompassed in the prime contract to the extent they arise within the purview of the subcontract is enforceable.*

> **Integrated Project Services v. HMS Interiors, Inc., March Term 2001, No.1789 (Cohen, J.) (10/21/04 - 7 pages).**

CONTRACTS – THIRD PARTY BENEFICIARIES - A party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself . . . unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance. Individual unit owners could be third party beneficiaries of the condominium association's insurance policy.

> **Hebrew School Condominium Association, *et al.* v. Enrique Distefano, *et al.*, May Term 2004, No. 1886 (Cohen, J.) October 21, 2004 – 7 pages).**

CONTRACTS - UNCONSCIONABILITY - *Waiver of right to sue contained in trade association's membership application and its by-laws was not unconscionable where waiver was not written in obfuscatory language or in small print buried in a lengthy text and plaintiff initialed it.*

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February Term, 2000, No. 02846 (Cohen, J.) (July 17, 2003 - 12 pages).**

CONTRACTS – THIRD PARTY BENEFICIARY - ***A party to a contract may not bring a claim against a third-party beneficiary for breach of that contract. Third-party beneficiary did not assume payment obligations of other party to that contract.***

Philadelphia Regional Port Authority v. Carusone Construction Company, July Term, 2003, No. 02701 (April 14, 2004) (Sheppard, J.)

CONTRACTS – WRITTEN MODIFICATIONS - ***Our law generally upholds the validity and sanctity of no-oral modification clauses. However, the requirements of a written modifications clause may be waived. Such a condition is considered waived when its enforcement would result in something approaching fraud. The effectiveness of a non-written modification, in spite of a contract condition that modifications must be written, depends upon whether enforcement of the condition is barred by equitable considerations.***

Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).

CONTRACTS – COURSE OF PERFORMANCE - ***Where there are repeated occasions for performance by one party and the other has knowledge of the nature of the performance and opportunity to object, a course of performance accepted or not objected to may be relevant to show the meaning of the contract, or a modification of it, or a waiver.***

Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).
~~as redundant of its breach of contract claim.~~

CONSTRUCTIVE TRUST - ***A Constructive Trust May Be Established As An Equitable Remedy Where It Is Necessary to Avoid Unjust Enrichment***

Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(April 30, 2001 - 8 pages)

CONSTRUCTIVE TRUST - ***Plaintiff May Maintain His Cause of Action for Imposition of a Constructive Trust as Incident to His Claims for Unjust Enrichment, Breach of Fiduciary Duty and Fraud***

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, NO. 1863 (Herron, J.)(July 10, 2001 - 38 pages)

CONSTRUCTIVE TRUST - ***Plaintiff corporations may assert claim for constructive trust against defendant corporations where agents of plaintiff corporations allegedly set up competing defendant corporations using plaintiff corporations' assets.***

Romy et al. v. Burke et al., May Term 2002, No. 1236

(Sheppard, J.) (May 2, 2003- 14 pages).

CONSTRUCTIVE TRUST/CORPORATION - *Motion for Imposition of a Constructive Trust Is Denied Where Petitioner Failed to Show that Respondent Was Unjustly Enriched by the Creation of New Corporation After Liquidation of the Corporation in Which Both Parties Had Been Fifty Percent Shareholders*

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(January 29, 2003)

CONTEMPT - *Defendant Is Held in Contempt for Failing to Appear at Hearing With Either No Excuse or an "Eleventh Hour" Requrest for a Continuance - Where Defendant Engages in Dilatory or Obdurate Behavior, Attorney Fees May Be Awarded - Because Defendant Failed to Respond to the Rule to Show Cause, All Averments of Fact in the Contempt Petition Are Deemed Admitted*

DiVergilis v. Silver, July 2001, No. 1563 (Herron, J.)(May 2, 2002 - 11 pages)

CONTRACT/BREACH - *Preliminary Injunction Denied Where Plaintiff Fails to Establish that the Parties Reached an Enforceable Agreement as to an Exclusive Print Agency for a One Year Period - Negotiations Concerning a Possible Future Agreement do not Constitute an Enforceable Agreement Where no Essential Terms Established Price, Delivery Date and Quantity - Plaintiff Failed to Establish that Breach of Contract Caused Irreparable Harm to Reputation or Future Earnings*

Creative Print Group, Inc. v. Country Music Live, Inc. and Mark Michaels, May 2000, No. 283 (Sheppard, J.)(June 13, 2000 - 12 pages)

CONTRACT/BREACH - *Breach of Contract Claim May Not Be Maintained Against Defendant Who Is Not a Party to the Contract - Corporation is Not Bound by Contracts of its Subsidiaries*

Hospicomm, Inc. v. International Senior Development, LLC., August 2000, No. 2195 (Herron, J.)(January 9, 2001 - 14 pages)

CONTRACT/BREACH - Where Representation Agreement Required Defendant to Refer Negotiations for Rental Spaces to Plaintiff, Complaint Set Forth Claim for Breach of Contract with the Requisite Specificity When Alleging that Defendant Entered into Two-Year Lease Without Plaintiff's Knowledge

The Flynn Company v. Cytometrics, Inc., June 2000, No. 2102

(Sheppard, J.)(November 17, 2000 - 14 pages)

CONTRACT/BREACH - *Where Defendant Was Required by Contract to Use "Best Efforts" to Place Membership Interests and Is Alleged in Complaint to Have Made "No Effort," Complaint Sets Forth a Breach of Contract Claim under New York Law*

EGW Partners, L.P. v. Prudential Insurance Co., March 2001, No. 336 (Sheppard, J.)(June 22, 2001 - 17 pages)

CONTRACT/BREACH - Complaint Fails *to Set Forth Claim for Breach of Contract By Soliciting Plaintiffs' Clients Where Contract Does Not Prohibit Soliciting Clients, Retaining Their Fees or Working Less Than Full-Time*

J. Goldstein & Co., P.C. v. Goldstein, January 2001, No. 3343 (Herron, J.)(June 14, 2001 - 12 pages)

CONTRACT/BREACH - *Demurrer to Breach of Contract Claim For Sales and Service Fees Under Operating and Marketing Agreements Is Overruled Where There Are Unclear Factual Issues Concerning The Triggering of These Requirements - Demurrer to Claim for Termination Fees Is Sustained Where Complaint Fails to Plead the Performance of Conditions Precedent to Recovering These Fees*

Harbour Hospital Services v. GEM Laundry, July 2000, No. 4830 & August 2000, No. 207 (Sheppard, J.)(July 18, 2001 - 27 pages)

CONTRACT/BREACH - *Breach of Contract Claim Against Union Is Legally Insufficent Where Union Was Not a Party to the Contract Entered Into by a Predecessor Union and Plaintiffs Fail to Plead Facts That Would Support Imposition of Successor Liability*

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 19 pages)

CONTRACT/BREACH - Plaintiff's Breach of Contract Claim Is Sufficently Specific Where It Alleges the Essential Terms of the Agreement and Its Breach

Temple University v. Johanson, M.D., December 2000, No. 353 (Herron, J.)(November 15, 2001 - 6 pages)

CONTRACT/BREACH - *Summary Judgment on Breach of Contract Claim is Granted Where Record Established No Evidence of Written Contract Identifying the Terms of a Purported Contracts Between Plaintiff And Defendant Insurance Broker*

Methodist Home for Children, et al. v. Biddle & Company, Inc., April 2001, No. 3510 (Sheppard, J.) (October 9, 2002 -

10 pages)

CONTRACT/BREACH - ***Claim for Breach of Contract or Breach of Warranty May Not Be Maintained Against Defendant Absent Contract or Other Allegation Establishing Contractual Privity or Showing that Warranty Was Intended to Flow to Defendant***

Precision Towers, Inc. v. Nat-Com, Inc. and Value Structures, Inc., April 2002, No. 2143 (Cohen, J.) (September 23, 2002 - 9 pages)

CONTRACT/BREACH/CONFLICTING DOCUMENT - ***Demurrer to Breach of Contract Claim Is Sustained Where Document Affixed to Support This Claim Was a Letter of Intent Expressing Intent Not to Be Bound, Thereby Negating Allegations of Contract to Purchase Plaintiff's Interest in Closely-Held Corporation***

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(March 22, 2002 - 31 pages)

CONTRACT/BREACH/SEVERABILITY/PARENT CORPORATION AND WHOLLY OWNED SUBSIDIARY/AMBIGUITIES - ***An Agreement Constitutes a Binding Contract Where There Is An Intent to Form a Contract and Consideration - The Intent of the Parties Must Be Considered to Determine Whether a Contractual Provision Is Severable - Where Defendant Is Not Bound by the Buy Out Provisions of a Contract, Summary Judgment Is Entered in his Favor - Defendant Parent Corporation Is Not Bound By the Contracts of Company that Merged with Defendant's Wholly Owned Subsidiary Because that Would be Tantamount to Piercing the Corporate Veil -***

Advanced Surgical Services, Inc. v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(November 8, 2001 - 16 pages)

CONTRACT/CONSTRUCTION/BREACH - ***Housing Authority Breached Construction Contract By Failing to Pay for Services Performed And By failing to Ensure that Preliminary Project Milestones Were Met – Plaintiff Is Entitled to Damages for Plumbing Work For Which It Was Never Paid and Damages for the Delay in the Project's Completion – Pursuant to 73 Pa.C.S. §1628 (repealed), The Contractor Working Under a Public Contract Is Also Entitled to Interest On the Amount Outstanding***

James J. Gory Mechanical Contracting, Inc. v. Philadelphia

Housing Authority, February 2000, No. 453 (Herron, J.)(July 11, 2001 - 29 pages)

CONTRACT/BREACH/DOWNCODING - *Complaint By Physician Alleging Breach of Contract by Insurer Lacked the Requisite Specificity in Setting Forth the Specific Time Period for the Alleged Breach by Downcoding - Complaint Lacks Specificity in Failing to Identify the Contractual Provisions that Were Breached -*

Corson v. IBC, December 2000, No. 2148 (Herron, J.)(June 15, 2001 - 10 pages)

Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)

CONTRACT/BREACH/STOCK OPTION AGREEMENT - *Plaintiff Set Forth Viable Claim for Breach of Contract Where Complaint Alleges that Defendant/Employer Promised Stock Options Pursuant to Offer of Employment But Failed to Grant It Entirely -*

Denny v. Primedia Argus Research Laboratories, April 2000, No. 3792 (Sheppard, J.)(May 2, 2001 - 9 pages)

CONTRACT/BREACH OF DUTY OF GOOD FAITH - *Every Contract in Pennsylvania Imposes on Each Party A Duty of Good Faith and Fair Dealing - The Implied Duty of Good Faith is Closely Related to the Doctrine of Necessary Implication - Shareholder's Complaint Sets Forth Claim For Breach of Duty of Good Faith Where It Alleges that Defendant Shareholder Failed to Submit Insurance Forms Necessary for A Determination of Disability to Trigger Buy-Out Agreement*

Baron v. Pritzker, Omicron Consulting, Inc., August 2000, No. 1574 (Sheppard,J.)(March 6, 2001 - 27 pages)

CONTRACT/BREACH OF DUTY OF GOOD FAITH - *Where Complaint Fails to State How Defendant/Drug Manufacturer Breached Its Contract, No Claim for Breach of Duty of Good Faith Is Presented*

Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)

CONTRACT/BREACH OF DUTY OF GOOD FAITH - *Delaware Law Imposes a Covenant of Good Faith and Fair Dealing in Every Contract - Where Contract Gives Discretion to a Party To Secure Government Approval of Its Plans, the Contractual Duty of Good Faith Requires That the Party Take Reasonable Steps to Secure That Approval - Contractual Duty of Good Faith Does Not Imply Duties that Contravene the Express Terms of the Contract or Impose Additional Substantial Obligations*

Textile Biocides, Inc. v. Avecia, January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)

CONTRACT/BREACH OF DUTY TO NEGOTIATE IN GOOD FAITH - ***Demurrer Sustained because Parties did not have a Binding Contract to Purchase or Finance Olde City Properties where Exchange of Letters Merely Contained Recommended Terms and Conditions - These Letters at best Constituted an Offer to Enter into Negotiations Not an Offer to Enter into a Contract - Letter Imposing Extensive Due Diligence Period did not Constitute an Acceptance or a Binding Contract but was a Counter Offer - Pennsylvania Courts have not Decided Whether a Cause of Action for Breach of a Duty to Negotiate in Good Faith is Cognizable - Purported Agreement to Negotiate in Good Faith Here Did Not Evidence a Mutual Intent to be Bound by Specific Terms - Plaintiffs Have Failed to State Cause of Action for Breach of Agreement to Negotiate in Good Faith***

Caplen et al. v. Richard W. Burick and the City of Philadelphia, Trustee Acting by the Board of Directors of City Trusts Girard Estate, February 2000, No. 3144 (Sheppard, J.)(August 4, 2000 - 39 Pages)

CONTRACT/BREACH/NEGLIGENCE - ***Under Pennsylvania law and "Gist of the Action Doctrine," Claim for Negligent Breach of Contract Is Dismissed - Where Complaint Alleges That Defendants MisManaged the Commercial Laundry Opertations Required by their Operating Agreement, These Allegations of Negligence Do Not Set Forth a Breach of Contract Claim***

Harbour Hospital Services, Inc. v. GEM Laundry Services, LLC, July 2000, No. 4830 & August 2000, No. 207 (Sheppard, J.)(July 18, 2001 - 27 pages)

CONTRACT/BUY-SELL PROVISION - ***Fifty Percent Shareholder's Attempted Purchase of Other Shareholder's Shares in Air Freight Corporation Deemed Void Where Shareholder's Offer Did Not Follow Buy/Sell Provision's Requirements By Adding Contingencies Outside the Parameters of the Buy/Sell Provision - Shareholder's Offer to Purchase Shares Is Void Under Ordinary Contract Principles of Offer and Acceptance Because Other Shareholder Rejected It - Plaintiff Precluded From Divulging Financial or Other Confidential Information Received in Exercising His Rights Under Buy/Sell Provision.***

Wyatt v. Phillips, January 2002, No. 4165 (DiNubile, J.) (August 27, 2002 - 10 pages)

CONTRACT/CONSTRUCTION - ***An Unambiguous Contract Provision Must Be Given Its Plain Meaning - Where Partnership Agreement Unambiguously Provided For Post-Dissolution Distribution of Fees, the Court May Interpret It As a Matter of Law***

Cohen v. McLafferty, **July 2000, No. 923 (Herron, J.)(June 15, 2001 - 9 pages)**

CONTRACT/COMMERCIAL IMPRACTICALITY - *A Consent Decree With the EPA to Close Defendant's Facility Is Not a Grounds for Invoking the Deoctrine of Commercial Impracticality Due to Increased Costs Especially Where the Consent Decree Was Entered Into Prior to the Parties' Contract*

Rohm & Haas Co. v. Crompton Corp., **November 2001, No. 215 (Herron, J.)(April 29, 2002 - 12 pages)**

CONTRACT/COVENANT OF GOOD FAITH - *A Covenant of Good Faith Is Implied in Every Contract Including Those That Arise in a Creditor-Lender Relationship - The Covenant of Good Faith Does Not Override the Express Terms of the Contract But Instead Fills in Those Terms That Have Not Been Expressly Stated - Defendant Bank Breached the Covenant of Good Faith Implied in its Agreement with Plaintiff When It Used the Term "Other Insurance" to Require the Purchase of Terrorism Insurance Where Plaintiff Alleges that Such Insurance Is Either Unavailable or Prohibitively Expensive*

Philadelphia Plaza - Phase II v. Bank of America National Trust and Savings Association, **April 2002, No. 3745 (Herron, J.)(June 21, 2002 - 15 pages)**

CONTRACT/COVENANT OF GOOD FAITH - *Covenant of Good Faith Is Implied in Every Contract Including Those Arising in a Creditor-Debtor Relationship*

Academy Industries Inc. v. PNC Bank, **May 2000, No. 2328 (Sheppard, J.)(May 20, 2002 - 34 pages)**

CONTRACT/DAMAGES - *Where a Party Incurred Costs to Perform Its End of the Bargain and Other Party Subsequently Breached, Reliance Damages Are Available to First Party - Where a Party Purportedly Performed Services Even As Other Party Timely and Clearly Indicated that the Purported Performance As Proposed Should Not Be Carried Out Because It Is Not What the Parties Agreed Upon Nor Is It Offered Within the Time Period Set in the Agreement, Reliance Damages for Performing the Contested Services Are Not Justified.*

Carol E. Albert, and Colleen Ward v. Lucy's Hat Shop LLC, and Avram Hornik, June 2001, No. 0914 (Sheppard, J.) (December 31, 2002 - 16 pages)

CONTRACT/DOCTRINE OF NECESSARY IMPLICATION - *Doctrine of Necessary Impliation Is Inapplicable to Plaintiff's Claim that Defendant Bank's Negotiations With a Potential Note Taker Impairs Plaintiff's*

Right to Redeem the Mortgage Where Plaintiff Has the Right to Redeem the Mortgage at Issue by Paying the Entire Mortgage

> **Philadelphia Plaza - Phase II v. Bank of America National Trust and Savings Association, May 2002, No. 332 (Herron, J.)(May 30, 2002 - 15 pages)**

CONTRACT/ENFORCEMENT OF LOST AGREEMENTS - *A Lost Agreement Is Enforceable If Plaintiff Proves By Clear and Convincing Evidence the Existence of the Agreement; an Unsuccessful, Diligent and Bona Fide Search for the Agreement; and the Contents of the Agreement*

> **United Products Corp. v. Transtech Manufacturing, Inc., August 2000, No. 4051 (Sheppard, J.)(November 9, 2000 - 40 pages)**

CONTRACT/FORCE MAJEURE PROVISION/FAILURE TO PERFORM - *Force Majeure Provision in Requirements Contract Did Not Excuse Defendant's Failure to Perform Due to the Closure of Its Facility Based on EPA Consent Decree - Defendant Failed to Allege Facts Suggesting How Closure of Its Facility Was Beyond Its Control - The Consent Decree Cannot Be an Event Beyond Defendant's Control Where Defendant Had Considerable Control Over Its Negotiation*

> **Rohm & Haas v. Crompton, November 2001, No. 215 (Herron, J.)(April 29, 2002 - 12 pages)**

CONSENT DECREE - PETITION TO ENFORCE – *Upon A Petition to Enforce a Consent Decree, Which Stated That the Respondent Could Buy All of the Interests In Certain Corporations and Limited Partnerships Owned by the Petitioner, and the Respondent Caused One of the Corporations to Make the Acquisition, the Court Interpreted the Consent Decree to Hold that the Acquisition by Respondent was Valid and Consistent with the Consent Decree.*

> **Wyatt v. Phillips, January Term 2002, No. 4165 (Sheppard, J.) (January 12, 2004 - 32 pages)**

CONTRACT/FRAUD - *Preliminary Injunction Denied Where Plaintiff Failed to Establish the Requisite Irreparable Harm to Enjoin an Alleged Breach of Asset Transfer Agreement*

> **Romy, M.D., Riverside Medical Center, P.C., Allegheny Pain Institute, P.C., RMC North Associates, P.C., Spine Center-Northfields Division, P.C., Spine Center Lehigh Valley, P.C. and Riverside Medical Services Corp. v. American Life Care, Inc., L-Four Five, LLC, TSC Management of Pennsylvania, Inc., Warren Haber, John L. Teeger and Eric D. Rosenfeld, December 1999, No. 752 (Sheppard, J.)(March 7, 2000 - 16 pages)**

CONTRACTS – ILLEGALITY - *The burden is on the party who sets up unreasonableness as the basis of contractual illegality to show*

how and why the contract is unlawful. Former employee failed to show that one year covenant not to compete was unreasonable.

Brotherston Homecare, Inc. v. Davis, November Term, 2009, No. 03756 (December 17, 2009) (Bernstein, J. 4 pages).

CONTRACT/INSURANCE FLOOD POLICY - *Where Insurance Policy Establishes Deductible for Flood Loss Based on Property's Location in a Particular Flood Zone and There Are Two Reasonable Though Conflicting Interpretations Concerning the Zone in which the Property in Dispute Is Located, Summary Judgment May Not Be Granted Because Ambiguities Are Construed in Favor of the Insured and Against the Insurer*

Sylvania Gardens v. Legion Insurance Co., August 2000, No. 734 (Sheppard, J.)(February 14, 2001 - 7 pages)

CONTRACT/INTEGRATION/PAROL EVIDENCE - A Court May Admit Parol Evidence If A Contract Is Either Ambiguous or Not Integrated - *Where Complaint Alleges that Contract Is Not Integrated, Parol Evidence May Be Considered to Determine Whether the Contract Represents the Final and Complete Expression of the Parties' Agreement - Where Plaintiffs Allege that Consulting Agreement Intentionally Omitted the Parties' Obligations for a Three Year Period from July 1999 through July 2002 and That the Parties Always Intended that the Agreement Should Be in Effect during that Period, Parol Evidence in the Form of Memoranda Could Be Considered to Determine the Parties' Intent in the Absence of an Integration Clause*

First Union National Bank et al. v. Quality Carriers, Inc., April 2000, No. 2634 (Sheppard, J.)(October 10, 2000 - 49 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Pennsylvania Law Permits an Intentional Interference Action Based on Both Existing and Prospective Contractual Relations - Allegations that Defendant's Comments Interfered with Potential Transactions Are Sufficient to Sustain Claim for Intentional Interference with Contractual Relations*

Fennell v. Van Cleef, et al., May 2000, No. 2754 (Herron, J.)(September 25, 2000 - 6 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Where Attorneys Allege that Defendants' Actions Interfered With Their Contract With Their Clients, They Have Set Forth An Element of a Claim for Tortious Interference Even If They Voluntarily Withdrew Their Representation After Defendants' Alleged Interference - To Determine Whether Plaintiffs Have Established the Requisite Purposeful Action by Defendants for an Intentional Interference Claim, the Focus Should Be On The Conduct At The Relevant Rather Than At the Present Time -*

Determination of Damages Is For the Fact-Finder

Golomb & Honik, P.C. v. Ajaj, November 2000, No. 425 (Herron, J.)(June 19, 2001 - 6 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *New York Law Protescts a Parent Corporation's Intereference in its Subsidiary's Contract as Privileged in the Absence of Malice or Illegality*

EGW Partners, L.P. v. Prudential Insurance, March 2001, No. 336 (Sheppard, J.)(June 22, 2001 - 17 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Provider of Staffing Services to Nursing Homes Set Forth Viable Claim for Intentional Interference With Contractual Relations by Alleging that After It Placed Defendant with a Nursing Home Position, Defendant Terminated His Employment But Then Entered Into New Agreement with the Nursing Home - Corporate Agent Acting Within the Scope of His or Her Agency Cannot Be Liable for Intentional Interference With a Corporate Contract*

ZA Consulting LLC v. Wittman, April 2001, No. 3941 (Herron, J.)(August 28, 2001 - 8 pages)

CONTRACT/INTENTIONALINTERFERENCE - *Claim for Intentional Interference with Contractual Relations by Hospital against Defendant Who Hired Physician Despite Restrictive Covenant Is Sufficiently Specific Where It Enables a Defendant to Prepare a Defense*

Temple University v. Johansen, December 2000, No. 353 (Herron, J.)(November 16, 2001 - 5 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Claim for Intentional Interference with Contractual Relations Is Legally Insufficent Where It Fails to Allege Intent*

Worldwideweb Networx Corp. v. Entrade Inc. and Mark Santacrose, December 2001, No. 3839 (Herron, J.)(June 20, 2002 - 10 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Plaintiff's Claim for Intentional Interference With Contractual Relations Is Insufficient due to Plaintiff's Failure to Establish a Reasonable Probability that It Would Have Reached an Agreement With Another Bank in the Absence of Defendant Bank's Actions*

Park Plaza - Phase II v. Bank of America National Trust and Savings Association, May 2002, No. 332 (Herron, J.)(May 30, 2002 - 15 pages)

CONTRACT/INTENTIONAL INTERFERENCE - *Summary Judgment May Not Be*

Granted as to Plaintiff's Claim for Intentional Interference with Contractual Relations Because the Issue of Whether the Defendant Actions Were Privileged or in Good Faith Is a Question of Fact for the Jury

> **Academy Industries Inc. v. PNC, N.A. et al.,** **May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 -34 pages)**

CONTRACT/PARTNERSHIP AGREEMENT/BREACH - ***Summary Judgment on Breach of Contract Claim is Granted Where Active Partners Retroactively Modified Retirement Benefits Pursuant to a General Amendment Provision in their Partnership Agreement to the Detriment of Retired Partners Who Had Completed the Requisite Years of Service and Received Retirement Compensation Under the Agreement***

> **Abbott v. Schnader Harrison Segal & Lewis LLP, June 2000, No. 1825 (Herron, J.)(February 28, 2001 - 26 pages)**

CONTRACT/SUMMARY JUDGMENT - ***Insurer's Motion for Summary Judgment Is Granted Where Plaintiff Is Not a Named Insured and the Language of the Fidelity Bond Precludes Plaintiff from Acting as a Third Party Beneficiary***

> **Guarantee Title & Trust Company v. Commonwealth Assurance & Abstract Company, March 2001, No. 370 (Sheppard, J.)(May 28, 2002)**

CONTRACT/TERMINATION/EVERGREEN PROVISION - ***Defendant Executors Effectively Terminated Management Agreement According to Its Unambiguous Terms So That Judgment on the Pleadings Is Granted - Parol Evidence Forbids Consideration of Antecedent Contemporaneous Agreements to Vary Terms of Contract that Parties Intend to Represeent a Complete Statement of Their Agreement - Plaintiffs Failed to Establish that Contract Contained an "Evergreen" Provision With a Rolling Three Year Term***

> **RRR Management Co. Inc. v. Basciano et al., January 2001, No. 4039 (Sheppard, J.)(March 4, 2002 - 21 pages)**

CONTRACT/TIME IS OF THE ESSENCE - ***A Time Is Of The Essence Provision May Be Implied Where the Parties' Intent in Executing the Contract Is to Facilitate Another Agreement Where Time Is Of The Essence and Where the Parties Have Set Deadlines to the Performance of Sequential Segments of the Contract.***

> **Carol E. Albert, and Colleen Ward v. Lucy's Hat Shop LLC, and Avram Hornik, June 2001, No. 0914 (Sheppard, J.) (December 31, 2002 - 16 pages)**

CONTRACTS/INTENTIONAL INTERFERENCE - ***Where Complaint Alleges that***

Defendant Employee Competed with Current Employer, Defendant's Claim that His Solicitation of Clients Was Privileged Is Without Merit

> **Goldstein v. Goldstein, January 2001, No. 3343 (Herron, J.)(June 14, 2001 - 12 pages)**

CONTRACTS/INTENTIONAL INTERFERENCE WITH EXISTING AND PROSPECTIVE CONTRACTUAL RELATIONSHIPS - *Plaintiffs' Claim for Interference with Existing or Prospective Contractual Relations Is Defective for Failure Allege Defendant's Intent to Interfere With Those Contracts*

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)**

CONTRACT/TORTIOUS INTERFERENCE - *Claim for Tortious Interference with Contractual Relations Must Involve A Contractual Relationship Between Plaintiff and a Third Party - Valid Claim for Tortious Interference Exists Based on Allegation That Defendants Interfered With Plaintiff's Contractual Relations with Its Customers*

> ***Advanced Surgical Services Inc. v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(January 12, 2001)***

CONTRACTS/TORTIOUS INTERFERENCE - *Where Shareholders Allege that Corporation Intentionally Sought to Deprive Them of Payments Under their Notes by Interfering with a Transaction, Corporation's Actions Cannot Be Considered Privileged as a Matter of Law*

> **First Republic Bank v. Brand, August 2000, No. 147 (Sheppard, J.)(June 1, 2001 - 20 pages)**

CONTRACTS/TORTIOUS INTERFERENCE - *Building Consultant for Surety Company Is Not Liable for Tortious Interference with Contract Where It Was Legally Justified to Assist Surety by Apprising It of the Status of a Construction Project - Building Consultant Is Not Liable for Tortious Interference of Contract Where the Contract at Issue Had Terminated Before Building Consultant Had Become Involved with the Project*

> ***San Lucas Construction Co., Inc. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(October 11, 2001 - 10 pages)***

CONTRACTUAL LIMITATIONS CLAUSE - *Judgment creditor seeking satisfaction of a judgment from the judgment debtor's insurer is barred by the policy's contractual limitations clause because: (1) judgment creditor was bound by the limitations clause just as if it were the judgment debtor; (2) judgment creditor's timely commencement of a New York civil action did not satisfy the limitations clause because the New York action was voluntarily*

discontinued and rendered a nullity; (3) New York trial court's grant of summary judgment did not operate to suspend the contractual limitations clause; (4) alleged conduct of the insurance company in withholding a key document did not act as a waiver of the limitations clause but, instead, acted to suspend the running of the limitations period until the document was produced; and (5) alleged breach of the policy by the insurer does not negate the limitations clause.

> **American Continental Properties, Inc. et al. v. Michael Lynn & Associates, P.C., February Term 1994; Number 3478. (Cohen, J.) (April 16, 2003 - 27 pages). COURT TYPE CN**

CONTRIBUTION - ***Contribution claims are properly asserted between joint tortfeasors. Contribution is not a proper claim where the underlying claims sound in contract.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).**

CONTRIBUTION - ***Where third party did not allege facts showing that employees committed tort against their employer, they could not be liable for contribution to third party.***

> ***Atchison Casting Corp. v. Deloitte & Touche, LLP., July Term, 2002 No. 003193 (Jones, J.) (March 14, 2002- 7 pages)***

COORDINATE JURISDICTION RULE - ***Under the coordinate jurisdiction rule, judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions.***
- Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is not precluded from granting relief although another judge has denied an earlier motion. However, a later motion should not be entertained or granted when a motion of the same kind has previously been denied, unless intervening changes in the facts or the law clearly warrant a new look at the question.
- When determining whether the coordinate jurisdiction rule applies, the Court looks to where the rulings occurred in the context of the procedural posture of the case.
- The coordinate jurisdiction rule is not intended to preclude granting summary judgment following the denial of preliminary objections.

> **Florence Furman and Leroy Furman v. Glenfield Capital Corp., August Term 2004, No. 3229, consolidated with Glenfield Capital Corp. v. Latanya Furman and Florence Furman, October Term 2004, No. 3064, (Abramson, J.) (January 12, 2006 - 11 pages).**

CORPORATE AUTHORITY – ***To show that a president of a defendant corporation has authorization to enter into a contract, a plaintiff may show any resolution of the corporation authorizing the execution of the contract or a valid ratification of the act by the stockholders or directors.***

The Partnership CDC v. Apple Storage Company, Inc., August 2004, No. 246(Abramson, J.) (July 29, 2005 - 8 pages).

COVENANT NOT TO COMPETE – ENTITIES IN COMPETITION – PROOF OF DAMAGES

Omnicron Systems v. Weiner, August Term, 2001, No. 0669 (Cohen, J.) (October 10, 2003).

CONVERSION –***A conversion action will not stand where the defendant has retained certain property interests in the thing allegedly converted (educational program) and has only combined such interests with information publicly available to create a rival program.***

Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages)(Sheppard, J.).

CONVERSION – ***Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, without the owner's consent and without lawful justification. The defendant's intent to exercise dominion or control over the goods which is in fact inconsistent with the plaintiff's rights establishes the tort.***

Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).

CONVERSION - ***Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification. The use or possession of the converted property need not pass to the converter, but may pass to a third person; the converter is liable if s/he interfered with the plaintiff's right to control the chattel, but the converter need not end up in possession or control of the converted chattel.***
– Money may be the subject of conversion, but employees, trade secrets and goodwill may not be.

Romy v. Burke, May Term, 2002, No. 01236 (January 20, 2005)

(Sheppard, J., 7 pages)

CONVERSION - ***Conversion is the deprivation of another's right of property in, or use or possession of, a chattel, or other interference therewith, without the owner's consent and without lawful justification. Money may be the subject of conversion, but failure to pay a debt is not conversion.***

> **Sigma Supplies Corp. v. Progressive Halcyon Insurance, August Term 2003, No. 02968 (May 21, 2004) (Sheppard, J.) Freedom Medical Supply, Inc. v. Nationwide Mutual Insurance Co., May Term, 2003, No. 03296 (May 21, 2004) (Sheppard, J.)**

CONVERSION - ***Allegation that Defendant Health Care Provider Refused to Cooperate in Returning Medical Equipment Supplied by Plaintiff Set Forth Viable Claim for Conversion Because Defendant's Intentional Non-cooperation and Effective Control of Medical Equipment that Could Not Be Removed Without Endangering the Lives of Patients Constitutes an Unreasonable Withholding of Possession***

> **Apria Healthcare, Inc. v. Tenet Healthsystem, Inc., February 2000, No. 289 (Herron, J.)(February 12, 2001 -10 pages)**

CONVERSION - ***Claim for Conversion Is Set Forth Where Plaintiff Originally Had Rights to Money that Defendant Wrongfully Appropriated After It Had Been Entrusted to Him - Conversion Claim Cannot Be Predicated on the Same Facts as a Contract Claim in a Complaint Where the Proper Remedy Lies in Breach of Contract -Where Physicians Allege that Insurers Failed to Pay for Services Rendered They Do Not Set Forth Claim for Conversion***

> **Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)**

CONVERSION - ***Plaintiff Fails to Set Forth Claim of Conversion Where Plaintiff's Rights Were Acquired through a Contract, Monies did not Originally Belong to Plaintiff and Proper Remedy Lies in Breach of Contract.***

> **Duane Morris v. Nand Todi, October 2001, No. 1980 (Cohen, J.) (September 3, 2002 - 10 pages)**

CONVERSION - ***Plaintiff Fails to Set Forth Claim of Conversion Against His Employer as to His Idea for Bell Atlantic Ready Where He Concedes That He Voluntarily Submitted This Idea Pursuant to a Solicitation to Help Employer Compete in Marketplace***

> **Bariarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)**

CONVERSION - *Claim for Conversion Is Set Forth Where Plaintiff Alleges that Defendant Failed to Pay for Goods Supplied to It*

> **Thermacon Enviro Systems, Inc. v. GMH Associates, March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages)**

CONVERSION - *Despite Designation of Count as "Constructive Trust," It Will Be Treated as a Claim for Conversion Due to the Facts Alleged - Two Year Statute of Limitations Applies to Bar Conversion Claim*

> **Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(February 4, 2002 -7 pages)**

CONVERSION - *Secured party may assert claim against third party for conversion of collateral even where borrower allegedly consented to conversion.*

> **Pennsylvania Business Bank v. Franklin Career Services, LLC et al., May 2002, No. 2507 (Cohen, J.) (December 31, 2002).**

CONVERSION - *Money constitutes a chattel that may be converted, but business goodwill and other intangibles do not unless they have been merged into a tangible document.*

> **Romy et al. v. Burke et al., May Term 2002, No. 1236 (Sheppard, J.) (May 2, 2003- 14 pages).**

CONVERSION – *An action against a Bank for conversion of funds, which funds had previously been assigned, cannot be maintained by the party who assigned the funds, in that that assignor is no longer the owner of the personalty (funds).*

> **Philadelphia Factors, Inc. v. The Working Data Group, Inc., *et al.* June Term, 2002, No 1726 (September 16, 2003) (Sheppard, J. – 5 pages). Superior Court Docket No 2508EDA2003**

CONVERSION – NEW YORK LAW - *Under New York law, conversion occurs when a defendant exercises unauthorized dominion over personal property in interference with a plaintiff's legal title or superior right of possession.*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

CORPORATION – AUTHORITY OF BOARD OF DIRECTORS - *Under*

Pennsylvania law, a board of directors has the authority over the business management and affairs of the corporation under 15 Pa.C.S.A. § 1721.

> **Lehigh Coal & Navigation Co. v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 3575 (*consolidated with* James J. Curran v. Coaldale Energy LLC and Coaldale Energy LLP, March Term, 2008, No. 4947) (September 10, 2008) (Sheppard, J., 10 pages)**

CORPORATE LIABILITY - ***Corporation Surviving a Merger Is Responsible for the Liabilities of Each of the Corporations So Merged and Consolidated - Corporations that Were Not Signatories of a Consulting Agreement May Not Be Held Liable Thereunder in the Absence of Allegations Sufficient to Pierce the Corporate Veil - Shareholder May Not Bring Action Against Individual Director Unless the Action is Brought as a Derivative Action on Behalf of the Corporation - Under Pennsylvania Law, Individual Corporate Officers May Not Be Held Liable in the Absence of Evidence of Particular Malfeasance***

> **First Union National Bank et al. v. Quality Carriers, Inc., April 2000, No. 2634 (Sheppard, J.)(October 10, 2000 - 49 pages)**

CORPORATE MEETING/NOTICE - ***Where Both Fifty Percent Shareholders Attended Corporate Meeting Together With Their Counsel, Any Objection as to Improper Notice Was Waived Pursuant to 15 Pa.C.S.A. Section 1705 and Relevant Precedent***

> **Liss v. Liss, June 2001, No. 2063 (Herron, J)(January 29, 2003 - 54 pages)**

CORPORATIONS – CHOICE OF LAW - ***A Pennsylvania court is empowered to dissolve a New Jersey corporation that is also a Pennsylvania domiciliary corporation, i.e. at least 60% of its outstanding shares are held by persons with addresses in Pennsylvania. However, the Pennsylvania court will apply New Jersey substantive law regarding the dissolution of corporations.***

> **Goldenberg v. Royal Petroleum Corp., September Term, 2003, No. 04168 (December 16, 2004) (Jones, J., - 5 pages)**

PIERCING THE CORPORATE VEIL- ***Plaintiff failed to plead conduct which the individual defendant allegedly engaged in that would bring her conduct within the parameters of a cause of action based on a theory of piercing the corporate veil such as undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs and the use of the corporate form to perpetuate a fraud.***

City of Philadelphia *et. al.* v. Human Services Consultants, II, Inc. *et. al.* , March Term 2003, No. 0950 (March 23, 2004)(Jones, J.).

PIERCING THE CORPORATE VEIL – ***When attempting to disregard corporate formalities, it is not necessary for plaintiff to set forth the evidence by which facts are to be proved, however, it is essential that the facts the pleader depends upon to show liability be averred. Court found that plaintiff failed to do so. Moreover, court found the fact that individual defendant may also own another company was immaterial to the issues presented, in that plaintiff failed to plead any actionable conduct by either individual or second company. As a result, plaintiff permitted to amend complaint to allege such facts.***

Kevin D. Flynn Development Corp. v. Corporate Express Office Products, Inc., et al., July Term 2005, No. 3523 (Sheppard, J.) (January 19, 2006 – 7 pages).

CORPORATE VEIL\PIERCING - ***Plaintiffs Have Not Alleged Sufficient Facts to Pierce the Corporate Veil Based on a Claim of Misleading Home Equity Loans Where the Identified Lender Was Another Entity ant the Complaint Fails to Allege that Defendant (1) Was Grossly Undercapitalized, (2) Failed to Adhere to Corporate Formalities, (3) Substantially Intermingled Personal and Corporate Affiars or (4) Used the Corporate Form to Perpetrate a Fraud***

Koch v. First Union Corp. et al., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)

CORPORATIONS – PIERCING CORPORATE VEIL - ***A corporation is to be treated as a separate and independent entity even if its stock is owned entirely by one person. This creates a strong presumption against piercing the corporate veil. A court will pierce the corporate veil only in limited circumstances, such as when the corporate form is used to defeat public convenience, justify wrong, protect fraud or defend crime, and only after considering such factors as undercapitalization, failure to adhere to corporate formalities, substantial intermingling of corporate and personal affairs, and use of the corporate form to perpetrate a fraud.***

Goldenberg v. Royal Petroleum Corp., September Term, 2003, No. 04168 (December 16, 2004) (Jones, J., - 5 pages)

PIERCING THE CORPORATE VEIL– ***Plaintiff failed to allege the special circumstances necessary to pierce the corporate veil. As such all claims alleged against Katz in his individual capacity in the amended complaint are dismissed.***

Tunnell-Spangler & Associates, Inc. v. Samuel P. Katz (A/K/A Sam Katz) and Entersport Capital Advisors, Inc., May Term 2003, No. 3030 (December 31, 2003) (Cohen).

CORPORATION\CONTRACTS - *Parent Corporation Is Not Liable for the Contractual Obligations of a Subsidiary Even If It Is A Wholly-Owned Subsidiary Absent Allegations That Would Compel Piercing Corporate Veil*

Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)

CORPORATION\CUSTODIAN - *Complaint Sets Forth Valid Claim for Appointment of Custodian Where It Alleges that Defendant is the Director in Control of Two Corporations, the Plaintiff Holds 50% of the Shares in those Corporations, and Defendant Has Caused the Corporations to Commit Various Illegal Acts toward Plaintiff as a Shareholder*

Baron v. Pritzker, Omicron Consulting, Inc. et al., August 2000, No. 1574 (Sheppard, J.)(March 6, 2001 - 27 pages)

CORPORATION, CLOSE\CUSTODIAN - A Custodian may Be Appointed for Closely Held Corporation When the Directors Have Acted Illegally, Oppressively or Fraudulently Toward One of More Holders of 5% of Its Outstanding Shares - U.S. Courts Have Taken 3 Approaches to Determine Whether a Minority Shareholder Is Being Oppressed - Although Pennsylvania Courts Have Generally Adopted the "Reasonable Expectations" Test to Define Oppression, They Have Not Addressed Oppression Within a Close Corporation - Precedent from New Jersey Provides Persuasive Guidance on Defining Oppression and Reasonable Expectations of Minority Shareholders in Close Corporations - Allegations that Individual Defendant Shareholders Excluded a Minority Shareholder from Management Decisions and Impeded His Ability to Obtain Corporate Financial and Other Information May Constitute Oppressive Behavior Within a Close Corporation that Would Be Grounds, If Proven, for the Appointment of A Custodian - Fraudulent or Illegal Behavior Is Distinguishable From Oppressive Behavior Directed Solely at the Shareholder's Investment in the Corporation

Borrello v. Borrello, April 2001, No. 1327 (Herron, J.)(August 27, 2001 - 23 pages)

CORPORATION, CLOSE/STANDING/SHAREHOLDER - *50% Shareholder Has Standing to Assert Direct Claims for Breach of Fiduciary Duty, Conversion and Civil Conspiracy Against Other 50% Shareholder Where Plaintiff Alleges A Wrongful Deprivation of His Right to Ownership and Other Corporate Benefits Through Defendant's Oppressive, Fraudulent and Conspiratorial Conduct*

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(March 22, 2002 - 31 pages)

CORPORATION/ELECTIONS - ***Where Corporate Board Acts Improperly By Moving Date of Annual Meeting to Perpetuate Its Own Control of the Corporation, Plaintiff Has Shown The Requisite Clear Right to Relief for a Preliminary Injunction - Injunctive Relief May Be Granted Where Corporation or Its Directors Interfere With the Fair Election of Officers - Interference With a Shareholder's Election Rights Constitutes Immediate and Irreparable Harm***

Jewelcor Management, Inc. v. Thistle Group Holdings, Co., March 2002, No. 2623 (Herron, J.)(March 26, 2002 - 16 pages)

CORPORATION/EQUITABLE RELIEF - Both ***Equitable and Statutory Relief Are Available For Claims Premised on Oppression by a Controlling Shareholder of a Closely-Held Corporation Where Complaint Alleges that Plaintiff/Shareholder Was Frozen Out of Management and His Compensation Cut While Corporate Funds Were Improperly Used for Defendant's Personal Expenses***

Baron v. Pritzker, Omicron Consulting et al., August 2000,No. 1574 (Sheppard, J.)(March 6, 2001 - 27 pages)

CORPORATION/FOREIGN/CERTIFICATE OF AUTHORITY - ***Discovery Is Ordered Where There Are Disputed Facts as to Whether Foreign Corporation Obtained a Certificate of Authority to Conduct Business in Pennsylvania that Is a Prerequisite for Litigating in Pennsylvania***

Worldwideweb Network Corp. v. Entrade, Inc. and Mark Santacrose, December 2001, No. 3839 (Herron, J.)(June 20, 2002 - 10 pages)

CORPORATION/TRANSFER RESTRICTIONS - ***Pursuant to 15 Pa.C.S.A. §1529(f) Oral First Option Agreement Concerning Sale of Corporate Shares Is Unenforceable Against Transferee Who Lacks Actual Knowledge of the Restriction at the Time of Transfer - To Be Enforceable Against a Transferee Without Actual Knowledge, A Transfer Restriction Must Be in Writing and Its Existence Noted Conspicuously on the Fact of the Security***

Pence v. Petty, December 2001, No. 593 (Herron, J.)(February 6, 2001 - 6 pages)

COSTS/VEXATIOUS CONDUCT - ***Plaintiff Who Obtained Injunction Ordering Repairs to Buildings Is Entitled to Counsel Fees and Costs as Sanction Where Defendants' Conduct Was Dilatory, Obdurate, Vexatious, Arbitrary and in Bad Faith in Defying Injunction by Failing to Begin Repairs and Obtaining Reconsideration of Order Based of Affidavit Falsely Averring that Compliance with the Order Was Not Possible***

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)

COUNTERCLAIM - Pennsylvania Rule of Civil Procedure 1031 Narrowly Restricts the Assertion of Counterclaims to Defendants

Legion Insurance Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(June 6, 2001 - 12 pages)(Non-defendant assignee of defendant's offensive claims but not his liabilities may not assert counterclaim; where defendant assigned his claims he has no claim to assert against plaintiff)

First Republic Bank v. Brand, August 2000, No. 147 (Sheppard, J.)(June 1, 2001 - 20 pages)(Employees who were not defendants may not assert counterclaim)

COURT ORDERS, CIVIL CONTEMPT

Trent Motel Associates, Inc. v. Bret Levy t/a Benny the Bums, September Term 2009 No. 794 (New, J.)(May 28, 2010, 6 pages).

IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING- ***Plaintiffs claim for breach of the covenant of good faith and fair dealing is dismissed since an independent cause of action for such a claim does not exist.***

Todi v. J&C Publishing, Inc., d/b/a Commercial Reality Review, Henry J. Strusberg and Strusberg & Fine, Inc., June Term, 2002, No. 2969 (July 18, 2003 - 13 pages) (Cohen, J).

COVENANT OF GOOD FAITH - ***There Is No Separate Claim for Breach of Covenant of Good Faith - Claim for Breach of Covenant of Good Faith Is Subsumed Within Breach of Contract Claim***

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)

COVENANT OF GOOD FAITH/PRELIMINARY INJUNCTION - Plaintiff Did Not Establish the Requisite Clear Right for Relief for a Preliminary Injunction Based on Breach of Covenant of Good Faith Because Plainitiff Seeks to Enjoin Defendant Bank From Disclosing Information to a Prospective Note Purchaser That Is Permitted Under the Relevant Agreement between the Plaintiff and Defendant - An Implied Covenant of Good Faith May Not Be Used to Imply Terms That Are Inconsistent With the Express Terms of the Contract -

Philadelphia Plaza - Phase II v. Bank of America National Trust and Savings Association, May 2002, No. 332 (Herron,

J.)(May 30, 2002 - 15 pages)

COVENANT OF GOOD FAITH/PRELIMINARY OBJECTION - *A Covenant of Good Faith Is Implied in Every Contract Including Those That Arise in a Creditor-Lender Relationship - The Covenant of Good Faith Does Not Override the Express Terms of the Contract But Instead Fills in Those Terms That Have Not Been Expressly Stated - Plaintiff Sets Forth Viable Claim Based on Allegations that Defendant Bank Breached the Covenant of Good Faith Implied in Its Agreement with Plaintiff When It Used the Term "Other Insurance" to Require the Purchase of Terrorism Insurance That Plaintiff Alleges Was Unavailable or Prohibitively Expensive*

Philadelphia Plaza - Phase II v. Bank of America National Trust and Savings Assoc., April 2002, No. 3745 (Herron,J.)(June 21, 2002 - 15 pages)

COVENANT NOT TO COMPETE - *Restrictive covenants are enforceable if they are incident to an employment relationship between the parties, the restrictions imposed by the covenant are reasonably necessary for the protection of the employer, and the restrictions imposed are reasonably limited in duration and geographic extent. Interests that can be protected through covenants include trade secrets, confidential information, good will, and unique or extraordinary skills.*

Brotherston Homecare, Inc. v. Davis, November Term, 2009, No. 03756 (December 17, 2009) (Bernstein, J. 4 pages).

COVENANT NOT TO COMPETE – INJUNCTION - *Where former employer showed that former employee's solicitation of clients would damage former employer's goodwill, injunction against solicitation was warranted.*

Brotherston Homecare, Inc. v. Davis, November Term, 2009, No. 03756 (December 17, 2009) (Bernstein, J. 4 pages).

COVENANT OF QUIET ENJOYMENT/INJUNCTION - Where Tenant Showed that Landlord Had Turned Off Water in Building So that City Would Shut Down Building and Force Tenant Out, the Tenant Was Entitled to a Preliminary Injunction Ordering the Landlord to Restore the Water and Remedy Other Violations of the City Code Such that the City Would Reopen the Building

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)

COVENANT OF QUIET ENJOYMENT/MITIGATION OF DAMAGES - Because Tenants Were Entitled to Specific Performance of the Implied and Express Covenants of Quiet Enjoyment in Their Lease, They Were Not Obliged to Mitigate Damages By Relocating to an Alternative Space that Cost Nearly Twice as Much as Their Leased Premises - Mitigation of

Damages Is Not a Defense to Equitable Enforcement of a Lease

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(October 2, 2001 - 9 pages)

CROSS CLAIMS/ADDITIONAL DEFENDANT - *Where a Defendant Joins an Additional Defendant, the Liability Must Be Premised on the Same Cause of Action Alleged by the Plaintiff in His Complaint - Where Plaintiff's Business Was Destroyed by Fire and He Brought Action Against His Landlord and Insurer for Breach of Fiduciary Duty and Bad Faith, the Landlord's Cross Claims Against the Insurer Are Dismissed Because the Alleged Liabilities Invoke Separate and Distinct Causes of Action - The Liability Asserted Against the Landlord For Failure to Replace and Repair the Building Arise from the Lease While the Claims Against the Insurer Arise from the Policy*

Rader v. Travelers Indemnity Co., March 2000, No. 1199 (Herron, J.)(January 17, 2002 - 8 pages)

CUSTODIAN/APPOINTMENT - *Custodian May Be Appointed in Closely Held Corporation Where Those in Control of the Corporation Have Acted Oppressively or Fraudulently*

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(March 22, 2002 - 31 pages)

- D -

DAMAGES - ***The interest that plaintiff claims it would have made on loans to third parties if it had not charged off portions of the loan it made to a third party is too uncertain, remote, and speculative and may not to be recoverable as damages for defendant accountant's alleged overstatement of the third party's assets on the financial statements.***

> **Firstrust Savings Bank v. Century Business Services, Inc., August Term, 2005, No. 04385 (July 6, 2007) (Bernstein, J., 7 pages).**

DAMAGES – ATTORNEY MALPRACTICE - ***Plaintiffs failed to show that their claimed damages resulted from, or were caused by, defendant attorneys' and insurance company's breaches of contract. The evidence established that plaintiffs, not defendants, caused plaintiffs' loss.***

> **Tower Investments, Inc. v. Rawle & Henderson LP, May Term, 2007, No. 03291 (June 8, 2009) (Bernstein, J., 6 pages).**

DAMAGES FOR BREACH

> **Mar-Dru, Inc. v. Hutamaki Food Services, Inc., May Term, 2005, No. 1476 (December 1, 2010 – 5 pages) (New, J.)**

DAMAGES; CONSTRUCTION DELAY DAMAGES; APPEAL; LEGAL MALPRACTICE

> **LVI Environmental Services, Inc. v. Duane Morrris, L.P., April Term, 2008, No. 00498 (May 10, 2010) (Sheppard, J., 6 pages)**

DAMAGES – CAUSATION - ***In order to recover damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss. Contractor failed to show that subcontractor caused contractor's increased costs where expert simply assigned percentage to subcontractor's work and multiplied that percentage by total damages suffered by contractor.***

> **Cornell & Co., Inc. v. PKF-MARK III, Inc., September Term, 2007, No. 00721 (June 30, 2009) New, J., 9 pages).**

DAMAGES - CONSEQUENTIAL - ***The additional, unreimbursed costs, increased overhead, interest, and attorneys' fees contractor claims as damages are all incidental and consequential to, and not the direct result of, subcontractor's alleged breach of the Subcontract because they do not relate directly to the subcontractor's work.***

Cornell & Co., Inc. v. PKF-MARK III, Inc., September Term, 2007, No. 00721 (June 30, 2009) New, J., 9 pages).

DAMAGES – FRAUD - ***In an action based on fraud, the measure of damages is 'actual loss', and not the benefit, or value, of that bargain. The victim is entitled to all pecuniary losses which result as a consequence of his reliance on the truth of the representations.***

Firstrust Savings Bank v. Century Business Services, Inc., August Term, 2005, No. 04385 (July 6, 2007) (Bernstein, J., 7 pages).

DAMAGES – NEGLIGENT MISREPRESENTATION - ***The damages recoverable for negligent misrepresentation are those necessary to compensate the plaintiff for the pecuniary loss to him of which the misrepresentation is a legal cause, including (a) the difference between the value of what he has received in the transaction and its purchase price or other value given for it; and (b) pecuniary loss suffered otherwise as a consequence of the plaintiff's reliance upon the misrepresentation. The damages recoverable for a negligent misrepresentation do not include the benefit of the plaintiff's contract with the defendant.***

Firstrust Savings Bank v. Century Business Services, Inc., August Term, 2005, No. 04385 (July 6, 2007) (Bernstein, J., 7 pages).

DAMAGES – LOST PROFITS - ***Lost profits are recoverable upon proper proof both in contract and in tort. The general rule of law applicable for loss of profits in both contract and tort actions allows such damages where (1) there is evidence to establish them with reasonable certainty, (2) there is evidence to show that they were the proximate consequence of the wrong. Lost income or profit is recoverable in an action for the destruction or interruption of an established business whenever such damages are not merely speculative or conjectural.***

Firstrust Savings Bank v. Century Business Services, Inc., August Term, 2005, No. 04385 (July 6, 2007) (Bernstein, J., 7 pages).

DAMAGES – ATTORNEYS' FEES - ***The American Rule states that a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception. However, this rule does not bar a client from seeking to recover as damages the attorneys' fees that it incurred in prior litigation as a direct result of its former attorney's breach of fiduciary duty.***

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 3827 (March 26, 2007 – 10 Pages) (Abramson, J.).

DAMAGES - *Plaintiff's Recovery on Equitable Claims Limited By Portion of Judgment Owed by Entry Entirely Owned By Plaintiff - Otherwise Plaintiff Would Make Profit to Which It Was Not Entitled.*

> **Resource Properties XLIV v. PAID et al., November 1999, No. 1265 and Resource Properties XLIV v. Growth Properties, Ltd., et al., March 2000, No. 3750 (Sheppard, J.)(August 2, 2002- 23 pages)**

DAMAGES/CONSEQUENTIAL - *Allegations in Plaintiff Contractor's Complaint Setting Forth Sums Due for Additional Work, Overhead, Lost Bonding Capacity and Profits Are Sufficient to Establish Claim for Consequential Damages*

> **JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)**

DAMAGES – FRAUD – *Under Pennsylvania law, the proper measure of damages in an action for fraud where the party does not seek to rescind the contract is the difference in value between the real, or market, value of the property at the time of the transaction and the higher, or fictitious, value which the buyer was induced to pay for it. Plaintiffs were awarded damages where plaintiffs' expert concluded that a well informed purchaser aware of defendants' misrepresentations would have paid substantially less than what plaintiffs paid.*

> **Academy Plaza, LLC I, Port Richmond LLC, and Washington Center LLC v. Bryant Asset Management, a/k/a Bryant Development Corp., May Term, 2002, No. 2774 Superior Court Docket Nos. 3537 and 3362 EDA 2006 (May 21, 2007 – 18 pages)(Sheppard J.).**

DAMAGES/LOST PROFITS - Plaintiffs' Claim for Lost Profits Should Not Be Dismissed Where Expert Reports Are Presented to Support This Claim

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)**

DAMAGES, PUNITIVE – *Punitive damages may be appropriate where an out-of-state defendant reaches into Pennsylvania and, with evil motive or reckless indifference to the rights of an in-state company, destroys the in-state company's business by diverting its assets out of state and appropriating its products.*

> **Fibonacci Group, Inc. v. Finkelstein & Partners, et al., January Term 2005, No. 001399 (Abramson, J.)(June 30, 2005 – 12 pages).**

DEAD MAN'S STATUTE *In order to successfully challenge the*

competency of a witness under the Dead Man's Statute, a party must show: (1) the deceased must have had an interest in the matter at issue, i.e., an interest in the immediate result of the suit; (2) the interest of the witness must be adverse; and, (3) a right of the deceased must have passed to a party of record who represents the deceased's interest.

The protections of the Dead Man's Statute will be waived if decedent before he died or a decedent's representative has required an adverse party to be deposed or to answer interrogatories.

A party cannot invoke the protections of the Dead Man's Statute in a legal action after they have conducted discovery in an identical action, against identical parties, in a different jurisdiction.

Segal, Wolf, Berk, Gaines & Liss, P.A. v. Arleen Wolf, *et al*, December Term, 2008, No. 4597 (August 25, 2009)(Sheppard, Jr., J., 7 pages).

DEAD PARTY - *A dead man cannot be a party to an action, and any such attempted proceeding is completely void and of no effect.*

Cassandra Hayes v. Manayunk Brewing Co., Philadelphia Beer Works, Inc., and Harry Renner, IV, August Term 2005, No. 2880 (Abramson, J.) (April 21, 2006 - 9 pages).

DECLARATORY JUDGMENT—*Interpretation of an insurance policy is a question of law.*

The Cove, Inc. v. Underwriters at Lloyd's, London et al., June Term 2003, No. 3662 (Jones, J.) (August 23, 2004 – 2 pages).

DECLARATORY JUDGMENT/INSURANCE COVERAGE- *Where the defendant does not fall within the definition of an uninsured pedestrian as defined under the terms of the policy, the defendant is not eligible for uninsured motorist benefits and a judgment on the pleadings is granted.*

AIU Insurance Company v. Barxha et. al., March Term 2004, No. 4507 (August 24, 2004 – 3 pages)(Sheppard, J.)

DECLARATORY JUDGMENT ACT - Complaint by Condominium Owner Set Forth an "Actual Controversy" Requisite for the Court's Exercise of Jurisdiction Where It Sought Declaration that Council Election Was Null and Void by Challenging the Validity of the Code and Bylaws as well as the Legitimacy of the Residential Manager

Pantelidis v. Barclay Condominium Association, August 200, No. 3819 (Herron, J.)(December 8, 2000 - 5 pages)

DECLARATORY JUDGMENT ACT - *Complaint Established the Requisite "Actual Controversy" for the Exercise of Jurisdiction Where It Alleges that Defendant Breached a Contract Even Where the Parties Had Terminated that Contract*

> **Greater Philadelphia Health Services II Corp. v. Complete Care Services, L.P., June 2000, No. 2387 (Herron, J.)(November 20, 2000 - 7 pages)**

DECLARATORY JUDGMENT ACTION - *Where Plaintiffs Seek a Declaration as to Future Damages for Medical Services to Be Rendered in the Future, Demurrer to Declaratory Judgment Action Is Sustained - Attorney Fees May Not Be Recovered Under Declaratory Judgment Act*

> **Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)**

DECLARATORY JUDGMENT ACTION - *Material Issues of Fact As to When the Condition of a Patient Seeking Emergency Medical Treatment Has Stabilized Preclude Granting Summary Judgment on Hospital's Request for a Declaratory Judgment as to (1) Whether Hospital or Health Maintenance Organization Must Obtain Informed Consent Before Transfers to Another Hospital and (2) Whether HMO Must Pay Hospital for Medically Necessary Services Whether the Services Are Rendered Before or After Stabilization*

> **Temple University v. Americhoice, January 2001, No. 2283 (Herron, J.)(September 17, 2001 - 11 pages)**

DECLARATORY JUDGMENT ACT /REAL PARTY IN INTEREST - *Secured party could not bring action for declaratory judgment that contract between borrower and purchaser of borrower's assets was in full force and effect where secured party did not allege that it was a party, a third party beneficiary, an assignee, or a successor in interest under the contract.*

> **Pennsylvania Business Bank v. Franklin Career Services, LLC et al.,May 2002, No. 2507 (Cohen, J.) (December 31, 2002).**

DEED IN LIEU OF FORECLOSURE – *A valid deed may be signed, acknowledged and delivered with the name of the grantee left blank provided there is authority, oral or written, express or implied in someone to fill in the blank.*

> **Factor, et al. v. Alliance Bank, et al. , March Term 2004, No. 3542 (Abramson, J.)(March 29, 2005 - 7 pages).**

DEEPENING INSOLVENCY - *Deepening insolvency is not recognized as a cause of action in Delaware or Pennsylvania. Deepening insolvency may be a cognizable harm justifying the court's*

exercise of equitable powers while there is still time to limit the natural and inevitable consequences of the continued deepening. However, once the ultimate harm from an unrestrained deepening insolvency has been suffered and bankruptcy has occurred, traditional claims for fraud and breach of fiduciary duty, which have been carefully shaped by generations of experience, are sufficient to recover for any wrongdoing.

> **Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).**

DE FACTO CORPORATION – ***There are three necessary requirements for an organization to be classified as a de facto corporation: First, there must be a law or charter under which an organization might be effected. Second, there must be an attempt to organize which falls so far short of the requirements of the law or charter as to be ineffectual. Third, there must be an assumption and exercise of corporate powers, notwithstanding the failure to comply with the law or charter.***
– Although it appears that no recent Pennsylvania case has found that an entity has qualified as a de facto corporation, the de facto corporation doctrine still seems to remain a viable concept in Pennsylvania.

> **Florence Furman and Leroy Furman v. Glenfield Capital Corp., August Term 2004, No. 3229, consolidated with Glenfield Capital Corp. v. Latanya Furman and Florence Furman, October Term 2004, No. 3064, (Abramson, J.) (January 12, 2006 - 11 pages).**

DEFAMATION – BUSINESS CONDUCT - ***A communication which ascribes to another conduct, character or a condition that would adversely affect his fitness for the proper conduct of his business, trade, or profession, is defamatory per se. Statements to the effect that an attorney has committed improper, illegal actions within the context of his practice, such as that he concealed information from his client, would tend to impugn his integrity and thereby blacken his business reputation.***

> **Bochetto v. Gibson, April Term, 2000, No. 03732 (July 27, 2006 – 8 pages) (Sheppard, J.)**

DEFAMATION – QUALIFIED PRIVILEGE – ABUSE - ***An attorney may claim qualified immunity from prosecution for transmitting a complaint in a legal action to a newspaper reporter. However, if he knew the allegations of the complaint to be false or he acted in reckless disregard of the truth of those allegations, then he abused his conditional privilege to disclose such allegations, and he cannot claim immunity. Furthermore, if his defamatory communications to the press were made for an improper or malicious motive, the qualified privilege is lost.***

Bochetto v. Gibson, April Term, 2000, No. 03732 (July 27, 2006 – 8 pages) (Sheppard, J.)

DEFAMATION – PUBLIC FIGURE - ***Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. An attorney who engaged in some political activities was not an all purpose public figure.***

Bochetto v. Gibson, April Term, 2000, No. 03732 (July 27, 2006 – 8 pages) (Sheppard, J.)

DEFAMATION – LIMITED PUBLIC FIGURE - ***An individual can become a public figure for a limited range of issues by voluntarily injecting himself or becoming drawn into a particular public controversy. In determining whether a plaintiff in a defamation action has become a limited purpose public figure, a court should reduce the public figure question to a more meaningful context by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation. A malpractice action against an attorney does not rise to the level of a public controversy, and it does not make the attorney a public figure, so he is a private person for purposes of a related defamation action.***

Bochetto v. Gibson, April Term, 2000, No. 03732 (July 27, 2006 – 8 pages) (Sheppard, J.).

DEFAMATION – ***In an action for defamation, the plaintiff has the burden of proving: 1) a false and defamatory statement concerning another; 2) an unprivileged publication to a third party; 3) fault amounting at least to negligence on the part of the publisher; and 4) either actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. Whether a challenged statement is capable of defamatory meaning is a question of law for the court to determine in the first instance. Certain communications, though undoubtedly offensive to the subject, do not rise to the level of defamation. Honest utterances reflecting personal belief and opinion are not actionable. Where a challenged statement is an expression of opinion, it is actionable only if the plaintiff can demonstrate that the communicated opinion may reasonably be understood to imply the existence of undisclosed defamatory facts justifying the opinion.***

Phillips v. Selig, July Term 2000, No. 01550 (Sheppard, J.)(October 12, 2006 – 11 pages).

DEFAMATION– ***Mere Outburst of insulting words not actionable as defamation – no business loss resulted.***

> **Paul A. Czech, individually and d/b/a YB Entertainment Group v. Geoffrey Gordon, Electric Factory Entertainment, Inc., *et al.*, October Term 2002, No. 0148 (Cohen, J.) (September 27, 2004 – 13 pages)**

DEFAMATION – OPINION - ***Plaintiff's assertion in letter to third party that defendant has a conflict of interest and a bias is merely a statement of opinion. An opinion is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion. Since the facts on which the opinion is based are set forth in the letter and are not themselves defamatory, plaintiff's opinion based on those facts, while possibly erroneous, is not libelous nor disparaging.***

> **Polydyne v. City of Philadelphia, February Term, 2001, No. 3678 (June 7, 2005) (Abramson, J., 6 pages).**

DEFAMATION – ELEMENTS - ***Both the causes of action for defamation and injurious falsehood require a publication that is not merely false; it must also be "defamatory" or "disparaging." Holding plaintiff-attorney out as member of defendant law firm after he was terminated is not sufficiently negative to be actionable under these two tort theories.***

> **Raskin, Liss & Franciosi, P.C. v. Franciosi, December Term, 2004, No. 02364 (April 6, 2005) (Abramson, J., 4 pages).**

DEFAMATION - ***Allegation that Defendant Called Individual Plaintiff "A Liar, a Thief, and a Crook" As a Matter of Law Is Capable of Setting Forth a Claim for Defamation - Pennsylvania Law Permits a Corporation to Bring an Action for Defamation***

> **Fennell v. Van Cleef, et al., May 2000, No. 2754 (Herron, J.)(September 25, 2000 - 6 pages)**

DEFAMATION - ***To Set Forth Valid Claim for Defamation, Complaint Must Specifically Identify the Allegedly Defamatory Statements - Punitive Damages May Be Claimed For Defamation When Complaint Alleges that Defendant Acted with Actual Malice***

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)**

DEFAMATION - ***Corporation May Be Either A Private or Public Figure for Purposes of Defamation Action - Corporation May Not Be Deemed a Public Figure Merely Because It Received Federal Research Grants or Because the Effectiveness of Its Drug Product Has Been Subjected to***

Peer Review Articles - Controversy Regarding the Value of Plaintiff's Stock and Effectiveness of Its Drug Is not A Public Controversy But May Have Been Created by Defendants' Publications - Under Pennsylvania Law, Where Corporation Is A Private Figure Plaintiff Seeking to Recover For Harm Inflicted as a Result of Publication of Defamatory Statements, Plaintiff Must Prove that the Defamatory Matter Was Published With "Want of Reasonable Care and Diligence to Ascertain the Truth or With Negligence"

Hemispherz Biopharma Inc. v. Asensio, July 2000, No. 3970(Sheppard,J.)(September 6, 2001 - 17 pages)

DEFAMATION - *Plaintiff Attorney Sets Forth Viable Defamation Claim Based on Allegation that Defendant Publicly Attacked Him as Incompetent, Dishonest and Unethical Because Such Statements Attack Plaintiff's Competence in the Legal Profession as well as His Honesty*

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

DEFAMATION - *Contractor Sets Forth Claim for Defamation Where It Alleges that Subcontractor Disseminated a False Memorandum Stating That the Contractor Over-billed for Services Performed, Thereby Damaging the Contractor's Reputation and Exposing It to Economic Harm*

Middletown Carpentry Inc, v. C. Arena, June 2001, No. 2698 (Sheppard, J.)(November 27, 2001 -12 pages)

DEFAMATION – FAILURE TO STATE A CLAIM - *A complaint for defamation must specify the precise words that the plaintiff deems defamatory and may not rely solely on conclusory statements as to the effect that the alleged defamatory words had on those who read or heard them.*

Carescience v. Panto, September Term 2002, No. 04583 (Jones, J.) (September 23, 2003).

DEFAMATION/JUDICIAL PRIVILEGE/DAMAGES - *Defamation Claim Based on the Faxing of a Copy of A Complaint to the Legal Intelligencer Cannot Be Maintained Because the Statements in the Complaint and the Activity of Faxing Them Fall Within the Scope of Judicial Privilege - Statements Made In the Regular Course of Judicial Proceedings Material to the Advancement of a Party's Interest Fall Within the Scope of Judicial Privilege and Cannot Serve as the Basis of Claims of Defamation, Intentional Interference with Contract or Commercial Disparagement - Generalized Statements About An Attorney's Duty to Provide Client With Adequate Information Are Not Defamatory - Defamation Claim Cannot Be Sustatined Where No*

Damages of Any Kind Are Alleged

Bocchetto v. Gibson, April 2000, No. 3722 Sheppard,J.)(March 13, 2002 - 19 pages)

DEFAULT

Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 10, 2010 – 10 pages) (New, J.)

DEFAULT; PARTNERSHIP; LENDER LIABILITY; MORTGAGE LOAN

Goldstein v. Stonebridge Bank, September Term, 2009, No. 2570 (June 30, 2010) (Bernstein, J., 3 pages)

DEFAULT JUDGMENT – PETITION TO OPEN – GENERAL DENIALS – EQUITABLE ESTOPPEL –

Third Federal Bank v. C & J Properties, Inc., *et al.*, March Term, 2011, No. 2806 (New, J.) (July 11, 2011 – 3 pages)

DEFAULT JUDGMENT – PETITION TO OPEN - *A petition to open a judgment is addressed to the equitable powers of the court and is a matter of judicial discretion. The court will only exercise this discretion when (1) the petition has been promptly filed; (2) a meritorious defense can be shown; and (3) the failure to appear can be excused. Petition to Open was denied where defendants filed their Petition a year and a half after the default judgment was entered and after notice of the judgment was sent to defendants at an address they admit was proper.*

-Docket entries constitute proof that the notices were properly mailed, so the presumption that defendants received them is established. Where defendants simply deny that they received two of the court's notices, even though they admit the notices were sent to a proper address, the presumption that defendants received the notices is not overcome by such uncorroborated testimony. Defendants are presumed to have received the notice of default judgment and notices of subsequent orders and judgments, so defendants' Petition to Open Default Judgment, filed months and even years after receipt of such notices, was not promptly filed.

Mills v. Cuccinotti, December Term, 2004, No. 03189 (September 20, 2007) (Bernstein, J., 5 pages)

DEFAULT JUDGMENT – *Where a plaintiff entered a default judgment without giving sufficient notice to the defendant of its intention to do so, the defendant could reopen the default judgment against him.*

– A default judgment was reopened where the defendant

believed in good faith that the plaintiff planned to file an amended complaint and consequently did not defend the first complaint, because the failure to defend constituted an oversight on the part of the defendant, not a deliberate decision not to defend.

> **TTAP Investment Co. v. Mark Bojanowski, et al., February Term 2004, No. 1209 (Sheppard, J.)(July 7, 2005 – 6 pages).**

DEFERENCE TO FEDERAL COURT - *Pennsylvania state trial court would not defer to a federal district court in Massachusetts on the issue of whether to affirm or vacate an arbitration award entered by the three arbitrators. Pennsylvania court had previously ruled that the parties chose their arbitrators in a timely fashion, so it had already addressed the primary issue raised in the motions before the federal court. It was a more efficient use of federal and state judicial resources for the Pennsylvania court to make its prior ruling final and subject to appeal than for a party to attempt to obtain inconsistent rulings from the Pennsylvania court and a federal court on the same issue.*

> **OneBeacon Insurance Group, Inc. v. Liberty Mut. Ins. Co., August Term, 2004, No. 02670 (March 11, 2008) (Abramson, J., 5 pages).**

DEFINITION OF "TRADE SECRET" UNDER THE UNIFORM TRADE SECRETS ACT – *An educational program, including its curriculum, does not qualify as a trade secret under the Uniform Trade Secrets Act because it has been intentionally placed into the public domain, thus is generally known and easily accessible by proper means.*

> **Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages)(Sheppard, J.).**

DEMURRER - *Where Complaint Alleges that Letter Acknowledged Existence of 5 Year Insurance Contract and that Defendant Orally Promised to Extend It on the Same Terms, Plaintiff Set Forth Viable Claim for Breach of Contract to Sell Policies On the Same Terms for 5 to 6 Consecutive Years - Viable Promissory Estoppel Claim Is Presented by Allegations that Plaintiff Relied on Insurer's Promises And Passed Up Opportunities to Purchase Insurance Policies From Other Insurance Companies - Viable Claim for Specific Performance Is Presented by Allegations That 6 Year Insurance Contracts Are Irreplaceable*

> ***Brickman Group, Ltd. v. CGU Insurance Co., July 2000, No. 909 (Herron, J.)(January 8, 2000 - 22 pages)***

DEMURRER - *A Demurrer Tests the Legal Sufficiency of a Complaint - A Demurrer Admits All Well-Pleaded Material Facts Set Forth in the*

Pleadings as well as Reasonable Inferences

Hydrair v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(July 27, 2000 - 19 pages)

Abrams v. Toyota Motor Credit Corp., April 2001, No. 503 (Herron, J.)(December 5, 2001 -23 pages)

DEMURRER - *As a General Rule, a Demurrer Cannot Aver the Existence of Facts Not Apparent From the Face of the Challenged Pleading - As a Limited Exception to this Rule, Where Plaintiff Avers the Existence of a Written Agreement and Relies Upon It To Establish His Cause of Action, the Defendant May Properly Annex and Reference That Agreement Without Creating a Speaking Demurrer*

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)

DEMURRER - *Broker's Complaint Seeking Commission Is Dismissed Because Under the Newly Amended Real Estate Licensing and Registration Act a Broker Agreement Must Be in Writing Or Include a Written Memorandum of the Agreement's Terms*

Roddy, Inc. v. Thackray Crane Rental, Inc., May 2001, No. 1566 (Sheppard, J.)(September 20, 2001 - 10 pages)

DEMURRER - While a Complaint May Set Forth Allegations of Facts, a Court May Disregard the Alleged Legal Effect of the Underlying Events

Poeta v. Jaffe, November 2000, No. 1357 (Sheppard, J.)(October 2, 2001 - 10 pages)

DEMURRER - *Demurrer Seeking Dismissal of Entire Complaint Is Denied Where It Fails to Provide Specific Reasons for Dismissal*

Flynn v. Peerless Door & Glass, Inc., November 2001, No. 830 (Sheppard, J.)(May 15, 2002 -7 pages)

DEMURRER/MONEY DAMAGES - *Plaintiff's Alternative Claim for Monetary Relief from Defendant Second Mortgagee Is Not Sustainable Where Plaintiff Released Its Mortgages upon Presentation of Allegedly Fraudulent Money Orders by Defendant Mortgagor and Defendant Second Mortgagee Did Not Cause Damages - Plaintiff May Seek to Reinstate its First Priority Mortgage Against Second Mortgagee.*

IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)

DEMURRER/MISTAKE - *Objection that Plaintiff's Claim Should Be Dismissed Because Plaintiff Made Mistake or Was Negligent Raises*

Questions of Fact and Must Be Overruled.

IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)

DEMURRER/IMPROPER JOINDER - *Plaintiff May Amend to Add New Defendant upon Discovery of Facts Implicating Additional Defendant Where Such Amendment Would Not Prejudice the Rights of Existing Parties.*

IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)

DERIVATIVE ACTIONS – SETTLEMENT - *A derivative action shall not be dismissed or compromised without the approval of the court. The court is responsible for determining whether the proposed settlement is fair and reasonable and beneficial to the corporation. The standards of class action settlements have been applied, although perhaps with somewhat less rigor, in the settlement of shareholder derivative suits.*

- The proponents of a derivative action settlement have the burden of proving that (1) the settlement is not collusive, but was reached after arm's length negotiation; (2) the proponents are counsel experienced in similar cases; (3) there has been sufficient discovery to enable counsel to act intelligently; and (4) the number of objectors or their relative interest is small.

- The stage of the litigation at which settlement occurs is an important consideration in determining whether to approve settlement. On the one hand, settlement late in the day means only the costs of trial and appeal are saved. On the other hand, completed discovery means the parties are more likely to form an accurate, and thus more convergent, estimate of the likely outcome of the case and potential damages. Thus, post-discovery settlements are more likely to reflect the true value of the claim and be fair.

Treasurer of the State of Connecticut v. Ballard Spahr Andrews & Ingersoll, LLP, December Term, 2003 No. 01796 (March 2, 2004 – 9 pages) (Cohen, J.)

DERIVATIVE ACTION - *Action Will Not Be Treated As A Derivative Action Where the Name of the Plaintiff Set Forth in the Capition is an Individual and the Count IV in Question Is Presented as a Claim for a Constructive Trust on Behalf of that Individual - Claim Desingated as "Constructive Trust" Based on the Facts Alleged Actually Sets Forth a Claim for Conversion - Two Year Statute of Limitations Applies to Conversion Claim*

Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(February

4, 2002 - 7 pages)

DETRIMENTAL RELIANCE - *Demurrer to Claim for Detrimental Reliance Is Overruled Because Detrimental Reliance Is In Essence Another Name for a Claim of Promissory Estoppel*

Thermacon Enviro Systems, Inc. v. GMH Associates, March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages)

DISCOVERY – *Pursuant to Pa.R.C.P. 4006 (Answers to Written Interrogatories by a Party), the answering party shall serve a copy of the answers, and objections if any, within thirty days after the service of the interrogatories.*

– Pursuant to Pa.R.C.P. 4009.12 (Answer to Request Upon a Party for Production of Documents and Things), the party upon whom the request is served shall within thirty days after the service of the request…serve an answer including objections to each numbered paragraph in the request.

– While it is true that the failure to file** objections **within the thirty-day time period does not automatically** waive **the right to object, the length of the delay and the reasons for the delay are factors to be considered by the court when a discovery rule has been violated.

– The pendency of preliminary objections does serve as a de facto or self-awarded stay of discovery.

Albert A. Ciardi, III, et al. v. Janssen & Keenan, P.C., et al., December Term 2005, No. 2175, (Abramson, J.) (June 27, 2006 - 4 pages).

DISCOVERY - *Motion to Compel Production of Ballots Cast in Election of Condominium Council is Granted Under Pa.R.C.P.4003.1(a) as well as Relevant Statutes and Precedent - Under Pa.C.S. §5508, a Member of a Nonprofit Corporation Has the Right to Inspect Records of Proceedings of the Members For Any Proper Purpose - Under 68 Pa.C.S. §3316 of the Uniform Condominium Act, Records of the Condominium Shall Be Made Reasonably Available for Examination by Any Unit Owner*

Pantelidis v. The Barclay Condominium Association, August 2000,No. 3819 (Herron, J.)(January 18, 2000 - 4 pages)

DISCOVERY/DEPOSITION/COACHING– *Where the record demonstrates a reasonable suspicion that during an off the record conversation between an attorney and client at a deposition, the deponent client was caused to change his testimony concerning a material issue in a case, an interrogating attorney may inquire into the subject matter of the conversation between attorney and client.*

- A defendant should be permitted to reopen a deposition to ascertain whether any witness coaching occurred in order to avoid tainting or obstructing the administration of justice.

AmerisourceBergen v. Curascript, July Term 2006 No. 2272 (April 17, 2007 – 11 pages) (Abramson, J,).

DISCOVERY / PRIVILEGED DOCUMENTS - ***An attorney who inadvertently receives confidential or privileged documents must return the documents because that attorney has ethical obligations that may surpass the limitations implicated by the attorney-client privilege and that apply regardless of whether the documents retain their privileged status - To determine whether an attorney who inadvertently receives confidential or privileged documents may not make use of the information discovered in those documents, a court considers the reasonableness of the precautions taken to prevent disclosure, the inadvertence, extent and number of disclosures, the steps taken after learning of the disclosure and the time frame in which those steps were taken, and issues of fairness and reasonableness, including the utility of extending the attorney-client privilege and the prejudice the receiving party would suffer.***

Herman Goldner Company, Inc. v. Cimco Lewis Industries, March 2001, No. 3501 (Herron, J.) (July 19, 2002 - 10 pages)

DISCOVERY,CLASS ACTION,CODE OF PROFESSIONAL CONDUCT--*Discovery Motion for Leave to Interview and Obtain Affidavit Testimony from Putative Class Members is Denied. Under Pennsylvania Law, Putative Class Members are Parties to an Action Until the Court Declines to Certify the Action. Putative Class Members are entitled to the Protections of Rule 4.2 of the Pennsylvania Rules of Professional Conduct. Defendant may not Engage in ex parte Communications with Putative Class Members and must adhere to the Rules of Discovery.*

Michelle Braun, Individually and on behalf of all other similarly situated v. Wal-Mart Stores, Inc. C.C.P. 0203-3127 (Sheppard, J.) (January 15, 2003 - 6 pages).

DISCOVERY/ REINSURANCE INFORMATION– ***Reinsurance agreements and communications between a reinsurer and an insurer is discoverable as the communications may lead to evidence concerning the true reasonable basis for denying coverage.***

Executive Risk v. Cigna, November 2004 No. 1495 (August 18, 2006 – 18 pages) (Bernstein, J.).

DISCOVERY/ VALUATION– ***Reserve information is discoverable in a bad faith action if the bad faith claim is based upon an insurer's failure to settle, disputed issue of value or whether the insurer made a reasonable offer to settle. However, where***

the bad faith claim is exclusively grounded in a denial coverage based on policy terms reserve information is neither relevant nor reasonably calculated to lead to the discovery of admissible evidence.

Executive Risk v. Cigna, November 2004 No. 1495 (August 18, 2006 – 18 pages) (Bernstein, J.).

DISCOVERY/JOINT DEFENSE PRIVILEGE- *A joint defense agreement existed between Executive Risk and the other insurers and therefore the attorney-client privilege and the work product doctrine are applicable to all communications and documents exchanged between Executive Risk and the other insurers up until the termination of the joint defense agreement.*

Executive Risk v. Cigna, November 2004 No. 1495 (August 18, 2006 – 18 pages) (Bernstein, J.).

DISPUTED PARTNERSHIP –

Mohl v. Key Sportz-Wear, *et al.*, October Term, 2003, No. 2127 Findings of Fact, Discussion and Conclusion of Law Sur Bench Trial (September 10, 2008 – 10 pages) (Sheppard, J.)

MOTION TO DISQUALIFY COUNSEL:

"[A] lawyer may not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if… [t]he representation of one client will be directly adverse to another client." Pa. R.P.C. 1.7(a)(1).

[A]bsent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even if the matters are wholly unrelated. Pa. R.P.C. 1.7(a) comment 6.

"A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives information." Pa. R.P.C. 1.9(a).

"Matters are substantially related … if they involve the same transaction or legal dispute." Pa. R.C.P. 1.9, comment 3.

Eun Y. Woo v. Eun Ae Oh *et al.* v. V. Moon Ahn, Esquire, October Term, 2010, No. 02633, (New, J.) (October 17, 2011- 5 pages).

MOTION TO DISQUALIFY COUNSEL/CONCURRENT CONFLICT OF INTEREST- *The test of whether an attorney has a conflicting interest so as to preclude his representation of a party is not the actuality of conflict but the probability that a conflict may arise.*

-Where counsel is retained to represent a joint venture in a state court action against one of the members and is also retained to represent some of the members in a federal court action against some of the members, a concurrent conflict of interest does not exist where the interests are not directly adverse.

Angelo v. Global Energy Management et. al., February Term 2007 No. 2906 (October 9, 2007, 6 pages)(Bernstein, J.).

MOTION TO DISQUALIFY COUNSEL/EFFECTIVENESS OF SCREEN/PROMPT NOTICE- ***A law firm fails to comply with the requirements of Rule of Professional Conduct 1.10(b) when the firm with whom a lawyer becomes associated represents a person in the same matter in which the firm with whom the lawyer was associated represents a client with materially adverse interest and fails to provide prompt written notice to the former client that the lawyer has joined the firm.***

Effectiveness of Screen/Sanction- ***The absence of a strong firm policy of termination or a disciplinary proceeding for violators of a screen leave a client vulnerable to potential disclosures of confidential information and constitutes an ineffective screen.***

Royal Bank of Pennsylvania v. Walnut Square Partners, March 2004 No. 7356 (April 21, 2006 – 3 pages)(Abramson, J.) Superior Court Docket No. 695 EDA 2006.

MOTION TO DISQUALIFY COUNSEL/EFFECTIVENESS OF SCREEN/PROMPT NOTICE- ***A law firm fails to comply with the requirements of Rule of Professional Conduct 1.10(b) when the firm with whom a lawyer becomes associated represents a person in the same matter in which the firm with whom the lawyer was associated represents a client with materially adverse interest and fails to provide prompt written notice to the former client that the lawyer has joined the firm.***

Screen/Sanction- ***The absence of a strong firm policy of termination or a disciplinary proceeding for violators of a screen leave a client vulnerable to potential disclosures of confidential information and constitutes an ineffective screen.***

Royal Bank of Pennsylvania v. Walnut Square Partners, March 2004 No. 7356 (March 7, 2006 – 8 pages)(Abramson, J.).

DISTRIBUTION; DISTRIBUTION; CLAIMS; CONTRACT INTERPRETATION-

GE Capital Business Asset Corporation v. R3 Foods Services, Inc., August Term 2009 No. 1661, April 20, 2010 (Bernstein, J.)(5 pages).

DURESS – ELEMENTS - ***The important elements in the applicability***

of the doctrine of economic duress or business necessity are that (1) there exists such pressure of circumstances which compels the injured party to involuntarily or against his will execute an agreement which results in economic loss, and (2) the injured party does not have an immediate legal remedy. Another essential element is that the party against whom the defense of duress is asserted must have placed the contracting party in the position which eliminated the party's exercise of free will. Duress will not be found where the complaining party caused his own pressure of circumstances.

DURESS – RATIFICATION - ***Ratification results if a party who executed a contract under duress accepts the benefits flowing from it, or remains silent, or acquiesces in the contract for any considerable length of time after the party has the opportunity to annul or avoid the contract.***

> **Kaplan v. Miller, March Term, 2004, No. 02783 (August 12, 2005) (Abramson, J., 7 pages)**

DUTY OF CARE – ***A sub-subcontractor who claimed that its general contractor and others owed it a duty of care to complete their construction work in a timely manner could not maintain the claim, because to recover for a duty of care, the duty of care must be a widely-recognized legal duty, and there is no legal duty to complete construction work in a timely manner.***

> **Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).**

DUTY TO DEFEND. - ***An insurer has no duty to defend an insured if the underlying complaint contains allegations excluded from coverage.***

> **12th Street Gym, Inc. v. Philadelphia Indemnity Insurance Company, July Term 2005, No. 3393 (July 25, 2006 – 7 pages) Sheppard, J.) Superior Court Docket No. 1740EDA 2006**

DUTY TO DEFEND - ***Under the terms of the parties' contract, defendant's duty to defend plaintiff is contingent upon its first having a duty to indemnify plaintiff. Where the duty to indemnify is disputed and is contingent upon which party is found at fault, the duty to defend is likewise contingent upon who is found to be responsible. At the point when liability is established, there will no longer be a need for a defense, but defendant may be compelled to reimburse the reasonable defense costs incurred by plaintiff.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control**

Nos. 091264, 091275, 091285).

DUTY TO DEFEND. - *An insurer has no duty to defend an insured if the underlying complaint contains allegations excluded from coverage.*

> **12th Street Gym, Inc. v. Philadelphia Indemnity Insurance Company, July Term 2005, No. 3393 (June 12, 2006 – 6 pages) (Sheppard, J.)**

DUTY TO DEFEND/INDEMINFY; COLLATERAL ESTOPPEL; ELEMENTS REQUIRED TO OBTAIN STAY OF PROCEEDINGS.

> **Colony Insurance Company v. Joseph Rocco & Sons d/b/a Hayden Contractors, Inc. And Allstate Insurance Company and Certain Underwriters at Lloyd's London, June Term 2010, No. 003934 (May 6, 2011) (New, J. 10 pages).**

DUTY OF GOOD FAITH - *Pennsylvania courts recognize a duty of good faith and fair dealing only as part of the obligations imposed under a contract between the parties. The Pennsylvania Superior Court has twice refused to recognize a cause of action for breach of the duty to negotiate in good faith. In considering the claim, the Superior Court has made clear that, if it were to be recognized, it would have to be based upon a detailed letter of intent evidencing both parties' agreement to be bound to negotiate in good faith.*

> **Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).**

DUTY OF LOYALTY—*An independent contractor can be an agent and violate duties owed the principal.*

> **Pollack v. Skinsmart Dermatology and Aesthetic Center P.C., September Term 2002, No. 2167 (Cohen, J.) (October 22, 2004 – 10 pages).**

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ECONOMIC DEVELOPMENT FINANCING LAW - ***City Did Not Violate the Economic Development Financing Law by Permitting PAID to Issue Bonds to Finance the Stadiums Because PAID Must Place a Disclaimer on the Bonds Disclosing that the City's General Credit Is Not Pledged - The Terms of the Bonds Are Subject to the City's Approval so that It May Ensure that the Required Disclaimer Is Present***

> **Consumers Education & Protective Association et al. v. City of Philadelphia, January 2001, No. 2470 (Sheppard, J.)(April 30, 2001 - 20 pages)**

ECONOMIC DURESS - ***Plaintiff failed to meet its burden in establishing a claim of economic duress in defense of a release of all claims that Plaintiff admitted to executing in exchange for a payment of money. In response to a summary judgment motion, the Plaintiff did not cite to and/or proffer any evidence of financial distress at the time the release was executed and failed to proffer any evidence that the Defendant's actions placed the Plaintiff in such dire financial straights so as to remove the exercise of free will. Furthermore, Plaintiff's actions subsequent to the execution of the release indicated ratification. Plaintiff never sought to rescind, revoke or invalidate the release on economic duress grounds until the Defendant raised the release as a defense to the Plaintiff's complaint, over two years after the release was executed.***

> **Academy Electrical Contractors, Inc. v. Nason & Cullen Group, Inc., *et al.*, July Term, 2001, Number 3252 (January 14, 2004- 9 pages) (Sheppard, Jr., J.)**

ECONOMIC LOSS DOCTRINE—*Absent the narrow circumstances established in Bilt-Rite Contractors, Inc. v. The Architectural Studio, 866 A.2d 270 (2005), negligence actions are barred by the economic loss doctrine.*

> **Danlin Management Group, Inc. v. The School District of Philadelphia, et al., January Term 2005, No. 4527 (Jones, J.) (August 29, 2005 – 8 pages).**

ECONOMIC LOSS – *A sub-subcontractor's claim for solely pecuniary losses derived from a negligence action may be dismissed because of the economic loss doctrine, which states that a plaintiff may not recover for a purely economic loss in a negligence action.*

> **Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).**

ECONOMIC LOSS DOCTRINE- ***Where plaintiffs' negligent misrepresentation claim only seeks damages for administrative,***

clerical and other legal expenses, the negligent misrepresentation claim is barred by the economic loss doctrine since such damages are purely economic.

> **Kraevner, et. al. v. OneBeacon Insurance Company, et. al., April Term, 2003 No. 0940 (September 29th, 2003) (Sheppard).**

ECONOMIC LOSS DOCTRINE - *Economic Loss Doctrine Does Not Bar Plaintiff's Claim For Intentional Interference with Contract and Fraud Claims*

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(January 9, 2001 - 8 pages)**

ECONOMIC LOSS DOCTRINE - *Pennsylvania's Economic Loss Doctrine Precludes Recovery for Economic Loss in Negligence Actions Where Plaintiff Suffers no Physical or Property Damage - Claim for Negligent Misrepresentation IS Stricken Where Plaintiff Fails to Allege Physical Damage or Harm - Economic Loss Doctrine Does Not Preclude Claim Based on Intentional Fraud*

> **First Republic Bank v. Brand, August 2000, No. 147 (Herron, J.)(December 19, 2000 - 19 pages)**

ECONOMIC LOSS DOCTRINE - *Economic Loss Doctrine Precludes Company that Constructs Sewer Controls from Recovering Under Negligent Misrepresentation Claim for Solely Economic Damages Caused by Defective Sensor or the Consequential Costs Associated with Replacing the Sensors, Loss of Good Will, Harm to Reputation or Reassignment of Employees - Economic Loss Doctrine Does Not Preclude Recovery for Replacing Other Component Parts of the Sewer System Not Manufactured by Defendant*

> **Waterware Corp. v. Ametek et al., June 2000, No. 3703 (Herron, J.)(April 17, 2001 - 15 pages)**

ECONOMIC LOSS DOCTRINE - *Where Counterclaim Alleges that Installation of New Flooring Damaged Existing Flooring, A Claim for Negligence or Strict Liability Is Not Barred by Economic Loss Doctrine Because There Is an Allegation of Damage to "Other Property"*

> **Stonhrd v. Advanced Glassfiber Yarns, April 2001, No. 2427 (Herron, J.)(November 21, 2001 - 7 pages)**

ECONOMIC LOSS DOCTRINE - *Claim of Emotional Distress Is Not Barred by the Economic Loss Doctrine Where the Counterclaim Alleges Physical Harm*

> **Legion Ins. Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(December 18, 2001 - 11 pages)**

ECONOMIC LOSS DOCTRINE - ***Corporation's Claim for Negligent Supervision by Bank of Its Employee for Failing to Alert Plaintiff to Embezzlement by Plaintiff's Agent Is Barred by the Economic Loss Doctrine Where Plaintiff Alleged Only Economic Loss***

> **IRPC Inc. v. Hudson, United Bancorp,** February 2001, No. 474 (Sheppard, J.)(January 18, 2002 - 15 pages)

ECONOMIC LOSS DOCTRINE - ***Economic Loss Doctrine Under Pennsylvania Law Precludes Recovery for Economic Loss in a Negligence Action or Strict Liability Where the Plaintiff Has Suffered No Physical Injury or Property Damage But the Doctrine Would Not Bar Intentional Misrepresentation Claims - Economic Loss Doctrine Does Not Bar Tort Claims By Manufacturer of Aircraft Piston Engines Against Manufacturer of Components For the Engines' Crankshafts Where Plaintiff Shows Damage to Other Property Such as Damage to Aircraft, Personal Injuries and Damage to the Engines Into Which the Crankshafts Were Assembled - Damages Incurred in Recalling and Testing Plaintiff's Crankshafts Are Economic and Thus Precluded As Tort Claims Under the Economic Loss Doctrine Although They May Be Sought in the Warranty Claims***

> **Teledyne Techonolgies Inc. v. Freedom Forge Corp.,** May 2000, No. 3398 (Sheppard, J.)(April 19, 2002 - 38 pages)

ECONOMIC LOSS DOCTRINE - ***Negligence Claim Asserting that Defendants Were Negligent In Failing to Finalize Registration Statement and Complete Registration of Plaintiff's Stock Shares Is Barred by Economic Loss Doctrine Where Plaintiff Fails to Allege Anything But Economic Loss***

> **Worldwideweb Networx Corp. v. Entrade, Inc. and Mark Santacrose,** December 2001, No. 3839, (Herron, J.)(June 20, 2002 - 10 pages)

ECONOMIC LOSS DOCTRINE - ***Economic Loss Doctrine Bars Claim for Negligent Misrepresentation Absent Allegation that Plaintiff Suffered Physical Injury or Property Damage***

> **JHE Incorporated v. SEPTA,** November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)

ECONOMIC LOSS DOCTRINE - ***The economic loss doctrine precludes recovery in negligence action for injuries which are solely economic.***

> **Thompson v. Glenmede Trust Company**, February Term, 2002, No. 04428(Cohen, J.)(February 18, 2003 - 3 pages)

ECONOMIC LOSS DOCTRINE - ***The economic loss doctrine precludes***

recovery in negligence action for injuries which are solely economic.

Thompson v. Glenmede Trust Company, February Term, 2002, No. 04428(Cohen, J.)(February 18, 2003 - 3 pages)

ECONOMIC LOSS DOCTRINE - ***Where damages claimed for negligent misrepresentation were legal fees and potential judgment amount, economic loss doctrine required that such claim be dismissed.***

Atchison Casting Corp. v. Deloitte & Touche, LLP., July Term, 2002 No. 003193 (Jones, J.) (March 14, 2002- 7 pages)

ECONOMIC LOSS DOCTRINE - ***Borrowers' claims against Bank for negligence and gross negligence must be dismissed because the damages claimed by borrowers, i.e., excessive interest payments, are purely economic.***

Nicholas A. Clemente, Esq. et al. v. Republic First Bank, December Term, 2002, No. 00802 (Jones, J.) (May 9, 2002)

ECONOMIC LOSS DOCTRINE/UTPCPL - ***The Economic Loss Doctrine Does Not Bar UTPCPL Claims In The Nature of Fraud and Intentional Tort For the Same Policy Justification Underlying This Court's Excepting Intentional Common Law Torts Claims From the Economic Loss Doctrine Namely This Court Does Not Believe That Outright Dishonesty Is Properly Redressed in a Breach of Contract or Warranty Claim - Further, the Pennsylvania Legislature Enacted UTPCPL While Cognizant of the Existence of Common Law Contract Remedies and Thus Intended for UTPCPL to Afford Customers Additional Separate Remedies To Prevent Unfair or Deceptive Practices.***

Oppenheimer v. York, March 2002, No. 4348 (Sheppard, J.) (October 25, 2002 - 15 pages)

EQUITY JURISDICTION - ***Trial Court May Hear Equity Claims Even When Plaintiff Erroneously Filed an Action at Law Because the Equity Side of the Court Is Always Open and to Dismiss or Sever Equity Claims Would Result in Piecemeal Litigation.***

IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)

EMERGENCY TREATMENT AND ACTIVE LABOR ACT (EMTALA) - Because *EMTALA Provisions Do Not Set Forth a Hospital's Obligations After the*

Condition of Patient Seeking Emergency Medical Treatment Has Stabilized, this Act Is Not Dispositive as to Declaratory Judgment Action by Hospital Seeking a Declaration of its Obligations in Transferring a Patient

Temple University v. Americhoice, January 2001, No. 2283 (Herron, J.)(September 17, 2001 - 11 pages)

EMINENT DOMAIN/APPOINTMENT OF BOARD OF VIEWERS - Petition that Alleges Nothing More Than Breach of Contract Action Cannot Be Transformed Into an Inverse Condemnation Claim Merely Because the Allegedly Breaching Party Is a Government Entity - Board of Viewers Cannot Be Appointed Where Petition Does Not Set Forth a Legally Sufficient Claim for Inverse Condemnation

DiGinto v. SEPTA, August 2001, No. 2475 (Herron, J.)(January 23, 2002 - 5 pages)

EMINENT DOMAIN, *De Facto* Taking—Prospective Injury - *In the law of eminent domain, no de facto taking occurs when the plaintiff alleges only future or prospective injury.*
—Business failure - In the law of eminent domain, when a public project, though temporary, causes a business to fail, then a de facto taking has occurred.

WEW Ltd. and Henry and Jacqueline Willis v. SEPTA, December Term, 2004, No. 2036 (September 12th 2006 – 8 pages) (Bernstein, J.)

EMOTIONAL DISTRESS - *Since plaintiff may recover his alleged emotional distress damages under its claim for wrongful use of civil proceedings, there is no need for him to assert a separate, redundant, claim for intentional infliction of emotional distress.*

Malcolm G. Chapman v. Oceaneering International, Inc., March Term, 2006, No. 04257 (November 30, 2006) (Sheppard, J., 6 pages)

EMOTIONAL DISTRESS/INTENTIONAL AND NEGLIGENT INFLICTION - *Claim for Intentional Infliction of Emotional Distress Is Incomplete Where It Fails to Allege Outrageous or Extreme Conduct by Defendant Attorney*
Legion Insurance Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(June 6, 2001 - 12 pages)

EMOTIONAL DISTRESS/INTENTIONAL AND NEGLIGENT INFLICTION - *Claim for Intentional Infliction of Emotional Distress Must Assert that Extreme or Outrageous Conduct Intentionally or Recklessly Caused Severe Emotional Distress - Claim for Intentional Infliction of Emotional Distress Is Set Forth Where Physician Alleges that Insurer Demanded that He Sign an Affidavit Adverse to his Interests*

and the Insurer Withdrew Its Respresntation of Him in Malpractice Action on the Eve of Trial - Claim for Emotional Distress Is Not Barred by Economic Loss Doctrine Where the Counterclaim Alleges Physical Harm - Plaintiff Sets Forth Claim for Negligent Infliction of Emotional Distress Since He Asserts that the Defendant Owed Him a Fiduciary Duty Under the Policy

Legion Ins. Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(December 18, 2001 - 11 pages)

EMPLOYMENT AGREEMENTS – The term "customer" as used in Non-Solicitation Clause does not include former customers because the Clause does not expressly say so.

- Restrictive covenants constitute a restraint on the employee's trade and are strictly construed against the employer.
- Ambiguous terms of an employment contract were construed against the employer-drafter.

Doyle Consulting Group, Inc. v. Stoffel, June Term, 2003, No. 02099 (February 13, 2004) (Cohen, J.)

EQUITABLE DEFENSE OF LACHES – ***The defense of laches bars relief when the plaintiff's dereliction indicates a lack of due diligence in failing to institute an action and such failure results in prejudice to another. The party asserting*** *laches* ***as a*** *defense* ***must present evidence demonstrating prejudice from the lapse of time. Evidence of prejudice may include establishing that a witness has died or become unavailable, that substantiating records were lost or destroyed, or that the defendant has changed his position in anticipation that the opposing party has waived his claims.***

PIDC Regional Development Corporation v. Allen Woodruff, July Term 2005, No. 1360 (Abramson, J.) (November 28, 2005 - 7 pages).

EQUITABLE ESTOPPEL – LIENS - ***In execution proceedings, where two competing lien creditors are fighting over proceeds that are insufficient to pay both creditors, the courts have permitted creditors to raise both equity and estoppel as bases for re-ordering the parties' lien priority.***

- Plaintiff set forth a claim for estoppel against defendant where plaintiff alleged that defendant filed its judgment one week before plaintiff's refinancing knowing that the judgment would not appear of record, and the failure of the judgment to appear of record caused plaintiff justifiably to believe that its mortgages would stand as first and second liens against the property.

Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)

EQUITABLE RELIEF - *A request for equitable relief based upon circumstances amounting to breach of contract will be denied where money damages are easily ascertainable and therefore an "irreparable" harm has not been demonstrated.*

Driscoll / Intech II v. Scarborough, IBCS, and FMB, August Term 2007 No. 1094 (February 12, 2008 – 11 pages) (Sheppard, J.).

EQUITABLE SUBROGATION - *Equitable subrogation is a widely-recognized exception to the 'first in time' rule which permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.*

- The equitable subordination rule may apply to prevent inequity due to plaintiff's claimed lack of notice of defendant's lien due to defendant's alleged failure timely to file its lien.

Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)

EQUITABLE SUBROGATION - *Plaintiff Established Its Right to Recovery on Equitable Subrogation Claim Where the Record Showed Plaintiff Inherited the Rights of the Original Claimant, the Claimant Paid the Creditor to Protect Its Own Interests and Did Not Act Voluntarily, the Claimant Was Not Primarily Liable for the Debt, the Entire Debt Had Been Satisfied and the Record Did Not Show an Injustice to Others Would Result by Plaintiff's Recovery.*

Resource Properties XLIV v. PAID et al., November 1999, No. 1265 and Resource Properties XLIV v. Growth Properties, Ltd., et al., March 2000, No. 3750 (Sheppard, J.)(August 2, 2002- 23 pages)

EQUITABLE SUBROGATION, BREACH OF TRUST, & PUNITIVE DAMAGES -- *Preliminary Objections Overruled where Equitable Claims for Injunctive Relief and Equitable Subrogation were Supported by Claims of Irreparable Harm and Action as Surety. Breach of Trust and Breach of Fiduciary Duty May be Claimed as Alternative Causes of Action where Plaintiff Asserts Existence of a Trust. Punitive Damages Based on Fraud Claim Must be Supported by Allegations of Malice, Vindictiveness or Wanton Disregard for Rights of Another*

Great American Alliance Insurance Co. v. JHE, Inc., etal., April Term, 2002, No. 2565 (Cohen, J.((November 21, 2002 - 2 Opinions, 6 pages each.

ESCROW /APPEAL - ***In an action between law firms over disputed fees, an order requiring one litigant to escrow a percentage of the fees is an interlocutory order (not a collateral order under Pa. R.A.P. 313). The amount ordered to be escrowed is discretionary, and in this instance, the court deemed it to be fair.***

> **Ominsky & Ominsky P.C. v. Joseph Messa, Jr., et al., January Term 2001, No. 3846 (Sheppard, J.) (April 7, 2003 - 4 pages).**

ESCROW AGENT – BAHAMANIAN LAW - ***An escrow agent's duties are defined by the escrow agreement, and the escrow agreement must be interpreted based upon common sense using a reasonable man standard.***

Willow Springs Ranch LLC v. Primavera, October Term, 2001, No. 00979 (October 31, 2003) (Cohen, J.)

ESCROW AGENT – BAHAMANIAN LAW - ***An escrow agent cannot dispose of escrow monies without the agreement of both parties unless and until it is determined whether or not the conditions of the escrow agreement have been satisfied.***

Willow Springs Ranch LLC v. Primavera, October Term, 2001, No. 00979 (October 31, 2003) (Cohen, J.)

EVIDENCE/SPOLIATION DOCTRINE - ***Spoliation Doctrine Does Not Apply to Preclude Defense Evdidence in Case Where Defendant Did Not Provide Original Tapes of a Television Program "Cooking With Momma" Where Plaintiffs Fail to Show that Defendants' Failure to Produce the Tapes Prejudiced Plaintiffs***

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)**

EQUITABLE CONVERSION - ***Under the Doctrine of Equitable Conversion Where A Contract that Promised the Establishment of an Easement Was Entered into Prior to the Assignment of a Parcel, the Easement Constituted an Encumbrance That Implicated the Title Policy***

> **Terra Equities v. First American Title Insurance Co., March 2000, No. 1960 (Sheppard, J.)(August 6, 2001 - 17 pages)**

EQUITABLE SUBROGATION - ***A Claim for Equitable Subrogation Consists of the Following Elements: (1) The Claimant Has Paid The Creditor to Protect His Own Interests; (2) The Claimant Did Not Act as a Volunteer; (3)The Claimant Is Not Primarily Liable for the Debt; (4) The Entire Debt Has Been Satisfied - For Federal Courts, Another Element a Plaintiff Must Establish Is that Allowing Subrogation Will Not Cause Injustice to the Rights of Others -***

Pennsylvania Courts Do Not Explicitly Consider Potential Injustice As An Element of the Plaintiff's Claim But as a Factor to be Considered by the Court - Where Predecessor in Interest Incurred Liability Solely Due to Default of Borrower, Plaintiff Did Not Act As Volunteer - Failure of Complaint to Allege that No Injustice Will Result From Granting Requested Relief Is Not Fatal or a Basis for Granting Preliminary Objections

> ***Resource Properties XLLIV v. Philadelphia Authority for Industrial Development, et al., November 1999, No. 1265 and Resource Properties XLIV, Inc. v. Growth Properties, Inc., March 2000, No. 3750 (Sheppard, J.)(November 7, 2000 - 14 pages)***

ESTOPPEL - *Negligent Misrepresentation and Estoppel are similar in that they both require: (1) inducement by misleading or misrepresentation; and (2) justifiable or reasonable reliance on the false information.*

- Insurer was not estopped from disclaiming coverage where it never unequivocally agreed to defend or indemnify the underlying malpractice action against its insureds. Insurer retained temporary counsel for insureds and appropriately protected their interests until insureds could protect their own interests. Insurer's very first communication with insureds, after being notified of the claim, was a letter in which insurer "reserve[d] all rights under the policy" while reviewing all relevant information.

> **Cordisco, Bradway & Simmons v. Gulf Insurance Group, February Term 2007, No. 00111 (July 18, 2008) (Bernstein, J., 18 pages)**

ESTOPPEL – *Plaintiffs estoppel claims failed as matter of law where plaintiff admitted that he did no rely on any defendants' representations as a condition of continuing his work him.*

> **Williams v. Hopkins, et al., August Term 2005, No. 3953 (Bernstein, J.)(April 5, 2007 – 6 pages).**

ESTOPPEL – CONTRACT MODIFICATION - *Under the estoppel concept, a contract may be modified if either words or actions of one party to the contract induce another party to the contract to act in derogation of the contract, and the other party justifiably relies upon the words or deeds of the first party.*

> **Kaplan v. Miller, March Term, 2004, No. 02783 (August 12, 2005) (Abramson, J., 7 pages)**

EXCULPATORY CLAUSE/INDEMNITY AGREEMENT - *Exculpatory Clauses, While Not Favored at Law, May Be Valid - Exculpatory Clauses Are Strictly Construed - Exculpatory Clause Unambiguously Releases Surety from Liability for Discharging Its Obligations Under the Bonded Contract*

and Taking Over the Contract's Completion or the Contract's Monies in the Event of Default by the General Contractor

> **San Lucas Construction Co., Inc. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(March 14, 2001 - 17 pages)**

EX PARTE RELIEF - *Where a party requests certain relief ex parte, that party's counsel has an affirmative duty pursuant to Rule 3.3(d) of the Pennsylvania Rules of Professional Conduct to inform the court of all material facts known to him or which will enable the court to make an informed decision, whether or not the facts are adverse to the represented party.*

> **GFL Advantage Fund, Ltd., Petitioner, For an Order Permitting Service of Subpoenas Duces Tecum Upon S&T Bank, etal., September Term, 2001, No. 3479 (Herron, J.) (January 6, 2003 - 35 pages).**

EXPERT WITNESS - *Expert testimony was not required to explain duty breached in negligent misrepresentation case because the duty allegedly breached by the defendant law firm was the duty not to tell lies and jury could understand such duty without expert assistance.*

> **Fidelity National Title Insurance Co. v. Linebarger Goggan Blair & Sampson, LLC, May Term, 2007, No. 01642 (September 9, 2008) (Abramson, J., 6 pages).**

EXPERT WITNESSES – *Court allowed deposition of Plaintiff's experts where court found that experts relied on conversations as a basis for their opinions but revealed no content of such conversations. Court found that plaintiff's failure to fully identify the facts upon which the opinion was based, rendered the defendant unable to file appropriate pretrial motions or prepare for trial.*

> **Farda v. Chelsea Properties, et al, May Term 2004, No. 926 Bernstein, J.)(April 18, 2006 – 7 pages).**

EXPERT WITNESSES – *Plaintiffs' contractual claims against expert witness failed as a matter of law where neither Plaintiff demonstrated the existence of a specific contractual obligation, either express or implied, between either of them and Defendants, which required the expert to provide expert testimony at the underlying trial.*

> **Rambo, et. al. v. Greene, et al., August Term 2004, No. 3894 (Jones, J.)(June 30,2005 – 3 pages).**

EXPERT WITNESSES – *Generally, an expert witness can not be compelled to give testimony against his will. Thus, in order to*

withstand preliminary objections, any claims that Plaintiffs may have against expert must be based upon the breach of a specific contractual agreement.

Rambo, et. al. v. Greene, et al., August Term 2004, No. 3894 (Jones, J.)(February 28, 2005 – 5 pages).

EXPERT WITNESSES - *Expert testimony is generally required in legal malpractice cases, unless the issue is so simple or the lack of skill or want of care is so obvious as to be within the range of an ordinary layperson's experience and comprehension.*

Romy v. Burke, May Term, 2002, No. 01236 (December 27, 2004 – 7 pages) (Sheppard, J.)

EXPERT WITNESS – PROFESSIONAL MALPRACTICE - *Whether an insurance broker failed to exercise a reasonable degree of care and skill related to common professional practice in obtaining sufficient insurance for a restaurant is a question of fact outside the normal range of the ordinary experience of laypersons. Therefore, plaintiff's failure to produce an expert witness as to the standard of care under which the agent should have conducted itself, and as to any deviation from that standard that may have occurred, makes plaintiff's case defective as a matter of law and justifies its dismissal.*

Riverdeck Holding Corp. v. United States Liability Ins. Co., January Term, 2003, No. 2306 (March 23, 2004) (Sheppard, J.)

EXECUTION OF JUDGMENTS - EXEMPTIONS

Bochetto & Lentz v. Whitman Council, Inc., May Term, 2009, No. 04358 (March 18, 2010) (New, J., 4 pages).

- F -

FAILURE TO PROVE DAMAGES

> **Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 10, 2010 – 10 pages) (New, J.)**

FALSE ADVERTISING CLAIM - Viable False Advertising Claim Under the Unfair Trade Practice and Consumer Protection Law, 73 P.S. §201-2(4)(v), *Is Set Forth Where Class Action Complaint Alleges that Webpage Book Offering and Book Dustjacket Gave Wrong Author Credit for Writing Book - Because Plaintiff Alleges that False Representations as to Author Were Likely to Affect Purchasing Decision, Causation Was Adequately Pleaded*

> **Kelly v. Penguin Putnam, Inc., August 2000, No. 980 (Herron, J.)(November 29, 2000 - 5 pages)**

FALSE LIGHT INVASION OF PRIVACY CLAIM - *Plaintiff Lawyer Sets Forth Viable Claim For False Light Invasion of Privacy When He Alleges that the Defendants Publicly Accused Him of Dishonesty and Incompetence With Knowledge that the Accusations Were Untrue and Would Place Him in a False Light Before His Client*

> **Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)**

FAMILY LAW – PROPERTY DISTRIBUTION – *In Pennsylvania, the Family Court retains jurisdiction over the disposition of property rights and interests between spouses, including those created under separate agreement, even after a final divorce decree is entered.*

> **Burman v. Burman, June Term 2006, No. 3902 (January 22, 2007 – 4 pages) (Sheppard, J.).**

FICTITIOUS PAYEE RULE – *The fictitious payee rule applies when a dishonest employee writes checks to a company's actual vendors, but intends that the vendors never receive the money; instead, the employee forges the names of the payees and deposits the checks at another bank. Under section 3-404(b) of the UCC, the endorsement is deemed to be "effective" since the employee did not intend for the payees to receive payment.*
- Revised UCC §3-404 changed the prior law by introducing a comparative fault principle. Therefore, although the fictitious payee rule makes the endorsement "effective," the corporate drawer can shift the loss to any negligent bank, to the extent that the bank's negligence substantially contributed to the loss. Under the revised Code, the drawer now has the right to sue the depositary bank directly based on the bank's negligence.

Victory Clothing Co., Inc. d/b/a Torre Clothing v. Wachovia Bank, N.A., February 2004, No. 1397, (Abramson, J.) (March 21, 2006 - 17 pages).

FIDUCIARY DUTY – *A minority shareholder holding 35% of the shares does not lead the Court to believe that defendants, as majority shareholders, hold an "overmastering influence" over plaintiff. The Complaint must show weakness, dependence, inferiority, or a disparity in the parties' position giving rise to an abuse of power before this Court will recognize a fiduciary duty and the breach thereof.*

John Burton v. Cristina Bojazi and John Bojazi, April Term 2005, No. 3551(Abramson, J.)(June 17, 2005 - 7 pages).

FIDUCIARY DUTY - *Pennsylvania Does Not Recognize Cause of Action for Breach of Fiduciary Duty For Failure to Renew Insurance Policy*

The Brickman Group, Ltd. v. CGU Insurance Co., July 2000,No. 909 (Herron, J.)(January 8, 2001 - 22 pages)

FIDUCIARY DUTY - *Employee Has Set Forth Breach of Fiduciary Claim Against Employer When He Alleges that He Disclosed His Marketing Idea to His Supervisors Under the Belief That the Idea Would Be Protected and He Would Get Recognition but Employer Disclosed the Idea to Another Company to Deprive Plaintiff of His Property and Proper Compensation*

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)

FIDUCIARY DUTY - *A Breach of Fiduciary Duty Claim Against a Health Insurer by Its Subscribers Cannot Survive Demurrer Because a Breach of Fiduciary Duty Claim Sounds Only in Contract, It Is Redundant of the Subsciber Plaintiffs' Claim for Breach of the Implied Duty of Good Faith and Pre-Contract Conduct Cannot Be a Basis for a Breach of Fiduciary Duty Claim Against a Healthcare Insurer*

Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, NO. 2705 (Herron, J.)(July 16, 2001 - 36 pages)

FIDUCIARY DUTY - A Member of a Limited Liability Company May Be Held Liable for Breach of Fiduciary Duty to Another Member Where the Operating Agreement Provides that Management Is Vested in the Members

Harbour Hospital Services v. GEM Laundry Services, July 2000, No 4830 (Sheppard, J.)(July 18, 2001 - 27 pages)

FIDUCIARY DUTY - *Plaintiffs Have Alleged Fiduciary Duty as to*

Defendants Who Acted as Financial Advisors with Vastly Superior Knowledge About Home Equity Loans and Who Had Access to Plaintiff's Highly Personal Financial Information - Plaintiffs Fail to Establish Fiduciary Duty Owed by Defendant/Lenders

> **Koch v. First Union Corp., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)**

FIDUCIARY DUTY - *While Controlling or Majority Shareholder Owes Minority Shareholder a Fiduciary Duty, A Claim for Breach of Fiduciary Duty Cannot Be Maintained Where Plaintiff Fails to Allege that Defendant Was a Controlling Shareholder*

> **First Republic v. Brand, August 2000, No. 147 (Herron, J.)(January 8, 2002 - 11 pages)**

FIDUCIARY DUTY - *Summary Judgment on Breach of Fiduciary Duty is Granted Where Record Failed to Show Disparity of Expertise Between the Parties to Warrant Finding a Fiduciary Relationship*

> **Methodist Home for Children, et al. v. Biddle & Company, Inc., April 2001, No. 3510 (Sheppard, J.) (October 9, 2002 - 10 pages)**

FIDUCIARY DUTY/ATTORNEY – Fiduciary duty running from attorney to client is not restricted to attorney acting solely in a fiduciary capacity.

> **Roosevelt's, Inc. t/a/ Philadelphia Management Company v. Valerie H. Lieberman, Esquire and Post & Schell, PC, November Term, 2003, No. 1929 (June 10, 2004 – 3 pages) (Cohen, J.)**

FIDUCIARY DUTY – ATTORNEY-CLIENT – CONFLICTS OF INTEREST - *The relationship between an attorney and his client is a fiduciary relationship. This concept of a fiduciary relationship by definition does not permit conflicts of interest. At common law, an attorney owes a fiduciary duty to his client; such duty demands undivided loyalty and prohibits the attorney from engaging in conflicts of interest, and breach of such duty is actionable.*

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

FIDUCIARY DUTY – BREACH – ATTORNEY - *When asserting a claim for breach of fiduciary duty against a law firm, the client has the burden of proving: (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the*

law firm of the other client; (2) that the subject matter of the relationship was substantially related; (3) that the member of the law firm acquired knowledge of confidential information from or concerning the former client, actually or by operation of law.

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).

FIDUCIARY DUTY – BREACH – DAMAGES -*In order to recover damages for a law firm's alleged breach of fiduciary duty, the client must show that it suffered economic damages that could be measured with certainty and, if awarded, would compensate the client for all financial losses it suffered as a result of the law firm's conduct, including the value of property taken.*

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).

FIDUCIARY DUTY – BREACH – DISGORGEMENT -*Courts throughout the country have ordered the disgorgement of fees paid or the forfeiture of fees owed to attorneys who have breached their fiduciary duties to their clients by engaging in impermissible conflicts of interests. However, in most cases where courts have ordered such disgorgement, the attorneys fees that were being disgorged were paid by the client, so the disgorgement was in essence a refund and qualifies as compensatory damages. Disgorgement to the client is not an appropriate remedy where a third party paid the client's legal fees. In such circumstance, disgorgement would not make the client whole; instead, the client would receive a windfall.*

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).

FIDUCIARY DUTY – BREACH – PROFITS AS DAMAGES -*Where a fiduciary acquires information in confidence and adopts or uses it for his own private benefit and personal profit to the exclusion and detriment of the client, he may be enjoined at the instance of the client and he may be required to account to the client for any profits derived therefrom as well as be subject to liability for damages sustained as a result of such breach of his fiduciary duties. An attorney may be required to pay its first client the net profits it earned from representing a second client if its representation of the second client was a breach of its fiduciary duties to the first client.*

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).

FIDUCIARY DUTY/CEOs - *Chief Financial Officer of Defendant Company Did Not Owe Plaintiff Individual Shareholder the Duty To See that*

his Shares Are Registered According to SEC Regulations as per Contract Between Plaintiff and Defendant Company - The Duty of an Officer Is to the Corporation and Not To Individual Shareholders.

WorldWideWeb Networks Corp. v. Entrade, Inc. and Mark Santacrose, December 2001, No. 3839 (Cohen, J.) (February 19, 2003) - 3 pages)

FIDUCIARY DUTY/CREDITOR & DEBTOR - *Where Creditor Gains a Substantial Control over the Debtor's Business, a Fiduciary Duty May Exist - Such a Fiduciary Duty Exists Where Creditor Came into Debtor's Premises and Began Running the Business, Cashed Checks, Fired Personnel, and Negotiated the Sale of the Debtor's Business* - The Standard for Determining Breach of this Fiduciary Duty Is "Good Faith" and Not "Commercial Reasonableness" - Summary Judgment May Not Be Granted on this Claim of Breach of Fiduciary Duty Where There Are Issues of Fact Concerning Defendant's Actions

Academy Industries Inc. v. PNC N.A. et al., May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 - 34 pages)

FIDUCIARY DUTY/PARTNERS - *Where Partners Withdraw from law Partnership prior to its Dissolution, the Remaining Partners Do Not Owe the Withdrawing Partner a Duty of Good Faith or Fiduciary Duty After He Has Withdrawn*

Poeta v. Jaffe et al., November 2000, NO. 1357 (Sheppard, J.)(May 30 2001 - 9 pages)

FIDUCIARY DUTY/PARTNERS - *Amended Complaint Sets Forth a Viable Claim for Breach of Fiduciary Duty By Alleging that Plaintiffs Remained Partners Until the Law Firm Dissolved, Thereby Giving Rise to Fiduciary Duties Owed to Them Throughout the Winding Up Process*

Poeta v. Jaffe et al., November 2000, No. 1357 (Sheppard, J.)(October 2, 2001 - 10 pages)

FIDUCIARY DUTY/PARTNERS - *Because the Relationship Between General Partners and Limited Partners Is Similar to the Relationship Between Directors and Shareholders, General Fiduciary Principles for Directors Apply to General Partners - General Partner Breached Its Fiduciary Duty to Limited Partners By Misinforming Them That Merger Could Be Consummated Without Vote of the Limited Partners - A Limited Partner Suffers Irreparable Harm Where He Is Deprived of Hist Right To Vote on the Merger of the Limited Partnership*

Wurtzel v. Park Towne Place Apartments, June 2001, No. 3511 (Herron, J.)(September 11, 2001 - 20 pages)

FIDUCIARY DUTY/SHAREHOLDERS - *Shareholders Do Not Have to Prosecute Their Claims as a Derivative Action Where They Allege the Corporation Failed to Safeguard the Interest of a Particular Group of Shareholders Who Held the Notes at Issue Rather than Asserting Claims on Behalf of all the Shareholders - Counterclaim Presents Sufficient Factual Allegations that the Defendant Shareholders Exercised the Requisite Control*

> **First Republic Bank v. Brand, August 2000, No. 147 (Sheppard, J.)(June 1, 2001 - 20 pages)**

FIDUCIARY DUTY – INSURER – INSURED – CONFLICTS OF INTEREST - *If a conflict of interest arises between an insurer and its insured, the attorney representing the insured must act exclusively on behalf of and in the best interests of the insured.*

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

FIDUCIARY DUTY - *Evidence of Relationship With Competing Company Deemed Insufficient to Show Breach of Fiduciary Duty of Plaintiff to Preclude His Seeking Equitable Relief*

> ***Wyatt v. Phillips, January 2002, No. 4165 (DiNubile, J.) (August 27, 2002 - 10 pages)***

FIRST AMENDMENT RIGHTS OF ANONYMOUS POSTERS TO THE INTERNET/DEFAMATORY PER SE STATEMENTS ON THE INTERNET
- This is a case of first impression as the Superior Court of Pennsylvania and the Supreme Court of Pennsylvania have not decided the appropriate standard by which court must analyze the issue whether to allow defamation plaintiffs to unmask anonymous internet posters which engage in defamatory conduct.

This court rejected the tests set out in Dendrite International v. Doe, 342 N.J. Super. 134, 775 A.2d756 (2001) and Doe v. Cahill, 2005 Del. LEXIS 381 (Del. 2005). Instead, this court found that existing procedural rules are adequate to protect anonymous poster's First Amendment rights. Thus, this court found that no new standards are required. Instead, this court analyzed John Doe's First Amendment right to speak freely and anonymously under this Commonwealth's pertinent rules of evidence.

This court held that because statements that are defamatory per se (this court previously held that many of the statements made in the Guestbook at issue were per se defamatory), while the posters are undeniably entitled to First Amendment rights, the per se defamatory statements are not entitled to First Amendment protection. Thus, this court held that defendants' are not

unreasonably burdened by this court's order that denied defendants' request that the identities of the posters not be revealed.

> **Klehr Harrison Harvey Bransburg & Ellers LLP. v. JPA Development, Inc., March Term, 2004, No. 0425 (Sheppard, Jr., J.) (January 4, 1006 – 19 pages). Superior Court Docket No 2836 EDA 2005**

FIRST AMENDMENT/NOERR-PENNINGTON DOCTRINE - ***Real estate developer's claim failed where it sought to recover damages against neighborhood civic association and its individual members for actions they had taken to influence public bodies concerning their opposition to developer's development plans. Such conduct was clearly protected under both the First Amendment and Noerr-Pennington Doctrine, pursuant to which an individual is immune from liability for exercising his or her First Amendment right to petition the government.***

> **Bethany Builders, Inc., et., et. al. v. Dungan Civil Assocet. al., March Term, 2001,No. 002043 (Cohen, J.)(March 13, 2003 - 9 pages)**

FIRST PARTY BENEFITS/MENTAL INJURY - ***Plaintiff was not entitled to recover first party benefits for the cost of her treatment for post-traumatic stress disorder, because both the policy at issue and the MVFRL cover only injuries which were a "result of a bodily injury," not those which were the result of a mental injury.***

> **Glickman v. Progressive Casualty Ins. Co., April Term 2005, No. 2729(Bernstein, J.)(March 9, 2006 – 3 pages).**

FLOOD ACT - ***The National Flood Insurance Act of 1968, 42 U.S.C. §§ 4001-4129, was inapplicable where the essence of Plaintiff's complaint related to the failure to procure flood insurance and not the execution of a federal flood insurance contract.***

> **Avondale Rentals, Inc. V. Roser & Einstein, Inc. etal, July Term, 2001, No. 2563(Cohen, J.) (December 18, 2002 - 3 pages).**

FORECLOSURE –

> **Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 15, 2010 – 2 pages) (New, J.)**
>
> **Cambridge Walnut Park, LLC v. U. S. Bank National Assoc.,**

***et al.*, May Term, 2008, No. 0517 (September 30, 2010 – 3 pages) (New, J.)**

FORECLOSURE; UNJUST ENRICHMENT; SET-OFF; BREACH OF PARTICIPATION AGREEMENT

LEM Funding XXXV, L.P. v. Sovereign Bank, September Term, 2009, No. 01296 (June 23, 1010) (Sheppard, J., 12 pages)

DOUBLE FORGERY - ***A double forgery occurs when the negotiable instrument contains both a forged maker's signature and a forged endorsement.***
– The Uniform Commercial Code failed to specifically address the allocation of liability in double forgery situations. Consequently, the courts have been left to determine how liability should be allocated in a double forgery case.
- In 1990, new revisions to Articles 3 and 4 of the UCC were implemented. The new revisions made a major change in the area of double forgeries. Before the revisions, the case law was uniform in treating a double forgery case as a forged drawer's signature case, with the loss falling on the drawee bank. The revisions, however, changed this rule by shifting to a comparative fault approach. Under the revised version of the UCC, the loss in double forgery cases is allocated between the depositary and drawee banks based on the extent that each contributed to the loss.
- By adopting a comparative fault approach, classification of the double forgery as either a forged signature or forged endorsement case is no longer necessarily determinative. Thus, under the revised Code, a depositary bank may not necessarily escape liability in double forgery situations, as they did under the prior law.
- In a case of first impression in the Pennsylvania state courts, the Court held that, under the revised Uniform Commercial Code, a drawer is not precluded from seeking recovery from a depositary bank in a double forgery situation under 13 Pa. C.S. § 3405. Therefore, the depository bank was held comparatively negligent for the drawer's loss for accepting for deposit non-personal business checks into a personal checking account, which was contrary to the depository bank's own regulations.

Victory Clothing Co., Inc. d/b/a Torre Clothing v. Wachovia Bank, N.A., February 2004, No. 1397, (Abramson, J.) (March 21, 2006 - 17 pages).

FORUM NON CONVENIENS - ***Petition to Dismiss Complaint due to Forum***

Non Conveniens Denied Where Defendant Insurer Failed to Show that Plaintiff's Choice of Forum Was Vexatious or Oppressive - Petitioner Has the Burden of Providing a Court with Such Evidence of Vexatiousness or Oppressiveness as Names of Witnesses to be Called, a General Statement Describing Their Testimony and Their Potential Hardships - Test Balancing Public and Private Hardships is No Longer Permissible

> **Terra Equities, Inc. v. First American Title Insurance Co., March 2000, No. 1960 (Sheppard, J.)((August 2, 2000 - 17 pages)**

FORUM NON CONVENIENS - Motion by Pennsylvania Corporation Seeking Dismissal of Plaintiff's Action Filed in Philadelphia on the Grounds of Forum Non Conveniens Is Denied Where Defendant Failed to Meet Its Burden of Showing that Plaintiff's Choice of Forum Is Oppressive and Vexatious

> **University Mechanical & Engineering Contractors, Inc. v. INA, November 2000, No. 1554 (Sheppard, J.)(December 7, 2001 - 18 pages)**

FORUM NON CONVENIENS - *Petition to Transfer Venue Based on Forum Non Conveniens Is Granted Where Defendants Met Their Burden of Showing Why Litigating This Action in Philadelphia Would Be Vexatious and Oppressive - Neither the Plaintiff nor Nine of the Ten Defendants Are Located in Philadelphia - None of the Events Giving Rise to This Lawsuit Involving the Alleged Substandard Construction of A Continuing Care Retirment Facility Occurred in Philadelphia - Most of the Defendants' Witnesses Are Not Located in Philadelphia*

> **Grace Community, Inc. V.KPMG Peat Marwick, LLP, February 2001, No. 478 (Sheppard, J.)(April 8, 2002 - 8 pages)**

FORUM NON CONVENIENS - *Petition by Steel Mill Onwner Located in Washington County to Transfer Action From Philadelphia Based on Forum Non Conveniens Is Granted Where Defendant Presents Affidavits By Its Witnesses that Litigation in Philadelphia Would Cause Them Undue Hardship - Holding Trial in Philadelphia Would Be Vexatious Where the Relevant Events Occurred 300 Miles Away and None of the Operative Facts Took Place in Philadelphia*

> **Internation Mill Services, Inc. v. Allegheny Ludlum Corp., June 2001, NO. 1559 (Herron, J.)(April 11, 2002 - 9 pages)**

FORUM NON CONVENIENS - *Petition to Dismiss Complaint due to Forum Non Conveniens Denied Where Defendant Corporation Failed to Meet its Burden of showing that Plaintiffs' Choice of Forum for Putative Class Action Was Vexatious or Oppressive.*

Dearlove v. Genzyme Transgenics Corporation, November 2001, No. 1031 (Sheppard, J.) (July 19, 2002 - 13 pages)

FORUM NON CONVENIENS - *Motion for Reconsideration of Petition to Dismiss Pursuant to 42 Pa. C. S. §5322(e) Denied Where Sufficiently Weighty Reasons Did Not Exist to Trump Plaintiffs' Choice of Home Forum*

Dearlove v. Genzyme Transgenics Corporation, November 2001, No. 1031 (Sheppard, J.) (December 31, 2002 - 13 pages)

FORUM SELECTION CLAUSE - *Additional Insured Is Entitled to Same Coverage as Named Insured and Has the Same Right to Test the Limits and Validity of Policy Provisions - Where Forum Selection Clause Is Challenged, a Court Must Determine Whether the Parties Freely Agreed to this Limitation and Whether Such Agreement Is Unreasonable at the Time of Litigation - Forum Selection Clause Will Not Be Enforced Where Plaintiff Establishes That Staggering Costs of Simultaneously Litigating Cases in England and Philadelphia Would Compel the Abandonment of Any Defense in the English Proceedings*

Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A., January 2000, No. 3633 (Herron, J.)(October 11, 2000 - 20 pages)

FORUM SELECTION CLAUSE - *Forum Selection Clause in Subcontract is Not Applicable Where the Claims at Issue in the Law Suit Are Independent of that Subcontract - Application of the Forum Selection Clause Would Not Be Reasonable Where Its Enforcement Would Preclude Plaintiff from Suing Jointly and Severally Liable Defendants in the Same Forum*

Gary Lorenzon Contractors, Inc. v. Allstates Mechanical Ltd., December 2000, No. 1224 (Sheppard, J.)(May 10, 2001 - 9 pages)

FORUM SELECTION CLAUSE - Forum Selection Clause Designating Pennsylvania Is Enforced Where Movant Argued that It Bestowed Jurisdiction on Him Only If the Word "Personal" Preceded the Word "Jurisdiction"

First Union Commercial Corp. v. Medical Management, February 2000, No. 3673 (Herron, J.)(July 26, 2000 - 10 pages)

FORUM SELECTION CLAUSE - *Forum Selection Clause Designating North Dakota Is Enforced Where Plaintiffs Failed to Show That Their Freely Agreed Upon Forum Selection Clause Should Not Be Enforced Because To Do So Would Seriously Impair Their Ability to Pursue Their Claim*

Credit America, Inc. v. Intercept Corp. et al., February 2001, No. 3923 (Herron, J.)(October 2, 2001 - 5 pages)

FORUM SELECTION CLAUSE - *Where Engagement Letter Signed by Shareholders' Companies Contained Forum Selection Clause, the Shareholders Were Bound by That Clause Selecting a New York Forum*

Kelly et al. v. Bear,Stearns & Co., Inc., April 2001, No. 2346 (Sheppard, J.)(December 18, 2001)

FORUM SELECTION CLAUSE/VENUE - *Forum Selectin Clause Is Enforced Where It Has Been Freely Agreed Upon by the Parties and Where It is Not Unreasonable at the Time of Litigation - In the Absence of Fraud, Failure to Read a Provision Is Not an Excuse or Defense to a Forum Selection Clause - Maryland Is Not an Unreasonable Forum in This Case*

Nelson Medical Group v. Phoenix Health Corporation, December 2001, No. 3078 (Sheppard, J.)(May 28, 2002 - 6 pages)

FORUM SELECTION - *Illinois forum selection clause was not unreasonable where: plaintiff was a small company whose operations will be stretched very thin if several of its principals had to attend trial in Illinois at the same time; all of plaintiff's witnesses and documents were in Pennsylvania; and one of defendant's witnesses was in Pennsylvania, but the rest are in neither Pennsylvania or Illinois. Inconvenience to plaintiff does not make the forum selection clause unreasonable, particularly where there was no evidence that a court in Illinois could not do substantial justice to plaintiff's claims.*
- Since plaintiff's fraud and tortious interference claims were all derivative of its contract claims, they were subject to the contract's Illinois forum selection clause.

John C. Cardullo & Sons, Inc. v. International Profit Assoc., Inc., August Term, 2005, No. 03515 (August 7, 2006 – 7 pages) (Abramson, J.).

FRAUD – BURDEN OF PROOF - *It is well settled that proof of fraud must be established by clear and convincing evidence. Evidence of the transfer of a deed to property between two parties, without more, is insufficient to establish a fraud claim.*

Coldwell Banker Mortgage v. Moore, August Term 2005, No. 1950 (August 2, 2007–7 pages)(Sheppard, J.).

FRAUD – ELEMENTS - *In order to assert a claim for fraud, the plaintiff must be the person who relied upon the misrepresentation and was damaged thereby. Plaintiff cannot bring such a claim if it was a third party who relied upon the misrepresentation, even if plaintiff was somehow damaged thereby.*

Raskin, Liss & Franciosi, P.C. v. Franciosi, December Term, 2004, No. 02364 (April 6, 2005) (Abramson, J., 4 pages).

FRAUD – ELEMENTS – Plaintiff failed to proffer evidence of a wrongful act by defendant that caused plaintiff damages, so plaintiff's claims under the New Jersey Consumer Fraud Act, for negligent misrepresentation, for fraud/fraudulent misrepresentation, and for breach of the duty of good faith and fair dealing were dismissed.

John J. Dougherty and Sons, Inc. v. Harleysville Ins. Co., January Term, 2004, No. 00560 (March 8, 2005 – Control No. 010121) (Abramson, J., 4 pages).

FRAUD/EVIDENCE - *Under Pennsylvania Law, Fraud Must Be Proven By Clear and Convincing Evidence*

Textile Biocides, Inc. v. Avecia, January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)

FRAUD – FUTURE PROMISES - *A promise to do something in the future, which promise is not kept, is not fraud, so defendant bank's alleged oral promise to provide additional funding in the future cannot serve as the basis for misrepresentation claims against it.*

DCNC North Carolina I, LLC v. Wachovia Bank, N.A., August Term, 2008, No. 01188 (June 17, 2009) (New, J. 5 pages)

FRAUD. - FUTURE PROMISE. *In a breach of contract case, an alleged promise of future payment made by an employer's agent does not constitute fraud where that promise is breached.*

JOA Case Management Solutions v. School District of Philadelphia and Sedgwick Claims Management Services, Inc., April Term 2005, No. 2290 (March 13, 2006 – 4 pages) (Abramson, J.)

FRAUD – FUTURE PROMISES - *A cause of action for fraud must allege a misrepresentation of a past or present material fact. A promise to do something in the future, which promise is not kept, is not a proper basis for a cause of action for fraud.*

DeSeta v. Goldner/Accord Ballpark, Inc., June Term, 2005, No. 02017 (January 10, 2006) (Sheppard, J., 6 pages)

FRAUD/GIST OF ACTION - *Fraud Claim Is Not Set Forth Where Plaintiff Fails to Allege that Defendants Made a Misrepresentation with the Intention of Deceiving Plaintiffs into Relying Upon It - Fraud*

Claim by Physicians Against Insurer Premised on Provider Agreement Are Precluded by Gist of Action Doctrine Because Plaintiffs Fail to Allege Any Misrepresentation Independent of the Provider Agreement

> ***Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)***

FRAUD/GIST OF THE ACTION - ***Gist of Action Doctrine Precludes Fraud Claim Where Claim Essentially Arises from Breach of Contract - Fraudulent Misrepresentation Claim Insufficiently Pled and Breach of Contract May Not Be Elevated to Fraudulent Misrepresentation Claim By Mere Bald Allegation that Defendant Never Intended to Perform His End of the Bargain at Time of Entering into the Contract.***

> **Duane Morris v. Nand Todi, October 2001, No. 1980 (Cohen, J.) (September 3, 2002 - 10 pages)**

FRAUD – GIST OF THE ACTION – ***Plaintiffs' tort claim is the gist of the action where the misrepresentations that induced plaintiffs to enter into the contract at issue implicate society's interest in preventing the formation of contracts based upon fraud.***

> **Academy Plaza, LLC I, Port Richmond LLC, and Washington Center LLC v. Bryant Asset Management, a/k/a Bryant Development Corp., May Term, 2002, No. 2774 Superior Court Docket Nos. 3537 and 3362 EDA 2006 (May 21, 2007 – 18 pages)(Sheppard J.).**

FRAUD/GIST OF THE ACTION - ***To Determine Whether Action Sounds in Tort or Contract, Court Must Distinguish between Tort Actions Arising From Breach of Duties Imposed as a Matter of Social Policy and Contract Actions Arising From Breach of Duties Imposed by Mutual Consensus - Complaint Does Not Set Forth a Tort Claim Where the Alleged Breach Derives Solely from a Representation Agreement that Plaintiff Would Be Defendant's Exclusive Real Estate Broker and Negotiator***

> **The Flynn Company v. Cytometrics, Inc., June 2000, No. 2102 (Sheppard, J.)(November 17, 2000 - 14 pages)**

FRAUD/GIST OF THE ACTION - ***Gist of Action Doctrine Does Not Apply to Preclude Fraud Claim Where Complaint Alleges that Nursing Home Manager Misrepresented Uncollectible Debts as Accounts Receivable to Dupe Plaintiff into Continuing to Pay Excessive Monthly Management Fee***

> **Greater Philadelphia Health Services II Corp. v. Complete Care Services, L.P., June 2000, No. 2387 (Herron, J.)(November 20,**

2000 - 7 pages)

FRAUD/GIST OF THE ACTION - *Gist of Action Doctrine Does Not Apply to Preclude Fraud Claim Where Complaint Alleges that After Executing Letter of Intent, Shareholders Misrepresented the Value of the Portfolio to Induce Plaintiff to Maintain Contractual Relations*

First Republic Bank v. Brand, August 2000, No. 147 (Herron,J.)(December 19, 2000 - 15 pages)

FRAUD – IMPUTATION - *Corporate officers' fraudulent conduct will not be imputed to the corporation if the officers' interests were adverse to the corporation and not for the benefit of the corporation. Where the officers plundered the corporation for their own benefit, their actions will not be imputed to the corporation.*

Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).

FRAUD IN THE INDUCEMENT – ASSIGNMENT OF LEASE – LIABILITY OF CORPORATE OFFICERS

Y & C Enterprise, Inc., and Soon P. Yun v. Okan's Food, Inc. and Okan Apaydin, September Term, 2008, No. 2687 (Bernstein, J.) (February 7, 2011 – 3 pages)

FRAUD IN THE INDUCEMENT – PAROL EVIDENCE RULE – *Plaintiffs' claims for fraudulent and negligent misrepresentation in the inducement to contract were barred by the merger clause contained in the agreement and the parol evidence rule.*

Bravo Group Industries, Inc. v. Rite Aid Corp., April Term, 2004, No. 06800 (December 2, 2004 – 7 pages (Sheppard, J.,)

FRAUD IN THE INDUCEMENT-*The "gist of the action doctrine" precludes plaintiffs from recasting an ordinary breach of contract claim into a tort claim.*

TodiI v. J&C Publishing, Inc., d/b/a Commercial Reality Review, Henry J. Strusberg and Strusberg & Fine, Inc., June Term, 2002, No. 2969 (July 18, 2003 - 13 PAGES) (Cohen, J).

FRAUD – JUSTIFIABLE RELIANCE - *A party alleging fraud must prove, by clear and convincing evidence: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying*

on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. Whether the party claiming to have been defrauded justifiably relied upon the false representation is generally a question of fact.

– Although all of the facts contained within the plaintiff's Requests for Admissions were deemed admitted because defendant failed to timely respond, there were still factual questions as to whether there was justifiable reliance on the defendant's misrepresentations.

> **Guarantee Title & Trust Co. v. Security Search & Abstract Co., May Term 2007, No. 1345 (August 4, 2008) (Bernstein, J., 7 pages)**

FRAUD – LIENS - ***Defendant's alleged tactical use of known filing delays does not amount to an omission or misrepresentation upon which a claim of fraud may be based. If any misrepresentation by omission was made regarding defendant's judgment, it could only have been made by the parties' debtor, who allegedly did not disclose the judgment's existence to plaintiff at the closing on the mortgage refinancing.***

> **Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)**

FRAUD/NEGLIGENT MISREPRESENTATION - ***Fraud Must be Averred with Particularity - Tort of Intentional Non-disclosure has the Same Elements as Intentional Misrepresentation Except that the Party Intentionally Conceals a Material Fact - Demurrer Sustained Where Plaintiff Fails to Allege that Misrepresentation was Material - Demurrer Sustained to Negligent Misrepresentation Claim Where Defendants Did Not Owe a Duty and there was no Material Misrepresentation***

> **Caplen v. Richard W. Burick and The City of Philadelphia, Trustee Acting By the Board of Directors of City Trusts, Girard Estate, February 2000, No. 3144 (Sheppard, J.)(August 4, 2000)**

FRAUD – OMISSION - ***Mere silence without a duty to speak will not constitute fraud. Where defendant bank's relationship with plaintiffs was one of commercial lender to experienced real estate developer, defendant had no duty to inform plaintiffs of the growing crisis in the financial and real estate markets which negatively affected all parties.***

> **DCNC North Carolina I, LLC v. Wachovia Bank, N.A., August Term, 2008, No. 01188 (June 17, 2009) (New, J. 5 pages)**

FRAUD – OPINION - ***If the subject matter of the transaction is one upon which both parties have an approximately equal competence to***

form a reliable opinion, each must trust to his own judgment and neither is justified in relying upon the opinion of the other. The fact that one of the two parties to a bargain is less astute than the other does not justify him in relying upon the judgment of the other. This is true even though the transaction in question is one in which the one party knows that the other is somewhat more conversant with the value and quality of the things about which they are bargaining.

Arsenal, Inc. v. AIG Baker Development, LLC, October Term, 2007, No. 03294 (March 20, 2009) (New, J. 15 pages).

FRAUD – PROMISE TO PERFORM IN FUTURE - *A cause of action for fraud must allege a misrepresentation of a past or present material fact. A promise to do something in the future, which promise is not kept, is not fraud. A landlord's promise to provide a renewal lease to a tenant is a promise to do something in the future, which does not give rise to a cause of action for fraud. Instead, such a promise of future performance may give rise to a contract action, if there is adequate consideration for the promise, or an equitable action to enforce the promise, if the tenant reasonably relied on the promise.*

Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).

FRAUD/PROMISSORY - *Under Pennsylvania and Delaware Law, A Claim that Defendant Committed Fraud by Promising to Pay Plaintiff Sales Commissions With No Intent To Pay Would Be Viable If Plaintiff Could Show That Promisor Did Not Intend to Perform That Promise At The Time He Made It - Here Plaintiff Failed to Present Any Evidence That Promisor Had No Intention to Perform At The Time He Made Promise So Summary Judgment Is Granted*

Textile Biocides, Inc. v. Avecia, January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)

FRAUD/REPURCHASE ACCOUNT - *Corporation Sets Forth Valid Claim for Fraud Against Bank for Its Failure to Disclose Allegedly Inadequate Fraud Prevention Measures Relating to Plaintiff's Repurchase Account*

IRPC, Inc. v. Hudson United Bancorp, February 2001, No 474 (Sheppard, J.)(January 18, 2002 - 15 pages)

FRAUD/SPECIFICITY - *Fraud Claim Is Legally Sufficient When the Dates and Times of Misrepresentation Are Given - Allegations Allow an Inference of Intent Which May Be Pled Generally*

Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(February 4, 2002 - 7 pages)

FRAUD – OMISSION - *Lender's failure to inform guarantor that borrower's principal would not be signing a guaranty was not an omission of a material term because it did not change guarantor's liability to lender.*

> **RCG Longview II, L.P. v. Uman Realty, LLC, June Term, 2008, No. 03586 (September 3, 2009) (New, J., 5 pages).**

FRAUD—*To prove a fraud claim, there must be reliance by the claimant, not that another party relied to the claimant's detriment.*

> **Pollack v. Skinsmart Dermatology and Aesthetic Center P.C., September Term 2002, No. 2167 (Cohen, J.) (October 22, 2004 – 10 pages).**

FRAUD - *Complaint Fails to Set Forth Viable Fraud Claim Where it Merely Asserts that Defendant Made False Statements to Others About Plaintiff's Work But Fails to Allege that Plaintiff Relied on Any False Statements*

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)**

FRAUD - *Employee's Claim for Fraud Withstands Demurrer Where It Alleges that Defendants Had a Present Intent to Not Honor Their Promises to Compensate Plaintiff Adequately and Failed to Recognize Plaintiff for His Idea Despite Their Assurances*

> **Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, NO. 1863 (Herron, J.)(July 10, 2001 - 38 pages)**

FRAUD - *Plaintiff's Fraud Claim Involving the Sale of 4 Snow Removal Trucks Is Sufficently Specific Since It Sets Forth All Elements of Fraud Since the Complaint Stated that Defendant Represented that The Four Trucks Sold Were Suitable for Salt When They Were Allegedly Defective*

> **V-Tech Services, Inc. V. Murray Motors Co., Inc., February 2001, No. 1291 (Herron, J.)(October 11, 2001 - 8 pages)**

FRAUD - *Plaintiffs Set Forth Viable Claim for Fraud as to Attorney Fee Agreement For Attorneys Who Prosecuted Claim against Tobacco Industry Where They Set Forth the Material Facts Upon Which Their Fraud Claim Is Based*

> **Levin v. Gauthier, May 2001, No. 374 (Sheppard, J.)(January 14, 2202 - 10 pages)**

FRAUD - *Where Counterclaim Fails to Set Forth a Misrepresentation*

as to Telecommunications Rates That Will Be Charged in the Future, a Demurrer to a Fraud Claim Is Sustained - Breach of a Promise to Do Something in the Future Is Not Fraud -

Shared Communication Services v. Greenfield, May 2001, No. 3417 (Herron, J.)(November 11, 2001 - 9 pages)

FRAUD - ***Plaintiff's claim of fraud against individual defendants was sufficient where plaintiff alleged that they "urged, knew of, and/or consented to" utterance of false statements by co-defendant.***

Pennsylvania Business Bank v. Franklin Career Services, LLC et al., May 2002, No. 2507 (Cohen, J.) (December 31, 2002).

FRAUD - ***Tenant Failed to Set Forth Legally Sufficient Claim for Fraud Based on Landlord's Alleged Misrepresentation of the Square Footage of Office Space Rented Where Tenant Failed to Allege that Landlord made the Misrepresentation "with knowledge of its falsity or recklessness as to whether it was true or false" and "with the intent of misleading another into relying upon it"***

Holl & Associates, P.C. v. 1515 Market Street Associates, P.C., May 2000, No. 1964 (Herron, J.)(August 10, 2000 - 7 pages)

FRAUDULENT CONVEYANCE – ***Plaintiff's claim failed under Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA"), 12 Pa.C.S.A. § 5101, et seq. where assignment at issue took place almost two years prior to Defendant's default under lease with Plaintiff. Thus, Plaintiff was neither a "present" or "future" creditor, as defined in PUFTA, and his claim failed under both 12 Pa.C.S.A. §§ 5104 or 5105.***

– Plaintiff's claim failed under Pennsylvania Uniform Fraudulent Transfer Act ("PUFTA"), 12 Pa.C.S.A. § 5101, et seq., as plaintiff had no "claim", as defined by the statute, since the judgment at issue had been dismissed with prejudice in a prior action.

Bell v. George, April Term 2003, No. 03225 (Sheppard, J.)(June 23, 2005 – 5 pages).

FRAUDULENT CONVEYANCE - ***Plaintiffs' Claim for Fraudulent Conveyance Is Legally Insufficent Where the Transferred Asset Is Not the Property of the Debtor But Is the Property of the Alleged Creditors***

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

FRAUDULENT CONVEYANCE - ***Plaintiff's fraudulent conveyance claim failed as a matter of law where plaintiff did not aver that defendant is a transferee, a person for whose benefit the***

transfer was made or a subsequent transferee.

> **Bell v. George, April Term 2003, No. 03225 (Sheppard, J.)(September 24, 2003– 8 pages).**

FRAUDULENT INDUCEMENT – WAIVER – ***Plaintiffs did not waive their claim for fraudulent inducement by proceeding to closing on a real estate transaction with knowledge of material misrepresentations made by defendants. The affirmance of a contract induced by fraud of the seller does not extinguish the right of the purchaser. It is not a waiver of the fraud nor does it bar the right to recover. It does bar a subsequent rescission.***

> **Academy Plaza, LLC I, Port Richmond LLC, and Washington Center LLC v. Bryant Asset Management, a/k/a Bryant Development Corp., May Term, 2002, No. 2774 Superior Court Docket Nos. 3537 and 3362 EDA 2006 (May 21, 2007 – 18 pages)(Sheppard J.).**

FRAUDULENT MISREPRESENTATION - ***The elements of fraudulent misrepresentation are: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. Pursuant to Pa. R.C.P. 1019(b), averments of fraud must be pled with particularity.***

> **Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June 10, 2008) (Bernstein, J., 8 pages)**

FRAUDULENT TRANSFER

> **Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 10, 2010 – 10 pages) (New, J.)**

FRAUDULENT TRANSFERS – STANDING - ***The Uniform Fraudulent Transfer Act grants a cause of action to any person who has a "claim," which is defined as "a right to payment" against the transferor. Where a bankruptcy trustee does not assert any right to payment against its debtor, the trustee does not have a "claim" against the debtor under UFTA. Therefore, under the terms of UFTA, the trustee does not have standing to bring an action against persons to whom the debtor made transfers.***

- The Bankruptcy Code gives a bankruptcy trustee a claim against its debtor and thereby gives the trustee the right to use applicable state law, namely UFTA, to avoid a fraudulent transfer.

Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).

FRAUDULENT TRANSFERS – JOINT LIABILITY - ***Where each defendant is the first transferee in its own transaction with transferor, each defendant can be found liable under UFTA only for the amounts it improperly received from the transferor and not for anything other defendants obtained in separate transactions. The allegations of joint and several liability for fraudulent transfers must be dismissed.***

Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).

FRAUDULENT MISREPRESENTATION – ***The elements of fraudulent misrepresentation are: (1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) resulting injury proximately caused by the reliance. The party alleging fraud must prove these elements by clear and convincing evidence.***

Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages)

FRAUDULENT MISREPRESENTATION - ***Shareholder Claim of Reliance on Defendants' Misrepresentations as to the Value of Stock Purchased by Defendant Does Not Serve as the Basis for Fraud Claim Because Statements of Value Are But a Part of the Trade Talk and Customary Bargaining - Where Shareholder Status Entitles Shareholder to Examine Corporate Records, a Purchaser's Representations as to Share Value are Outweighed by Opportunity to Make Independent Evaluation***

Martinez v. Russo, March 2000, No. 1943 (Herron, J.)(August 8, 2000 - 9 pages)

FRIVOLOUS ACTION – ***Pennsylvania courts do not recognize a separate tort of "frivolous action," nor do the allegations of the Counterclaim support a separate claim. Such a claim is consumed within the Dragonetti statute, 42 Pa.C.S.A. § 8351.***

Buckeye Retirement Co., LLC. v. Michael W. Lloyd, December Term 2004, No. 3257 (Abramson, J.)(September 1, 2005 - 7 pages).

FUTURE DAMAGES - ***Plaintiff failed to present sufficient evidence to allow question of future lost profits to go to jury.***

Plaintiff's evidence of causation and the calculation of the lost profits was nothing more than speculation.

New Hope Books, Inc., *et al.* v. Datavision Prologix, Inc., July Term, 2001, Number 1741 (Cohen, J.) (June 24, 2003- 8 pages)

- G -

GIST OF THE ACTION DOCTRINE – ***Where a fraud claim is based upon the provisions in a confidentiality agreement, the duty arising is contractual, and therefore the gist of the action doctrine precludes any accompanying tort claim.***

> **Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages) (Sheppard, J.).**

GIST OF THE ACTION DOCTRINE - *Gist of the action doctrine will preclude "fraud in the performance" claims where those claims are duplicative of the breach of contract claims.*

> **Driscoll / Intech II v. Scarborough, IBCS, and FMB, August Term 2007 No. 1094 (February 12, 2008 – 11 pages) (Sheppard, J.).**

GIST OF THE ACTION DOCTRINE – *The gist of the action doctrine precludes a plaintiff from asserting both fraud and breach of contract claims where the fraud claim is based solely on defendants' failure to comply with the terms of the contract.*

A conversion claim based upon the sellers' failure to return to the purchasers the purchase price on a condominium that fails to comply with the terms of the contract is precluded by the gist of the action doctrine.

> **Chapski and Lee v. The Moravian At Independence Square Condominium Assoc., et al, July Term 2007 No. 4086 (November 30, 2007 – 11 pages) (Sheppard, J.).**

GIST OF THE ACTION - *Where Complaint alleged that defendants knowingly, intentionally, and/or with reckless disregard for their accuracy falsely represented certain things to plaintiff in the parties' contract, claims for fraud and negligent misrepresentation were dismissed as redundant of breach of contract and breach of warranty claims.*

> **NVRF, LLC v. Trevose Funding Services, June Term, 2008, No. 03173 (December 30, 2009) (New, J. 4 pages).**

GIST OF THE ACTION - CONVERSION – *The "gist of the action" doctrine operates to preclude a plaintiff from re-casting ordinary breach of contract claims into tort claims. A claim should be limited to a contract claim when the parties' obligations are defined by the terms of the contract. Where the claim is that defendant failed to pay plaintiff distributions under a shareholders' agreement, the gist of the action doctrine bars a claim for conversion.*

Fischer v. Dawley, June Term, 2006, No. 00508 (February 6, 2007) (Sheppard, J. 5 pages).

GIST OF THE ACTION – FRAUD - Since subcontractor's fraud claim against contractor arose out of an alleged modification of the subcontract between the parties, and it essentially duplicated the subcontractor's breach of contract claims against contractor, which were being prosecuted in a separate action, the fraud claim was barred by the gist of the action doctrine.

Carson/DePaul/Ramos v. Driscoll/Hunt, October Term, 2005, No. 1090 (July 20, 2006 – 4 pages) (Sheppard, J.)

GIST OF THE ACTION DOCTRINE—*A claim for a breach of fiduciary duty based upon an employee's position with his employer is not barred by the gist of the action doctrine.*

Firstrust Bank v. James Didio, et al., March Term 2005, No. 200 (Jones, J.) (July 27, 2005 – 7 pages).

GIST OF THE ACTION - *Since claims for tortious interference with contract, fraud, and civil conspiracy involve alleged breaches of duties created and grounded in that contract, such claims must be dismissed under the gist of the action doctrine.*

Advantage Systems, Inc. v. Bentley Systems, Inc., October Term, 2005, No. 04908 (September 19, 2006) (Sheppard, J., 4 pages)

GIST OF THE ACTION. *Courts will not allow a contractual breach to be recast in torts: to do so would inject confusion into the well-settled forms of recovery available in contracts.*

JOA Case Management Solutions v. School District of Philadelphia and Sedgwick Claims Management Services, Inc., April Term 2005, No. 2290 (March 13, 2006 – 4 pages) (Abramson, J.)

GIST OF THE ACTION - *Where the claim is that the defendant failed to pay money that was due to plaintiff under a contract, the gist of the action doctrine bars a duplicative claim for conversion.*

Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).

GIST OF THE ACTION – *Pennsylvania courts have held that the gist of the action doctrine bars tort claims: (1) arising solely from a contract between the parties; (2) where the duties allegedly breached were created and grounded in the contract itself; (3)*

where the liability stems from a contract; or (4) where the tort claim essentially duplicates a breach of contract claim or the success of which is wholly dependent on the terms of a contract.

> **Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages.**

GIST OF THE ACTION – A cause of action for fraud brought by a plaintiff in a case founded mainly in contract may be dismissed under the gist of the action doctrine. The doctrine precludes plaintiffs from re-casting ordinary contract claims as tort claims in order to take advantage of punitive damages.

> **Premium Assignment Corporation v. City Cab Company, Inc., March Term 2005, No. 1135(Abramson, J.)(July 15, 2005 - 4 pages).**

GIST OF THE ACTION – *A claim for negligent beach of contract is barred by the gist of the action doctrine where the breach of contract claim stems directly from the negligence claim.*

> **Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).**

GIST OF THE ACTION - *The gist of the action doctrine precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. Tort actions lie for breaches of duties imposed by law as a matter of social policy, while contract actions lie only for breaches of duties imposed by mutual consensus agreements between particular individuals. A tort claim is barred where the duties allegedly breached were created and grounded in the contract itself or the tort claim essentially duplicates a breach of contract claim or the success of the tort claim is wholly dependent on the terms of the contract.*

> **Pennsylvania Business Bank v. Franklin Career Services, LLC, May Term, 2002, No. 02507 (March 14, 2005) (Jones, J., 5 pages).**

GIST OF THE ACTION DOCTRINE—*Tort claims based on express lease provisions are barred by the gist of the action doctrine.*

> **Bricks, Boards & Gargoyles v. Plant Realty Company, Inc., March Term 2004, No. 2295 (Cohen, J.) (December 3, 2004 – 5 pages).**

GIST OF THE ACTION DOCTRINE - *Plaintiffs' claims for negligence and nuisance were barred by the gist of the action doctrine where plaintiffs cited only to contract provisions in support of their claims.*

Bravo Group Industries, Inc. v. Rite Aid Corp., April Term, 2004, No. 06800 (December 2, 2004- 7 pages) (Sheppard, J.)

GIST OF THE ACTION – *Fraud claim was barred by gist of the action doctrine where the allegedly intentional misrepresentation was a promise to do something in the future that was set forth in a written contract. Proper claim was for breach of that contract.*

Philadelphia Regional Port Authority v. Carusone Construction Company, July Term, 2003, No. 02701 (April 14, 2004) (Sheppard, J.)

Gist of the Action– *Since Plaintiff's allege conduct which could potentially pierce the corporate veil and since plaintiff's fraud claim is based upon misrepresentations made by defendant in performance of the contract, the fraud claim is barred by the gist of the action. However, plaintiffs' fraud claim against another defendant is not barred by the gist of the action because they were not a party to the contract in issue.*

City of Philadelphia *et. al.* v. Human Services Consultants, II, Inc. *et. al.* , March Term 2003, No. 0950 (March 23, 2004)(Jones, J.).

GIST OF ACTION - *Where Complaint Alleges Improper Conduct That Does Not Arise From the Contract at Issue, Gist of Action Doctrine Does Not Apply*

Advanced Surgical Services, Inc. v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(January 12, 2001 - 7 pages)(Allegation that defendant attempted to induce plaintiff' customers not to place orders with plaintiff was distinct from underlying contract at issue so that gist of action doctine does not apply)

Legion Insurance Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(May 21, 2001 - 18 pages)(Gist of Action Doctrine does not preclude claims distinct from contract claim that attorney attempted to harass defendant and violated Rules of Professional Conduct)

GIST OF ACTION - *Where Parties Entered Into Contract to Broadcast Plaintiff's Cooking Show for 52 Weeks, Allegation of Improper Conduct in Producing Advertisements and Broadcasting Show Are Independent of the Contract and Do Not Fall Within Gist of the Action Doctrine*

Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(January 9, 2001)

GIST OF ACTION - *Fraud Claims by Physicians Against Insurer Premised on Provider Agreement Are Precluded by Gist of Action Doctrine Because Plaintiffs Fail to Allege Any Misrepresentation Independent of the Provider Agreement*

> ***Gregg v. IBC,* December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)**

GIST OF ACTION - *Negligence Claim Is Barred by Gist of the Action Doctrine Where the Duties That Are Alleged to Have Been Breached Arise Solely from the Various Contracts Rather than from a Socially Imposed Duty*

> ***Goldner Company, Inc. v. Cimco Lewis Industries, Inc.,* March 2001, No. 3501 (Herron, J.)(September 25, 2001 - 7 pages)**
>
> ***Honeywell International, Inc. v. Archdiocese of Philadelphia,* May 2001, No. 2219 (Herron, J.)(October 24, 2001 - 7 pages)**

GIST OF ACTION - *Where Contract for the Replacement of Windows Created the Duties that Defendant Allegedly Breached, Negligence Claim Based on this Contract Is Dismissed Under Gist of the Action Doctrine - Gist of the Action Doctrine Also Bars Fraud Claim that Is Premised on Wrongs Committed Under the Contract*

> ***Flynn v. Peerless Door & Glass,* November 2001, No. 830 (Sheppard, J.)(May 15, 2002 - 7 pages)**

GIST OF THE ACTION - *Borrowers' claims against Bank for fraud, negligence, and gross negligence must be dismissed because the only duty allegedly breached by Bank was contractual and Borrowers had asserted claim for breach of contract against Bank.*

> **Nicholas A. Clemente, Esq. et al. v. Republic First Bank, December Term, 2002, No. 00802 (Jones, J.) (May 9, 2002 - 3 pages)**

GIST OF THE ACTION – *Court would not deny plaintiff's claims for negligent and intentional misrepresentation under the gist of the action doctrine where defendant denied existence of contract that would act as bar to tort claims.*

> **Comsup Commodities, Inc. v. Osram Sylvania, Inc., February Term, 2003, No. 01438 (December 3, 2002) (Cohen, J.)**

GIST OF THE ACTION DOCTRINE - *Where duty allegedly breached in accounting firm's claim for fraud and negligent misrepresentation against corporation and it agents arose out of auditing contract between accounting firm and corporation, gist of the action doctrine barred tort claims against corporation and its agents.*

Atchison Casting Corp. v. Deloitte & Touche, LLP., July Term, 2002 No. 003193 (Jones, J.) (March 14, 2002- 7 pages)

GIST OF THE ACTION - ***The gist of the action doctrine does not serve to bar alternative causes of actions based upon implied or constructive contracts, such as the claims for unjust enrichment and promissory estoppel.***

JK Roller Architects, LLC v. Tower Investments, July Term, 2002, No. 2778 (Jones, J.)(March 17, 2003 - 7 pages)

GIST OF THE ACTION - ***Plaintiff's claim for fraud in the inducement of a contract would be dismissed under the gist of the action doctrine where inducing (mis)representation was also contained in the contract and defendant's failure to perform as represented constituted a breach of contract.***

Axcan Scandipharm, Inc. v. American Home Products, October Term, 2002, No. 02167 (Sheppard, J.) (July 22, 2003- 9 pages).

GIST OF THE ACTION - ***Claim for breach of implied covenant of good faith and fair dealing was really a claim for breach of contract and could serve as basis for dismissing duplicative fraud claim under the gist of the action doctrine.***

Axcan Scandipharm, Inc. v. American Home Products, October Term, 2002, No. 02167 (Sheppard, J.) (July 22, 2003-9 pages).

GIST OF THE ACTION - ***Gist of the Action doctrine bars plaintiff's breach of fiduciary duty claim where the factual allegations underpinning the claim merely duplicate the allegations of breach of contract contained in an another count.***

Mercy Health System of Southeastern Pennsylvania v. Metropolitan Partners Realty LLC, *et al.* November Term, 2001; No. 3046. (Jones, J.) (July 10, 2003 - 8 pages).

GOOD FAITH – ***The implied covenant of good faith and fair dealing does not allow for a claim separate and distinct from a breach of contract claim; instead, a claim arising from a breach of the covenant of good faith must be prosecuted as a breach of contract claim, as the covenant does nothing more than imply certain obligations into the contract itself.***

Berlinerblau v. The Psychoanalytic Center of Philadelphia, April Term, 2005, No. 02406 (October 11, 2005) (Sheppard,

J., 4 pages)

GOOD FAITH - Every Contract Imposes a Duty of Good Faith and Fair Dealing in its Performance and Enforcement - Implied Duty of Good Faith May Also Arise From the Doctrine of Necessary Implication - Implied Duty of Good Faith Cannot Displace the Express Terms of A Contract Nor Can the Duty Be Implied as to Any Matter Specifically Covered by the Written Agreement - Duty of Good Faith May Not Be Imposed on the Basis of a Special Relationships Where the Contract Provides that Its Parties are "Independent Entities" - Where Complaint Sets Forth a Claim for Express Breach of Provider Agreement by, inter alia, Denying Reimbursement For Medically Necessary Treatment, the Court Sustains the Demurrer to the Providers' Good Faith Claim

> **Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(July 16, 2001 - 36 pages)**

GOOD FAITH - Absent an underlying breach of contract, no independent cause of action for breach of the implied duty of good faith exits in Pennsylvania.

> **Vine Street Food Co., LLC v. Mini Mall West, Inc., et. al., December 2001, No. 03996 (Sheppard, J.)(November 12, 2002 - 5 pages)**

GOOD FAITH/CONTRACT/UCC - *Preliminary Objections to Bad Faith Affirmative Defense Are Overruled Because a Party Responding to UCC Breach of Contract Claim May Assert as an Affirmative Defense that the Claimant Failed to Act in Good Faith*

> **York Paper v. Bartash Printing, Inc. August 2001, No. 3111 (Herron, J.)(February 6, 2002 - 3 pages)**

GOOD FAITH/FAIR DEALING - The Implied Duty of Good Faith Arises Under the Law of Contracts - This Implied Duty of Good Faith Cannot Act to Displace the Express Terms of the Contract Nor Can It be Implied as to any Matter Covered by the Written Agreement

> ***Middletown Caprentry v. C. Arena, June 2001, No. 2698 (Sheppard, J.)(November 27, 2001 - 12 pages)***

GOODS AND SERVICES INSTALLMENT SALES ACT - *Agreement Falls Within the Goods and Services Installment Sales Act ("GSISA") Where It Provides for the Renting of Property With Installment Payments and The Eventual Ownership of the Property - The Provisions of teh GSISA and the Rental Purchase and Agreement Act Are Mutually Exclusive - If an Agreement Falls Within the GSISA, It Must Include Specified Information Which Defendant Concedes Is Missing So that Summary Judgment Is Entered for Plaintiff*

Anoushian v. Rent-Rite Inc., **November 2001, No. 2679 (Herron, J.)(May 10, 2002 - 12 pages)**

GOODS AND SERVICES INSTALLMENT SALES ACT -- Preliminary Objections Sustained and Case is dismissed where Plaintiff, an Ordinary Consumer, improperly brought an action *under the Rental Purchase Agreement Act. Rental Purchase Agreements for personal/household use for an initial period of four months or less, that are automatically renewable, and provide the lessee the right to acquire ownership of the property are governed by the Goods and Services Installment Sales Act, not the Rental Purchase Agreement Act.*

Griffin, etal. v. Rent-A-Center, Inc., December Term, 2000, No. 2373 (Cohen, J.) (December 15, 2002 - 4 pages).

GUARANTY - CONSIDERATION - *A loan of $2 million is adequate consideration for a personal guaranty by borrower's principal's uncle. A guaranty serves as a necessary inducement to the lender to make the loan to the borrower. By giving the guaranty, the uncle exchanged his promise to reimburse the lender in the future for lender's promise to loan money to nephew's company.*

RCG Longview II, L.P. v. Uman Realty, LLC, June Term, 2008, No. 03586 (September 3, 2009) (New, J., 5 pages).

GUARANTEE/DISCHARGE - *Summary Judgment May Not Be Granted Where There Are Material Issues of Fact Concerning Whether Guarantee's Disposal of Creditor's Property Was Commercially Reasonable*

Academy Industries Inc. v. PNC NA et al., May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 - 34 pages)

GUARANTY ACT - *By the clear and ambiguous terms of the Pennsylvania Property and Casualty Insurance Guaranty Association Act, 40 P.S. §§ 991.1801-991.1820, PPCIGA is deemed to "stand in the shoes" of the insolvent insurer and therefore is obligated to provide coverage as the insolvent insurer would have been so obligated but for its insolvency, subject to the limitations of the Guaranty Act.*

- Under the Guaranty Act, PPCIGA is obligated to pay " …covered claims existing prior to the determination of the insolvency…" 40 P.S. § 991.1803 (b)(1)(i). The court found that claims made under the policy's reporting tail "existed" prior to the insolvency because the events giving rise to liability took place prior to that date; once the occurrence happens, liability insurance coverage attaches even though the claim many not be made for sometime thereafter.

University Health Services, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Association, January Term 2003, No. 3572 (Sheppard, Jr., J.) (May 5, 2004 – 9 pages).

GUARANTY ACT – *Court found that insureds of the insolvent insurer may be "claimants" under the Pennsylvania Property and Casualty Insurance Guaranty Association Act. As a result, PPCIGA was obligated to make separate $300,000.000 payments (minus statutory deductions) on behalf of each insured defendant, in the underlying medical malpractice action.*

Janet Cox v. Pennsylvania Property and Casualty Insurance Guaranty Association, January Term 2005, No. 0960 (Abramson, J.)(October 27, 2005 – 8 pages).

GUARANTY – SPOUSAL - *When determining whether a creditor has violated the Federal Consumer Credit Protection Equal Credit Opportunity Act by requiring a spousal signature, it is critical to determine whether the husband and wife were joint applicants on the loan. Lenders are permitted to require spousal signatures where the spouses are joint applicants.*

- Under the Federal Consumer Credit Protection Equal Credit Opportunity Act, lenders are generally permitted to require a spousal signature where (1) the guarantor signs as a party whose assets are necessary for the credit seeker to qualify as creditworthy, or (2) when a guarantor's signature is required to perfect a creditor's security interest in pledged assets which are jointly held.

Commerce Bank, N.A. v. Porterra, LLC, December, 2006, No. 2577 (March 7, 2008) (Abramson, J., 7 pages).

- H -

HEALTHCARE - ***Material Issues of Fact As to When the Condition of a Patient Seeking Emergency Medical Treatment Has Stablized Preclude Granting Summary Judgment on Hospital's Request for a Declaratory Judgment as to (1) Whether Hospital or Health Maintenance Organization Must Obtain Informed Consent Before Transfers to Another Hospital and (2) Whether HMO Must Pay Hospital for Medically Necessary Services Whether the Services Are Rendered Before or After Stabilization***

> **Temple University v. Americhoice,** **January 2001, No. 2283 (Herron, J.)(September 17, 2001 - 11 pages)**

HOME RULE CHARTER - ***City Council Did Not Violate the Home Rule Charter When It Approved the Team Sublease Terms and Conditions But Did Not Consider the Actual Team Leases as Part of the Ordinances Because the Council Properly Approved the Substance of the Team Subleases and the Final Subleases Did Not Deviate Materially from those Conditions***

> **Consumers Education & Protective Association v. City of Philadelphia,** **January 2001, No. 2470 (Sheppard, J.)(April 30, 2001 - 20 pages)**

HOME RULE CHARTER - ***Manufacturer of Fiber Optic Equipment Lacks Standing to Bring Suit Aganist the City Under Home Rule Charter Where It Fails to Allege Either That It is a Taxpayer or That It Does Business in Philadelphia***

> **International Fiber Systems, Inc. v. City of Philadelphia,** **October 2001, No. 968 (Sheppard, J.)(June 27, 2002 - 17 pages)**

- I -

IMMUNITY/GOVERNMENTAL/POLITICAL SUBDIVISION TORT CLAIMS ACT - *City Is Immune Under Political Subdivision Tort Claim Act to Claim for Tortious Interference of Contract Between Manufacturer of Fiber Optics Equipment and Subcontractor*

International Fiber Systems, Inc. v. City of Philadelphia, October 2001, No. 968 (Sheppard, J.)(June 27, 2002 - 17 pages)

IMMUNITY/LEGISLATIVE/GOVERNMENTAL - *City Councilman's Motion for Judgment on the Pleadings Based on Claim of Absolute Legislative and Governmental Immunity Is Denied Where There Are Allegations That He Interfered with the Approval of the City and/or PAID for the Assignment of a Sublease Between Plaintiffs*

DeSimone Inc. v. City of Philadelphia, November 2001, No. 207 (Herron, J.)(May 7, 2002 - 21 pages)

IMPLIED WARRANTY OF HABITABILITY—*There is no implied warranty of habitability in a commercial lease.*

Bricks, Boards & Gargoyles v. Plant Realty Company, Inc., March Term 2004, No. 2295 (Cohen, J.) (December 3, 2004 – 5 pages).

IMPOSSIBILITY OF PERFORMANCE - *The financial inability of one of the parties to complete its obligation under a contract will not effect a discharge under the defense of impossibility. Moreover, in order for a discharge to occur under this defense, there must be the occurrence of a supervising event that was not contemplatd by the parties.*

Levey v. Cogan Sklar, LLP, July Term 2001, No 2725 (Cohen, J.) June 20, 2003 - 10 pages).

IMPROPER FORM OF CAUSE OF ACTION– *Preliminary Objections to plaintiff's complaint in equity seeking to transfer the case to the law side of the court since a full and adequate remedy at law exists are overruled; this court is vested with the full jurisdiction of the whole court, equity and law.*

E.I. Fan Company, L.P. v. Angelo Lighting Co., et. al., April Term 2003, No.: 0327(August 18, 2003) (Sheppard).

IMPROPER PURPOSE –

Century General Construction & Contracting, LLC, *et al.* v. Aloia Construction Co., Inc., *et al.*, October Term, 2009, No. 3255 (October 27, 2010 – 3 pages) (J. New)

IN CAMERA REVIEW – ***While it remains to be seen if indeed the underlying materials fall under the protection of the attorney-client privilege, the trial court at the very least must conduct an in camera inspection of the documents to determine this contention.***

> **Albert A. Ciardi, III, et al. v. Janssen & Keenan, P.C., et al., December Term 2005, No. 2175, (Abramson, J.) (June 27, 2006 - 4 pages).**

INDEMNITY – ***Court found indemnity agreement entered into in connection with the issuance of a surety bond to be clear and unambiguous where indemnitor agreed to "…indemnify and hold harmless the surety from all loss and expense of whatever kind, including , but not limited to, cost of investigation, court costs and attorney's fees…"***

> **Star Ins. Co. v. Livingston, August Term 2004, No. 03554 (Sheppard, J.)(July 26, 2005– 5 pages).**

INDMENIFICATION - ***If the parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.***

> **Integrated Project Services v. HMS Interiors, Inc., March Term 2001, No.1789 (Cohen, J.) (10/21/04 - 7 pages).**

INDEMNIFICATION - ***Indemnification May Derive from Contract or Equitable Principles***

> **Penn Mutual Life Insurance Co. v. Ajax Management Corp., May 2001, NO. 3661 (Herron, J.)(November 16, 2001 - 6 pages)**

INDEMNIFICATION: ***Contractual indemnification clause required buyer of assets to indemnify the seller for attorneys fees and costs incurred in a personal injury suit brought by the buyer's employee that was based upon a purchased asset.***

> **Boise Cascade Corporation v. Sonoco Products Company, January Term 2002; Number 3939 (Cohen, J.) (May 15, 2003 - 14 pages).**

INDEMNIFICATION – CONTRACTS - ***Indemnity agreements are to be narrowly interpreted in light of the parties' intentions as evidenced by the entire contract. In interpreting the scope of an indemnification clause, the court must consider the four corners of the document and its surrounding circumstances.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control**

Nos. 091264, 091275, 091285).

INDEMNIFICATION – DECLARATORY JUDGMENT - ***In a construction contract indemnification case, where the underlying actions are not resolved or settled and no party has yet been found at fault, it was impossible to determine whether the underlying claims are within the scope of the contract's indemnity clause. It was not for court to enter a declaratory judgment regarding indemnification in the underlying actions pending in other courts. Instead, each of the courts hearing such claims must make its determination regarding liability, and then it or a subsequent court shall determine if any indemnification duty is owing to indemnitee.***

Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).

INDEMNIFICATION –FUTURE LOSSES - ***It is well settled that before any right of indemnification arises, the party seeking indemnification must in fact pay damages to a third party. In other words, the indemnitee must have suffered some loss, either personally, or by making payment to others, for which it claims indemnification from indemnitor. Any indemnification action premised on an anticipated future loss is premature and must be dismissed.***

Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).

INDEMNIFICATION – INDEMNITEE'S NEGLIGENCE - ***If the parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee's own negligence, they must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.***

Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).

INDEMNIFICATION – LOST PROFITS - ***Where an indemnification provision covers all "losses" suffered by plaintiff as a result of a breach of warranty by defendant, the indemnification language is broad enough to cover plaintiff's lost profits, if such losses were caused by defendant's breach.***

NVRF, LLC v. Trevose Funding Services, June Term, 2008, No. 03173 (December 30, 2009) (New, J. 4 pages).

INDEMNIFICATION PROVISION - ***An indemnification provision that***

expresses unequivocally a subcontractor's intent to assume liability for the negligence of a contractor, waives the subcontractor's immunity under the Workers' Compensation Act.

> **Merck & Co., Inc., Bovis Lend Lease, Inc. and Zurich American Insurance Company v. Transcontinental Casualty Company, *et al*. December Term, 2005, No. 1825, (September 19, 2006 – 8 pages) (Abramson, J.)**

INDEMNIFICATION – STIPULATION – ATTORNEY FEES

> **Sovereign Bank v. XL-75, Inc. and Mark Jackson, November Term, 2009, No. 4667 (New, J.) (April 7, 2011 – 3 pages)**

INDEMNIFICATION – SUMMARY JUDGMENT - ***In order to survive summary judgment on its claim under construction contract's indemnification language, potential indemnitee must point to evidence of record indicating that the claimed damages are potential indemnitor's fault rather than potential indemnitee's own or a third party's fault.***

> **Carson/DePaul/Ramos v. Driscoll/Hunt, February Term, 2004, No. 02166 (June 29, 2006) (Abramson, J., 21 pages). (Control Nos. 091264, 091275, 091285).**

INDEMNIFICATION – Motion for Summary Judgment - ***Subcontractor owed the contractor and construction manager a duty of indemnification since the subcontractor/ contractor agreement incorporated and identified the contract between the contractor and the construction manager.***

> **American Contractors Insurance Group, et. al. v. Harleysville Mutual Insurance Group, et. al., November Term, 2000 No. 1843 (September 17, 2003) (Jones).**

INDISPENSABLE PARTY – ***In a breach of contract action brought by a purchaser of a condominium against the seller, the general contractor who developed the condominiums years prior to the contract is not an indispensable party.***

> **Chapski and Lee v. The Moravian At Independence Square Condominium Assoc., et al, July Term 2007 No. 4086 (November 30, 2007 – 11 pages) (Sheppard, J.).**

INDISPENSABLE PARTIES – RES JUDICATA - ***A order of dismissal based upon the failure to join indispensable parties does not have res judicata effect because in the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of the missing party. A trial court must dismiss such an action without reaching the merits of plaintiff's claims since any order of the court on the merits would be null***

and void for want of jurisdiction. In addition, any such dismissal is without prejudice to plaintiff's right to institute a new action wherein all indispensable parties are made parties to the proceedings.

> **Vasile Marincas v. U.S. Mail Delivery System, Inc., *et al.*, March Term, 2004, No. 3123 (Sheppard, Jr., J.) (10/15/04 – 4 pages).**

INDISPENSABLE PARTIES – RES JUDICATA - A *order of dismissal based upon the failure to join indispensable parties does not have res judicata effect because in the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of the missing party. A trial court must dismiss such an action without reaching the merits of plaintiff's claims since any order of the court on the merits would be null and void for want of jurisdiction. In addition, any such dismissal is without prejudice to plaintiff's right to institute a new action wherein all indispensable parties are made parties to the proceedings.*

> **Vasile Marincas v. U.S. Mail Delivery System, Inc., *et al.*, March Term, 2004, No. 3123 (Sheppard, Jr., J.) (July 20, 2004 – 5 pages).**

INDISPENSABLE PARTIES- *Where the complaint allegations do not implicate the rights of other insurers and do not affect the disposition of the case on the merits, defendant's request to join indispensable parties must be denied. As the litigation progresses, the parties may move to join such insurers as indispensable parties since the issue of failure to join indispensable parties may be raised at any time.*

> **Pennsylvania Turnpike Commission v. First State Insurance Company, July Term 2003 No. 1464 (April 14, 2004) (Sheppard).**

INDISPENSABLE PARTY - *School District Is Not Indispensable Party Where Complaint Alleges Breach of Contract Claim Involving Sale of Coupons to It*

> **Levin et al. v. Schiffman and Just Kidstuff, July 2000, No. 4442 (Sheppard, J.)(February 1, 2001 - 26 pages)**

INDISPENSABLE PARTY - *Vendor That Was Awarded Polymer Purchase Contract Is Not an Indispensable Party Where the Gravamen of the Action Focuses on the Actions of the City and Its Agent in Conducting Plant Scale Trial in Awarding the Contract*

> **Polydne, Inc. v. City of Philadelphia, February 2001, NO. 3678 (McInerney, J.)(August 1, 2001 - 39 pages)**

INDISPENSABLE PARTY - *Where Subcontractor Brought Declaratory Judgment Action Against Insurer Concerning Coverage for an Underlying Construction Dispute Complaint Was Dismissed for Failure to Join the Indispensable Parties That Included the Named Insured, Other Interested Insurers and the Claimants in the Underlying Action*

> **University Mechanical & Engineering Contractors, Inc. v. Insurance Company of North America, November 2000, No. 1554 (Sheppard, J.)(May 1, 2002 - 27 pages)**

INDISPENSABLE PARTY - *Where Complaint Alleges that Competitive Bidding Requirements Pursuant to the Home Rule Charter Should Apply to a Development Lease, the Parties to that Lease Should Be Joined As Indispensable Parties Because Their Interests Would Be Affected By a Ruling on This Issue - Contractors and Subcontractors Are Not Indispensable Parties Where Complaint Does Not Set Forth Allegations that Would Affect their Interests*

> **International Fiber Systems, Inc. v. City of Philadelphia, October 2001, No. 968 (Sheppard, J.)(June 27, 2002 - 17 pages)**

INDISPENSABLE PARTY - *Preliminary Objections Asserting Failure to Join Indispensable Party Are Overruled Where Complaint Does Not Present Allegations That Would Affect the Interests of the Alleged Indispensable Party*

> **Tremco Inc. v. Pennsylvania Manufacturers' Insurance Company, June 2000, No. 388 (Sheppard, J.)(June 27, 2002 - 16 pages)**

INDISPENSABLE PARTY- *PETITION TO INTERVENE - To determine whether a party is indispensable to an action involves consideration of whether the absent parties have a right or interest related to the claim, and if so, what the nature of that right or interest is, whether that right or interest is essential to the merits of the issue, and whether justice can be afforded without violating the due process rights of absent parties - A petition to intervene must include a copy of the pleading which the petitioner will file if permitted to intervene or, must adopt certain pleadings or parts of pleadings already filed in the action - A petition to intervene may be denied where the petitioner's "legally enforceable interest" amounts to an interest based purely on financial gain - A petition to intervene may be denied where the petitioner's interests are already adequately represented and intervention would unduly delay trial.*

> **Eastern America Transport & Warehousing, Inc. v. Evans Conger Broussard & McCrea Inc., July Term 2001, No. 2187 (Herron, J.) (July 31, 2002 - 8 pages)**

INJUNCTION – *Court found that injunction preventing landlord from confessing judgment was necessary to prevent immediate and irreparable harm to tenant, where notice of intent to enter judgment was defective and where underlying default was questionable at best. Moreover, the injunction was reasonably suited to prevent immediate harm caused to tenant without impinging unnecessarily on landlord's right to confess judgment in the event of any future breaches of the lease.*

Asian Bank v. 224 E. 13th Street, Realty, et al., May Term 2005, No. 01031 (Jones, J.)(June 8, 2005 - 7 pages)

Injunction/Contract for Goods–Petitioner's claim for immediate injunctive relief is denied where its claims for future injury is fully compensable by monetary damages as set for in the Pennsylvania Uniform Commercial Code, 13 Pa. C.S. section 2100 *et. seq*. as well as its claim for intentional interference with contractual relations.

Warehouse Technology, Inc. v. Lift Incorporated, *et. al*., January Term 2006 No. 2827 (January 27, 2006)(Bernstein, J.).

INJUNCTION/INTERPRETATION OF SALE AGREEMENT/NON COMPETE PROVISION/CONTROL OF EMPLOYEES- *The non compete provision contained in the Agreement of Sale only embraces employees when they are under the common control of their employer that is when they are performing work within the course and scope of their employment. When they are performing work outside the course and scope of their employment the non compete agreement does not apply.*

– Where two radio broadcasters hired by a radio station to work in radio independently go out on their own and start a television production company in which they host, air and produce a show for television without any assistance from the radio station and are working outside the scope of their employment with the radio station, the employees in performing their television duties are not under the common control of radio station.

– Enforcing a non compete provision against two employees by prohibiting them from performing work in a private business venture outside the course and scope of their employment and outside the common control of their employer would place an unreasonable restriction upon the employees' freedom without any resulting benefit and would bargain away their private rights.

Farm Journal, Inc. v. Tribune Entertainment Company, December Term 2005 No. 2397 (May 25, 2006 – 17 pages)(Sheppard, J.).

INJUNCTION/PERMANENT - ***Company that Manufactures Polymers for Use in Solid Waste Water Treatment Was Not Entitled to Permanent Injunction Because It Failed to Show that the City's Award of the Bid Constituted a Manifest Abuse of Discretion or an Arbitrary Execution of the City's Duties or Functions - The City's Witnesses Presented Credible Evidence that They Acted with Discretion and Good Faith in the Conduct of the Official Polymer Trials, in Drawing Up Bid Specifications and in Adhering to Those Specifications When Awarding the Bid to Cytec - The Mere Suggestion of Fraud or Favoritism or a Possible Conflict of Interest is Insufficient to Void an Otherwise Valid Bid Award - The Evidence Showed that All the Bids Were Analyzed on A Common Standard - The Evidence Showed that Bid Specifications Were Not Changed or Altered After the Bids Were Opened to Give a Competitive Advantage to Cytec Over All Other Bidders***

Polydyne, Inc. v. City of Philadelphia, February 2001, No. 3678 (McInerney, J.)(August 1, 2001 - 39 pages)

INJUNCTION, PRELIMINARY - ***Criteria - Relief May Not be Granted if One Element is Lacking - Plaintiff's Right to Relief is Not Clear Where None of the Writings or Evidence Spells Out Any Obligation for Defendants to Make Payments - Plaintiff Failed to Establish that Harm Cannot be Remedied by Monetary Damages - "No Monetary Damages" Exception Inapplicable***

Fennell, Fennell Media Consulting and Kazu Ito v. Van Cleef and Van Cleef and Co., May 2000, No. 2754 (Herron, J.)(May 31, 2000 - 5 pages)

INJUNCTION, PRELIMINARY - ***Preliminary Injunction Issued to Require Former Owner of Business to Return Computer to Purchaser of Business and its Assets - Clear Right to Relief Existed Where Plaintiff Demonstrated that Computer Was Purchased as a Business Asset and Defendant Removed it Without Consent - Irreparable and Immediate Harm Shown Where Information on Computer Could be Used to Disrupt Plaintiff's Business and Integrity of its Systems***

Fidelity Burglar & Fire Alarm Co., Inc. v. Defazio, June 2000, No. 3060 (Herron, J.)(August 4, 2000 - 7 pages)

INJUNCTION, PRELIMINARY - ***A Claim for Tortious Interference With Contract Would Support An Injunction***

Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)

INSOLVENCY - ***Where defendants had clearly ceased to pay their debts as they become due and had delayed paying their creditors for several years, they satisfy the requirements for a finding of apparent insolvency, and the court properly labeled them***

"insolvent."

Davis-Giovinazzo Construction Company, Inc. v. Heritage Village Ventures, II, Inc., November Term, 2002, No. 01247 (July 20, 2005) (Sheppard, J. 8 pages) Superior Court Docket No. 3212EDA2004

INJUNCTION/DISQUALIFY COUNSEL– ***A former client seeking to disqualify a law firm representing an adverse party on the basis of its past relationship with a member of the law firm has the burden of proving (1) that a past attorney/client relationship existed which was adverse to a subsequent representation by the law firm of the other client; (2) that the subject matter of the relationship was substantially related; and (3) that a member of the law firm, as attorney for the adverse party, acquired knowledge of confidential information from or concerning the former client, actually or by operation of law.***

- The fact that two representations involved similar or related facts is not sufficient to warrant the finding of a substantial relationship so as to disqualify the attorney from the representation. Rather, the test is whether the information acquired by an attorney in his former representation is substantially related to the subject of matter of subsequently represented.

- Where the evidence produced fails to establish that confidential information was provided to counsel in the prior action, disqualification is not required.

Goldfarb v. Kuhl, September Term 2005 No. 1825 (October 24, 2005, 6 pages)(Jones, J.).

IN PARI DELICTO - *In pari delicto is usually applied in an action between a corporation and an innocent third party. In pari delicto is not applicable when a corporation brings an action against an insider for misconduct.*

Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).

***IN PERSONAM* JURISDICTION - A defendant should reasonably anticipate being haled into the court of the forum state if the defendant purposefully availed himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws.**

TD Bank. N.A. v. Vernon Coyle and Rose Coyle, April Term 2011, Case No. 1104-02518; April Term 2011, Case No. 1104-02529, (New, J. (10/28/11 - 5 pages).

INSURANCE COVERAGE; ACCIDENT; OCCURRENCE; ROOF

Certain Underwriters at Lloyd's London v. Berzin, September Term, 2009, No. 01263 (June 28, 2010) (Bernstein, J., 3 pages)

INSURANCE COVERAGE; LOSS PAYEE; INTERLOCUTORY APPEAL; CERTIFIED QUESTION

ABC Bus Leasing, Inc. v. Certain Underwriters at Lloyds, London, May Term, 2008, No. 01815 (June 28, 2010) (Bernstein, J., 3 pages)

INSURANCE – DISCRETION TO SETTLE - *The insurance contract under which insurer tendered a defense to plaintiffs expressly provided that insurer "may at [its] discretion investigate any occurrence and settle any claim or suit that may result." The terms of the policy do not require insurer to obtain plaintiffs' consent to any settlement. In this case, insurer exercised its discretion and settled the action against the insured within policy limits without causing any loss to plaintiffs, so there was no breach of the duty of good faith and fair dealing.*

Tower Investments, Inc. v. Rawle & Henderson LP, May Term, 2007, No. 03291 (June 8, 2009) (Bernstein, J., 6 pages).

INSURANCE – DUTY OF BROKER - *Broker was not negligent in failing to add plaintiff as additional insured under renewal insurance policy where insured never instructed broker to add plaintiff. Broker had no duty to ascertain if plaintiff was an additional insured under renewal policy.*

Hua Da Remodelling v. USF&G *et al.*, June Term, 2008, No. 03390 (December 7, 2009 – 9 pages) (Bernstein, J.).

INSURANCE – INJURY TO EMPLOYEE OF INSURED - *Policy contained an exclusion for injuries to employees of the insured. There is an exception in the Policy for "insured contracts" in which the insured by "contract or agreement" has assumed "the tort liability of another person or organization to pay damages because of bodily injury." Plaintiff failed to produce evidence of any "insured contract" between it and insured in which insured assumed plaintiff's tort liability for bodily injuries to insured's employee.*

Hua Da Remodelling v. USF&G *et al.*, June Term, 2008, No. 03390 (December 7, 2009 – 9 pages) (Bernstein, J.).

INSURANCE – SCOPE OF COVERAGE – *A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage.*

Harleysville Mutual Insurance Co. v. Erie Ins. Exchange,

October Term 2006, No. 2028 (October 7, 2008) (New, J., 8 pages)

INSURANCE – INTERPRETATION OF CONTRACT - ***The interpretation of the terms of a contract, including an insurance contract, is a matter of law for the court. Under Pennsylvania law, the primary consideration in interpreting a contract, including an insurance contract, is the language of the contract itself. That language must be construed in accordance with its plain and ordinary meaning. The intent of the parties to a written contract is deemed to be embodied in the writing itself, and when the words are clear and unambiguous the intent is to be gleaned exclusively from the express language of the agreement.***

Harleysville Mutual Insurance Co. v. Erie Ins. Exchange, October Term 2006, No. 2028 (October 7, 2008) (New, J., 8 pages)

INSURANCE – INTERPRETATION OF CONTRACT – PLAIN AND ORDINARY MEANING OF TERMS - ***Words of common usage in an*** *insurance* ***policy are to be construed in their natural, plain and ordinary sense, and the court may inform its understanding of these terms by considering their dictionary definitions.***

Harleysville Mutual Insurance Co. v. Erie Ins. Exchange, October Term 2006, No. 2028 (October 7, 2008) (New, J., 8 pages)

INSURANCE – INTERPRETATION OF TERM "USE" IN POLICY - ***The term "use" in an insurance policy has broad but not unlimited applications. If the term "use" is construed to embrace all of its possible meanings and ramifications, practically every activity of mankind would amount to a "use" of something. However the term must be considered with regard to the setting in which it is employed. The dictionary definition of the term "use" is "to put into service or apply for a purpose; employ."***

Harleysville Mutual Insurance Co. v. Erie Ins. Exchange, October Term 2006, No. 2028 (October 7, 2008) (New, J., 8 pages)

INSURANCE COMPANY ***it cancels policy is liable for portion of premium kept by broker.***

Triage, Inc. v. Prime Insurance Syndicate, Inc. et al., November Term 2002, No. 1570 (Cohen, J.) (10/13/04 – 4 pages).

INSURANCE – OCCURRENCE POLICY - ***Where Policy provides coverage for "bodily injury or property damage that is caused by an 'occurrence' that takes place in the covered territory if the bodily injury or property damage occurs during the policy***

period," there was no coverage for injuries that happened outside the policy period even though the cause of the injuries existed during policy period.

- POLICY INTERPRETATION - ***When all of the provisions of the policy are read together, it is clear that the policy provides coverage for accidental bodily injury or property damage which occurs, and for personal or advertising injury which is committed, within the policy period. Policy does not cover bodily injury which is "committed" or caused during the policy period, but which is not felt until after the policy period ends.***

> **Copley Assoc. Ltd. v. Erie Insurance Exchange, December Term, 2005, No. 01332 (June 12, 2007) (Abramson, J., 6 pages).**

INSURANCE - ***As a result of insured's settlement with its insurer for more than the Policy's coverage amount, the insured necessarily obtained the coverage amounts to which it claims it was entitled, plus additional funds for its troubles. Since the insured has been made whole, it has not suffered any damage due to non-coverage for which its insurance agent could be liable. Therefore, its claim against the agent for professional negligence in obtaining too little coverage from the insurer was properly dismissed for lack of damages.***

> **Prima-Donna, Inc. v. Acono-Rate Ins. Agency, Inc., June Term, 2004, No. 02005 (October 24, 2006) (Bernstein, J. 6 pages).**

INSURANCE—*The court determines the scope of coverage under an insurance policy by reading the policy to avoid ambiguities.*

> **Raimo Corp.. v. Indian Harbor Ins. Co., et al., November Term 2003, No. 611 (Abramson) (July 15, 2005 – 8 pages).**

INSURANCE - ***A reporting tail changes the nature of the claims-made policy and shifts the focus to when the event giving rise to liability took place, rather than when it was reported. In essence, the tail converts a claims-made policy into an occurrence policy.***

> **University Health Services, Inc. v. Pennsylvania Property and Casualty Insurance Guaranty Association, January Term 2003, No. 3572 (Sheppard, Jr., J.) (May 5, 2004 – 9 pages).**

INSURANCE -*Claim for insurance coverage will not be joined with underlying liability claim.*

> **Acme-Hardesty Co. et al. v. Wenger et al., February Term 2001, No.1799 (Sheppard, J.) (January 31, 2003 - 12 pages).**

INSURANCE - BAD FAITH - ***To prove bad faith, a plaintiff must show by clear and convincing evidence that the insurer (1) did not have a reasonable basis for denying benefits under the policy and (2) knew or recklessly disregarded its lack of a reasonable basis in denying the claim. Bad faith claims are fact specific and depend on the conduct of the insurer vis a vis the insured.***

Erie Ins. Exchange v. Steven Sze, et al., January Term 2008, No. 4100 (August 4, 2008) (Abramson, J., 8 pages)

INSURANCE – BAD FAITH - ***Pennsylvania does not recognize a cause of action for common law bad faith or bad faith arising in trespass. Nor does Pennsylvania recognize a cause of action for breach of the implied covenant of good faith and fair dealing separate and apart from a cause of action for breach of contract. In addition, a claim that an insurer has breached its fiduciary duty to its insured is subsumed within a claim for bad faith. Furthermore, there is no private right of action under the Unfair Insurance Practices Act, although the requirements of the UIPA can be considered in determining if an insurer has acted in bad faith.***

Hebrew School Condominium Association, *et al.* v. Enrique Distefano, *et al.*, May Term 2004, No. 1886 (Cohen, J.) October 21, 2004 – 7 pages).

INSURANCE BROKER NEGLIGENCE – ***Insurance broker could not be liable for negligence as a matter of law where there would have been no coverage under either of the two policies forms at issue.***

JEP Management, Inc., et al. v. Federal Insurance Company et al., August Term 2004, No. 4170 (Bernstein, J.)(August 8, 2006 – 9 pages).

INSURANCE – CONSENT TO SETTLEMENT- ***Even if the policy does not expressly say so, an insurer that withholds its consent to settle must show that it did so in good faith, fairly, and reasonably. In order to show that its consent was reasonably withheld, the insurer must show that the proffered settlement was prejudicial to it. The purpose of the prejudice requirement is to allow an insurer to refuse payment only if its procedural handicap has led to disadvantageous, substantive results. Courts have required a showing not only of the loss of substantial defense opportunities, but also of a likelihood of success in defending liability or damages if those opportunities had been available.***

Resource America, Inc. v. Lloyd's, April Term, 2003, No. 02709 (November 12, 2004- 10 pages) (Sheppard, J.)

INSURANCE/CONTRACT - Breach of Policy by Insurer - Preliminary Injunction Granted in Part - Irreparable Harm Shown Where Failure to Process Claims Will Force Plaintiff Out of Business - Reasonable Expectations of Insured Apply to Valuable Papers Claims Based on Representations of Insurer's Agent and Additional Premiums Paid

TJS Brokerage & Co., Inc. v. Hartford Casualty Insurance Co. and Peterman Co., December 1999, No. 2755 (Herron, J.)(April 24, 2000 - 44 pages)

INSURANCE/CONTRACT/BREACH - *Preliminary Objections Sustained Where Insured Fails to Set Forth Claim for Breach of Policy Where She Alleges that Insurer Gave Her the Option to Select Method of Payments Through an Account That Differed from the Default Selection of Benefit Payments Made By Her Decedent Husband/Insured*

Piesach v. Continental Assurance Co., June 2001, No. 3663 (Herron, J.)(January 8, 2001 - 6 pages)

INSURANCE/CONTRACT/PARTIES - *Where Plaintiff Is Neither a Named Insured in the Declarations Page nor an Additional Named Insured under the Policy, Summary Judgment Is Granted in Favor of the Insurer on Breach of Contract Claim - Plaintiff Is Not a Third-Party Beneficiary Where Parties to Contract at Issue Did Not Intend Coverage for the Plaintiff*

Tremco, Inc. v. Pennsylvania Manufacturers' Insurance Co., June 2000, No. 388 (Sheppard, J.)(June 27, 2002 - 16 pages)

INSURANCE COVERAGE – ADVERTISING INJURY - *Insurer had no duty to defend under the advertising injury provisions of commercial liability policy with respect to a claim against the insured for improper transmission of unsolicited faxes whose content was harmless because such faxes did not constitute publication of material that violates a person's right to privacy.*

Telecommunications Network Design, Inc. v. Brethren Mutual Ins. Co., January Term, 2006, No. 3503 (May 10, 2007 – 9 pages) (Abramson, J.)

INSURANCE COVERAGE – BURDEN OF PROOF - *Under an "all risks" policy, the plaintiff must demonstrate that the property damage was the result of an occurrence during the policy period and that it was a covered cause of loss.*

- Where plaintiff failed to prove, by way of documentary evidence, affidavit, or otherwise that the property damage to the premises commenced during the policy period, summary judgment for the insurer was granted.

Western Metal Bed Co., Inc. v. Lexington Insurance Co., August Term, 2005, No. 04134 (August 29, 2007) (Bernstein, J., 12 pages).

INSURANCE COVERAGE – DUTY TO DEFEND – ***An insurer's duty to defend continues only until the claim is excluded from the scope of the policy. When a claim is not within policy coverage and effective notice is given to the insured, the insurer is not estopped from terminating all payments. A reservation of rights in this respect, to be effective, need only be timely communicated to the insured. Insurer complied with this requirement, so insurer is not estopped from denying coverage by continued participation in a defense that it did not owe on a claim that was outside policy coverage.***

> **Cordisco, Bradway & Simmons v. Gulf Insurance Group, February Term 2007, No. 00111 (July 18, 2008) (Bernstein, J., 18 pages)**

INSURANCE COVERAGE – LIQUOR LIABILITY - ***Insurer had no duty to defend or indemnify insured under liquor liability policy for claim that insured was liable for negligent use of excessive force, negligent training and supervision, negligent hiring, negligent failure to protect, and intentional battery because the claim contained no allegation that the injuries resulted from insured's selling, serving, or furnishing alcohol to anyone.***

> **Whiskey Tango Inc. v. United States Liability Ins. Group, May Term, 2006, No. 03026 (May 15, 2007- 4 pages) (Bernstein, J.).**

INSURANCE COVERAGE – LIQUOR LIABILITY - ***There was no coverage under a Liquor Liability Policy for injuries sustained in a bar brawl where trial court in underlying action precluded all parties from referencing that any individual allegedly involved in the brawl was intoxicated, and the transcript, particularly the jury instructions given in the underlying action, did not support plaintiff's assertion that a liquor liability claim was put before the jury.***

– RESERVATION OF RIGHTS – TIMING - ***Insurer's denial of coverage by issuing second reservation of rights letter at close of discovery in underlying action was valid where insurer could not determine until that time that there was no evidence to support plaintiff's claim of coverage and neither insured nor plaintiff suffered any prejudice as a result of denial.***

> **United National Specialty Insurance Co v. Gunboat, Inc., December Term, 2004, No. 03045 (June 28, 2006) (Bernstein, J., 7 pages)**

INSURANCE COVERAGE – MISREPRESENTATION BY INSURED - ***The insured had constructive knowledge of a material risk to which the insurer did not agree and which it cannot be forced to insure. The Rules of Professional Conduct require Partners, Managers and Supervisory Lawyers at a Law Firm to ensure that "all lawyers in***

the firm conform to the Rules of Professional Conduct," including Competence and Diligence. This duty required Partners, Managers and Supervisory Lawyers at the insured Law Firm to have knowledge of a former employee's admitted malpractice. It is fair to attribute constructive knowledge to the Law Firm, even if not every member had actual knowledge. Therefore, the Law Firm made a material misrepresentation on a professional liability insurance application when it answered "no" to the question asking about potential claims.

Cordisco, Bradway & Simmons v. Gulf Insurance Group, February Term 2007, No. 00111 (July 18, 2008) (Bernstein, J., 18 pages)

INSURANCE COVERAGE – NOTICE - *Where an insurance company seeks to be relieved of its obligations under an insurance policy on the ground of late notice, the insurance company is required to prove that the notice provision was in fact breached and that the breach resulted in prejudice to its position.*

Western Metal Bed Co., Inc. v. Lexington Insurance Co., August Term, 2005, No. 04134 (August 29, 2007) (Bernstein, J., 12 pages).

INSURANCE COVERAGE – NOTIFICATION PROVISION – *Plaintiff insured's claim is not barred for failure to comply with the policy provisions where defendant insurance company failed to show that it was prejudiced by insured's delay in filing its claim, or that insured did not mitigate its damages, and where insured was induced to forbear bringing a lawsuit where insurer was still in the process of investigating insured's claim.*

Prime Medica Associates v. Valley Forge Insurance Co., November Term, 2004, No. 0621 (April 26, 2007)(Sheppard, J. 15 pages).

INSURANCE COVERAGE – OCCURRENCE - An occurrence for purposes of determining insurance coverage happens when the injurious effects of the negligent act first manifest themselves in a way that would put a reasonable person on notice of injury.

Western Metal Bed Co., Inc. v. Lexington Insurance Co., August Term, 2005, No. 04134 (August 29, 2007) (Bernstein, J., 12 pages).

INSURANCE COVERAGE – PERSONAL INJURY - *Insurer had no duty to defend under the personal injury provisions of commercial liability policy with respect to a claim against the insured for improper transmission of advertising faxes because advertising offenses were excluded.*

Telecommunications Network Design, Inc. v. Brethren Mutual

Ins. Co., January Term, 2006, No. 3503 (May 10, 2007 – 9 pages) (Abramson, J.)

INSURANCE COVERAGE – POLICY INTERPRETATION - ***Words of common usage in an insurance policy are to be construed in their natural, plain and ordinary sense, and the court may inform its understanding of these terms by considering their dictionary definitions.***
- Where an insurance policy stated that all claims arising out of the same acts or series of related acts should be treated as one claim, the fact that the claims involved different legal theories did not cause the claims to be treated as separate and distinct under the policies. Instead, only differences in the underlying facts alleged could give rise to separate claims.

Aetna, Inc. v. Lexington Ins. Co., May Term, 2003, No. 03076 (May 2, 2006) (Abramson, J., 22 pages).

INSURANCE COVERAGE – PROPERTY DAMAGE - ***Insurer had duty to defend under property damage provision of commercial liability policy with respect to a claim against the insured for improper transmission of unsolicited faxes because it was possible for the insured to be found liable even if the transmission was not expected or intended from the point of view of the insured.***

Telecommunications Network Design, Inc. v. Brethren Mutual Ins. Co., January Term, 2006, No. 3503 (May 10, 2007 – 9 pages) (Abramson, J.)

INSURANCE COVERAGE – REASONABLE EXPECTATIONS - ***Where there was nothing unclear or inconspicuous in the language of liquor liability policy, a commercial insured is presumed to have read it and understood the coverage provided. Furthermore, a commercial insured is not entitled to claim, in the face of such unambiguous policy language, that it reasonably expected to obtain coverage different than that set forth in the policy.***

Whiskey Tango Inc. v. United States Liability Ins. Group, May Term, 2006, No. 03026 (May 15, 2007 – 4 pages) (Bernstein, J.).

INSURANCE COVERAGE – TIME LIMITATIONS - ***Where policy required insured to bring an action against insurer within two years after the date on which the direct physical loss or damage occurred and complaint was filed almost four years after the property damage was discovered, claims were time barred.***

Western Metal Bed Co., Inc. v. Lexington Insurance Co., August Term, 2005, No. 04134 (August 29, 2007) (Bernstein, J., 12 pages).

INSURANCE – COVERAGE - ***The Policy at issue can be read to cover***

tortious acts "committed" during the Policy period, in addition to resulting injuries that occur within the Policy period. However, in the Underlying Action for which the insured seeks coverage, the insured is not alleged to have "committed" any wrongful acts. Instead, the insured was alleged to have failed to prevent the harm that befell the claimants. The word "commit" as used in the Policy means to perform as an act. What the insured allegedly did is an "omission," which means to neglect to perform what the law requires.

Copley Assoc. Ltd. v. Erie Ins. Exchange, December Term, 2005, No. 01332 (December 29, 2006) (Abramson, J., 5 pages).

INSURANCE COVERAGE - *The court declined to extend reasonable expectations doctrine to commercial insureds which were represented by a sophisticated insurance broker where policy language was clear and unambiguous.*

JEP Management, Inc., et al. v. Federal Insurance Company et al., August Term 2004, No. 4170 (Bernstein, J.)(August 8, 2006 – 9 pages).

INSURANCE COVERAGE – *Plaintiff was injured while covered under an automobile insurance policy which covered three vehicles and provided stacked uninsured motorist coverage in the amount of $15,000.00. At the time of the accident, Plaintiff was also insured under a commercial automobile policy with Phoenix which provided non-stacked UM coverage in the amount of $50,000.00 per accident. Court found that Phoenix was entitled to a set off the $45,000.00 plaintiff received under the automobile policy and was only obligated to pay Plaintiff $5,000.00.*

Heenan v. Phoenix Ins. Co., May Term 2005, No. 3604 Abramson, J.)(April 24, 2006– 4 pages).

INSURANCE COVERAGE – *A rental car agreement is not a policy of insurance. It was undisputed that when Progressive's insured rented the vehicle from Avis, he declined all of the insurance options available under that. Because the Progressive Policy provided primary insurance coverage to its insured for the underlying claim, Avis is under no obligation to provide coverage to insured under the Rental Agreement or the Motor Vehicle Responsibility Law. Summary judgment entered in favor of Avis.*

Progressive Classic Ins. Co. v. Avis Rent A Car, February Term 2005, No. 507(Sheppard, J.) (February 13, 2006 – 4 pages).

INSURANCE COVERAGE – *Court found no duty to defend owed by insurance company where conduct in question was specifically excluded by the policy.*

Taggart v. Utica First Insurance Company, July Term 2001, No. 77 (Jones, J.) (December 29, 2005 - 3 pages).

INSURANCE COVERAGE – *Under § 1714 of the MVFRL, an owner of a currently registered uninsured motor vehicle can not recover first party benefits, even if the uninsured vehicle was not actually involved in the accident. As such, the court found that Progressive owed no obligation to provide first-party medical benefits or income loss benefits to insured. However, insured was still entitled to full-tort coverage for his uninsured motorist claim because § 1705 (a)(5) of the MVFRL does not apply to situations where the claimant was not operating his unregistered vehicle at the time of the accident.*

Progressive Halcyon Ins. Co. v. Kennedy, November Term 2004, No. 369 (Abramson, J.) (September 22, 2005 – 4 pages).

INSURANCE COVERAGE – *Under Pennsylvania law, an insurance company need not demonstrate prejudice when there has been a failure to comply with notice provisions in a "claims-made" policy.*
– Based on the clear and unambiguous language of the policy, the court found that requirement of "reasonableness" in notice provision indicated that plaintiff insurance company's actions in evaluating and reporting claims must be judged objectively and in accordance with that of a reasonable insurance carrier under similar circumstances

Ace American Ins. Co. v. Underwriters at Lloyd's and Companies, et al.., July Term 2001, No. 77 (Abramson, J.) (August 30, 2005 – 6 pages).

INSURANCE COVERAGE – *Under Pennsylvania law, an insurance company need not demonstrate prejudice when there has been a failure to comply with notice provisions in a "claims-made" policy.*
– Based on the clear and unambiguous language of the policy, the court found that requirement of "reasonableness" in notice provision indicated that plaintiff insurance company's actions in evaluating and reporting claims must be judged objectively and in accordance with that of a reasonable insurance carrier under similar circumstances

Ace American Ins. Co. v. Underwriters at Lloyd's and Companies, et al..,July Term 2001, No. 77 (Abramson, J.) August 30, 2005 – 6 pages).

INSURANCE COVERAGE - *The unambiguous language of insurance policy dictated that the word "insured" included the named insured. Accordingly, Plaintiffs' claims fell within the Employee Exclusion and were therefore excluded from coverage.*

Roosevelts, Inc., et al. v. Zurich American Ins. Co., et al., November Term 2003, No. 3505 (Sheppard, J.)(May 25,

2005 – 5 pages). Superior Court docket nos. 823 and 824 EDA 2005

INSURANCE COVERAGE – BREACH OF CONTRACT EXCLUSION - ***Under the breach of contract exclusion in an insurance policy, the insurer need not provide the insured with a defense nor indemnify the insured with respect to an underlying trade secret action because, when the court in the underlying action dismissed the tort claims under the gist of the action doctrine, it necessarily found that the duties that the insured allegedly breached were contractual rather than tort duties. In other words, the court found that the liability that plaintiff in the underlying action is attempting to impose upon the insured would not exist in the absence of the contract between them.***

-All of the tort and other claims in the underlying action "arise out of a breach of contract," and they are excluded from coverage under the insurance policy, because plaintiff in the underlying trade secret action freely gave its proprietary fiber to the insured. Therefore, the insured could not be found guilty of theft, conversion, negligence, fraud, or tortious interference with respect to the fiber in the absence of an agreement limiting the insured's use of the fiber. It is only because the insured agreed to keep the fiber a secret that it was wrongful for the insured to forward it to a third party.

INSURANCE COVERAGE – MISAPPROPRIATION OF IDEAS - ***A claim for misappropriation of ideas under an applied contract usually involves advertising or entertainment ideas, or something less developed or concrete than the chemical formulae, manufacturing processes, and other applied methodologies at issue here.***

Drexel University v. National Union Fire Ins. Co., October Term, 2004, No. 02442 (May 4, 2005) (Abramson, J., 5 pages)

INSURANCE COVERAGE – SCOPE OF POLICY- ***A court's first step in a declaratory judgment action concerning insurance coverage is to determine the scope of the policy's coverage. After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.***

INSURANCE COVERAGE – UNDERLYING COMPLAINT - ***The particular cause of action that a complainant pleads is not determinative of whether coverage has been triggered. To allow the manner in which the complainant frames the request for redress to control would encourage litigation through the artful use of pleadings designed to avoid exclusions in liability insurance policies.***

INSURANCE COVERGAE – INTENTIONAL ACTS - ***An insured intends an injury if he desired to cause the consequences of his act or if he acted knowing that such consequences were substantially***

certain to result.

Allstate Ins. Co. v. Keough, June Term, 2004, No. 01580 (March 10, 2005) (Jones, J., 3 pages)

INSURANCE COVERAGE - *It was the insured's duty to submit complete and accurate information to the insurer in applying for insurance and in applying for a modification of the insurance policy to add an additional auto. The insurer had no independent duty to double check the title information provided by the insured.*
- Where the interest of the insured in an automobile was not truly stated in the policy, there was a misrepresentation or concealment in regard to a material fact or circumstance concerning the subject matter of the insurance. The insurer was therefore entitled to disclaim coverage for that automobile, and the insured was entitled to receive a refund of the premiums it paid with respect to that automobile.

John J. Dougherty and Sons, Inc. v. Harleysville Ins. Co., January Term, 2004, No. 00560 (March 8, 2005 – Control No. 010102) (Abramson, J., 5 pages).

INSURANCE COVERAGE - *An excess insurer is not required to drop down to provide primary coverage where the underlying primary insurer is insolvent, unless required to do so by the policy itself.*

M.A.G. Enterprises, Inc. t/a Cheerleaders v. National Union Fire Ins. Co., et al.,August Term 2002, No. 3835 (Jones, J.)(February 16, 2005 – 11 pages).

INSURANCE – COVERAGE DISPUTES - *After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until such time that the claim is confined to a recovery that the policy does not cover.*

NCMIC Insurance Company v. Larry Turetsku, D.C. and Robin Kelly, January Term 2004, No. 2487 (Jones, J.) (8/26/04 – 3 pages)

INSURANCE – COVERAGE DISPUTES - *The policy's assault and battery exclusion expressly precludes coverage for defendants' negligent acts or omissions by which they allegedly failed to prevent or suppress the intentional assault on plaintiff.*
- After determining the scope of coverage, the court must examine the complaint in the underlying action to ascertain if it triggers coverage. If the complaint against the insured avers facts that would support a recovery covered by the policy, then coverage is triggered and the insurer has a duty to defend until

such time that the claim is confined to a recovery that the policy does not cover.

> **U.S. Underwriters Insurance Co. v. AGV, Inc., Lauren Vaile, Anthony Criniti and Theresa Criniti, Individually and d/b/a A. Criniti Realty, September Term 2003, No. 4493 (Jones, J.) (8/26/04 – 3 pages).**

INSURANCE COVERAGE – LIQUOR LIABILITY - ***Interpretation of the terms of a liquor liability insurance policy is a matter of law for the court. Such policies are intended to cover an insured's liability for wrongful acts under the Dram Shop Act. Absent express provisions to the contrary, such policies do not impose liability on a insured for intentional physical harm caused by its employees to third persons where such harm was not caused by the insured selling, serving, or furnishing any alcoholic beverage.***

– UNDERLYING CLAIMS - ***If the complaints in the underlying action against the insured do not set forth any causes of action covered by the insurance policy, then the insurer need not defend nor indemnify the insured.***

> **Riverdeck Holding Corp. v. United States Liability Ins. Co., January Term, 2003, No. 2306 (March 23, 2004) (Sheppard, J.)**

INSURANCE COVERAGE - ***This court found that no conflict existed between the language of the two insurance policies with identical language and different insureds where the plain language of the policies revealed that one insured's obligation was primary and the other was excess.***

> **Providence Washington Ins. Co. v. Ohio Casualty Ins. Co., December Term 2002 No. 3844 (Jones, J.) (March 17, 2004 – 7 pages).**

INSURANCE / DECLARATORY JUDGMENT / VOIDING POLICY ON THE BASIS OF FRAUD OR MISREPRESENTATION – ***Where the execution of a contract of insurance has been induced by fraudulent misrepresentations of the insured, the insurer may secure its cancellation.***

– The burden of proving insurance fraud is on the party alleging it, and it must be established by clear and convincing evidence.

- In order for an insurer to carry its burden of proving misrepresentation to void a policy, it must establish: (1) that the representation was false; (2) that the subject matter was material to the risk; and (3) that the applicant knew it to be false and made the representation in bad faith.

- Mere mistakes, inadvertently made, even though of material matters, or the failure to furnish all details asked for, where it appears there is no intention of concealing the truth, does not work a forfeiture, and a forfeiture does not follow where

there has been no deliberate intent to deceive, and the known falsity of the answer is not affirmatively shown. In other words, in order to show a policy is void ab initio on the basis of fraud, the insurer must prove that the intent to deceive was deliberate.
- Whether a misstatement of fact made in an insurance application was made in bad faith is ordinarily a question for the finder of fact.

Rutgers Casualty Insurance Company v. Calvin Richardson, June 2004, No.0486 (Abramson, J.) (February 1, 2006 - 3 pages).

INSURANCE / DUTY TO COOPERATE – ***The issue of whether there has been a material breach of the insured's duty to cooperate is for the finder of fact to decide.***
- Although a breach of a duty to cooperate will relieve the insurer from liability under the policy, a failure to cooperate must be substantial and will only serve as a defense where the insurer has suffered prejudice because of the breach.
- An insured's duty to cooperate is breached where the insured neglects to disclose information needed by the insurer to prepare a defense, does not aid in securing witnesses, refuses to attend hearings or to appear and testify at trial or otherwise fails to render all reasonable assistance necessary to the defense of the suit.
- Prejudice can be shown where the lack of cooperation fails to allow the insurance company to participate meaningfully in legal proceedings that may result in its payment of the claim at issue.
- Defendant was not only an essential witness, but the only witness for the defense, and his aid was necessary for the preparation and trial of the suit against him. His voluntary disappearance left the insurer without a defendant and a defense. Under such circumstances, he was precluded from indemnification under the policy.

Atlantic States Insurance Company v. Patrick Hunt, The Bullard Company, and Kimberly Rugh, February 2004, No. 2642, (Abramson, J.) (September 19, 2005 - 3 pages).

INSURANCE – DUTY TO COOPERATE - ***In order to show that the insured breached the duty to cooperate, the insurer must show that the breach is something more than a mere technical departure from the letter of the policy. Instead, the insurer must show that the breach is a material variance that results in substantial prejudice and injury to the insurer's position.***
-Where an insurer seeks to avoid liability for lack of cooperation, the question whether there has been a material breach is ordinarily for the jury. However, where the insurer has not put forth sufficient evidence to sustain its burden of

showing that the insured's alleged acts of non-cooperation were material and prejudicial to the insurer, then the court may grant summary judgment for the insured.

Resource America, Inc. v. Lloyd's, April Term, 2003, No. 2709 (November 12, 2004- 10 pages) (Sheppard, J.)

INSURANCE – DUTY TO DEFEND - ***Under Pennsylvania law, if the factual allegations of the complaint against the insured state a claim which would potentially fall within the coverage of the policy, then the insurer has the duty to defend.***

- An insurer agrees to defend the insured against any suits arising under the policy even if such suit is groundless, false, or fraudulent. Because the insurer agrees to relieve the insured of the burden of defending even those suits which have no basis in fact, the obligation to defend arises whenever the complaint filed by the injured party may potentially come within the coverage of the policy.

- When a court is deciding whether a duty to defend exists, it must compare the allegations in the complaint with the provisions of the insurance contract and determine whether, if the complaint allegations are proven, the insurer would have a duty to indemnify the insured. In the event that the complaint alleges a cause of action which may fall within the coverage of the policy, the insurer is obligated to defend. In making this determination, the factual allegations of the complaint are taken to be true and the complaint is to be liberally construed with all doubts as to whether the claims may fall within the coverage of the policy to be resolved in favor of the insured.

- The duty to defend remains with the insurer until it is clear that the claim has been narrowed to one beyond the terms of the policy.

Harleysville Mutual Insurance Co. v. Rite Aid Corporation, et al., February Term 2007, No. 3801 c/w October Term 2007, No. 3816 (July 9,2008) (Sheppard, J., 8 pages)

INSURANCE DUTY TO DEFEND– ***In a claims made policy although the underlying EEOC class action complaint was filed during the Lexington policy period, the insured received written notice of the underlying EEOC class action before the policy's effective date with the filing of the charge of discrimination with the Equal Employment Opportunity Commission. Thus, no coverage for the underlying action is available.***

LA Weight Loss Centers, Inc. v. Lexington Insurance Company, December Term 2003 No. 1560 (March 1, 2006 – 15 pages) (Jones, J.).

INSURANCE COVERAGE – DUTY TO DEFEND - ***Where several of the counts in the complaint in the underlying action contain allegations***

that plaintiff engaged in wrongful acts as a director of corporate insured, as well as in other capacities, it was theoretically possible that plaintiff would later be found liable "solely by reason of [his] being such a director of [corporate insured]," as required under the D&O policy. As a result, the insurer initially had an obligation to pay plaintiff's defense costs in the underlying action, unless it could show that one of the policy's exclusions applies.

- Once the court in the underlying action dismissed the claims made against plaintiff in his capacity as a director of the corporate insured, so that the only counts remaining against him involved acts he undertook in his capacity as an attorney, the malpractice exclusion in the D&O policy applied, and any duty the insurer had to pay plaintiff's defense costs and to indemnify him ceased.

Hunt v. National Union Fire Ins. Co. of Pittsburgh, Pa., December Term, 2004, No. 2742 (November 8, 2005) (Sheppard, J., 5 pages).

INSURANCE/DUTY TO DEFEND - ***In a Declaratory Judgment Action, Insurer Has No Duty to Defend Tavern in Claim by Patron Who Was Injured in an Assault and Battery by Another Patron Where the Policy Contains an Explicit Exclusion for Claims Arising Out of Any Assault and Battery and the Facts Alleged in the Complaint Arise from the Assault and Battery***

Lexington Insurance Co. v. Tunney's Hollywood Tavern, Inc., June 2001, No. 3213 (Herron, J.)(January 14, 2002 - 10 pages)

INSURANCE – DUTY TO DEFEND - In order to decide whether a duty to defend exists, a court must interpret the insurance policy to determine the scope of the coverage and must analyze the complaint filed against the insured to determine whether the claims asserted potentially fall within that coverage.

- Even if the term "malicious prosecution" in a general commercial liability insurance policy encompasses a claim for abuse of process, a patent invalidity counterclaim brought against an insured is not an abuse of process claim. The claim was based on the insured's allegedly improper conduct before the Patent and Trademark Office, so, under the doctrine of federal pre-emption, it cannot be recast as an abuse of process claim. Therefore, the insurer has no duty to defend its insured with respect to such a patent invalidity counterclaim.

High Concrete Structures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, October Term, 2003, No. 01264 (February 3, 2004) (Sheppard, J.).

INSURANCE/EXCESS POLICY - A Primary Insurer May Have a Direct Duty to Notify an Excess Insurer When Its Policy Is Implicated by a Pending Claim ***Because the Primary Insurer Has Unique Access Both to***

Information Concerning the Claim and to Expertise in Evaluating the Risks the Claim Poses to the Excess Policy - Under the Primary Insurer Subrogation Theory, A Primary Insurer Would Assume the Insured's Obligation According to the Terms of the Excess Policy to Notify the Excess Insurer that Its Policy Might Be Implicated in a Pending Claim

> **United States Fire Insurance Co. v. American Fire Insurance Co., February 2000, No. 3986 (Sheppard, J.)(April 6, 2001 - 21 pages)**
>
> **United States Fire Insurance Co. v. American Fire Insurance Co., February 2000,No. 3986 (Sheppard, J.)(May 30, 2001)(denying motion for reconsideration of primary insurer subrogation theory)**

INSURANCE/FIDUCIARY DUTY - *Insured May Assert Claim for Breach of Fiduciary Duty Distinct From the Good Faith Duties Imposed by Statute - Insurer May Voluntarily Assume Contractual Fiduciary Duties Where It Undertakes to Assist and Advise the Insured in Processing Claims Or Where It Asserts Rights Under the Policy to Handle Claims Against the Insured - There Is No Private Cause of Action for Violation of the Unfair Insurance Practices Act - A Private Action Under the Unfair Trade Practices and Consumer Protection Law May Not Be Based On a Commercial Insurance Policy - Request for Punitive Damages May Not Stand As a Separate Count*

> **Rader v. Travelers Indemnity Co., March Term 2000, No. 1199(Herron, J.)(September 25, 2000)**

INSURANCE/INTERPRETATION OF POLICY - *The Interpretation of an Insurance Policy Is a Question of Law - Where the Policy Excludes Assault and Battery Resulting from "act or Omission In Connection With Prevention or Suppression of an Assault or Battery," It Excludes Claims of Negligent Hiring and Supervision to the Same Extent as a Policy with Distinct Expressed Exclusion of "Negligent Hiring and Supervision" Clause.*

> **M&M High Inc. v. Essex Insurance Co., July 2001, No. 0997 (Cohen, J.) (November 18, 2002 - 9 pages)**

INSURANCE/LIQUIDATED DAMAGES - *Where Neglignce of Subcontractor's Employee In Bridge Construction Project Caused Delay and Attendant Economic Loss to Subcontractor, This Loss was Covered by the Subcontractor's Insurance Policy for Property Damage - The Term "Property Damage" Includes "Liquidated Damage" - Liquidated Damages in This Case Flow From the Accident or Sound in Tort And Thus Are Not Excluded from the Policy Because of Any Contractual Foundation - Exclusion Based on Subcontractor's Failure to Perform Contract*

Does Not Apply Where Liquidated Damages Arose From Subcontractor's Negligence or Accident

> **Mattiola Construction Corp. v. Commercial Union Ins. Co., April 2001, No. 1215 (Herron, J.)(March 8, 2002 - 12 pages)**

INSURANCE – MALPRACTICE COVERAGE – ***A professional liability insurer has no duty to defend or indemnify the insured in the underlying litigation unless the act that caused the alleged harm is a professional skill associated with the insured's specialized training.***

> **NCMIC Insurance Company v. Larry Turetsku, D.C. and Robin Kelly, January Term 2004, No. 2487 (Jones, J.) (8/26/04 – 3 pages)**

INSURANCE - NOTICE OF CLAIM - ***Where documents in evidence indicated that insurer was aware of insured's claim prior to institution of litigation, there was genuine issue of material fact as to whether insured had complied with notice of claim provisions of insurance contract, which precluded granting of summary judgment on that issue.***

> **Faith Assembly of Go v. Payton et al., July Term, 2001, No. 01637 (Cohen, J.) (March 13, 2003 - 4 pages).**

INSURANCE/NOTIFICATION/EXCESS AND PRIMARY INSURERS - ***Under Both the General Standards of Insurance Practice and the Guiding Principles for Primary and Excess Insurance Companies, A Primary Insurer May Have A Direct Duty To Notify an Excess Insurer When Its Policy Is Implicated by a Pending Claim - Parties' Agreement to Assign Excess Insurer Notification Duty to Insured Superceded Any Notification Duty of the Primary Insurer - Where the Excess Insurer Fails to Show Prejudice Due to Delayed Notice of Claim, It Is Not Entitled to Reject Coverage as a Matter of Law - The Primary Insurer Subrogation Theory May Be Invoked by an Excess Insurer as a Defense to a Primary Insurer's Equitable Subrogation Claim, But May Not Be Used to Assert a Claim Offensively - Where the Plaintiff Did Not Argue That the Primary Insurance Policy Was Exhausted There Could Be No Finding That the Excess Insurance Policy Was Triggered or That the Excess Insurer Had Any Coverage Obligation***

> **United States Fire Insurance Co. v. American National Insurance Company, February 2000, No. 3986 (Sheppard, J.)(July 8, 2002 - 15 pages)**

INSURANCE – OCCURRENCE - ***An "occurrence" policy protects the policyholder from liability for any act done while the policy is in effect. The determination of when an occurrence happens must be made by reference to the time when the injurious effects of the occurrence took place. An occurrence during the policy period takes place when both the accident and the resulting injury occur in the policy period. Thus, an "occurrence" happens when injury is reasonably apparent, not at the time the cause of the injury occurs. The cause and the injury may happen at very distinct periods.***

> **Copley Assoc. Ltd. v. Erie Ins. Exchange, December Term, 2005, No. 01332 (December 29, 2006) (Abramson, J., 5 pages).**

INSURANCE – POLICY INTERPRETATION - ***Words of common usage in an insurance policy are to be construed in their natural, plain and ordinary sense, and the court may inform its understanding of these terms by considering their dictionary definitions.***

> **Copley Assoc. Ltd. v. Erie Ins. Exchange, December Term, 2005, No. 01332 (December 29, 2006) (Abramson, J., 5 pages).**

INSURANCE POLICY – OCCURRENCES - ***The general rule is that an occurrence is determined by the cause or causes of the resulting injury. The majority of jurisdictions employ the 'cause theory'. Using this analysis, the court asks if there was but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage. In cases involving claims for environmental contamination, each site is not a separate occurrence, but each source of pollution is a separate occurrence.***

> **The Pyrites Company, Inc. v. Century Indemnity Company, January Term, 2003, No. 04514 (August 30, 2005) (Sheppard, J., 5 pages)**

INSURANCE/PREMIUM REBATES OR INDUCEMENTS - ***Under Pennsylvania Law, Insurance Agents and Companies Are Prohibited From Offering or Granting Premium Rebates, Special Advantages or Other Inducements to a Prospective Client to Secure an Insurance Contract Where Such Offers Are Not Incorporated Within the Policies - "Insurance Program Guarantee" to Sell a Full Program of Various Types of Liability Insurance at the Same Premium for a 6 Year Period Constitutes an Inducement That Was Not Incorporated Within the Insurance Policy So That Summary Judgment Is Granted As to That Claim***

> **The Brickman Group, Ltd. v. CGU Insurance Co., July 2000,No. 909 (Herron, J.)(March 26, 2002 - 9 pages)**

INSURANCE/RESERVATION OF RIGHTS/RECOUP DEFENSE COSTS– ***A reservation of rights letter does not create a contract allowing an insurer to recoup defense costs from its insured but rather is a means to assert defenses and exclusions which are already set in the policy. Absent a provision in the policy, an insurer should not be permitted to unilaterally amend the policy by including the right to reimbursement in its reservation of rights letter.***

> **LA Weight Loss Centers, Inc. v. Lexington Insurance Company, December Term 2003 No. 1560 (March 1, 2006- 15 pages) (Jones, J.).**

INSURANCE – RETENTION OF COUNSEL - ***When a liability insurer retains counsel to defend an insured, the insured is considered the client.***

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

INSURANCE/TERRORISM - ***Allegations Support the Claim that Defendant Bank Breached the Covenant of Good Faith Implied in Its Agreement with Plaintiff When It Used the Term "Other Insurance" to Require the Purchase of Terrorism Insurance Where Plaintiff Alleges that Such Insurance Is Either Unavailable or Prohibitively Expensive***

> **Philadelphia Plaza- Phase II v. Bank of America National Trust and Savings Association, April 2002, No. 3745 (Herron, J.)(June 21, 2002 - 15 pages)**

INSURANCE/TITLE POLICY - ***Insured under Title Policy Alleged the Requisite Actual Loss By Asserting that the Insured Area in Dispute was Worth Less Encumbered by an Easement and Insured had Incurred Costs in Attempting to Clear Title - The Term "Actual Loss" has been Liberally Construed under both Pennsylvania and Florida Law - Policy Language does not Require this Insured to Exercise Option as a Prerequisite to Asserting a Claim - Insurer is Required to Provide Coverage Where Insured Prosecutes Actions to Secure Title***

> **Terra Equities, Inc. v. First American Title Insurance Co., March 2000, No. 1960 (Sheppard, J.)(August 2, 2000 - 17 pages)**

INSURANCE POLICY /WAIVER - ***Insurance company waived the insurance policies' exclusions as a defense to the insureds' request for payment of attorneys' fees and costs when they failed to raise the exclusions as a defense in their answer and subsequent pleadings. Policy contained no duty to defend and, therefore, the attorneys' fees and costs were treated as any other loss under the policy.***

Howard E. Steinberg v. Syndicate 212 at Lloyd's of London, etal, C.C.P. No. 0210-1479
Edward Charlton, et al v. Syndicate 212 at Lloyd's of London, etal, C.C.P. No.0212- 4534 (Sheppard, J.) (September 8, 2003 – 19 pages).

INSURANCE/SURPLUS LINES LAW - *With respect to placement of insurance with a surplus lines insurer, Pennsylvania law is in step with those jurisdictions recognizing that an insurance agent/broker has an obligation to investigate the financial soundness of the insurance carrier with which the agent/broker places insurance and to refrain from placing insurance with a carrier that the agent/broker knows or should know to be financially unsound.*

M.A.G. Enterprises, Inc. t/a Cheerleaders v. National Union Fire Ins. Co., et al.,August Term 2002, No. 3835 (Jones, J.)(February 16, 2005 – 11 pages).

INTENDED THIRD PARTY BENEFICIARY - *When identity of Plaintiff is never discussed or mentioned in contract negotiations, the fact that the Plaintiff's name happens to be on a sample product given to one contracting party is not sufficient to confer him status as an intended third party beneficiary of contract.*

New Hope Books, Inc., *et al.* v. Datavision Prologix, Inc., July Term, 2001, Number 1741 (Cohen, J.) (June 24, 2003- 18 pages)

INTENT OF THE PARTIES IN A WRITING [FINDINGS OF FACT, CONCLUSIONS OF LAW] – *In Pennsylvania, the court ascertains the intent of the parties as manifested by the language in the written instrument. When the language is clear and unambiguous, the court gives effect to that language.*

Aaron Wesley Wyatt v. Ira Silverstein and Silverstein and Bellin, LLC, March Term, 2004, No. 5214 (January 11, 2007 – 11 pages) (Abramson, J.)

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS – To establish a claim for intentional interference with contractual relations, a plaintiff must allege: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and, (4) the occasioning of actual legal damage as a result of the defendant's conduct.

Fischer v. Dawley, June Term, 2006, No. 00508 (February 6, 2007) (Sheppard, J. 5 pages).

INTENTIONAL INTERFERENCE WITH EXISTING CONTRACT - SUMMARY JUDGMENT ***Summary judgment was granted on a portion of plaintiff's claim where plaintiff failed to offer evidence that defendant intended to cause second, similar yet unrelated, breach by third party of its contract with plaintiff and where the second breach was too remote and unrelated to defendant's alleged interference for such interference to have been the legal cause of the second breach.***

The Flynn Co. v. 615 Chestnut Master Lease, L.P., January Term, 2002, No. 2923 (C. Darnell Jones, II, J.) (March 25, 2003- 6 pages).

INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS – *An investment qualifies as a prospective contract under the tort of Intentional Interference with Contractual Relations.*

Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 030042 (August 6, 2003) (Jones).

INTENTIONAL & NEGLIGENT MISREPRESENTATION, TORTIOUS INTERFERENCE & PUNITIVE DAMAGES -- ***Interpreting New York Law, Summary Judgment Granted as to Claim for Tortious Interference and Punitive Damages where Defendant had a Legitimate Economic Interest and Plaintiff Failed to Demonstrate Malice Toward Plaintiff. Summary Judgment Denied as to Intentional & Negligent Misrepresentation Claims where Principal of Defendant May be Liable for Allegedly Withholding Facts From Defendant's Agents and Agents Negligently or Innocently Misrepresented Facts to Plaintiff.***

EGW Partners, L.P. v. Prudential Insurance Co. Of America and Prudential Securities, Inc., March Term, 2001, No. 0336 (Sheppard, J.) (February 12, 2003 - 9 pages).

INTERFERENCE WITH CONTRACTUAL RELATIONS – ***In order to succeed on an interference with an existing contractual relation claim, plaintiffs must demonstrate that defendants acted solely – or at least primarily – to cause specific harm to plaintiffs' contractual relationship with another party. Summary judgment granted in favor of defendants where plaintiff failed set forth a sufficient factual basis to prove that any of the defendants' actions were motivated by a desire to harm plaintiffs, rather then to further their own specific interests.***

Phillips v. Selig, July Term 2000, No. 01550 (Sheppard, J.)(February 8, 2007 – 11 pages).

INTERFERENCE WITH EXISTING CONTRACTUAL RELATIONS/AT-WILL EMPLOYEE - *Under Pennsylvania law, "an action for intentional interference with the performance of a contract in the employment context applies only to interference with a prospective employment relationship, whether at-will or not, not a presently existing at-will employment relationship.*

Z A Consulting, LLC v. Andrew Wittman, April Term 2001, No. 3941 (Cohen, J.) (December 11, 2002 - 8 pages).

INTEGRATION CLAUSE - Where the Agreement of Sale contains an express disclaimer of all representations not set forth in the Agreement, such a disclaimer is intended to, and should, put a reasonable person on notice that all prior oral representations cannot be relied upon unless they are expressly set forth in the Agreement.

Arsenal, Inc. v. AIG Baker Development, LLC, October Term, 2007, No. 03294 (March 20, 2009) (New, J. 15 pages).

INTERLOCUTORY APPEAL—*An interlocutory appeal cannot be based on a factual dispute.*

Beckermayer v. AT&T Wireless, et al., August Term 2002, No. 469 (Jones, J.) (February 9, 2005 – 3 pages).

INTERPLEADER - *For purposes of interpleader, an "adverse claimant" is not merely one who makes a claim against the defendant, rather it is one whose claim is inconsistent with (or adverse to) the claim made against the defendant by the plaintiff in a specific action.*

Holmes School LP, et. al. v. The Delta Organization, Inc., June Term, 2002, No. 03512(Cohen, J.)(November 19, 2002 - 4 pages)

INTERPRETATION OF INSURANCE CONTRACTS

Certain Underwriters at Lloyd's London v. Pawel Wodjalski, Seneca Insurance Corp. et al., September Term, 2009, No. 01347 (April 7, 2011 – 10 pages) (New, J. 10).

INTERVENTION– *Intervention is the procedural mechanism through which claimants raising adverse claims against the money, property or debt held by another may be required to litigate*

their claims in one proceeding. The grant or refusal of a petition for interpleader is an equitable consideration resting within the sound discretion of the trial court and will not be disturbed absent an abuse of the discretion.

- Where the petitioner fails to substantiate the allegations contained within her Petition that she is the sole shareholder of a corporation, the Petitioner has failed to satisfy her burden under Pa. R. Civ. P. 2327 to persuade the court of her right to intervene.

Pat's King of Steaks, Inc. v. Olivieri, January Term 2007 No. 2990; Superior Court Docket No. 1070 EDA 2008 (May 15, 2008 – 5 pages) (Sheppard, J.).

INTERVENTION/TIME TO APPEAL- ***An order denying intervention must be appealed within thirty days of its entry or not at all because the failure to attain intervenor status forecloses a later appeal. The mere filing of a motion for reconsideration does not toll the running of the appeal period unless the trial court expressly grants reconsideration within that period.***

Pat's King of Steaks, Inc. v. Olivieri, January Term 2007 No. 2990; Superior Court Docket No. 1070 EDA 2008 (May 15, 2008 – 5 pages) (Sheppard, J.).

INTERLOCUTORY APPEAL; CERTIFIED QUESTION; INSURANCE COVERAGE; LOSS PAYEE

ABC Bus Leasing, Inc. v. Certain Underwriters at Lloyds, London, May Term, 2008, No. 01815 (June 28, 2010) (Bernstein, J., 3 pages)

IRREPARABLE HARM - ***Loss of Office Space by Commercial Tenant Is Irreparable Harm Because the Office Space Is a Unique Asset - Here Dislocation Cause By Landlord Has Caused Disruption to the Tenants' Business, the Loss of an Employee and a Threat of Unascertainable Profit Losses***

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(October 2, 2001 - 9 pages)

INVASION OF PRIVACY - ***To state a cause of action for invasion of privacy in Pennsylvania, a plaintiff must demonstrate an intentional intrusion on the seclusion of his private concerns which was substantial and highly offensive to a reasonable person. To be highly offensive to a reasonable person, "a major misrepresentation of a person's character, history, activities or beliefs is made that could reasonably be expected to cause a reasonable man to take serious offense."***

Czech v. Gordon, October Term 2002, No. 0148 (Cohen, J.) (October 2, 2003 – 7 pages).

- J -

JOINDER OF ADDITIONAL DEFENDANT—PROHIBITED PURSUANT TO Pa. R.C.P. 2256(a).

> **Olwidas, LLC v. Amit Azoulay v. Jonathan Nadav, March Term, 2011, No. 3536 (Bernstein, J.) (August 2, 2011 - 3 pages).**

JOINDER ADDITIONAL DEFENDANTS; PRELIMINARY OBJECTIONS; RESIDENTIAL REAL ESTATE-

> **Giesler, et. al. v. 1531 Pine Street et. al., November Term 2008 No. 4301 (New, J.)(February 2, 2010 - 5 pages).**

JOINDER/ADDITIONAL DEFENDANT - *Original Defendant May Join Additional Defendant As A Matter of Course Within 60 Days After the Court Rules on Defendant's Preliminary Objections That, if Sustained, Would Require the Termination of the Action or the Filing of an Amended Complaint*

> **DeStefano & Assocs., Inc. v. Cohen et al., June 2000, No. 2775 (Herron, J.)(June 25, 2001 - 5 pages)**

JOINDER/ADDITIONAL DEFENDANT - *Where a Defendant Joins an Additional Defendant, the Liability Must Be Premised on the Same Cause of Action Alleged by the Plaintiff in His Complaint - Where Plaintiff's Business Was Destroyed by Fire and He Brought Action Against His Landlord and Insurer for Breach of Fiduciary Duty and Bad Faith, the Landlord's Cross Claims Against the Insurer Are Dismissed Because the Alleged Liabilities Invoke Separate and Distinct Causes of Action - The Liability Asserted Against the Landlord for Failure to Replace and Repair the Building Arise from the Lease While the Claims Against the Insurer Arise from the Policy*

> **Rader v. Travelers Indemnity Co., March 2000, No. 1199 (Herron, J.)(January 17, 2002 - 8 pages)**

JOINDER/ADDITIONAL DEFENDANT - *Additional Defendant May Be Joined by Original Defendant in a Class Action Where the Additional Defendant's Alleged Liability Is Related to the Original Claim Plaintiff Set Forth Against the Original Defendant Based on the Quality of the Non-OEM Parts Used in Repairing Plaintiff's Vehicle - Joinder Complaint Is Valid Where Additional Defendant Could by Solely Liable, Liable Through Indemnification or Jointly and Severally Liable -*

> **Greiner v. Erie Insurance Exchange, February 2000, No. 3053**

JOINDER/ADDITIONAL DEFENDANT - *Joinder Complaint Is Dismissed As*

Untimely Where It Was Filed More Than 60-days After Preliminary Objections Were Overruled - The Time Period For Filing a Joinder Complaint Is Not Extended by the Filing of Motions for Reconsideration

> **Thermacon Enviro Systems, Inc. v. GMH Assocs., Inc., March 2001, No. 4369 (Herron, J.)(March 21, 2002 - 5 pages)**

JOINDER/CAUSES OF ACTION - ***Plaintiff's Failure to Separate Causes Of Action Where Identical Claims Involve Distinct Properties and Different Dollar Amount For Damages Does Not Warrant Dismissal for Misjoinder Where Underlying Relevant Facts And Applicable Law Are the Same.***

> **IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)**

JUDICIAL IMMUNITY – MALPRACTICE - ***A witness who testified in connection with a judicial proceeding is generally immune from malpractice claims that arise out of relevant and pertinent testimony that the witness gave.***

> **Crown Cork & Seal, Co., Inc. v. Montgomery, McCracken, Walker & Rhoads, LLP, December Term, 2002, No. 03185 (December 29, 2003) (Jones, J.)**

ABSOLUTE JUDICIAL PRIVILEGE - ***Because all of the wrongful conduct ascribed to Defendants in Complaint are alleged to have taken place in connection with the certain bankruptcy proceeding, claim fails as a matter of law because it is well settled that private witnesses, as well as counsel, are absolutely immune from liability for testimony, even if false, given or used in connection with judicial proceedings.*** ***The doctrine of absolute judicial privilege applies to statements, including averments in pleadings and other submissions to the court, made in the "regular course of judicial proceedings" which are "pertinent and material" to the litigation, regardless of the tort claimed.***

> **Bell v. George, April Term 2003, No. 03225 (Sheppard, J.) (September 24, 2003– 8 pages).**

JUDGMENT NOTWITHSTANDING THE VERDICT - ***Plaintiff Transportation Broker Met Its Burden of Proof Under Defendant's Insurance Contract That Vandalism to Its Business Caused the Business Income Loss Suffered by Plaintiff - President of Plaintiff Company Testified As to All Property Damaged by the Vandalism and How The Damage Affected the Day-to-Day Operations of His Business - Plaintiff Offered Sufficient Evidence for a Jury to Reasonably Infer that It Suffered a "Necessary Suspension" of its Business Operations - Where There Was No Reasonable Basis for the Damages the Jury Awarded for the Phone Switch, a JNOV Must Be Granted in Defendant's***

Favor

TJS Brokerage & Co., Inc. v. Hartford Casualty Insurance Co., December 1999, No. 2755 (Herron, J.)(April 22, 2002 - 19 pages)

JUDGMENT NOTWITHSTANDING THE VERDICT - ***Plaintiff Pharmaceutical Company Was Not Entitled to JNOV On Defamation and Commercial Disparagement Claims Where Evidence Was Not Such That No Two Reasonable Minds Could Find Otherwise And Entry of a JNOV is Not An Appropriate Sanction to Remedy Defendant's Misconduct Despite The Egregious Nature of His Conduct***

Hemispherx Biopharma, Inc. v. Asensio, et al., July 2000, No. 3970(Sheppard, J.) (October 22, 2002 - 39 pages)

MOTION FOR JUDGMENT ON THE PLEADINGS - ***Pennsylvania Rule of Civil Procedure 1034 provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." Judgment on the pleadings may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. In ruling on a motion for judgment on the pleadings, the court may consider only the pleadings and attached documents.***

Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (April 7, 2009) (Bernstein, J., 9 pages)

MOTION FOR JUDGMENT ON THE PLEADINGS/LEGAL MALPRACTICE- ***In a legal malpractice action a client cannot sue his attorney for legal malpractice when the client is simply dissatisfied with the terms of the settlement, unless the client can show that he was fraudulently induced to enter the settlement.***

- Where the client is suing an attorney for failing to advise them regarding the controlling law applicable to their claim, such as the statute of limitations and its ramifications, the claim is not barred even though the action was settled since the settlement was not in issue.

Jan Rubin Associates, Inc. v. Nixon Peabody, LLP, June Term 2007 No. 0916 (July 31, 2008 – 5 pages) (Sheppard, J.).

JUDGMENT ON THE PLEADINGS - ***Pa. R.C.P. 1034 provides that "[a]fter the relevant pleadings are closed, but within such time as not to unreasonably delay the trial, any party may move for judgment on the pleadings." A motion for judgment on the pleadings is similar to a demurrer. It may be entered where there are no disputed issues of fact and the moving party is***

entitled to judgment as a matter of law. In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents. Further, neither party may be deemed to have admitted conclusions of law.

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

MOTION FOR JUDGMENT ON THE PLEADINGS/ COVERAGE/ CONTRACT CLAIMS– ***Where an insurance policy contains a specific policy exclusion that the insurer shall not make payment for loss in connection with a claim made against an insured that arises out of, is based upon or is attributable to a contract, any contractual claims that are made in an action are excluded from coverage under the terms of the policy.***

> **Temple University Health System, Inc. et. al. v. National Union Fire Insurance Company of Pittsburgh, Pa., February 2004 No. 1547 (January 7, 2005- 12 pages) (Jones, J.).**

MOTION FOR JUDGMENT ON THE PLEADINGS/ COVERAGE/EMPLOYER LIABILITY EXCLUSION– ***Although this court is bound by the holding of the Pennsylvania Supreme Court in Pennsylvania Mfrs' Assoc. Ins. Co. v. Aetna Casualty & Surety Ins. Co. 1 and its interpretation of the severability clause contained therein, the "employer's liability" exclusion contained within the Erie policy contains an exception for "insured contract" which allows coverage to exist.***

-The "insured contract" exception found in the "employer liability" exclusion provides that if an employer, enters into an agreement to insure another party for its tort liability, then the "employer's liability" exclusion, which exempts coverage of bodily injury to an employee arising from actions undertaken during the course of employment, is rendered inapplicable.

> **Clemens Construction Co. Inc. v. Eureka Metal and Glass Services, et. al., October Term 2007 No. 1232 (July 21, 2008 – 6 pages)(Abramson, J.).**

MOTION FOR JUDGMENT ON THE PLEADINGS/COVERAGE/NEGLIGENCE/GIST OF THE ACTION– ***In reviewing a complaint for purposes of determining insurance coverage, where the complaint contains a claim for breach of contract and negligence and the negligence claim is really a claim that the defendants negligently breached a contract, the negligence claim is barred by the gist of the action doctrine and is not subject to coverage under the policy.***

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1 426 Pa. 453, 233 A.2d 548 (1967).

Temple University Health System, Inc. et. al. v. National Union Fire Insurance Company of Pittsburgh, Pa., February 2004 No. 1547 (January 7, 2005 – 12 pages) (Jones, J.).

MOTION FOR JUDGMENT ON THE PLEADINGS/COVERAGE/BREACH OF FIDUCIARY DUTY– ***Where the gist of the breach of fiduciary duty claim is not contractual in nature since the alleged fiduciary relationship may exist independently from any contractual relationship between the parties, the claim is not barred by the gist of the action doctrine.***

Temple University Health System, Inc. et. al. v. National Union Fire Insurance Company of Pittsburgh, Pa., February 2004 No. 1547 (January 7, 2005- 12 pages) (Jones, J.).

JUDGMENT ON THE PLEADINGS - ***Surety's Motion for Judgment on the Pleadings Is Granted Because as a Matter of Law Exculpatory Clauses in Indemnity Agreement Absolve It From Liability For Any Conduct Short of Deliberate and Willful Malfeasance - Indemnity Agreement Authorized Surety to Take Control of the Construction Work and Contract Proceeds Where Plaintiff/General Contractor Was in Default of its Construction Contract or Failed to Pay Sub-contractors***

San Lucas Construction Co., Inc. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(March 14, 2001 - 17 pages)

JUDICIAL EFFICIENCY ***While the promotion of judicial efficiency is an important consideration, it is not an adequate defense in the face of a viable legal action. The paramount concern of the court is to reach a just result even if further litigation is required to achieve this end.***

Fischer v. Dawley, June Term, 2006, No. 0508 (August 25, 2009)(Sheppard, Jr., J., 10 pages).

JUDICIAL ESTOPPEL - ***Where defendant argued in Preliminary Objections that plaintiff's claims must be arbitrated and then parties stipulated to arbitrate one of plaintiff's claim, defendant was not subsequently estopped from arguing that remaining claim had to be litigated because defendant's arbitration argument was not made in prior litigation and was not successfully maintained with respect to the claim that was not arbitrated.***
JUDICIAL ADMISSIONS - ***Where defendant argued in Preliminary Objections that plaintiff's claims must be arbitrated, such legal argument did not constitute a judicial admission because it was not a statement of fact.***

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term,

2000, No. 3827(May 15, 2006) (Abramson, J., 4 pages).

JUDICIAL PROTECTION OF IDEAS – *Providing business education to professional athletes is not a novel idea and therefore fails to warrant the court's protection.*

Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages)(Sheppard, J.).

JUDICIAL REVIEW – PROCEEDINGS OF PRIVATE BODIES – *The court has only limited power to review the decisions of a private, voluntary, organization with respect to its own members. At most, the court may determine whether the organization complied with its own procedural rules, but only after the complaining member has exhausted the process provided for in those rules.*

Berlinerblau v. The Psychoanalytic Center of Philadelphia, April Term,2005, No.02406 (October 11, 2005 – 4 pages)(Sheppard, J.)

JURISDICTION/MINIMUM CONTACTS - *Plaintiff's general allegations that the defendants performed concerts in Philadelphia and that records have been promoted and sold in Pennsylvania, from which defendants allegedly received royalties, is insufficient to demonstrate requisite minimum contacts in the absence of specific evidence that defendants purposefully directed activities toward the forum state*

Lowe v. Tuff Jew Productions, et al.., January Term 2004, No. 1112 (Bernstein, J.) (March 6, 2006 – 10 pages).

JURISDICTION – *Pennsylvania court lacked personal jurisdiction over California law firm which served as local counsel to Plaintiff in California litigation where phone calls, letters and emails were sole contact with Pennsylvania.*

Triad ML Marketing, Inc. v. Clark & Trevithick, et al., February 2005, No. 900(Abramson, J.) (September 1, 2005– 6 pages).

JURISDICTION, SPECIFIC – *Where out-of-state defendants with no systematic contacts in Pennsylvania reached out into Pennsylvania to divert the assets and business opportunities of a Philadelphia-based company, the court found that defendants were subject to Pennsylvania jurisdiction under the rules for specific jurisdiction.*

Fibonacci Group, Inc. v. Finkelstein & Partners, et al., January Term 2005, No. 001399 (Abramson, J.)(June 30, 2005 – 12 pages).

JURISDICTION – ***A choice of law provision is not a forum selection clause, and therefore, alone, can not be the basis of personal jurisdiction over defendant.***

- By entering into a loan agreement with a Pennsylvania bank, the court found that defendant availed himself of the laws of the Commonwealth and that it was reasonably foreseeable that if he defaulted on the Demand Note, which was made and delivered in Philadelphia, he could be sued in that forum. The fact that the Note was later assigned to another financial institution does not alter this conclusion.

> **Buckeye Retirement Co., LLC. v. Michael W. Lloyd, December Term 2004, No.3257 (Abramson, J.)(April 18, 2005- 4 pages).**

JURISDICTION—*A non-interest bearing note results in no pecuniary benefit and does not create jurisdiction under Pennsylvania's long arm statute.*

> **BDO Seidman, LLP v. Kader Holdings Co., et al., May Term 2004, No. 973 (Jones, J.) (February 11, 2005 – 4 pages).**

COORDINATE JURISDICTION RULE - In our legal system, the advent of a new judge does not herald a sea change in the law of the case, and the parties are not entitled to re-argue issues that were decided by the previous judge. Both the new judge and the parties must abide by the previous judge's decisions.

> **OneBeacon Ins. Group LLC v. Liberty Mutual Ins. Co., August Term, 2004, No. 02670 (April 19, 2005) (Abramson, J., 4 pages).**

JURISDICTION/FORUM SELECTION CLAUSE—*Generally, a court with jurisdiction will decline to proceed with a case where the parties have freely agreed to litigate in another forum.*

> **Penn-Mont Benefits Servs., Inc. v. Great S. Life Ins. Co., March Term 2004, No. 7283 (Cohen, J.) (January 12, 2005 – 3 pages).**

SUBJECT MATTER JURISDICTION/INDISPENSABLE PARTY/ DECLARATORY JUDGMENT ACT- *A court lacks subject matter jurisdiction when a plaintiff/insured fails to join an indispensable party such as a claimant with a pending asbestos related claim against an insured in a declaratory judgment action against the insurer.*

> **Kraevner, et. al. v. OneBeacon Insurance Company, et. al., April Term, 2003 No. 0940 (September 29th, 2003) (Sheppard).**

PERSONAL JURISDICTION – *Pennsylvania court does not have general personal jurisdiction over California law firm which had passive*

internet website, whose attorneys made sporadic, largely unconnected visits to Pennsylvania, and which thereby earned 0.033% of its total billings in Pennsylvania over a six and a half year period.

- Pennsylvania court had specific personal jurisdiction over California law firm with respect to claim that firm committed malpractice in connection with depositions taken in Pennsylvania, but not with respect to claims that firm committed malpractice with respect to certain real property located in California and litigation related activities that took place in California.

Crown Cork & Seal Co., Inc. v. Montgomery McCracken Walker & Rhoads, LLP, December Term, 2002, No. 03185 (April 26, 2004- (Jones, J.)

JURISDICTION, IN PERSONAM - *Where Guaranty Contains a Clause Selecting Pennsylvania as the Forum for Disputes, the Parties have Agreed in Advance to Confer Personal Jurisdiction on a Pennsylvania Court - In Forum Selection Clause Cases, the Only Issue is the Enforceability and Effect of the Clause and Not Whether the Non-moving Party Can Demonstrate that the Defendant's Contacts with the Forum State Are Sufficient to Exercise In Personam Jurisdiction - Under Pennsylvania Law, Forum Selection Clause is Enforceable Unless the Parties did not Freely Agree to the Clause or the Enforcement of the Clause Would be Unreasonable - Contract Principles Apply to Guaranty Contracts and under those Principles the Parties Intended to Consent to the Jurisdiction of a Pennsylvania Court - A Source of Jurisdiction Beyond the Forum Selection is Unnecessary*

First Union Commercial Corporation v. Medical Management Services, LLC, et al., February 2000, No. 3673 (Herron, J.)(July 26, 20000 - 10 pages)

JURISDICTION, IN PERSONAM - *Where Preliminary Objections Asserting Lack of In Personam Jurisdiction Raise Factual Issues, a Court Must Order Additional Discovery Through Interrogatories, Depositions or Evidentiary Hearing - When Objecting to Personal Jurisdiction, the Objecting Party Bears the Initial Burden of Proof - To Exercise Jurisdiction Over a Non-Resident, the Commonwealth's Long Arm Statute Must Authorize Jurisdiction and Constitutional Principles of Due Process Must Be Satisfied - Under the U.S. Constitution, a Court May Exercise Either Specific or General Jurisdiction*

Miltenberg & Samton, Inc. v. Assicurazioni Generali, January Term 2000, No. 3633 (Herron, J.)(October 11, 2000 - 20 pages)

Greiner v. Erie Insurance Exchange, February 2000, No. 3053 (Herron, J.)(June 26, 2001 - 19 pages)

JURISDICTION, IN PERSONAM - *Defendants Waived Any Objection to Venue or In Personam Jurisdiction by Failing to Raise these Defenses in a Timely Fashion in Federal Court Prior to the Transfer*

of the Case to State Court

Hemispherx Biopharma, Inc. v. Asensio, July 2000, No. 3970 (Sheppard, J.)(February 14, 20001 - 29 pages)

JURISDICTION, IN PERSONAM/INTERNET - *Pennsylvania Court Lacked Personal Jurisdiction Over North Carolina Resident Where Contact With This Forum Was Premised on Passive Internet Postings on the Yahoo Bulletin Board of Negative Information Concerning the Corporate Plaintiff - Under the "Effects Test," Pennsylvania Court Had Jurisdiction Over North Carolina Resident Who Not Only Posted Internet Messages on the Yahoo Bulletin Board But Also Sent a Single E-Mail to Plaintiff's Independent Auditors in Pennsylvania Accusing Plaintiff of "Fraudulent Accounting Practices" and "Borderline Criminal Activity"*

American Business Financial Services, Inc. v. First Union National Bank, et al., January 2001, No. 4955 (Herron, J.)(March 5, 2002 - 16 pages)

JURISDICTION / IN PERSONAM - *Placing Phone Calls From Florida to Pennsylvania, Sending Correspondence From Florida to Pennsylvania, and Remitting Royalty Payments to a Pennsylvania Address Alone is Neither Sufficient Evidence of Minimum Contacts with Pennsylvania Nor Sufficient Evidence Showing That Florida Franchisee Purposefully Availed Itself of the Privilege of Acting Within Pennsylvania*

Bain's Deli Corporation v. C&L Foods, et al, October 2001, No. 294 (Sheppard, J.) (September 11, 2002 - 7 pages)

JURISDICTION/IN PERSONAM/SUFFICIENT CONTACTS - *Plaintiff Failed to Show that Defendant Had Sufficient Minimum Contacts with Pennsylvania Where Plaintiff Merely Established that the Parties Had a Contract, Plaintiff Was Headquartered in Pennsylvania, and Defendant Had a Website Acessible To, But Not Interactive With, Pennsylvania Residents.*

Alti v. Dallas European, April 2002, No. 2843 (Cohen, J.) (September 30, 2002 - 5 pages).

JURISDICTION, ORPHANS' COURT - *Preliminary Objections Alleging that Orphans'Court Had Exclusive Jurisdiction over Breach of Contract Claim Involving Conversion of Common Trust Funds by Trustee Sustained - Trial Division Has Jurisdiction over Breach of Contract Claim Against Trustee*

Parsky v. First Union Corporation, February 2000, No. 771 (Herron, J.)(June 29, 2000 - 2 Pages)

JURISDICTION, PRIMARY - ***Where Class Action Complaint Alleges Breach of Insurance Policy and Violation of the UPTCPL, Primary Jurisdiction Doctrine Does Not Require Transfer to the Pennsylvania Insurance Department Because PID Does Not Have Power to Decide Whether Insurance Company Breached Contract, Violated the UTPCPL or Acted in Bad Faith - Pennsylvania Courts Have Recognized the Doctrine of Primary Jurisdiction Under Which a Court Will Refrain from Exercising Subject Matter Jurisdiction Until an Agency Created to Consider a Particular Class of Claims Has Ruled On the Matter - Primary Jurisdiction Doctrine Is Distinct From Doctrine of Exhaustion of Administrative Remedies***

Greiner v. Erie Ins. Exchange, February 2000, No. 3053 (Herron, J.)(November 13, 2000 - 17 pages)

JURISDICTION, SUBJECT MATTER - ***Purchaser May Not Sustain an Individual or Class Action Against Vendor for Refund of Overcharged Sales Tax - Failure to Exhaust Administrative Remedies Presents a Jurisdictional Challenge that May Be Raised at any time; Where There Is an Adequate Remedy for Overcharged Sales Tax, Court Must Dismiss Class Action for Lack of Subject Matter Jurisdiction; Tax Code Provides a Remedy for Refund of Sales Tax***

Heaven v. Rite Aid Corporation, January 2000, No.596 (Herron, J.)(October 27, 2000 - 10 pages)

JURY INSTRUCTIONS - ADVERSE INFERENCE - ***An opposing party is not entitled to have the jury instructed that it may draw an adverse inference when a litigant fails to call a witness who presumably would support his allegation, when the witness is equally available to both parties. The inference is permitted only where the uncalled witness is peculiarly within the reach and knowledge of only one of the parties.***

- An inference may not be drawn if the potential witness is available to both parties, or the witness has no special information material to the issue, or the witness' testimony would be merely cumulative.

Allied Construction Services, Inc. v. Roman Restoration, Inc., March Term, 2004, No. 02271 (June 19, 2007) (Bernstein, J., 10 pages).

JURY TRIAL – ***Because the legislature was silent on the issue of the availability of a jury trial and affirmatively used the term "court" in the statute, because there was not any legislative history to the contrary, and because no similar causes of action existed at the time the Constitution was enacted, plaintiff did not have a right to trial by jury for claims under the Motor Vehicle Financial Responsibility Law.***

Sigma Supplies Corp. v. Progressive Halcyon Insurance, August Term 2003, No. 02968 (April 21, 2004) (Sheppard, J.)

JURY/EX PARTE CONTACT WITH JUDGE/EXTRANEOUS CONSIDERATIONS - *Where New Trial Is Sought Due to A Jury's Consideration of Extraneous Matters or Ex Parte Contact Between Judge and Juror, Movant Has Burden of Showing A Reasonable Likelihood of Prejudice - Juror's Reading of A Civil Action Which Portrays Expert Witness Who Testified at Her Trial Is Not Sufficient Grounds For Finding A Reasonable Likelihood of Prejudice - Plaintiff Is Not Entitled to Additional Discovery As to Extraneous Influences Because a Juror May Not Testify as to the Actual Effect of Such Matters on Their Verdict*

Rohm & Haas Co. v. Continental Casualty Co., November 1991, No. 3449 (Herron, J.)(February 26, 2002 - 17 pages)

JURY DEMAND - *Pennsylvania Rule of Civil Procedure 1007.1 Does Not Explicitly Bar a Trial Court From Allowing Untimely Jury Demand - Prejudice Is Not a Factor in Determining Whether to Grant Demand*

Harmon Ltd. v. CMC Equipment Rental, Inc., January 2000, No. 2023 (Herron, J.)(December 14, 2000)

JURY DEMAND - *Demand for Jury Trial Will Be Stricken Where Complaint Asserts Both Equitable and Legal Claims - Pennsylvania Constitution Does Not Afford a Right to a Jury Trial in Equity Action*

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(March 22, 2002 - 31 pages)

JURY TRIAL - *Pennsylvania's Unfair Trade Practices and Consumer Protection Law Does Not Include A Right to Demand a Trial By Jury - Under Recent Pennsylvania Precedent, Plaintiff Asserting Bad Faith Claim May Not Demand Jury Trial -Plaintiff Is Not Entitled to Jury Trial on her Claims for Declaratory Judgment and Injunctive Relief*

Greiner v. Erie Ins. Exchange, February 2000, No. 3053 (Herron, J.)(November 13, 2000 -17 pages)

Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)(UTPCPL Does Not Include a Right to Demand Jury Trial)

JURY TRIAL – PROMISSORY ESTOPPEL - *A plaintiff is entitled to a jury trial on a promissory estoppel claim. As promissory estoppel is invoked in order to avoid injustice, it permits an equitable remedy to a contract dispute. Thus, as promissory estoppel makes otherwise unenforceable agreements binding, the doctrine sounds in contract law.*

Osborne-Davis Transportation, Inc. v. Mothers Work, Inc., February Term, 2007, No. 02512 (February 20, 2008) (Bernstein, J., 5 pages).

JURY TRIAL/WAIVER - Under Pennsylvania Law, the Right to Trial by Jury May be Waived by Express Agreement - Waiver of Jury Trial is Valid When the Waiver Is Conspicuous, the Party Opposing the Waiver Had Business Experience Necessary to Understand It, There Is No Disparity in Bargaining Relationship and Opposing Party Had Opportunity for Negotiation

Academy Industries, Inc. v. PNC Bank, N.A., May 2000, No. 2383 and PNC Bank, N.A. v. Academy Industries, Inc., July 2000, No. 634 (Sheppard, J.)(January 30, 2001 - 6 pages)

Mesne Properties, Inc. v. Penn Mutual Life Insurance Co., July 2000, No. 1483 (Waiver of Jury Trial Provision in Loan Agreement Is Enforceable Under Pennsylvania Law But Only As to Parties to That Agreement)(Herron, J.)(April 6, 2001 - 14 pages)

JURY TRIAL/WAIVER - *Under New York Law, a Broadly Worded Jury Waiver Provision May Be Invoked by a Nonparty to the Contract*

EGW Partners v. Prudential Insurance Co., **March 2001, No. 336 (Sheppard, J.)(December 20, 2001 - 3 pages)**

- L -

LACHES—*To demonstrate laches, a party must establish a delay arising from the complainant's failure to exercise due diligence and prejudice to the party resulting from the delay.*

> **Monroe Court Homeowner's Association v. Southwark Realty Company, et al., October Term 2004, No. 777 (Abramson, J.) (August 11, 2005 – 8 pages).**

LACHES - *Doctrine of Laches Does Not Apply Where Action Relating to Sheriff's Sale of Property Was Filed Nine Months After The Sale Occurred and Defendants Suffered No Prejudice Due to the Delay*

> **Linda Marucci v. Southwark Realty Co., November 2001, No. 391 (Herron, J.)(May 15, 2002 - 13 pages)**

LACK OF ADEQUATE CONSIDERATION; RESTRICTIVE COVENANT; PRELIMINARY INJUNCTION; UNCLEAN HANDS-

> **Tri State Paper, Inc. v. Prestige Packaging, Inc., November 2009 No. 4078, (December 30, 2009 – 5 pages) (Bernstein, J.).**

LANDLORD & TENANT/COVENANT OF QUIET ENJOYMENT - Landlord Breached Covenant of Quiet Enjoyment and Constructively Evicted Tenants By Changing Lock of Building, Failing to Provide Essential Services, Willfully Neglecting Building, Violating City Code to the Extent that City Shut Down Building, and Failing to Remove the Violations

> **Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(May 8, 2001 - 19 pages)**

> **Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)**

LEGAL MALPRACTICE - *Plaintiffs' fraud and breach of fiduciary duty claims focus on defendant's breach of his fiduciary and ethical duties as attorney for the plaintiffs, so they are, in substance, a claim that defendant committed legal malpractice.*

-Whether an attorney failed to exercise a reasonable degree of care and skill related to common professional practice in handling a real estate transaction is a question of fact outside the normal range of the ordinary experience of laypersons, so expert opinion is required to prove it.

-Truthful representations by defendant cannot form the basis for a claim of fraud, breach of fiduciary duty, or conspiracy.

> **Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (January 21, 2009) (Bernstein, J., 8 pages)**

LEASE - *Covenant in Lease For the Performance of Some Duty Runs With the Land and Passes to Transferee*

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(June 21, 2001 - 4 pages)

LEAVE TO AMEND -The court will not allow amendment of a pleading if the party will be unable to state a claim on which relief will be granted in the amendment.

Acme-Hardesty Co. et al. v. Wenger et al., February Term 2001, No.1799 (Sheppard, J.) (January 31, 2003).

LEGAL MALPRACTICE; DAMAGES; CONSTRUCTION DELAY DAMAGES; APPEAL

LVI Environmental Services, Inc. v. Duane Morrris, L.P., April Term, 2008, No. 00498 (May 10, 2010) (Sheppard, J., 6 pages)

LEGISLATIVE IMMUNITY - *The umbrella of legislative immunity extends to protect elected officials from civil suits for intentional interference with contractual relations, where the facts demonstrate that the official was speaking on behalf of his constituency.*

DeSimone, et al. v. Philadelphia Authority For Industrial Development, et al., November Term, 2001, No. 00207 (Cohen, J.)(June 10, 2003 - 13 pages).

LENDER LIABILITY; MORTGAGE LOAN; DEFAULT; PARTNERSHIP

Goldstein v. Stonebridge Bank, September Term, 2009, No. 2570 (June 30, 2010) (Bernstein, J., 3 pages)

LETTER OF CREDIT - *Withdrawal of the Attempted Draw on Standby Letter of Credit by Bank, Which Acted as Confirming Bank and Co-Beneficiary, Mooted Buyer's Breach of Warranty Claims against Bank - Allegations Did Not Support Any Claim Against Bank Other Than One Based on the Letter of Intent*

Sorbee International Ltd. v. PNC Bank, N.A., et al., May 2001, No. 806 (Herron, J.) (July 16, 2002 - 9 pages)

LIABILITY OF CORPORATE DIRECTORS - *Under Delaware law, an entity's Certificate of Incorporation may contain a provision limiting the personal liability of a director to the corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. The Delaware immunity statute does not bar*

claims for "intentional misconduct." It does, however, bar claims for negligence and gross negligence.

> **Miller v. Santilli, July Term, 2006, No. 01225 (Sept. 20, 2007) (Bernstein, J., 16 pages).**

LIBEL - ***A party, upon leave from the court, may at amend at any time a pleading if the new matter merely amplifies the averment in the Complaint.***

> **Philip H. Behr v. W. Joseph Imhoff *et al.*, March Term, 2004, No. 0589 (March 5, 2007 – 4 pages), (Sheppard, J.)**

LIENS - ***A junior creditor may require a senior creditor to explain how the amount it claims due was calculated, so plaintiff is entitled to demand that defendant produce evidence to show that the amount its claims under its judgment is correct.***

> **Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)**

LIEN PRIORITY – ACTION - ***A subsequent execution creditor cannot intervene in a suit between his judgment debtor and a prior judgment creditor, so plaintiff could only raise the question of defendant's judgment lien status in a collateral action.***

> **Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)**

LIEN PRIORITY – STANDING - ***Plaintiff had standing to ask the court to determine whether defendant's apparently superior lien was not properly perfected in accordance with the statutory requirements of the Uniform Enforcement of Foreign Judgments Act because plaintiff is an aggrieved lien creditor of defendant's judgment debtors.***

> **Indymac Bank v. Arczip, Inc., June Term, 2006, No. 00124 (November 28, 2006 (Bernstein, J., 9 pages)**

LIMITATIONS OF ACTIONS - TORTS - ***Defamation and tortious interference with prospective and existing contract claims were time barred where statements upon which both clams were based were made more than two years before lawsuit was filed.***

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February Term, 2000, No. 02846 (Cohen, J.) (July 17, 2003 - 12 pages).**

LIMITED PARTNERSHIP– ***A limited partner is not liable for the obligations of the limited partnership. All general partners of a limited partnership are liable for the debts and obligations of the partnership.***

> **Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages).**

LIQUIDATED DAMAGES – EXCLUSIVE REMEDY - ***The Agreement's liquidated damages provision applies to all breaches and is the exclusive damages remedy available to plaintiff. The deposit is the only damages plaintiff may recover for defendant's breach, even with respect to those matters that expressly survive termination of the Agreement.***

> **Arsenal, Inc. v. AIG Baker Development, LLC, October Term, 2007, No. 03294 (March 20, 2009) (New, J. 15 pages).**

LIQUIDATED DAMAGES - ***The Validity of a Particular Liquidated Damages Provision Is a Question of Law - A Valid Liquidated Provision Is a Reasonable Estimate of Damages That Are Difficult to Assess - Liquidated Damages Provision Is Stricken As Unreasonable Where They Are A Penalty***

> **ZA Consulting, LLC v. Wittman, April 2001, No. 3941 (Herron, J.)(January 9, 2002 - 8 pages)**

LIQUIDATED DAMAGES / PRELIMINARY OBJECTIONS - ***Preliminary Objections denied where Defendants argued that the limitation of damages clause contained in the agreement between the parties precluded Plaintiffs' claims for incidental and/or consequential damages as a matter of law. While a demurrer may be used to test whether or not a cause of action is stated, it may not be used to test the limits of liability. Gen. State Auth. v. Sutter Corp., 24 Pa. Commw. 391, 356 A.2d 377 (1976).***

> **Perry Square Realty, Inc., et. al. v. Independence Realty, Inc., June Term, 2001, No.2989 (Cohen, J.)(November 27 - 7 pages)**

LIQUOR LAWS –

> **Coalition of Restaurant Owners for Liquor Control Fairness, *et al.* v. Commonwealth of Pennsylvania, Pennsylvania Liquor Control Board, June Term, 2010, No. 2422 (September 1, 2010 – 4 pages) (New, J.)**

LIS PENDENS

The doctrine of lis pendens applies if the moving party satisfies the identity test. Under the identity test, dismissal of a later cause of action may be appropriate when the same parties are involved, the same rights are asserted, and identical relief is sought in each action.

Where the lis pendens identity test is not strictly met but the action involves a set of circumstances where the litigation of two suits would create a duplication of effort on the part of the parties and waste judicial resources, the trial court may stay the later-filed action.

Eun Y. Woo v. Eun Ae Oh *et al.* v. V. Moon Ahn, Esquire, October Term, 2010, No. 02633, (New, J.) (October 17, 2011 - 3 pages).

LIS PENDENS - *In order to find lis pendens a valid objection to the immediate entertainment or continuation of a suit, the objecting party must demonstrate to the court that in each case the parties are the same, and the rights asserted and the relief prayed for are the same.*

Steak Quake LLC v. Bomis, December Term, 2004, No. 03335 (March 18, 2005, 4 pages) (Sheppard, J.).

LIS PENDENS - *Although a party may raise preliminary objections based on the pendency of a prior action, the doctrine of lis pendens requires that the prior action be still pending. Where the prior action between the parties was dismissed, an objection based on prior pending action was without merit.*

Vasile Marincas v. U.S. Mail Delivery System, Inc., *et al.*, March Term, 2004, No. 3123 (Sheppard, Jr., J.) (July 20, 2004 – 5 pages).

LIS PENDENS -- *In Order to Plead Successfully the Defense of Lis Pendens, it must Be Shown That the Prior Case Is the Same, the Parties Are the Same, and the Relief Requested Is the Same. The Question of Prior Pending Action Is Purely a Question of Law Determinable from an Inspection of the Pleadings.*

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (February 11, 2003- 10 pages).

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (April 2, 2002 - 11 pages) (Appeal to Superior Court; Docket No. 1009 EDA 2003).

LIS PENDENS – *Prior action involving declaratory judgment did not justify stay or abatement of later filed action for breach of contract, promissory estoppel, fraud, and negligent misrepresentation.*

Comsup Commodities, Inc. v. Osram Sylvania, Inc., February Term, 2003, No. 01438 (December 3, 2002) (Cohen, J.)

LIS PENDENS – BURDEN OF PROOF - ***It is plaintiffs' burden of proof to show that they were entitled to file a lis pendens. A lis pendens is a cloud on title, and its practical effect is to impede the development of real property. It is analogous to another equitable remedy, the preliminary injunction, because it effectively prevents, or enjoins, the record owner of real property from transferring its interest in the property for full market value, or, in this case, from undertaking construction. Therefore, the party who filed a lis pendens bears the burden of proof, as does the party asking for a preliminary injunction.***

> **Philadelphia Waterfront Partners, L.P. v. Churchill Development Group LLC, January Term, 2007, No. 03811 (June 4, 2007) (Bernstein, J., 8 pages).**

LIS PENDENS – GROUNDS FOR STRIKING - ***Lis pendens was not properly filed against real property owned by corporation where the dispute between the parties centered on which party controlled corporation, not who held title to real property. Lis pendens impeded the parties' intended development of the property. Plaintiffs' alleged harm could be adequately addressed with damages, so lis pendens stricken.***

> **Philadelphia Waterfront Partners, L.P. v. Churchill Development Group LLC, January Term, 2007, No. 03811 (June 4, 2007) (Bernstein, J., 8 pages).**

LOSS PAYEE; INTERLOCUTORY APPEAL; CERTIFIED QUESTION; INSURANCE COVERAGE

> **ABC Bus Leasing, Inc. v. Certain Underwriters at Lloyds, London, May Term, 2008, No. 01815 (June 28, 2010) (Bernstein, J., 3 pages)**

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MAILBOX RULE - ***It has long been the law of our Commonwealth that proof of mailing raises a rebuttable presumption that the mailed item was received, and it is well-established that the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed. Instead, corroborative evidence of lack of receipt is required to overcome the presumption of receipt.***

> **Mills v. Cuccinotti, December Term, 2004, No. 03189 (September 20, 2007) (Bernstein, J., 5 pages)**

MALICIOUS PROSECUTION –

> **Century General Construction & Contracting, LLC, *et al.* v. Aloia Construction Co., Inc., *et al.*, October Term, 2009, No. 3255 (October 27, 2010 – 3 pages) (J. New)**

MALICIOUS PROSECUTION - ***Plaintiff pled lack of probable cause where it alleged that, despite that fact that defendant and its counsel knew that plaintiff bore no fault for the wrongs alleged in the underlying action, they asserted and continued to litigate claims against plaintiff in the underlying action. Plaintiff pled that the proceedings in the underlying action terminated in its favor when it alleged that it was dismissed from the underlying action.***

> **Malcolm G. Chapman v. Oceaneering International, Inc., March Term, 2006, No. 04257 (November 30, 2006) (Sheppard, J., 6 pages)**

MALPRACTICE/ATTORNEY – ***The court found that the Statute of Limitation period began when a Federal Judge in the criminal case ruled that the defense, which is at the heart of the legal malpractice claims, could not be presented at the criminal trial. At that point, plaintiffs knew or should have known that defendant law firm's advice was flawed and caused them injury.***

In addition, the court found that the guilty pleas of the corporate plaintiff and an individual plaintiff to one of 77 counts leveled against them by the Federal prosecutors, did not bar plaintiffs from bringing a malpractice action against defendant because the crux of plaintiffs' suit is plaintiffs' reliance on alleged erroneous advice which lead them to commit the crimes.

> **Brodie, *et al.* v. Morgan Lewis & Bockius LLP, February Term, 2004, No. 2004 (January 20, 2005 – 18 pages) (Sheppard, Jr., J.)**

MALPRACTICE/ATTORNEY – ***Attorney's monitoring of an action on behalf of a client may create a duty for purposes of legal malpractice.***

> **Roosevelt's, Inc. t/a/ Philadelphia Management Company v. Valerie H. Lieberman, Esquire and Post & Schell, PC, November Term, 2003, No. 1929 (June 10, 2004 – 3 pages) (Cohen, J.)**

MALPRACTICE/ATTORNEY - ***Settlement Agreement Does Not Preclude Malpractice Action Against Attorneys Where Former Client Alleges That Attorneys Failed to Protect Their Client's Legal Rights, They Failed to Provide Material Facts and They Failed to Disclose Conflicts of Interest***

> ***Red Ball Brewing Company v. Buchanan Ingersoll, P.C., May 2000, NO. 1994 (Sheppard, J.)(March 13, 2001 - 16 pages)***

MALICIOUS PROSECUTION - Pennsylvania courts have always maintained, in the tort law context, that there is a clear distinction between the tort of abuse of process and the tort of malicious prosecution, the latter of which is now codified in the "Dragonetti Act."

> **High Concrete Structures, Inc. v. National Union Fire Ins. Co. of Pittsburgh, PA, October Term, 2003, No. 01264 (February 3, 2004) (Sheppard, J.).**

MANDAMUS - *A proceeding in mandamus is available to compel the performance of a ministerial act or mandatory duty where there exists no other adequate and appropriate remedy, there is a clear legal right in the plaintiff, and a corresponding duty in the defendant. Where the right to a zoning permit is clear, the issuance thereof by the proper official is no more than the performance of a ministerial act which admits of no discretion in the municipal officer, therefore mandamus is both appropriate and proper to compel performance.*

The court will not discard mandamus in favor of protracted administrative appeals where entitlement to issuance of land use permits is clear. Such appeals would unduly burden landowners with an inadequate, and inefficient, remedy, while facilitating municipal abuse of the licensing power.

> **Land Endeavor 0-2, Inc. v. City of Philadelphia, February Term, 2005, No. 00814 (April 13, 2006) (Sheppard, J., 10 pages). Commonwealth Court Docket No. 268CD2006**

MATTER OF LAW VERSUS ISSUES OF FACT/ADMISSIBILITY OF EVIDENCE/ JURY INSTRUCTIONS/EXPERT NOT CALLED UPON TO TESTIFY AT TRIAL/PRE-TRIAL AND POST-TRIAL INTEREST - *Defendant, in its pleadings admit that the "controversy centers around one question of fact . . .".*

Therefore, despite defendant's later attempt to re-characterize the issue as being a matter of law, the issue was a question of fact for the jury to decide.

Evidence that the store at issue was profitable was properly allowed as it went to credibility of the defendant as defendant's position was that the store was closed because the property was "untenantable". Evidence in the form of notes taken by an agent of the defendant, contemporaneously with a conversation with the defendant's adjuster after the adjuster had inspected the property, was properly admitted as "Records of Regularly Conducted Activity."

The purpose of the court's charge to the jury is to "provide guidance to the jury on the relevant legal issues arising from the claims before the jury." Ferrer v. Trustees of the University of Pennsylvania, 573 Pa. 310, 346, 825 A.2d 591, 612-613 (2002). Moreover, in charging the jury, the court should not "supplement the arguments of the opposing parties." Id. Therefore, as the court's charge adequately covered the general subject of defendant's rejected jury instructions—the court's charge was proper.

Defendants argued that the court committed error in precluding evidence related to the involvement and opinions of an expert that was not used as an expert witness at trial. Pennsylvania Rule of Civil Procedure 4003.5, subpart (a)(3), provides that "A party may not discover facts known or opinions held by an expert who has been retained or specifically employed by another party in anticipation of trial and who is not expected to be called as a witness at trial . . ." Consequently, the court did not erroneously preclude the opinion or testimony of the individual at issue.

Plaintiff asserted that pre-trial and post-trial interest should be awarded at the rate of fifteen percent per annum, an amount written into the parties' contract. Pursuant to plaintiff's Motion of Reconsideration, the court awarded plaintiff pre-trial interest at the statutory rate of six percent per annum. As to the post-trial interest and the difference between the court's award of six percent pre-trial interest and the fifteen percent interest prayed for by plaintiff, the court found that the jury's award may be viewed as a "compromise verdict", a verdict "in a lesser amount than [the jury would award] if it was free from doubt." Morin v. Brassington, 871 A.2d 844, 852-853 (Pa. Super. 2005). The issue of mitigation of damages was hotly disputed in this case. Therefore, the court held that the jury's award should not be disturbed by the addition of post-trial interest or pre-trial interest in the amount of fifteen percent per annum.

Spak Land Company v. The Goodyear Tire & Rubber Co., Inc., November Term,2001, No.2672 ***Superior Court Docket Nos. 2170EDA2005 and 2172EDA2005*** **(Sheppard, Jr., J.) (September 29, 2005 – 23 pages)**

MECHANIC'S LIEN – ***A waiver of liens filed by a contractor on behalf of all subcontractors will not be enforceable if the waiver was not filed in a timely manner in accordance with the Mechanics Lien law.***

–A subcontractor, as a third party, may bring a direct cause of action against two parties, an owner and a surety, on a construction bond.

– Although an owner is an indispensable party that must be named in a complaint to enforce a mechanic's lien, a claimant subcontractor is not precluded from naming additional parties as defendants so long as they are properly joined.

> **Hightec HVAC, Inc. v. Travelers Casualty and Surety Co., et al., March Term 2005, No. 3580(Abramson, J.)(July 15, 2005 - 5 pages).**

MECHANICS LIEN/PRELIMINARY OBJECTIONS—*Subcontractor must provide preliminary notice to owner of property before filing mechanics' lien.*

> **Asphalt Care Company, Inc. v. Wendy's Old Fashioned Hamburgers of New York, Inc., May Term 2004, No. 1102 (Jones, J.) (October 22, 2004 – 2 pages).**

MEDIATION—*A mediation clause requiring the parties to pursue mediation before litigation may be waived. Waiver may be found if a party fails to assert mediation as a defense in a timely manner or if a party avails itself of the judicial process in order to resolve the dispute.*

> **A.T. Chadwick Co. v. PFI Construction Corp. and Process Facilities, Inc., September Term 2003, No. 1998 (Jones, J.) July 30, 2004 – 10 pages).**

MEDICAID FRAUD ABUSE AND CONTROL ACT - *Commonwealth Stated Cause of Action Under Pennsylvania's Medicaid Fraud Abuse and Control Act, 62 P.S. §§ 1401 et seq., by Alleging that Defendants Directly and Indirectly Exposed It to Claims for Payment for Synthroid Rather Than Less Expensive Bioequivalents*

> **Commonwealth of Pennsylvania v. BASF, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)**

MEDICAL MONITORING - *Pennsylvania Law Recognizes a Common Law Cause of Action for Medical Monitoring Premised on Negligence But Not a Claim for Medical Monitoring Premised on Strict Liability*

> **Cull v. Cabor Corp., December 2000, No. 657 (Sheppard, J.)(May 3, 2001 - 9 pages)**

MEDICAL MONITORING - *Without an underlying tort, no relief for*

medical monitoring can be asserted.

Ashton, et al. v. Aventis Pasteur, Inc. et al., July Term, 2002, No. 04026(Cohen, J.)(May 22, 2003 - 11 pages).

MEDICAL RECORDS ACT – *Private Cause of Action - Plaintiff may not assert a private cause of action under the Medical Records Act, which is part of the Rules of Evidence and which also implicates the Rules of Civil Procedure regarding discovery. In order to bring claims for alleged Medical Records Act violations, plaintiff must look to the common law for relief.*
– Paper Records - There is no law requiring hospitals, or their designated medical records service companies, to preserve paper originals of a patient's medical records, and there is nothing in the Medical Records Act that requires that copies be made from the original, paper records.

McShane v. Recordex Acquisition Corp., February Term, 2003, No. 01117 (November 14, 2003) (Jones, J.).

MERCHANTABILITY/IMPLIED WARRANTY - Where Plaintiffs in Class Action Allege General Damages But Fail to Allege that They Personally Suffered Damages Due to Defendant's Breach of Warranty, Demurrer Is Sustained

Grant v. Bridgestone Firestone, Inc., September 2000, No. 3668 (June 12, 2001)(Herron, J. - 10 pages)

MERCHANTABILITY/IMPLIED WARRANTY - *Where Plaintiff Has Not Alleged that the Supposed Defect in Defendant's Tires Has Actually Manifested Itself, Preliminary Objections Are Sustained - Under Pennsylvania Law, A Breach of Implied Merchantability Claim May Be Maintained Only were Plaintiff Alleges that Harm Was Caused by Defendant's Product*

Grant et al. v. Bridgestone Firestone, September 2000, No.3668 (Herron, J.)(January 10, 2002 - 13 pages)

MERGER - *Merger Should Not Be Declared Void ab initio Merely Because Defendants Violated Statutory Notice Requirements that Were Intended to Protect the Interests of the Plaintiff Shareholders - Allowing Defendants to Use Their Own Errors Against the Plaintiff Shareholders Would Be Inequitable in This Case of First Impression Under Pennsylvania Law - Delaware Precedent is More Nuanced than Defendants Suggest - Massachusetts Precedent is Ultimately More Persuasive on this Issue - The Interests of Third Parties Would Be Jeopardized by Uncertainty if Mergers Were Rendered Void Whenever Shareholder Statutory Notice Requirements Were Violated - Impracticability of Voiding the Merger is a Relevant Consideration*

First Union National Bank et al. v. Quality Carriers, April Term 2000, No. 2634 (Sheppard, J)(October 10, 2000 - 49 pages)

MISAPPROPRIATION OF TRADE SECRETS – ELEMENTS OF CLAIM - ***When an employee learns an employer's trade secrets in the course of a confidential employment relationship, a court may enjoin the employee's use or disclosure of those secrets, regardless of whether the employee entered into a covenant restricting his use of such information.***

Carescience v. Panto, September Term 2002, No. 04583 (Jones, J.) (September 23, 2003).

MISJOINDER OF CAUSES OF ACTION – ***Court refused to permit case to proceed where the complaint combined two claims arising from two separate policies of insurance that insured two different properties in connection with two unrelated losses. However, rather than dismiss the entire case, the court elected to sever the matters.***

Weiner v. Markel Ins. Co., et al., August Term 2005, No. 1045 (Sheppard , J.)(April 26, 2006 – 9 pages).

MISREPRESENTATION - ***Defendant's Statement That It Would Pay Plaintiff on Time Does Not Constitute a Misrepresentation Absent an Allegation that Defendant Knew that this Statement Was False or Material or that Defendant Intended the Plaintiff to Act Upon the Statement***

Thermacon Enviro Systems v. GMH Associates, March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages)

MISREPRESENTATION/INTENTIONAL - ***Under New York Law, a Claim for Intentional Misrepresentation May Arise from A Defendant's Failure to speak Where There Is a Special Relationship Between the Parties - Under Pennsylvania Law, a Claim for Intentional Misrepresentation May Arise from a Defendant's Failure to Speak Where the Defendant Owes the Plaintiff a Duty of Disclosure - Like Pennsylvania, New York Focuses on the Type of Duty Breached to Determine Whether an Action Arises in Contract or Tort***

EGW Partners, L.P. v. Prudential Insurance, March 2001, No. 336 (Sheppard, J.)(June 22, 2001 - 17 pages)

MISREPRESENTATION/INTENTIONAL/NEGLIGENT - ***Summary Judgment on Misrepresentation Claim is Granted Where Plaintiff Failed to Demonstrate Any Representation Took Place With Regard to the Market for Coverage for Sexual Misconduct Liability.***

Methodist Home for Children, et al. v. Biddle & Company, Inc., April 2001, No. 3510 (Sheppard, J.) (October 9, 2002 - 10

pages)

MISREPRESENTATION/INTENTIONAL/NEGLIGENT/INDEPENDENT DUTY - *Allegation of an Independent Duty to Disclose Is Not Necessary For a Claim for Intentional Misrepresentation or Intentional Concealment - Claims Based on Negligent Misrepresentation and Concealment Require That Plaintiff Demonstrate that Defendant Owed An Independent Duty*

DeStefano & Associates v. Roy S. Cohen et al., June 2000, No. 2775 (Herron, J.)(April 9, 2001 - 10 pages)

MISREPRESENTATION/NEGLIGENT - *Under New York law, a Claim for Negligent Misrepresentation Requires the Existence of a Special Relationship Between Plaintiff and Defendant, While Pennsylvania Law Requires Only That the Defendant Owe the Plaintiff a Duty*

EGW Partners, L.P. v. Prudential Life Insurance, March 2001, No. 336 (Sheppard, J.)(June 22, 2001 - 17 pages)

MORTGAGE

Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 10, 2010 – 10 pages) (New, J.)

Cambridge Walnut Park, LLC v. U. S. Bank National Assoc., *et al.*, May Term, 2008, No. 0517 (September 30, 2010 – 3 pages) (New, J.)

MORTGAGES – DEFAULT - *Summary judgment could not be granted for lender who claimed that filing of mechanics liens against mortgaged property was an event of default under the mortgage securing a construction loan. There were material questions of fact as to whether lender waived one lien as event of default and caused two others to be filed by failing to continue making loan disbursements.*

- Appointment of a receiver for borrower and the mortgaged property was an event of default under the mortgage securing a construction loan, so lender was entitled to recover all amounts previously disbursed under loan, plus interest and attorneys fees. There was no evidence that the lender caused the receiver to be appointed by failing to continue making loan disbursements.

Commerce Bank, N.A. v. Porterra LLC, February Term, 2007, No. 03257 (November 27, 2007) (Abramson, J., 6 pages)

MORTGAGE/CLAIM FOR STATUTORY FINE - *When Mortgagee Fails to Mark a Mortgage Satisfied as Set Forth in 21 Pa.C.S. §681, an Aggrieved Party May Bring a Claim for Statutory Fine Pursuant to 21 Pa.C.S. §682 - Where Complaint Lacks Specific Allegations Necessary for*

Defendant to Prepare a Defense, an Amended Complaint Must be Filed

Mesne Properties, Inc. v. Penn Mutual Life Insurance Co., July 2000, No. 1483 (Herron, J.)(November 29, 2000 - 7 pages)

Mesne Properties, Inc. v. Penn Mutual Life Insurance Co., July 2000, No. 1483 (Where Complaint Alleges that a Party Incurred Expenses Due to Failure to Mark Mortgage Satisfied that Party has a capacity to sue Even If It Is Not the Mortgagor)(Herron, J.)(April 6, 2001 - 14 pages)

MORTGAGE FORECLOSURE, SUMMARY JUDGMENT, CONFESSION OF JUDGMENT, COLLATERAL ESTOPPEL-

TD Bank v. Joint Theater Center, Inc. *et. al*., February 2009 No. 3713 (New, J.) (February 23, 2010, 5 pages)

TD Bank v. Joint Theater Center, Inc., February Term 2009 No. 4008 (New, J.) (July 8, 2010, 5 pages).

MORTGAGE LOAN; DEFAULT; PARTNERSHIP; LENDER LIABILITY

Goldstein v. Stonebridge Bank, September Term, 2009, No. 2570 (June 30, 2010) (Bernstein, J., 3 pages)

MOTOR VEHICLE FINANCIAL RESPONSIBILITY LAW - *Medical providers who have been paid benefits outside the 30 day statutory time period are limited to the remedies set forth in 75 Pa.C.S. § 1716, namely 12% interest. A determination which would result in the assessment of fines, penalties, or even a declaration that an insurance company has engaged in improper insurance practices does not rest within the jurisdiction of this court, but is a matter that should properly be raised before the Department of Insurance.*

Silverman, et al. v. Rutgers Insurance Co., June Term 2003, No. 0363 (Jones, J.)(March 31, 2004 - 11 pages).

MUNICIPAL LEASES/STADIUMS/CONSTITUTIONAL DEBT RESTRICTION - City's Obligation under Stadium Prime Lease Does Not Violate the Debt Restriction Provision of the Pennsylvania Constitution Because the City's Lease Obligations Are Not Debts as Defined by the Pennsylvania Constitution - A Governmental Rental Obligation Under a Long Term Lease Agreement With a Public Authority Is Not a "Debt" if (1) the Obligation is Specifically Limited to the Government's Available Current Revenues and (2) the Authority and Its Bondholders Cannot Circumvent This Limitation by Subjecting the City's Assets to Sale or Execution on Default

Cnsumers Education and Protective Association v. City of Philadelphia, January 2001, No. 2470 (Sheppard, J.)(April 30, 2001 - 20 pages)

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NEGLIGENCE – ECONOMIC LOSS - ***Defendant's claimed damages, for which it desires to hold additional defendant liable, will arise only in the event that it is found liable to pay money to plaintiff for breach of contract. Such potential damages constitute~~are clearly~~ economic loss for which a negligence action will not lie. The only exception to the economic loss doctrine is for claims brought against a design professional or~~, possibly, against~~ someone else who is in the business of providing information to others. The sub-contractor who provided the structural concrete services and related work for the Project was in the business of building things, not in the business of supplying information for use by others.***

> **DeSeta v. Goldner/Accord Ballpark, Inc., June Term, 2005, No. 02017 (January 10, 2006) (Sheppard, J., 6 pages)**

NEGLIGENCE – ***In Pennsylvania, a local governmental agency is immune from liability to persons or property, where the plaintiff fails to show that the local governmental agency had notice of the dangerous condition of its fire hydrant, before the injurious event.***

Maryann Pietrak v. Underwriters at Lloyd's of London c/o Mendes and Mount and City of Philadelphia, December Term, 2004, No. 02026, (May 26, 2006 – 7 pages) (Abramson, J.)

NEGLIGENCE – ***Plaintiff's negligence claim against three defendants dismissed where the "duty" purportedly breached by defendants was based upon their alleged breach of the lease to which two of the defendants were not parties. The negligence claim against the third defendant failed under the gist of the action doctrine which precludes plaintiffs from re-casting ordinary breach of contract claims into tort claims. The fact that defendant may have negligently, recklessly, or intentionally breached a contractual duty does not give rise to a tort claim, but instead provides a basis for a breach of contract claim only.***

> **Eighth Floor, Inc. v. Terminal Industrial Corp., et al., July Term 2003, No.02855(Cohen, J.)(December 15, 2003 – 6 pages).**

NEGLIGENCE/DUTY OF CARE—*To determine whether a duty of care exists in a particular instance, the court examines the relationship between the parties, the social utility of the actor's conduct, the nature of the risk imposed and foreseeability of the harm incurred, the consequences of imposing a duty upon the actor, and the overall public interest in the proposed solution.*

Raimo Corp.. v. Indian Harbor Ins. Co., et al., November Term 2003, No. 611 (Abramson) (July 15, 2005 – 8 pages).

NEGLIGENCE/DUTY - *Any action based in negligence is premised on the existence of a duty owed by one party to another. While both private individuals and attorneys owe a duty of candor and veracity to the tribunal in connection with judicial proceedings, Pennsylvania does not recognize a private cause of action against a party for failure of same.*

Bell v. George, April Term 2003, No. 03225 (Sheppard, J.)(September 24, 2003– 8 pages).

NEGLIGENCE - *Summary Judgment on Negligence Claim is Denied Where Issue of Fact Exists As to Whether Broker Acted Negligently in Failing to Obtain Higher Limits of Sexual Misconduct Liability Insurance Coverage in The Marketplace*

Methodist Home for Children, et al. v. Biddle & Company, Inc., April 2001, No. 3510 (Sheppard, J.) (October 9, 2002 - 10 pages)

NEGLIGENCE – ECONOMIC LOSS – *Where plaintiffs' claimed damages constitute the difference between the amounts they paid for the insurance they received and the lesser amounts they claim they should have paid, plaintiffs' could not assert a negligence claim to recover such economic loss.*
NEGLIGENCE – GIST OF THE ACTION – *Where plaintiffs' negligence claims essentially duplicate their breach of contract claims, the negligence claims fail under the gist of the action doctrine.*

Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term, 2003, No. 01835 (May 2, 2006) (Abramson, J., 5 pages).

NEGLIGENCE/MEDICAL MONITORING- *Expert testimony is necessary to prove the elements requisite for a medical monitoring claim.*

Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).

NEGLIGENCE/REAL ESTATE LICENSING AND REGISTRATION ACT - Negligence Claim Based on Defendant's Failure to Mark a Mortgage Satisfied Cannot Be Maintained by Third Party Because RELA Was Not Intended to Benefit Third Parties With Whom a Person Benefitting From a

Broker's Services May Interact - Negligence Claim Based on Section 324 A of the Restatement (2d) Torts Is Not Viable Where Plaintiff Does Not Allege Physical Harm

Penn Mutual v. Ajax Management, May 2001, No. 3661 (Herron, J.)(November 16, 2001 - 6 pages)

NEGLIGENT MISREPRESENTATION - ***When it is one's business and function to supply information he is liable, if, knowing that action will be influenced, he supplies it negligently. If, on the other hand, the nature and extent of the transactions that will be regulated by the information is not known, no such liability exists.***

- Negligent misrepresentation by a businessperson does not require privity of contract and is an exception to the Economic Loss Doctrine. In Pennsylvania, the tort is limited to actions against persons in the business of supplying information to others, rather than expressly making it applicable to all businesspersons who supply misinformation.

- Where defendant law firm was in the business of collecting delinquent taxes through foreclosure proceedings, and it regularly provided Delinquent Real Estate Tax Statements to third parties and attended the Sheriff's sale of any property against which it filed a tax foreclosure action, it may be found liable if it made a misrepresentation regarding a third party's ability to pay-off one of the tax liens upon which defendant had foreclosed.

Fidelity National Title Insurance Co. v. Linebarger Goggan Blair & Sampson, LLC, May Term, 2007, No. 01642 (September 9, 2008) (Abramson, J., 6 pages).

NEGLIGENT MISREPRESENTATION – ***The elements of negligent misrepresentation are: 1) a misrepresentation of a material fact; (2) made under circumstances in which the misrepresenter ought to have known its falsity; (3) with an intent to induce another to act on it; and (4) which results in injury to a party acting in justifiable reliance on the misrepresentation.***

Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages).

NEGLIGENT MISREPRESENTATION- ***Defendants are entitled to judgment as a matter of law on plaintiff's negligent misrepresentation claim since plaintiffs requested the court to enter judgment in his favor for $500,00.00.***

Todi v. J&C Publishing, Inc., d/b/a Commercial Reality Review, Henry J. Strusberg and Strusberg & Fine, Inc., June Term,

2002, No. 2969 (July 18, 2003 - 13 PAGES) (Cohen, J).

NEGOTIABLE INSTRUMENTS – TRANSFER WARRANTIES - ***Under Sections 3416 and 4207 of the UCC, drawer of checks did not have standing to bring claims for breach of transfer warranties against banks that processed checks because drawer was not also a transferee.***
– PRESENTMENT WARRANTIES - ***Under Sections 3417 and 4208 of the UCC, drawer of checks did not have standing to bring claim for breach of presentment warranties against banks that processed checks because drawer was not also the drawee.***
– CONVERSION - ***Under Section 3420 of the UCC, drawer of checks did not have standing to bring conversion claim against banks that processed checks because drawer was the issuer of the checks.***
- NEGLIGENCE - ***Drawer of checks could not assert claim for common law negligence against banks that processed checks because drawer alleged only economic loss and common law negligence claims are displaced by the provisions of the UCC respecting wrongful payment of negotiable instruments.***
– Drawer of checks may be able to assert "comparative negligence" claims under Sections 3404 and 3405 of the UCC against bank that accepted checks for deposit in its depositor's account.

Nestlé USA, Inc. v. Wachovia Corp., August Term, 2005, No. 01026 (May 11, 2005) (Sheppard, J., 6 pages).

NEWLY DISCOVERED EVIDENCE; CONTRACT INTERPRETATION; CONNECTION BETWEEN SETTLEMENT AGREEMENTS AND CONTRACTS -

Barry Bernsten, *et al* v. Daniel Bain, *et al*, December Term, 2003, No. 00130 (April 30, 2009) (Sheppard, J., 9 pages).

NEW MATTER—*Impertinent matter is immaterial and inappropriate to the proof of the cause of action and may be struck from New Matter.*

Edmonds, et al. v. Royal., October Term 2004, No. 1406 (Abramson, J.) (August 22, 2005 – 5 pages).

NEW TRIAL - ***Where New Trial Is Sought Due to A Jury's Consideration of Extraneous Matters or Ex Parte Conduct Between Judge and Juror, Movant Has Burden of Showing A Reasonable Likelihoood of Prejudice - Juror's Reading of A Civil Action Which Portrays Expert Witness Who Testified at Her Trial Is Not Sufficent Grounds For Finding A Reasonable Likelihood of Prejudice -Plaintiff Is Not Entitled to Additional Discovery As to Extraneous Influences Because a Juror May Not Testify as to the Actual Effect of Such Matters on Their Verdict***

Rohm & Haas Co. v. Continental Casualty Co., November 1991,

No. 3449 (Herron, J.)(February 26, 2002 -17 pages)

NEW TRIAL - ***Defendant Did Not Meet The Severe Burden of Showing a Reasonable Likelihood of Prejudice Requiring a New Trial Based on Statements By Plaintiff that Defendant Insurer Had Been Ordered by the Court in a Prior Injunction Proceeding to Pay Plaintiff's Claims***

TJS Brokerage & Co., Inc. v. Hartford Casualty Insurance Co., December 1999, No. 2755 (Herron, J.)(April 22, 2002 - 19 pages)

NEW TRIAL - ***New Trial Warranted Based Primarily on Defendant's Prejudicial Misconduct During Trial Including His Disregard for This Court's Authority, Basic Courtroom Etiquette, Repeated Violations of Orders In Limine and Disrespect Shown to This court and Opposing Counsel in the Presence of the Jury***

Hemispherx Biopharma, Inc. v. Asensio, etal., July 2000, No. 3970(Sheppard, J.) (October 22, 2002 - 39 pages)

NOERR-PENNINGTON IMMUNITY - ***Where Preliminary Objections Asserting Noerr-Pennington Immunity Raise Issues of Fact, They Will Be Denied***

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

NON-COMPETE – INJUNCTION - ***In order for former employer to obtain injunction preventing former employee from being employed by a competitor, the former employer must show it has a legitimate business interest at stake, i.e., that: 1) it imparted its trade secrets or other confidential information to its former employee; or 2) the former employee can effect his former employer's existing customer goodwill, or 3) the former employee possess unique or extraordinary skill.***

- Former employer could not show it had a proprietary interest in information it imparted to former employee where such information was also known to persons outside its business.

- Former employer could not enjoin former employee from working for competitor where there was no evidence that former employee utilized contacts or references to which former employer gave him access.

Koreck v. IAB, April Term, 2008, No. 2149 (August 20, 2009) (New, J., 6 pages).

NONCOMPETITION PROVISION/BREACH - ***Where Complaint Asserting Breach of Contract or Noncompetition Provision Fails to Allege that***

Nursing Director Competed With the Plaintiff Which Provided Staffing and Consulting Services, the Claim for Breach of Contract Is Insufficient

> **ZA Consulting, LLC v. Wittman, April 2001, No. 3941 (Herron, J.)(August 28, 2001 - 8 pages)**

NON-COMPETITION PROVISION/BREACH - ***The provision of staff to perform medical and nursing services is not the same as actually providing such services and therefore, employee of staffing company who left to accept employment with client/nursing home did not violate Non-Competition Agreement as a matter of law.***

> **Z A Consulting, LLC v. Andrew Wittman, April Term 2001, No. 3941 (Cohen, J.) (December 11, 2002 - 8 pages).**

NONJOINDER OF NECESSARY PARTIES – ***In a declaratory judgment action, where the Court is being asked to determine the validity of a contract, the parties to the contract are necessary parties to the litigation because their interests will be affected by the Court's determination.***

> **ESP Enterprises and Liberties West Partners v. John J. Garagozzo and Ronald Egan January Term 2005, No. 4218 (Abramson, J.)(June 27, 2005 - 4 pages).**

Non Profit Corporation Act/ Conflict of Interest– ***A non profit corporation's by laws are to be construed reasonably, must be consistent with the law of the land and are subordinate to the laws of the Commonwealth. Therefore, where a conflict of interest by law is silent as to whether a vote is required as in 15 Pa. C.S. § 5728, the court will construe the silence as an acceptance of the requirements of section 5728.***

> **Harry H. Higgins Realtor, Inc. v. Philadelphia Housing Corp., December Term 2001, No. 004106 (December 22, 2003) (Jones).**

NONSUIT - ***Nonsuit Was Properly Entered Where Landlord Failed to Establish the Necessary Elements of His Cause of Action To Recover Additional Rents***

> **Sandrow v. Red Bandana Co., July 2000, No. 3933 (Herron, J.)(May 23, 2002 - 16 pages)**

NONSUIT - ***Nonsuit was properly entered in a bad faith insurance action where plaintiff failed to establish the necessary elements of its claim - Plaintiff failed to offer evidence that the defendant insurer lacked a reasonable basis for denying benefits***

TJS Brokerage & Co., Inc. v. Hartford Casualty Insurance Co., December 1999, No. 2755 (Herron, J.) (July 26, 2002 - 12 pages)

NOTICE

Mar-Dru, Inc. v. Hutamaki Food Services, Inc., May Term, 2005, No. 1476 (December 1, 2010 – 5 pages) (New, J.)

NOVATION - ***A novation may only be found where the evidence demonstrates: 1) the displacement and extinction of a valid contract; 2) the substitution for it of a valid new contract; 3) sufficient legal consideration for the new contract; and 4) the consent of the parties.***

Levey v. Cogen Sklar, LLP, July Term, 2001, No. 02725 (Cohen, J.)(June 20, 2003 - 10 pages)

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OCCURRENCE; INSURANCE COVERAGE; ACCIDENT; ROOF

> **Certain Underwriters at Lloyd's London v. Berzin, September Term, 2009, No. 01263 (June 28, 2010) (Bernstein, J., 3 pages)**

OPEN THE DEFAULT JUDGMENT - NO MERITORIOUS DEFENSE –*A filing of a petition to open fails to contain a meritorious defense where the attached answer fails to propose any defense.*

> **76 Carriage Company, Inc. v. Torgro Limousine Service, Inc., March Term 2007 No. 3432; Superior Court Docket No. 263EDA2007 (February 27, 2008 – 5 pages) (Sheppard, J.).**

OPEN THE DEFAULT JUDGMENT - UNTIMELY FILING –*A filing of a petition to open is untimely where the court has adequately notified defendant of its failure to respond to the complaint, the delay between defendant's discovery of default judgment and the filing of the petition was 127 days, and such delay is attributed to defendant's own administrative error.*

> **76 Carriage Company, Inc. v. Torgro Limousine Service, Inc., March Term 2007 No. 3432; Superior Court Docket No. 263EDA2007 (February 27, 2008 – 5 pages) (Sheppard, J.).**

OPEN JUDGMENT - *A court should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury. The evidence of a meritorious defense must be clear, direct, precise and believable. When determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence. An order of the court opening a judgment does not impair the lien of the judgment or any execution issued on it.*

> **PIDC Regional Development Corporation v. Allen Woodruff, July Term 2005, No. 1360 (Abramson, J.) (November 28, 2005 - 7 pages).**

MOTION TO OPEN JUDGMENT NON PROS/CERTIFICATE OF MERIT– ***The filing of an amended counterclaim does not void a notice of intent to enter judgment of non pros which was filed to the original counter claim. The period within which a certificate of merit must be filed runs from the date of filing the original counterclaim regardless of the filing of an amended counterclaim.***

> ***- Where a claim does not sound in professional liability a***

non pros for failure to file a certificate of merit is improper. In order to determine whether a certificate of merit is required the substance of the allegations are to be examined to determine whether a professions judgment is at issue.

Venturi, Scott, Brown and Assoc., Inc. v. JFK 734, Inc., et. al., November Term 2007 No. 1589 (February 13,2009 – 7 pages)(Bernstein, J.).

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PARENS PATRIAE - ***Commonwealth Has Standing as Parens Patriae to Bring Restitution Claims Only on Behalf of Citizens Who Opted Out or Were Not Included in Multi-District Class Action Settlement - Commonwealth Can Bring Request in Its own Right for Injunctive Relief, Civil Penalties and Restitution***

> **Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)**

PAROL EVIDENCE RULE—SEPARATE CONTRACT - ***The parol evidence rule does not preclude evidence of a separate contract that is supported by consideration; consequently, summary judgment is inappropriate where the moving party seeks to preclude evidence of a separate contract that is supported by consideration.***

> **Robert M. Feldman v. Philadelphia Trust Company, April Term, 2005, No. 1925 (Nov. 27, 2006 – 6 pages) (Bernstein, J.)**

PAROLE EVIDENCE RULE – ***In context of sale of commercial real estate, parole evidence rule barred evidence that defendants made representations regarding the condition of the property, where the agreement specifically stated that plaintiff agreed that no such representations were made or to be relied upon. In light of the integration clause, defendant could not be bound by any representations other than those expressly contained within the Agreement.***

> **Banks v. Hanoverian, et al., January Term 2005, No. 2807 (Abramson, J.) (March 10, 2006 – 12 pages).**

PAROLE EVIDENCE RULE - ***Since the parties' written agreement is not ambiguous on the issue raised by defendant and it contains a merger clause, defendant may not rely upon parole evidence of prior oral agreements and discussions to vary, modify or supersede the fully integrated agreement.***

> **Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).**
> ~~**as redundant of its breach of contract claim.**~~

PAROLE EVIDENCE - ***Under Delaware Law, Parol Evidence Is Admissible If a Writing Is Not Integrated, Is Ambiguous or Where There Is an Allegation of Fraud***

> **Textile Biocides, Inc. v. Avecia, Inc., January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)**

PAROL EVIDENCE - ***Although Plaintiff's Fraud Claim Might Withstand Preliminary Objections, Representations That Were Made Prior To Or***

Contemporaneous With The Contract Would Be Barred by the Parol Evidence Rule At Trial

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)**

PAROL EVIDENCE - Under Colorado Law, Integration Clauses Are Enforceable and Extrinsic or Parol Evidence Offered to Prove the Existence of Prior or Contemporaneous Agreements Is Inadmissible - An Exception to the Parol Evidence Rule Based on Claims for Fraudulent Misrepresentation or Negligent Misrepresentation in the Inducement of a Contract Applies Only in Limited Circumstances When Tort Claims Are Not Specifically Prohibited by the Terms of an Agreement

> **Branca v. Conley, February 2001, No. 2277 (Herron, J.)(October30, 2001 - 11 pages)**

PAROL EVIDENCE - *Parol Evidence Bars Extrinsic Evidence to Prove Fraud in the Inducement When the Prior Oral Representation Relates to a Subject Specifically Dealt With in the Contract*

> **Babiarz v. Bell Atlantic- Pennsylvania, August 2000, No. 1863 (Herron, J.)(November 20, 2001 - 11 pages)**

PAROL EVIDENCE - *Where Lease at Issue Clearly Precludes Tenant From Using Parking Lot for Its Exclusive Use, It Is Not Necessary to Consider Whether the Tenant's Alleged Concessions as to Its Intended Use of the Lot Are Precluded by Parol Evidence Rule*

> **Pobad Assocs. v. Albert Einstein Healthcare Network, June 2001, No. 2885 (Herron, J.)(February 4, 2002)**

PAROL EVIDENCE RULE/FRAUD IN THE EXECUTION - *Plaintiff Pleads Fraud in the Execution Where Plaintiff Alleges that Document Was Altered to Add Terms After Plaintiff Signed It - Parole Evidence Is Admissible to Contradict the Terms of the Agreement Where Fraud in the Execution Is Alleged.*

> **Marguerita Downes v. Morgan Stanley, September 2001, No. 2985 (Herron, J. (September 23, 2002 - 22 pages)**

PARTNERSHIP; LENDER LIABILITY; MORTGAGE LOAN; DEFAULT

> **Goldstein v. Stonebridge Bank, September Term, 2009, No. 2570 (June 30, 2010) (Bernstein, J., 3 pages)**

PARTNERSHIPS – ACTIONS AGAINST - *General partner of defendant partnership was not properly named as a party to a declaratory judgment action in which defendant sought only a judgment with*

respect to the defendant partnership's property because there would never be any need for defendant to execute against the property of the general partner.

> **Kmart of Pennsylvania, L.P. v. McDade Mall Assoc, L.P., November Term, 2004, No. 03258 (March 24, 2005 – 3 pages) (Sheppard, J.)**

PARTNERSHIP AGREEMENT - Summary Judgment on Breach of Contract Claim is Granted Where Active Partners Retroactively Modified Retirement Benefits Pursuant to a General Amendment Provision in their Partnership Agreement to the Detriment of Retired Partners Who Had Completed the Requisite Years of Service and Received Retirement Compensation Under the Agreement

> **Abbott v. Schnader Harrison Segal & Lewis LLP, June 2000, No. 1825 (Herron, J.)(February 28, 2001 - 26 pages)**

PARTNERSHIP AGREEMENTS - ***Accounting partnership was not permitted to change the retirement and withdrawal provisions of its partnership agreement after plaintiff-partner expressed his intent to withdraw from the partnership.***

> **Levey v. Cogen Sklar, LLP, July Term, 2001, No. 02725 (Cohen, J.)(June 20, 2003 - 10 pages)**

PARTNERSHIP DISPUTE, ARBITRATION CLAUSE, APPRAISER, PETITION TO VACATE ARBITRATION DECISION-

> **Spencer v. Spencer, August Term 2007 No. 2066, April 13, 2010 – 4 pages) (New, J.)**

PARTNERSHIP/DISSOLUTION - ***Complaint Alleges Dissolution of Law Partnership When It States that By the Express Will of the Partners the Firm Assets Were Transferred to a Different Law Firm that Thereafter Engaged the Partners***

> **Poeta v. Jaffe, November 2000, No. 1357 (Sheppard, J.)(October 2, 2001 - 10 pages)**

PUNITIVE DAMAGES – ***The standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.***

> **Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).**

PARTNERSHIP BY ESTOPPEL/SUMMARY JUDGMENT- ***Section 8328 of the Uniform Partnership Act entitled Partner by Estoppel provides that where a third person attempts to hold someone liable on a theory of partnership some person who has represented himself or consented to another having represented him as a partner may be held liable on a theory of estoppel. Third persons who are mislead by this holding out and act to their detriment have rights against such individuals based upon the doctrine of estoppel. Where a plaintiff attempts to create a partnership as between alleged partners, the doctrine of estoppel is not sufficient.***

> **Welker v. Mychak et. al., September Term 2003 No. 4221 (November 22, 2004((Cohen, J.).**

PARTNERSHIP/MERGER - ***Where Partnership Agreement Requires Consent of the General Partner and a Two-Thirds Interest of the Limited and General Partners for Any Merger, A Merger Without the Consent of Two-Thirds of the Partnership Interests Would Be Illegal - The Bona Fide Purchaser Exception Set Forth in the Partnership Agreement Applies Only to Transfers and Leases of Assets and Not to Mergers and Consolidations - Elimination of the Supermajority Voting Provision in a Limited Partnership Agreement Requires Approval of a Supermajority of the Partners - Corporate General Partner Breached His Fiduciary Duty to Limited Partners When He Failed to Inform Them of Their Right to Vote on a Merger***

> **Wurtzel v. Park Towne Place Apartments, June 2001, No. 3511 (Herron, J.) (September 11, 2001 - 20 pages)**

PENALTY, INTEREST AND ATTORNEY FEES

> **The Pietrini Corporation t/a Pietrini & Sons, Inc. v. Agate Construction Co., Inc., *et al.*, January Term, 2003, No. 0442 (Sheppard, J.) (July 5, 2005 – 4 pages) Superior Court Docket No. 1388 EDA 2005**

PENDENCY OF PRIOR ACTION - ***Under Pennsylvania Law, the Question of Pending Prior Action Is Purely a Question of Law Determinable from an Inspection of the Pleadings - Generally an Action Underway Outside the Commonwealth is Not Considered a Pending Action Unless It Reaches Judgment and Thereby Comes Within the Full Faith and Credit Clause of the United States Constitution***

> **Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A., January 2000, No. 3633 (Herron, J.)(October 11, 2000 - 20 pages)**

PENDENCY OF PRIOR ACTION - ***To Sustain a Preliminary Objection Based on Pending Prior Action, Objecting Party Must Demonstrate that the***

Parties, the Rights Asserted and the Relief Sought Are the Same - This Test Is Strictly Applied - Objections Based On Pendency of Prior Action Are Denied Where Plaintiff and Defendant in Philadelphia Action Have No Connection to Bucks County Action and When Claims Asserted Against Philadelphia Defendant Are Not Present in Bucks County Action

> **Polin Associates, et al. v. Cigna a/k/a Insurance Company of North America, March 2000, No. 2447 (Herron, J.)(November 3, 2000 - 5 pages)**

PENDENCY OF PRIOR ACTION - *Objections Based on Pendency of Prior Action Are Moot Where Appeal to Third Circuit and Action in Foreign State Have Been Stayed*

> ***Hemispherx Biopharma, Inc. v. Manuel Arsenio, July 2000, No. 3970 (Sheppard, J.)(February 14, 2001 - 29 pages)***

PENDENCY OF PRIOR ACTION - *Preliminary Objections Based on Prior Pending Action Overruled Where Actions Do Not Involve the Same Parties and the Claims Do Not Arise from the Same Contract*

> **Waterware Corporation v. Ametek et al., June 2000, No. 3703 (Herron, J.)(April 17, 2001 - 15 pages)**

PENDENCY OF PRIOR ACTION - *Pendency of Prior In Personam Action in a Foreign Court Is Not a Defense in a Subsequent Action in Pennsylvania - The Question of a Pending Prior Action Is Purely a Question of Law Determinable From an Inspection of the Pleadings - A Stay May Be Issued Where the Litigation of Two Suits Would Create a Duplication of Efforts and a Waste of Judicial Resources*

> **American Risk Associates, Ltd. v. Employers Reinsurance Corp., January 2001, No. 3373 (Herron, J.)(September 14, 2001 - 4 pages)**

PENNSYLVANIA COMMERCIAL CODE – *Pennsylvania Commercial Code 13 Pa.C.S. § 4406, entitled "Duty of customer to discover and report unauthorized signature or alteration," plainly applies to "customers." Section 4406(f) places an obligation on the customer to exercise reasonable promptness in reviewing its bank statements and discovering any unauthorized payments, by way of unauthorized signature or alteration, within one year after the bank provides the necessary financial records. Section 4406(f) was inapplicable to the depository bank because the plaintiff was not a "customer", as defined by the statute, of the depository bank. Therefore, the one-year preclusion under Section 4406(f) did not apply.*

> **Victory Clothing Co., Inc. d/b/a Torre Clothing v. Wachovia Bank, N.A., February 2004, No. 1397, Control No. 071103**

(Abramson, J.) (August 29, 2005 - 7 pages).

COURSE OF PERFORMANCE - ***Course of performance is a sequence of conduct between the parties subsequent to formation of the contract during performance of the terms of the contract.***

Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).

PERSONAL JURISDICTION - GENERAL AND SPECIFIC - ***A trial court may exercise personal jurisdiction over a non-resident defendant if either general or specific jurisdiction is found. General jurisdiction is based upon a defendant's general activities within a forum as evidenced by continuous and systematic contacts within the state. Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action. Regardless of whether general or specific jurisdiction is found to exist, the propriety of submitting a defendant to Pennsylvania law must be tested against the Pennsylvania long arm statute, 42 Pa. C.S.A. § 5322, and the due process clause of the Fourteenth Amendment.***

– GENERAL – CORPORATE DEFENDANT - ***Pennsylvania courts may exercise general personal jurisdiction over a corporation or partnership when the corporation or partnership carries on a continuous and systematic part of its general business within Pennsylvania. Since there is no established legal test to determine whether a corporation or partnership's activities are sufficiently continuous and systematic to warrant the exercise of general jurisdiction, a court must proceed by evaluating the facts of each case.***

– GENERAL – DEFENDANT'S INTERNET WEBSITE - ***Pennsylvania state and federal courts addressing the relationship between personal jurisdiction and the foreign defendant's Internet web sites have established a sliding scale of jurisdiction based largely on the degree and type of interactivity on the web site. A passive web site that does little more than make information available to those who are interested in it is not grounds for the exercise of general personal jurisdiction.***

- Where defendant's website was a passive website and there was no evidence in the record that defendant targeted its website toward residents of the Commonwealth of Pennsylvania, defendant's website did not make it subject to general personal jurisdiction in Pennsylvania.

– SPECIFIC - ***For a court to exercise specific personal jurisdiction over a non-resident, (1) the nonresident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice. Whether sufficient minimum contacts exist for the assertion of in personam jurisdiction is***

based on a finding that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there.

- Phone calls and/or correspondence into the forum are not sufficient to establish minimum contacts for jurisdictional purposes where the focus of the dispute is outside the forum.

- An unsolicited referral of business to a non-Pennsylvania lawyer from a Pennsylvania lawyer does not provide sufficient contacts to make the former amenable to suit in Pennsylvania.

DLM Mechanical, Inc., et al. v. Flamm, Boroff & Bacine, P.C., et al., September Term 2006, No. 1274 (August 25, 2008) (Abramson, J., 8 pages)

PERSONAL JURISDICTION – SPECIFIC JURISDICTION - ***Where defendant continued to exercise control over plaintiff's Pennsylvania bank account, and he continued to assert an ownership interest in, and to purport to act on behalf of, plaintiff, which is a Pennsylvania limited liability company with its principle place of business in Philadelphia, defendant was subject to specific personal jurisdiction based on his transacting business in this Commonwealth, causing harm in this Commonwealth by an act or omission outside this Commonwealth, and exercising powers under the authority of this Commonwealth as a director, officer, or other fiduciary of a corporation.***

– BURDEN OF PROOF - ***The moving party has the burden of supporting its objections to the court's personal jurisdiction. Therefore, where defendant does not address the specific jurisdictional allegations of the Complaint in his Preliminary Objections, he has not sustained his burden of putting those facts in dispute.***

Steak Quake LLC v. Bomis, December Term, 2004, No. 03335 (March 18, 2005 – 4 pages) (Sheppard, J.).

PERSONAL JURISDICTION – GENERAL - ***The activities of corporate defendant's subsidiary do not confer general personal jurisdiction over corporate defendant in Pennsylvania based on an alter-ego theory of jurisdiction even though corporate defendant's consolidated annual report contained financial information on its subsidiaries, corporate defendant's internet site included information about its subsidiaries, corporate defendant owned subsidiary's stock, and subsidiary sold corporate defendant's products in Pennsylvania.***

The Court did not have general personal jurisdiction over corporate defendant due to defendant's operation of a website, even though Pennsylvania residents could purchase a limited number of goods and services from a few of corporate defendant's subsidiaries through their connected websites, where corporate defendant's website is not targeted at Pennsylvania residents.

- Corporate defendant's national advertising campaign did not subject it to general personal jurisdiction in Pennsylvania,

even if some Pennsylvania residents responded to that campaign, where advertising campaign was not purposefully directed at Pennsylvania.

GoInternet.Net, Inc. v. SBC Communications Corp., March Term, 2003, No. 03348 (Sheppard, J.) (December 17, 2003).

PERSONAL JURISDICTION – JUDGMENT - NULLITY - ***A court must have personal jurisdiction over a party in order to enter a judgment against it. Action taken by a court without jurisdiction is a nullity.***

– GENERAL OR SPECIFIC - ***A trial court may exercise personal jurisdiction over a non-resident defendant if either general or specific jurisdiction is found. General jurisdiction is based upon a defendant's general activities within a forum as evidenced by continuous and systematic contacts within the state. Specific jurisdiction is narrower in scope and is focused upon the particular acts of the defendant that gave rise to the underlying cause of action.***

– SPECIFIC - ***For a court to exercise specific personal jurisdiction over a non-resident, (1) the nonresident defendant must have sufficient minimum contacts with the forum state and (2) the assertion of in personam jurisdiction must comport with fair play and substantial justice. Whether sufficient minimum contacts exist for the assertion of in personam jurisdiction is based on a finding that the defendant's conduct and his connection with the forum State are such that he should reasonably anticipate being haled into court there.***

– BURDEN - ***In evaluating an objection to personal jurisdiction, the objecting party initially bears the burden of proof. However, once the moving party supports its objections to personal jurisdiction, the burden of proving personal jurisdiction is upon the party asserting it.***

– EXISTENCE OF CONTRACT - ***The mere existence of a contract between an in-state party and an out-of-state party is not sufficient, by itself, to confer Pennsylvania courts with jurisdiction over the out-of-state party. Rather, negotiations prior to the contract, its contemplated future consequences, the terms of the contract and the parties' actual course of dealing must be evaluated in determining whether the defendant purposefully availed itself of the privilege of conducting activities within the forum State.***

– CHOICE OF LAW PROVISION - ***A provision in an agreement that the laws of a particular forum are to govern disputes arising under the agreement is not the equivalent of a consent to personal jurisdiction. Indeed, a choice of law provision in a contract is not determinative of personal jurisdiction. Choice-of-law analysis -- which focuses on all elements of a transaction, and not simply on the defendant's conduct -- is distinct from minimum contacts jurisdictional analysis -- which focuses at the threshold solely on the defendant's purposeful connection to the forum. Such a provision standing alone would***

be insufficient to confer jurisdiction.

– PETITION TO STRIKE CONFESSION OF JUDGMENT – ***Since the Court lacked personal jurisdiction over defendants, the confession of judgment against them was stricken.***

> **RAIT v. Jack Boyajian, Boyajian Asset Trust, Araxie Boyadjian, and Helen Boyadjian, July Term 2008, No. 4448 (March 27, 2009) (New, J., 8 pages)**

PERSONAL JURISIDICTION – SPECIFIC - ***Corporate defendant's alleged interference with contracts that were to be performed outside of Pennsylvania does not subject it to specific personal jurisdiction in Pennsylvania with respect to plaintiffs' tortious interference claims even though the harm caused by the interference was felt by plaintiffs in Pennsylvania because that is where plaintiffs are located.***

- Pennsylvania does not have specific personal jurisdiction over corporate defendant with respect to misrepresentation claims arising out the promises corporate defendant made during its settlement discussions with plaintiffs, even though corporate defendant may have made a few phone calls to Pennsylvania, because the focus of the dispute corporate defendant was trying to settle was outside Pennsylvania.

> **GoInternet.Net, Inc. v. SBC Communications Corp., March Term, 2003, No. 03348 (Sheppard, J.) (December 17, 2003).**

Petition to Open Judgment of Non Pros – ***Where a judgment of non pros is entered on the record, a plaintiff should file a petition to open the judgment of non pros pursuant to Pa. R. Civ. P. 3051 before filing a second complaint asserting the same cause of action.***

> **Harry H. Higgins Realtor, Inc. v. Philadelphia Housing Corp., December Term 2001, No. 004106 (December 22, 2003) (Jones).**

PETITION TO STRIKE / OPEN – ***A petition to strike and a petition to open are two distinct forms of relief, each with separate remedies.***

- A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.

- It is well settled that a petition to open a default judgment is addressed to the equitable powers of the court and the trial court has discretion to grant or deny such petition.

- To succeed on a petition to open a default judgment, the moving

party must establish the following three elements: (1) the petition to open was promptly filed; (2) the default can be reasonably explained or excused; and (3) there is a meritorious defense to the underlying claim. All three factors must appear before a court is justified in opening a default judgment.
- With regard to the first element, there is no bright line test that must be applied to determine whether a petition to open a judgment is timely. In other words, the law does not establish a specific time period within which a petition to open a judgment must be filed to qualify as timely. Instead, the Court focuses on two factors: (1) the length of the delay between discovery of the entry of the default judgment and filing the petition to open judgment, and (2) the reason for the delay.
- In cases where courts have found that a petition to open was promptly filed, the period of delay was normally less than one month.
- Conclusory statements that amount to mere allegations of negligence or mistake, absent more, will not suffice to justify a failure to appear or answer a complaint so as to warrant granting relief from a default judgment.
- The requirement of a meritorious defense is only that a defense must be pleaded that if proved at trial would justify relief.
- When a trial court has discussed all three elements of the tripartite test, it need not specifically set forth its consideration of the prejudices and equities.

Cassandra Hayes v. Manayunk Brewing Co., Philadelphia Beer Works, Inc., and Harry Renner, IV, August Term 2005, No. 2880 (Abramson, J.) (April 21, 2006 - 9 pages).

PETITION TO STRIKE CONFESSED JUDGMENT - STANDARD - ***A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike may only be granted when there is an apparent defect on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses. The facts averred in the complaint are to be taken as true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.***
- When determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence. A court should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury. The evidence of a meritorious defense must be clear, direct, precise and believable.

– FAILURE TO ALLEGE MERITORIOUS DEFENSE – ***Since defendant failed to allege any meritorious defenses, its Petition to Open Confessed Judgment was denied.***

RAIT v. Highland 100 LLC, July Term 2008, No. 4441 (March 17, 2009) (New, J., 8 pages)

PETITION TO STRIKE CONFESSED JUDGMENT - STANDARD - ***A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike may only be granted when there is an apparent defect on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses. The facts averred in the complaint are to be taken as true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.***

- When determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence. A court should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury. The evidence of a meritorious defense must be clear, direct, precise and believable.

– FAILURE TO ALLEGE MERITORIOUS DEFENSE – ***Since defendant failed to allege any meritorious defenses, its Petition to Open Confessed Judgment was denied.***

RAIT v. Highland 100 LLC, July Term 2008, No. 4858 (March 17, 2009) (New, J., 10 pages)

PETITION TO STRIKE CONFESSED JUDGMENT - STANDARD – ***A petition to strike a judgment is a common law proceeding that operates as a demurrer to the record. A petition to strike may only be granted when there is an apparent defect on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses. The facts averred in the complaint are to be taken as true; if the factual averments are disputed, the remedy is by a proceeding to open the judgment and not by a motion to strike. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.***

- When determining a petition to open a confessed judgment, the court may look beyond the confession of judgment documents to testimony, depositions, admissions, and other evidence. A court

should open a confessed judgment when the petitioner acts promptly, alleges a meritorious defense, and provides sufficient evidence to require submission of the issue to a jury. The evidence of a meritorious defense must be clear, direct, precise and believable.

- CONSENT TO JURISDICTION PROVISION - ***Since defendants clearly agreed to submit to jurisdiction in Pennsylvania pursuant to a consent to jurisdiction provision within the contract that they executed, defendants' argument that the Court lacks personal jurisdiction over them failed. Thus, defendants' petition to strike confessed judgment was denied.***

– FAILURE TO ALLEGE MERITORIOUS DEFENSE – ***Since defendants failed to allege any meritorious defenses, their Petition to Strike Judgment was denied.***

RAIT v. Jack Boyajian and Boyajian Asset Trust, July Term 2008, No. 4854 (March 17, 2009) (New, J., 12 pages)

PIERCING CORPORATE VEIL –

Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)

PIERCING THE CORPORATE VEIL—*Although no precise test determines when the corporate veil should be pierced, a strong showing of domination and control by the parent corporation is required.*

BDO Seidman, LLP v. Kader Holdings Co., et al., May Term 2004, No. 973 (Jones, J.) (March 11, 2005 – 7 pages).

PIERCING THE CORPORATE VEIL/PRELIMINARY OBJECTIONS - ***Plaintiff's insistence on collectively referring to individual defendant and corporate entity collectively as one entity throughout the Complaint fails to satisfy Pennsylvania's requirement of fact pleading with respect to alter ego claim.***

JK Roller Architects, LLC v. Tower Investments, July Term, 2002, No. 2778 (Jones, J.)(March 17, 2003 - 7 pages)

PLEADINGS – IMPERTINENT MATTER - ***The right of a court to strike impertinent matter should be sparingly exercised and only when a party can affirmatively show prejudice. There is some authority for the proposition that, even if the pleading of damages was impertinent matter, that matter need not be stricken but may be treated as mere surplusage and ignored.***

- PUNITIVE DAMAGES - ***A request for punitive damages cannot stand as an independent cause of action; rather, a request for punitive damages is incidental to a cause of action.***

– SPECIFICITY - ***The purpose of the pleadings is to place the***

defendants on notice of the claims upon which they will have to defend. In order for the Court to determine whether the defendant has been put upon adequate notice of the claim against which he must defend, the Court must not simply focus upon one portion of the complaint. Rather, in determining whether a particular paragraph in a complaint has been stated with the necessary specificity, such paragraph must be read in context with all other allegations in that complaint.

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

PLEADING - ***Pa. R.C.P. 1019(i) only requires plaintiff to attach the "material part" of the writing that supports its claim, not the entire document.***

> **GMI Contractors Inc. v. PKF Mark III, Inc., et al., April Term 2005, No. 3006(Jones, J.) (December 29, 2005 - 3 pages).**

PLEADINGS – AMENDMENTS - ***Amendments to pleadings will be liberally allowed to secure a determination of cases on their merits. However, a court is not required to allow amendment of a pleading if a party will be unable to state a claim on which relief could be granted. The right to amend will be withheld if there does not appear to be a reasonable possibility that the amendment will be successful.***

> **Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term, 2003, No. 01835 (May 2, 2006) (Abramson, J., 5 pages).**

PLEADINGS - ***Pennsylvania is a fact pleading state, which requires that the pleader define the issues, apprise the defendant of an asserted claim, and set forth all material and essential facts to support that claim. If the nature of plaintiff's claim against defendant changed during the course of these proceedings, then plaintiff should have filed a Motion to Amend its already amended Complaint to add a new claim.***

> **Robinson v. Berwind Financial, L.P., November Term, 2002, No. 00220 (December 29, 2005) (Jones, J., 6 pages)**

PLEADINGS/PERMISSIBLE - ***Under the Pennsylvania Rules of Civil Procedure, in a reply to a counterclaim, a plaintiff may include new matter and any affirmative or other defenses. There is, however, no provision for a reply containing a "counter-counterclaim." Thus, such a filing constitutes an impermissible pleading and must be stricken.***

Factor, et al. v. Alliance Bank, et al. , March Term 2004, No. 3542 (Abramson, J.)(March 29,2005 - 7 pages).

PLURALITY OPINION; AUTHORITY FOR THE CREATION OF PRIVILEGE; ATTORNEY-CLIENT PRIVILEGE; WORK PRODUCT PRIVILEGE; STATUTORY CONSTRUCTION ACT

Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)

POST TRIAL MOTIONS – TIME FOR FILING - ***Post-trial motions must be filed within ten days after the filing of the decision in the case of a trial without a jury. The decision in this case was the May 10th Judgment, so defendant's Post-Trial Motion had to be filed by May 20, 2006. Defendant filed his Post-Trial Motion on July 10, 2006, over a month and a half late, and the court properly denied it.***

> **United National Specialty Ins. Co. v. Gunboat, Inc., December Term, 2004, No. 03045 (November 20, 2006) (3 pages, Bernstein, J.)**

PRAECIPE FOR ENTRY OF JUDGMENT - ***A party may praecipe for entry of judgment after a bench trial if: 1) no timely post-trial motion is filed; 2) the court does not act on a timely post-trial motion within 120 days; or 3) the court does not enter judgment itself. In this case no timely motion for post-trial relief was filed, and the court entered judgment itself, so defendant's praecipe for entry of judgment was improper.***

> **United National Specialty Ins. Co. v. Gunboat, Inc., December Term, 2004, No. 03045 (November 20, 2006) (3 pages, Bernstein, J.)**

PREEMPTION, EXPRESS/COMMUNICATIONS ACT—*Under Communications Act, indirect impact on rates and delivery of wireless service of a judicial decision does not rise to the level of regulation required for express preemption.*

> **Beckermayer v. AT&T Wireless, August Term 2002, No. 0469 (Jones, J.)(October 22, 2004 – 10 pages).**

PREEMPTION, IMPLIED/COMMUNICATIONS ACT—*Under Communications Act, disclosure of technical specifications of wireless phone is not equivalent to changing the technical specifications, which is required for finding implied preemption.*

> **Beckermayer v. AT&T Wireless, August Term 2002, No. 0469 (Jones, J.)(October 22, 2004 – 10 pages).**

PRE-JUDGMENT INTEREST – ***Plaintiff is not entitled to an award of pre-judgment interest where plaintiff failed to seek a certain liquidate sum of damages, specifically damages that were either stated in the parties' contract or ascertainable by application of a formula stated in the contract.***

> **Prime Medica Associates v. Valley Forge Insurance Co., November Term, 2004, No. 0621 (April 26, 2007)(Sheppard, J. 15 pages).**

WITH PREJUDICE - ***"With prejudice" means an adjudication on the***

merits and final disposition, barring right to bring or maintain an action on same claim or cause. Moreover, the addition of the words "with prejudice" to an order granting a motion to dismiss a complaint indicates finality for purposes of appeal.

William Bell t/a Marcris Investments v. William Bernicker, April Term 2005, No. 1904 (Abramson, J.) (October 28, 2005 - 4 pages).

PRELIMINARY INJUNCTION; ELEMENTS REQUIRED TO OBTAIN PRELIMINARY INJUNCTION, INTERPRETATION OF CONTRACTS.

Eagle National Bank and Eagle Nationwide Mortgage Company v. ISCP Funding, LLC, March Term, 2011, No. 00685 (May 3, 2011) (Bernstein, J. 9 pages).

PRELIMINARY INJUNCTION; RESTRICTIVE COVENANT; TORTIOUS INTERFERENCE WITH CONTRACT

Jassin M. Jouria, M.D. v. Education Commission for Foreign Medical Graduates, August Term, 2009, No. 04291 (June 23, 2010) (Sheppard, J., 7 pages)

PRELIMINARY INJUNCTION, BREACH OF CONTRACT, LIKELY TO SUCCEED ON THE MERITS-

Arc One Enterprises v. AV8, Inc., March Term 2010 No. 684 Sheppard, J.) (May 3, 2010, 7 pages).

PRELIMINARY INJUNCTION, RESTRICTIVE COVENANT, LACK OF ADEQUATE CONSIDERATION, UNCLEAN HANDS-

Tri State Paper, Inc. v. Prestige Packaging, Inc., November 2009 No. 4078, (December 30, 2009 – 5 pages) (Bernstein, J.).

PRELIMINARY INJUNCTION—STANDARDS –

Olwidas, LLC v. Amit Azoulay v. Jonathan Nadav, March Term, 2011, No. 3536 (Bernstein, J.) (August 2, 2011 - 5 pages).

PRELIMINARY INJUNCTION ***The purpose of a preliminary injunction is to preserve the status quo and to prevent imminent and irreparable harm that might occur before the merits of a case can be heard and determined.***

An injunction will be granted if a party can show that: (1) relief is necessary to prevent immediate and irreparable harm; (2) a greater injury will occur from refusing the injunction than from granting it; (3) the injunction will restore the parties to the status quo; (4) the alleged wrong is manifest and the injunction is reasonably suited to abate it; and (5) the

plaintiff's right to relief is clear.

> **J.J. White, Inc. v. Burke, December Term, 2008, No. 3889 (August 25, 2009)(Sheppard, Jr., J., 8 pages).**

Preliminary Injunction/Irreparable Harm– ***In order for the court to grant a preliminary injunction, plaintiffs must demonstrate the likelihood of a loss that is not entirely ascertainable or compensable by money damages. Even when monetary damages are fully calculable a preliminary injunction may be granted when there is proof that the threatened monetary loss is so great that it threatens the existence of a business or when a defendant improperly takes money which unquestioningly belongs to plaintiff.***

- Allegations of improper distribution of partnership funds without more are insufficient to prove irreparable harm.

> **Franklin Capital Partners, Inc. et. al. v. Moosecorp II et. al., May Term 2006 No. 3660 (September 11, 2006) (Abramson, J).**

PRELIMINARY OBJECTIONS; JOINDER ADDITIONAL DEFENDANTS; RESIDENTIAL REAL ESTATE-

> **Giesler, et. al. v. 1531 Pine Street et. al., November Term 2008 No. 4301 (New, J.)(February 2, 2010 - 5 pages).**

Preliminary Objections/Arbitration Agreement- ***Where the nature of the dispute alleged in the joinder complaint falls outside the parameters of an arbitration provision and is not related to nor arise from the contract between the contracting parties, the dispute is not subject to arbitration.***

> **GE Supply v. Kvaerner, Philadelphia Shipyard, Inc. et. al., February Term 2005 No. 1683 (January 4, 2006 – 6 pages) (Jones, J.).**

Preliminary Objection/breach of fiduciary duty- ***Plaintiff allegations that defendant held himself out to the public as a certified insurance counselor, that plaintiff relied upon defendants superior expertise and that defendants had knowledge about the property from a prior transactions is insufficient to create a fiduciary duty. Merely relying on defendants' specialized skill in an arms length commercial transaction does not give rise to a confidential relationship required to state a claim for breach of fiduciary duty.***

> **Dardzinski v. Foley Insurance Agency, Inc. et. al., July Term 2008 No. 4141 (August 29, 2009 – 15 pages) (Sheppard, J.).**

PRELIMINARY OBJECTIONS/COMMERCIAL LEASE/BREACH CONTRACT/PAROLE EVIDENCE RULE/FRAUDULENT INDUCEMENT /FRAUD IN THE EXECUTION-CC

Pizza, LLC v. Liberty/Commercz 1701 JFK Bouldevard, L.P., et. al., April Term 2010 No. 1218 (New, J.) (August 8, 2011 - 8 pages).

PRELIMINARY OBJECTIONS – IMPROPER VERIFICATION – SANCTIONS

Stonebridge Life Insurance Co., Catherine Brewington, *et al.*, July Term, 2009, No. 0061 (Bernstein, J.) (May 12, 2011 – 3 pages)

PRELIMINARY OBJECTIONS/JURISDICTION- ***Civil courts presented with a controversy involving the internal governance or administration of a religious association must be sensitive to the potential constitutional issues at stake. To discourage interference with the free exercise of religion by civil courts, the Unites States Supreme Court and the Pennsylvania Supreme Court have embraced a deference rule.***

- Where the complaint alleges facts concerning the internal decision to close an existing congregation due to scattered and diminished attendance and financial strength making it allegedly impractical to fulfill the congregation's mission, the court should defer jurisdiction.

Evangelical Lutheran Church of the Redeemer v. Southeastern Pennsylvania Synod of the Evangelical Lutheran Church in America, February Term 2008 No. 3906 (September 22, 2008- 6 pages) (New, J.).

PRELIMINARY OBJECTIONS/TIME OF FILING—*Although a party filed preliminary objections one day later than permitted by local rule, the other party's failure to demonstrate prejudice permitted the court to consider the preliminary objections on the merits.*

Edmonds, et al. v. Royal., October Term 2004, No. 1406 (Abramson, J.) (August 22, 2005 – 5 pages).

PRELIMINARY OBJECTIONS

City of Philadelphia v. Hotels.Com, *et al.*, July Term, 2005, No. 0860 (May 25, 2006 – 6 pages) (Abramson, J.)

PRELIMINARY OBJECTIONS—*Preliminary objections to a previous complaint have no impact on preliminary objections to a subsequent amended complaint.*

Estate of Rodgers v. Morris Chapel Missionary Baptist Church, October Term 2004, No. 1577 (Abramson, J.) (December

19, 2005 – 4 pages).

PRELIMINARY OBJECTIONS—*To comply with the particularity requirement of Pa. R.C.P. 1019(b), the pleadings must adequately explain the nature of the claim to the opposing party and must convince the court that the averments are not mere subterfuge.*

> **Spivak v. Corporate Financial Services, January Term 2004, No. 1597 (Abramson, J.) (April 15, 2005 – 5 pages).**

PRELIMINARY OBJECTIONS – *It is only within the response to the Motion to Determine Preliminary Objections that a responding party has the opportunity to include a Memorandum of Law explaining to the Court why the preliminary objections should be overruled.*

> **MSWPA, Inc. and Michael S. Williams v Dan m. Achek and Achek Design & Construction Co. Inc. , June Term 2005, No. 0973 (Abramson, J.) (December 13, 2005 - 4 pages). Superior Court Opinion.**

PRELIMINARY OBJECTION

> **Gemini Bakery Equipment v. Baktek, *et al.*, February Term, 2004, No. 3204 (April 11, 2005 – 8 pages) (Abramson, J.)**

PRELIMINARY OBJECTION/DEMURRER/UCC/NEGLIGENCE– *The UCC is to be liberally construed and applied to promote its underlying purposes and policies which include simplifying and clarifying the law governing commercial transaction, fostering an expansion of commercial practices and standardizing the law of the various jurisdictions. - Where the allegations of the complaint are covered by section 3404 of the UCC and the UCC would provide a comprehensive remedy for the plaintiff, then the UCC displaces the common law negligence claim and the negligence claim is dismissed.*

> **United States Steel v. Express Enterprises of Pa. et. al., March Term 2005 No. 0140 (March 22, 2006 – 3 pages) (Sheppard, J.).**

PRELIMINARY OBJECTIONS/DEMURRER/RESPONSE
Based on Philadelphia Civil Rule *1928(c)(5), the court found that it was proper to sustain plaintiffs' Preliminary Objections, as an answer need not be filed to "preliminary objections raising alleged legal insufficiency of a pleading (demurrer)."

The court also found that defendant's use of a Motion to Strike plaintiffs' Preliminary Objections to defendant's Preliminary Objections was proper because defendant raised several errors of form and defects contained in plaintiffs' Preliminary Objections

to defendant's Preliminary Objections which errors and defects were not grounds for Preliminary Objections. Pa.R.C.P. 1028.

The court found that under Pa. R.C.P.126, as plaintiffs admitted that that they were able to make themselves aware of information that would have been included in the motion court cover sheet which they complain was not served upon them, the court found that defendant's failure to serve plaintiffs with motion court cover sheet did not result in prejudice to the plaintiffs.

> **Estate of Jean Mateson *et al*. v. Mateson Chemical Corporation, July Term, 2005, No. 0139 (Sheppard, Jr., J.) (December 27, 2005 – 12 pages).**

PRELIMINARY OBJECTIONS – DEMURRER – STANDARD - ***In considering preliminary objections, all material facts set forth in the complaint as well as all inferences reasonably deducible therefrom are admitted as true for the purpose of this review. The question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Any doubts as to whether a demurrer should be sustained shall be resolved in favor of overruling it.***

> **Erie Ins. Exchange v. Steven Sze, et al., January Term 2008, No. 4100 (August 4, 2008) (Abramson, J., 8 pages)**

PRELIMINARY OBJECTIONS/DEMURRER/ABUSE OF PROCESS- ***Plaintiff's allegations within the complaint that the "legal process" used by defendants, recording an Agreement of Sale and its Amendments with the Recorder of Deeds to demonstrate an equitable interest in the property, are insufficient to state a claim for abuse of process. The recording of the Agreement and Amendments with the Recorder of Deeds does not constitute legal process since it is not encompassed within the range of procedures incident to the litigation process. Thus, the claim for abuse of process is dismissed.***

> **JMS Properties Inc. v. American Recycling Corporation et. al., December 2004, No. 0087 (May 18, 2005- 6 pages)(Sheppard, J.).**

PRELIMINARY OBJECTION/ERISA/PREEMPTION- ***Plaintiff's allegations that defendants misrepresented the tax consequences of pending IRS regulations prior to their promulgation and prior to Plaintiff's investment in the plan is not preempted by ERISA.***

> **Shulick v. DeGRoat, et. al., January Term 2005 No. 1565 (June 7, 2005 – 10 pages) (Abramson, J.).**

PRELIMINARY OBJECTIONS/FORUM SELECTION CLAUSE/SPECIFIC JURISDICTION/FAIR PLAY AND JUSTICE –

Parker Square PEH, LLC v. Joseph C. McDowell, Jr., *et al.*, October Term, 2009, No. 3014 (Sheppard, J.) (October 4, 2010 – 6 pages)

PRELIMINARY OBJECTIONS/GIST OF THE ACTION– *Where the alleged misrepresentations arise solely from the contract between the parties and are inextricably intertwined with the contract, the claims for intentional and negligent misrepresentation are barred by the gist of the action doctrine.*

David J. Dardzinski, *et al. v.* Foley Insurance Agency, Inc., *et al.*, JULY TERM, 2008, NO. 4141 (August 25, 2009 – 15 pages) (Sheppard, J.)

PRELIMINARY OBJECTION/MECHANICS LIEN/ ENFORCEMENT/MANNER OF SERVICE-

HVAC Distributors, Inc. v. Carlisle Street Partners, LP, November Term 2010, No. 3426 (May 19, 2011 – 3 pages) (Bernstein, J.).

PRELIMINARY OBJECTIONS/THIRD PARTY BENEFICIARY– *A sub-sub contractor is not a third party beneficiary to a contract between a subcontractor and a general contractor since the subcontract agreement fails to designate the sub-subcontractor as a party to receive a benefit directly or indirectly.*

Emerald Erectors, Inc. v. Helcrist Iron Works, Inc., February 2004 No. 3189 (Sheppard, Jr., J.) (March 16, 2005 – 4 pages).

PRELIMINARY OBJECTIONS/PIERCING THE CORPORATE VEIL—*Allegations of domination and control, use of corporations as alter ego, and undercapitalization are sufficient to demonstrate piercing of the corporate veil for purposes of withstanding preliminary objections.*

James J. Gory Mechanical Contracting, Inc. v. Turchi, August Term 2004, No. 3361 (Jones, J.) (March 31, 2005 – 7 pages).

PRELIMINARY OBJECTIONS/PIERCE CORPORATE VEIL- *Allegations of undercapitalization, intermingling of funds, failure to adhere to corporate formalities, and control without any allegations explaining how defendant's personal interest were furthered constitute conclusions of law and are legally insufficient to pierce the corporate veil.*

Tunnell-Spangler & Associates, Inc. v. Samuel P. Katz, May Term 2003, No. 3030 (Cohen, J.) (7/15/04 – 6 pages)

PRELIMINARY OBJECTION/CAPACITY TO SUE/PARTNERSHIP- ***Where the complaint fails to allege that an individual partner is not a general partner or a limited partner who has become subject to the liability of a general partner, it is not necessary to name the partner (s) as a plaintiff.***

Preliminary Objection/Breach of Fiduciary Duty- ***Where the complaint fails to allege any facts suggesting weakness, dependence, inferiority or disparity in the parties' position giving rise to an abuse of power, the complaint fails to state a claim for breach of fiduciary duty.***

> **MRED General Partner, LLC v. Tower Economics Company, Inc., November Term 2004 No. 2531 (April 12, 2005) (Abramson, J.)**

PRELIMINARY OBJECTIONS/UTPCPL- ***Plaintiffs do not have standing to bring a claim under the Unfair Trade Practice and Consumer Protection Law (UTPCPL) when the allegations fail to state allege that plaintiff was a consumer of services for personal, family or household purposes.***

> **Dardzinski v. Foley Insurance Agency, Inc. et. al., July Term 2008 No. 4141 (August 29, 2009- 15 pages) (Sheppard, J.).**

PRELIMINARY OBJECTIONS/UTPCPL- ***Since the Association is not the "purchaser" as defined by the UTPCPL, it is statutorily precluded from bringing a private cause of action under the UTPCPL. Preliminary Objections/Real Estate Seller Disclosure Act- The Real Estate Disclosure Law only requires the seller of a unit in a condominium to make disclosures regarding the seller's own unit and not the common elements or common facilities of the condominium. Since, plaintiff's allegations relate to the common elements of the condominium, the Real Estate Seller Disclosure Law does not apply.***

> **Coronado Condominium Association, Inc. v. Iron Stone Coronado, L.P. et. al., December Term 2004, No. 2691 (November 7, 2004; 5 pages) (Jones, J.).**

PRELIMINARY OBJECTION/UTPCPL/STANDING- ***Plaintiff lacks standing to bring a claim under the UTPCPL where the purchase of an investment plan was for his business.***

> **Shulick v. DeGRoat, et. al., January Term 2005 No. 1565 (June 7, 2005 – 10 pages) (Abramson, J.).**

PRELIMINARY OBJECTIONS/IMPROPER VENUE- ***Where the evidence demonstrates that although defendant conducted business in Philadelphia for approximately five years on a part time basis, at the time suit was instituted defendant did not transact any business in this county. Thus, venue was improper since the***

defendant did not regularly conduct business in this County.

> **146 Montgomery Investors v. Parke Rehabilitation & Sports, June Term 2005 No. 3446 (October 5, 2005 4 pages) (Abramson, J.).**

PRELIMINARY OBJECTION—LIABILITY OF A LIMITED PARTNER IN CONTROL OF THE BUSINESS. ***Limited partners may be liable for the breaches of a limited partnership if they are also managing members of the general partnership, and if, as managing members, they agree to be liable as limited partners pursuant to the terms of a contract to which the general partnership and the limited partnership are parties.***

> **New River City, G.P., LLC v. Pine Projects, LLC *et al*., No. 0821, (July 13, 2007 – 5 pages), (Bernstein, J.)**

PRELIMINARY OBJECTIONS/TORTIOUS INTERFERENCE WITH CONTRACT- ***Where plaintiffs fail to allege any action or inaction on the part defendants to interfere with a contract and solely allege an independent act, a claim for tortious interference with contract has not been plead.***

> **Dardzinski v. Foley Insurance Agency, Inc. et. al., July Term 2008 No. 4141 (August 29, 2009 – 15 pages) (Sheppard, J.).**

PLEADING/ALTERNATIVE CAUSES OF ACTION - ***Complaint Fails to Conform to Pa.R.C.P. 1020(a) Where There Are No Separate Counts For the Misrepresentation and Negligent Misrepresentation Claims Because Such Claims Are Distinct Causes of Action.***

> **Methodist Home for Children, et al. v. Biddle & Company, Inc., April 2001, No. 3510 (Sheppard, J.) (October 9, 2002 - 10 pages)**

PLEADING/FACTS - ***Where Facts Supporting Claims of Bad Faith or Arbitrary or Vexatious Litigation Are Absent From the Complaint, the Claims Are Insufficiently Pled, and the Court May Not Consider Any Purported Facts Subsequently Submitted in Motion Brief Because Briefs Are Not Part of the Record.***

> **Carol E. Albert, and Colleen Ward v. Lucy's Hat Shop LLC, and Avram Hornik, June 2001, No. 0914 (Sheppard, J.) (December 31, 2002 - 16 pages)**

PLEADING SUFFICIENCY/FRAUD - ***Deliberate Non-Disclosure Has the Same Elements as Culpable Misrepresentation - Allegation that Defendant***

Secretly Set Up Competing Law Firm and Enlisted Plaintiff's Clients Is Allegation of Non-Disclosure of Material Facts - Scienter Is Sufficiently Pled Where Plaintiff Alleges Facts that Describe Deliberate Sequential Acts Which Resulted in Set-Up of Competing Firm - Present Intent not to Honor a Promise to Perform in the Future is Fraud.

> **Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)**
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> **Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)**
> **Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 Eds 2003(Sheppard, J.) (April 2, 2003 - 31 pages)**

PLEADING SUFFICIENCY/DUTY OF LOYALTY ***- An Employee Owes a Duty of Loyalty to Its Employer.***

> **Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)**
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> **Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)**
> **Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 Eds 2003(Sheppard, J.) (April 2, 2003 - 31 pages)**

PLEADING SUFFICIENCY/TORTIOUS INTERFERENCE ***- Where Plaintiff Alleges that Defendant Obtained List of Clients from Plaintiff's Law Firm Offices and Subsequently Contacted Plaintiff's Clients Misrepresenting Plaintiff's Ability to Continue Representing Clients, Which Resulted in Actual Harm to Plaintiff, Tortious Interference Was Sufficiently Pled - It Is a Reasonable Inference that List Obtained from Plaintiff's Offices is one of Plaintiff's Clients and that Plaintiff's Firm Has a Contract with those Clients.***

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 (Sheppard, J.) (December 31, 2002 - 26 pages)

Sagot Jennings & Sigmond v. Neil Sagot, April 2002, No. 3099; Superior Court Docket no. 434 EDA 2003(Sheppard, J.)(April 2, 2003 - 31 pages)
Jennings Sigmond v. Phillips & Brooke, P.C., Neil Sagot, P.C., Laura M. Brooke, and Stuart J. Phillips, June 2002, No. 3098 Superior Court Docket No. 433 EDA 2003(Sheppard, J.) (April 2, 2003 - 31 pages)

PENNSYLVANIA INSURANCE GUARANTY ASSOCIATION ACT (PIGA) - *The Provisions of PIGA Become Applicable Upon an Order of Liquidation with a Finding that an Insurer Is Insolvent After the Effective Date of the Act - Where Plaintiff's Insurer PIC Was Declared Insolvent and Ordered into Liquidation on January 21, 1998 which is after the Effective Date of the Act, Then the Amended Statute Applies So That Any Amount Payable on a Claim May Be Reduceed by the Amount of Any Recovery Under Other Insurance*

Gallman v. Pennsylvania Property and Casualty Insurance Guaranty Association, April 2000, No. 2267 (Herron, J.)(June 26, 2001 - 9 pages)

PENNSYLVANIA PUBLIC WORKS BOND PAYMENT ACT - *The Pennsyvlania Public Bonds Payment Act Does Not Apply to SEPTA*

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 -21 pages)

PLEADING/AMENDED COMPLAINT/ASSERTING DIRECT CLAIM AGAINST FORMER ADDITIONAL DEFENDANT - *Objection by Former Additional Defendant that Plaintiff Could Not Amend Complaint to Assert a Direct Claim Against It Is Without Merit - An Amended Complaint Takes the Place of the Original Complaint*

V-Tech Services Inc. V. Murray Motors, et al., February 2000, No. 1291 (Herron, J)(October 11, 2001 - 8 pages)

PLEADING/COUNT - *Pennsylvania Is a Fact-Pleading Jurisdiction - While a Complaint Must Include the Facts Upon Which a Claim Is Based, It Does Not Have to Identify the Legal Theory Underlying the Claim as a Heading to a Count - Where Complaint Sets forth Facts for Breach of Contract Implied in Fact, the Caption Heading Does Not Have to Label Such Claim Explicitly*

Advanced Surgical Servs.v. Innovasive Devices, Inc., August 2000, No. 1637 (Herron, J.)(December 4, 2001 - 6 pages)

PLEADING/GENERAL DENIAL/ADMISSION - *Where Preliminary Objections Stated that Individual Was Not an Agent Authorized to Accept Service of Process and Response Does Not Specifically Deny this Factual Averment or Assert Lack of Knowledge But Instead Claims that the Objection Avers Information Outside the Complaint that Is Not Cognizable as a Preliminary Objection, the Respondent Must Be Deemed to Admit that Individual Was Not Authorized to Accept Process*

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)**

PLEADING/GENERAL DENIAL/ADMISSION - *Since Pa.R.C.P. 1019(c) Requires That A Denial of the Performance, Occurrence or Satisfaction of Conditions Precedent Be Made "Specifically and With Particularity," Failure to Make This Denial With Specificity Shall Have the Effect of an Admission - Where PHA Merely Stated that Contractor Breached Contract By Failing to Comply With It, This Denial Lacked the Requisite Specificity and Thus Constitutes an Admission that the Contractor Fully Performed - Answer Containing Admission May Not Be Amended Where It Would Prejudice the Plaintiff Who Conducted Discovery and Prepared For Trial Based, in part, on Defendant's Admission*

> ***James J. Gory Mechanical Contracting, Inc. v. Philadelphia Housing Authority, February 2000, No. 453 (Herron, J.)(July 11, 2001 - 29 pages)***

POST TRIAL MOTION

> **Pharmerica Pharmaceutical Services, Inc. v. Elizabeth Homes, et al., August Term, 2001, No. 3198 (Sheppard, Jr., J.) (1/25/05 – 4 pages) Opinion to Superior Court**

POST TRIAL MOTION/WAIVER- *Where a party fails to make a specific exception or objection to an alleged error in the trial court's instruction, the alleged error is deemed waived and will not be considered subsequently even if the instruction proposed by the appealing party is considered a "binding instruction".*

> **Thomas Jefferson University et. al. v. Wapner et. al., June Term 2001 No. 2507 (October 22, 2004, 16 pages)(Jones, J.)**

POST TRIAL MOTION/ WPCL/GOOD FAITH- *The trial court did not err when it allocated the burden of proving the employer acted in good faith in asserting a right to setoff when it withheld wages from the employee.*

> **Thomas Jefferson University et. al. v. Wapner et. al., June**

Term 2001 No. 2507 (October 22, 2004, 16 pages)(Jones, J.)

PREEMPTION - ***A Pharmaceutical company following the FDA's scheme for labeling is not shielded from state tort liability.***

Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).

PREEMPTION/NATIONAL LABOR RELATIONS ACT - ***NLRA Does Not Preempt State Claim by Lawyer Against Defendants For Interfering With Their Client Umpires By Causing Them to Switch Unions Because These Claims Fall Within the Two Exceptions to the Garmon Preemption Doctrine - Where the Controversy Is Not Identical to that Which Could Be Presented Before the NLRA, It Is Not Preempted - Where Plaintiffs Are Neither An Employer Nor a Union, They Are Not Parties to a Collective Bargaining Agreement and They Are Not Subject to NLRA Protection, Their Claim Is Not Identical to Any Claim Before the NLRB***

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

PRELIMINARY INJUNCTION – ***A preliminary injunction cannot serve as a judgment on the merits since, by definition, it is a temporary remedy granted until that time when the parties' dispute can be completely resolved.***

M. Kelly Tillery, Esq. v. Leonard & Sciolla, LLP, June Term 2005, No. 3085 (Sheppard, J.) (October 11, 2006 – 4 pages)

PRELIMINARY INJUNCTION – REQUIREMENTS – ***An injunction would not be granted where the harm of which plaintiffs' complained, i.e. breach of the oral contract between the parties, could be adequately compensated with money damages, particularly since the payment of money was the only relief that plaintiffs sought in their Motion.***

– It was not grounds for granting an injunction that defendant might prove to be judgment-proof if and when plaintiffs finally obtained a judgment against him.

- A party who invokes the court's equitable powers asks the court to enforce the requirements of conscience and good faith. Plaintiffs must come to the court with clean hands, and they cannot expect the court to enforce a transaction that offends the court's conscience. Therefore, an injunction will not issue where the transaction that plaintiffs want the court to help them complete was intended to mislead innocent third parties.

Kim v. Choi, July Term, 2005, No. 03410 (August 9, 2005) (Abramson, J., 5 pages).

PRELIMINARY INJUNCTION– *Duration of a covenant not to compete for a period of five years from the sale of a business or termination from employment which ever is longer is unreasonable where Goldstein has been within Veritext's employ for five years, has not been paid pursuant to the Subordinated Promissory Note since October 2000 and has not been paid a salary for since April 2001.*

Reporting Services Associates, Inc., et. al. v. Veritext, L.L.C. et. al., June Term, 2003 No.: 489 (September 10, 2003) (Jones).

PRELIMINARY INJUNCTION – *Upon the plaintiff's Petition for Preliminary Injunction, the court held that the evidence failed to demonstrate that a preliminary injunction was necessary to prevent immediate and irreparable harm which could not be compensated by damages, or that greater injury would result by refusing the injunction than by granting it.*

Innaphase Corp. v. Overman, July Term 2003, No. 2807 (Sheppard, J.) (February 5, 2004 - 15 pages) Appeal to Superior Court Docket No. 2886EDA2003.

INJUNCTION PENDING APPEAL- *Defendant failed to satisfy the standard governing relief in the nature of a stay pending appeal under Pa. R. A. P. 1781 and the stringent requirements for a preliminary injunction namely immediate and irreparable harm. As a result the petition was denied.*

Reporting Services, Inc. and Lee Goldstein v. Veritext, L.L.C. Veritext Pa/RSA, L.L.C and Michael Sandler, June Term 2003, No.: 0489(January 7, 2004) (Jones).

PRELIMINARY INJUNCTION/BOND - *In Determining the Bond That Must Be Posted When Granting a Preliminary Injunction, the Court Must Balance the Equities and Require a Bond that Would Cover Reasonably Foreseeable Damages*

Einstein Community Health Associates, Inc. v. Beth Shortridge, M.D., November 2000, No. 1814 (Sheppard, J.)(December 13, 2000)

PRELIMINARY INJUNCTION - *Former employee/sales representative is enjoined for a period of six months from soliciting, contacting, or engaging in business relations with fourteen businesses that he maintained relationships with while employed by petitioner*

Olympic Paper Co. v. Dubin Paper Co. and Brian Reddy, October 2000, No. 4384 (Sheppard, J.)(December 29, 2000 - 23 pages)

PRELIMINARY INJUNCTION - Where Landlord Breached Covenants in Lease to Provide Heat, Elevator Service, Water and Cleaning Services, Plaintiffs Established the Clear Right to Relief Necessary for a Preliminary Injunction - Where Landlord's Breach of Lease Created Conditions that Made It Impossible for Plaintiff/Dentist to Treat his Patients, Plaintiff Demonstrated Immediate and Irreparable Harm

Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(May 8, 2001 -19 pages)

PRELIMINARY INJUNCTION - *Limited Partner Who Is Deprived of His Right to Vote on the Merger of the Limited Partnership Suffers Irreparable Harm That Cannot Be Compensated With Money - An Injunction Barring the Defendant from Buying Other Limited Partners' Shares and From Undertaking the Merger Will Preserve the Status Quo and Is Reasonably Suited to Abate the Defendant's Wrongs*

Wurtzel v. Park Towne Place Apartments, June 2001, No. 3511 (Herron, J.)(September 11, 2001 - 20 pages)

PRELIMINARY INJUNCTION - *Plaintiff Taxi Cab Company's Motion for Preliminary Injunction To Prevent Defendant Taxi Company From Using a Particular Telephone Number Is Denied For Failure to Show a Clear Right to Relief Since It Is Unclear Whether the Right to the Telephone Number Had Been Transferred to the Plaintiffs - Plaintiffs also Failed to Show Irreparable Harm that Could Not Be Compensated by Damages*

Hamdan and Northeast Taxi Coach, Inc. V. Alwalidi and Northeast Coach, Inc., April 2001, No.4437 (Herron, J.)(November 2, 2001 - 6 pages)

PRELIMINARY INJUNCTION - *Plaintiff's Motion for Preliminary Injunction seeking placement of fees generated from legal representation of Union in escrow pending adjudication of the merits of the underlying claims is denied where plaintiff failed to establish the actual existence of immediate and irreparable harm which monetary damages could not remedy. Moreover, plaintiff failed establish "a clear right to relief," insofar as he has failed to demonstrate that he was entitled to any portion of the legal fees generated following his termination as counsel for the Union.*

Mozenter v. Trigiani, June Term, 2002, No. 605 (Sheppard, J.)(April 2, 2003 - 10 pages)

PRELIMINARY INJUNCTION - *Preliminary injunction granted requiring the defendant radiologists to assign one-third of the magnetic*

resonance imaging "reads" to the plaintiff radiologists to prevent immediate and irreparable harm to the business opportunities and market advantage of the plaintiffs which could not be compensated by money damages alone.

Kessler v. Broder, November Term 2002, No. 04183 (Sheppard, Jr., J.) (July 28, 2003 - 10 pages)

PRELIMINARY INJUNCTION/COVENANT OF QUIET ENJOYMENT - Where Tenant Showed that Landlord Turned Off Water in Building so that City Would Shut Down Building and Force Tenants Out, the Tenant Was Entitled to a Preliminary Injunction Orderting the Landlord to Restore the Water and Remedy Other Violations of the City Code Such that City Would Reopen Building - *The Defendant Limited Partnership Is Chargeable With the Knowledge and Misrepresentations of Its Agents - Nonparties May Not Knowingly Help a Person Violate an Injunction - Plaintiff Seeking Injunction Is Entitled to Counsel Fees and Costs As a Sanction Where Defendant's Conduct Is Dilatory, Obdurate, Vexatious, Arbitrary and in Bad Faith in Defying Injunction Order, Failing to Begin Repairs in Good Faith and Obtaining Reconsideration of that Order Based on False Affidavits*

Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)

PRELIMINARY INJUNCTION/IMPOSITION OF FINES - *Fines May Be Awarded to Abate Wrongs Suffered by Tenant Who Obtained a Preliminary Injunction Against Landlord Because A Court of Equity Has Broad Powers to Fashion Relief According to the Equities of a Case - Court of Equity May Impose Fines to Assure Compliance With Injunction Order*

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(October 2, 2001 - 9 pages)

PRELIMINARY INJUNCTION/NONPARTIES - *Nonparties May Not Knowingly Help a Person Violate an Injunction*

Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)

PRELIMINARY OBJECTION -

Northstar Waste LLC v. Lester J. Lishon, U S Environmental, Inc. and Enviro-Waste Solutions, Inc., February Term 2004, No. 4699 (Cohen, J.) (8/10/04 – 2 pages).

PRELIMINARY OBJECTION -

Validation Commerce, LLC v. Ngravis, Bryant Yingst, Justin Staufer and Donald E. Reynolds, March Term, 2004, No. 7272 (Cohen, J.) (8/28/04 – 4 pages)

PRELIMINARY OBJECTION/ARBITRATION- ***The goal of arbitration is not net where one defendant to an action is subject to an arbitration provision and another is not and where enforcement of the arbitration provision against one party alone would create two cases, one in court and one in arbitration, and cause plaintiff to relitigate the same liability and damage claim in two separate forums with two separate fact finders.***

Jules Lichtman and WEBNET Entertainment, Inc. v. Paul Taufer, Esquire, *et al.* March Term, 2004, No. 5560 (Jones, J.) (July 13, 2004 – 19 pages)

PRELIMINARY OBJECTION/ DUTY TO DEFEND – ***Where the underlying action fails to allege "Bodily Injury" or "Property Damage" defendants Maryland Casualty Company and Harleysville Mutual Insurance Company does not owe plaintiffs a duty to defend.***

GE Aquarium, Inc. v. Harleysville Mutual Insurance Company, June Term 2003 No. 0038 (December 27, 2004 – 12 pages) (Jones, J.).

PRELIMINARY OBJECTIONS/ SUBJECT MATTER JURISDICTION/ PATENTS- ***Where patent rights are incidental or indirectly involved in a cause of action, this court properly has jurisdiction over the matter.***

Jules Lichtman and WEBNET Entertainment, Inc. v. Paul Taufer, Esquire, *et al.* March Term, 2004, No. 5560 (Jones, J.) (July 13, 2004 – 19 pages)

PRELIMINARY OBJECTIONS/ARBITRATION/WAIVER- ***A right to enforce an arbitration clause may be waived if the party by virtue of his conduct has accepted the judicial process by failing to raise the issue of arbitration promptly, engaging in discovery, filing pre trial motions which do not raise the issue of arbitration, waiting for adverse rulings and then raising the issue of arbitration or waiting until the case is ready for trial before asserting arbitration.***
- Preliminary objections to a second amended complaint asserting arbitration should be overruled when the defendant failed to assert the defense by filing preliminary objections to the amended complaint or in its answer with new matter to the amended complaint as required by Pa. R. Civ. P. 1030 and 1032(a).

1930-1934 Associates, L.P. v. Lovett Contracting, et. al., September Term 2005 No. 0908 (May 22, 2006 – 5 pages)

(Sheppard, J.).

PRELIMINARY OBJECTIONS/ARBITRATION/WAIVER- ***Defendant did not waive the valid agreement to arbitrate between the parties since it did not engage in discovery, file pretrial motions, wait for trial or suffer any adverse rulings.***

> **Tunnell-Spangler & Associates, Inc. v. Samuel P. Katz (A/K/A Sam Katz) and Entersport Capital Advisors, Inc., May Term 2003, No. 3030 control number 100380 (December 31, 2003) (Cohen).**

PRELIMINARY OBJECTIONS/CROSS CLAIMS- Cross claims are proper under Pa. R. Civ. P. 2252(a) where they arise from the same transaction or occurrence as those alleged in the complaint.

> **Crossing Construction Company, Inc. v. Delaware River Port Authority, July Term 2003 No. 2699 (May 7th, 2004 - 7 pages)(Sheppard, J.)**

PRELIMINARY OBJECTIONS/ UTPCPL/STANDING- ***Plaintiff's UTPCPL claim must be dismissed since plaintiff lacks standing to raise the claim since plaintiff did not purchase or lease the goods as required by the statute.***

> **Greencourt Condominium Association v. Greencourt Partners, et. al., January Term 2004, No. 04045 (April 30, 2004) (Cohen, J.)**

PRELIMINARY OBJECTIONS: CLASS ACTION - ***Preliminary Objections as to the Class Definition Should be Deferred until the Certification Stage - Breach of Written Warranty Claim Under UTPCPL Cannot be Sustained Where There is No Compliance with Pa.R.C.P. 4019(h) - Claim for Fraud Under the UTPCPL Cannot be Sustained Absent Allegations of Knowledge and Scienter - Under Pennsylvania Law, Plaintiff May Represent a National Class***

> **Green v. Saturn, January 2000, No. 685 (Herron, J.)(June 2, 2000 - 5 pages)**

PRELIMINARY OBJECTIONS

> **Duane Morris, LLP f.k.a Duane Morris & Heckscher LLP v. Nand Todi, October Term 2001, No. 1980 (J. Cohen) (6/17/04- 2 pages)**

PRELIMINARY OBJECTIONS - ***Plaintiff Bank's Complaint Set Forth Claim for Fraudulent Misrepresentation Based on Defendant's Knowing Withdrawal of Funds from Bank Account without Entitlement - "Gist***

of the Action" Doctrine Inapplicable where Fraud Claim is Distinct from Breach of Contract Claim - Plaintiff Bank set forth Claim for Breach of Contract Premised on Bank Account and Contract of Deposit - Objections to Defective Verification and Failure to Attach Writing Dismissed as Moot When Subsequently Supplied by Praecipe

> ***Mellon Bank, N.A., v. Maris Equipment Co.,* March 2000, No. 2039 (Herron, J.)(July 26, 2000 -13 Pages)**

PRELIMINARY OBJECTIONS - ***Preliminary Objections Sustained Where Count does not Set Forth Claim with Sufficient Specificity and Contains More than One Claim - Claim for Tortious Interference with Contract is Legally Insufficient Absent Allegation of Contractual Relationship between the Plaintiff and a Third Person - Claim for Defamation is Set Forth with the Requisite Specificity as to EAB, Roaten and PEBA but not as to NEBB - Conspiracy Claim is Insufficient in Failing to Allege Direct or Circumstantial Evidence of a Combination and Intent - Preliminary Objections based on Statute of Limitations Overruled Because this Defense May Only be Presented in a Responsive Pleading as New Matter***

> **Hydrair, Inc. v. National Environmental Balancing Bureau, et al., February 2000, No. 2846 (Herron, J.)(July 27,2000 - 9 Pages)**

PRELIMINARY OBJECTIONS - ***Under Revised Philadelphia Rule 1028(c)(2) Providing that an Answer Need Not be Filed to Preliminary Objections Raising an Issue under Pa.R.C.P. 1028(a)(2)(3) or (4), a Court may not Grant as Uncontested Objections Asserting Lack of Specificity - Allegations of Fraud were set Forth with the Specificity Required by Pa.R.C.P. 1019(b) - Preliminary Objections Asserting Failure to Attach Writings Overruled as Irrelevant***

> **Brokerage Concepts, Inc. v. J.W.S. Delavau Co., February 1999, No. 1114 & J.W.S. Delavau Co., Inc., January 2000, No. 413 (Herron, J.)(July 13, 2000 - 3 pages)**

PRELIMINARY OBJECTIONS - ***Preliminary Objections to Claim of Equitable Subrogation Sustained Where Complaint Fails to Allege that Entire Debt Has been Satisfied - Plaintiff May File Amended Complaint Within 20 Days***

> **Resource Properties XLIV, Inc. v. Growth Properties, Ltd., March 2000, No. 3750 (Herron, J.)(July 24, 2000 - 2 pages)**

PRELIMINARY OBJECTIONS - ***Objection for Failure to Aver Time, Place and Items of Special Damages Sustained Where Complaint Does Not Aver When Payment is Due Nor What Comprises the Overall Sum of $93,000 in Damages - Attachment of Invoices to Answer to Objections Is Not Sufficient to Correct Defective Complaint***

> ***St. Hill and Associates, P.C. v. Capital Asset Research Corp.,***

***Ltd.,** May 2000, No. 5035 (Herron, J.)(September 7, 2000 - 6 pages)*

PRELIMINARY OBJECTIONS - ***Preliminary Objections Should Not Be Summarily Sustained Merely Because Unopposed - Where Objections Raise Issues of Fact, Court Is Obliged to Require the Submission of Additional Evidence Through Depositions and Interrogatories - Complaint Must Be Amended Under Pa.R.C.P. 1020(a) Where It Presents More than One Cause of Action in a Count -***

Acme Markets, Inc. v. Dunkirk, et al., February 2000, No. 1559 (Herron, J.)(September 18, 2000 - 34 pages)

PRELIMINARY OBJECTIONS - ***Although Contract Provides that Liquidator Shall Be Selected by Arbitration, It Does Not Require That Disputes Concerning Allocation of Partnership Funds Must Be Submitted to Arbitration - Agreements to Arbitrate Must Strictly Construed and Confined to the Clear Intent of the Parties - There is Concurrent Jurisdiction of Law and Equity in Actions by Partners Against Co-Partners in Connection with Partnership Matters - Claim of Prior Pending Action Is Dismissed Where Defendant Fails to Attach Requisite Documents Because Question of Prior Pending Action is Question of Law Determinable From the Pleadings***

Cohen v. McLafferty, July 2000, No. 923 (Herron, J.)(September 29, 2000 - 12 pages)

PRELIMINARY OBJECTIONS - ***After Analysis of the Elements of Claims for Breach of Contract, Promissory Estoppel, Fraudulent Misrepresentation, Negligent Misrepresentation, Fraudulent Conveyance, Conspiracy as well as the Allegations in the Amended Complaint, Demurrers Asserting Failure to Allege Actual, Compensable Damage and/or Causation Are Overruled - Under Pennsylvania law, Claim for Unjust Enrichment Does Not Require Allegation of Loss by the Plaintiff or Causation - Demurrer to Claim for Contractual Compensation Adjustments is Overruled Because Plaintiff Adequately Alleged Damage - Objections Seeking More Specific Pleading of Claims for Fraudulent Conveyance and Conspiracy Are Sustained Because the Allegations Are Insufficient to Allow the Defendants to Prepare a Defense***

Graduate Cardiology Consultants, P.C., v. Vivra, February 2000, No. 2827 (Herron, J.)(October 20, 2000 - 15 pages)

PRELIMINARY OBJECTIONS - ***Allegation that Defendants Were "Otherwise Negligent Under the Circumstances" Is Stricken As Insufficiently Specific***

Treco v. Wolf Investments Corp., March 2000, No. 1765 (Herron, J.)(February 15, 2001 - 9 pages)

PRELIMINARY OBJECTIONS - ***When Reviewing Preliminary Objections***

Challenging the Legal Sufficiency of a Complaint, A Court May Rely on Documents Forming in Part the Foundation of the Suit Even When They Are Not Attached to the Complaint

> **Red Bell Brewing Co. v. Buchanan Ingersoll, P.C., May 2000, No. 1994 (Sheppard, J.)(March 13, 2001 - 16 pages)**

PRELIMINARY OBJECTIONS - ***Demurrers to Causes of Action for Fraudulent Inducement, Negligent Misrepresentation, Breach of Fiduciary Duty, Interference with Business Relations, and Breach of Duty of Good Faith and Fair Dealing Sustained - Demurrers to Cause of Action for Defamation Overruled - Objection to Scandalous and Impertinent Matter Overruled - Objection for Failure to Allege Agency Overruled - Objection to Claim for Punitive Damages Overruled***

> **Sylk v. Bernsten, January Term 2002, No. 1906 (Sheppard, J.) (February 4, 2003 - 25 pages)**

PRELIMINARY OBJECTIONS/ALTERNATIVE DISPUTE RESOLUTION – ***Plaintiff's complaint was not filed in violation of the parties agreed upon dispute resolution procedure since the dispute in question does not fall within the scope of the dispute resolution provision at issue.***

> **Rowcomm, LLC. v. Southeastern Transportation Authority, September Term 2003, No. 000844 (February 20, 2004)(Jones).**

PRELIMINARY OBJECTION/ ARBITRATION- ***Where two contractual instruments are to be interpreted as one and one agreement contains an arbitration provision and the other does not, if the dispute at issue falls within the scope of the arbitration provision then the matter should be remanded to arbitration.***

> **Heck Family Partnership, et. al. v. Accupac Acquisition Inc., C/O H.I.G. Capital LLC., November Term 2004, No. 0007 (May 23, 2005 – 9 pages) (Jones, J.).**

PRELIMINARY OBJECTIONS—BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING - ***A party may not maintain separate claims of breach of contract and breach of the covenant of good faith and fair dealing, because the latter arises from a contractual relationship and asserts nothing more than a mere breach of contract.***

There Are No Fourteenth Amendment Property Rights In a Government Contract "for Convenience" - ***A government contract creates a property interest protected under the due process clause of the Fourteenth Amendment only in two situations: first, when the contract is characterized by a quality of either extreme dependence (as in the case of welfare benefits), or permanence***

(as in the case of tenure), or sometimes both (as may occur in the case of social security benefits); second, when the contract contains a provision allowing the government to terminate the contract only for cause. Thus a government contract creates no property right protected under the Fourteenth Amendment if its provisions state that the relationship may be terminated "for convenience."

Philips Brothers Electrical Contractors, Inc. v. The School District of Philadelphia and the School Reform Commission July Term 2007, No. 3105(April 9, 2008 – 5 pages) (Sheppard, J.)

PRELIMINARY OBJECTION/COMMON LAW INDEMNIFICATION– ***The right of indemnity rests upon a difference between the primary and secondary liability of two persons each of whom is made responsible by the law to an injured party. Secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible. Where defendant insurers fail to allege any facts to establish any legal or special relationship between it and the co defendant, a claim for common law indemnification does not exist.***

Letwin v. Rain and Hale, August Term 2007 No. 2316 September 12, 2008 – 6 pages) (New, J.).

PRELIMINARY OBJECTIONS/CONTRIBUTION– ***Contribution based on joint and several liability is governed by statute and is available among joint tortfeasors. Where the complaint and cross claim fail to allege a common duty owed to plaintiffs and the breach of their respective duties gives rise to a different claim, defendants are not joint tortfeasors and a claim for contribution does not lie.***

Letwin v. Rain and Hale, August Term 2007 No. 2316 (September 12, 2008 – 6 pages) (New, J.).

PRELIMINARY OBJECTIONS/DOCUMENTS - ***Documents Attached to Preliminary Objections But Not Attached to Complaint May Be Considered in Ruling on Preliminary Objections If the Documents Form a Part of the Basis of the Suit***

Abrams v. Toyota Motor Credit Corp., April 2001, No. 503 (Herron, J.)(December 5, 2001 - 23 pages)

PRELIMINARY OBJECTIONS/FRAUD– ***Where the complaint fails to allege***

that defendant made any misrepresentations to the plaintiff, the claim for fraud is dismissed.

Damerjian et. al. v. Bardelas, May Term 2008 No. 2382 (May 15, 2009- 14 pages)(Bernstein, J.).

PRELIMINARY OBJECTIONS/PERSONAL JURISDICTION-*Personal jurisdiction exists over non resident individual defendants where the contacts of a resident co-conspirator over whom the court has jurisdiction are imputed to the foreign co-conspirator for jurisdictional determinations. In order for co- conspirator jurisdiction to exist there must be substantial acts in furtherance of the conspiracy within the forum of which the out of state co-conspirator was or should have been aware.*

> **Damerjian et. al. v. Bardelas, May Term 2008 No. 2382 (May 15, 2009 – 14 pages) (Bernstein, J.).**

PRELIMINARY OBJECTIONS- UNJUST ENRICHMENT- *Plaintiffs failed to state a claim for unjust enrichment where plaintiffs are indirect purchasers and had no direct dealings with plaintiffs and failed to allege how the enrichment was unjust.*

> **Stutzle, et. al. v. Rhone –Poulenc S. A., et. al., October Term, 2002 No.2668 (September 29, 2003) (Cohen).**

PRELIMINARY OBJECTIONS/UTPCPL- *Plaintiffs, who purchase stock for investment purposes, lack standing to bring a claim under the UTPCPL.*

> **Damerjian et. al. v. Bardelas, May Term 2008 No. 2382 (May 15, 2009- 14 pages)(Bernstein, J.).**

PRELIMINARY OBJECTIONS/ ECONOMIC LOSS DOCTRINE- *Where the plaintiff purports to state a claim under § 552 of the Restatement (Second) of Torts, Information Negligently Supplied for the Guidance of Others, and seeks solely economic damages, plaintiff's claim is barred by the economic loss doctrine.*

> **Greencourt Condominium Association v. Greencourt Partners et. al., January Term 2004 No. 004045 (December 22, 2004 – 5 pages) (Cohen, J.).**

PRELIMINARY OBJECTIONS / EXISTENCE OF AGREEMENT FOR ALTERNATIVE DISPUTE RESOLUTION - *Where it is undisputed that the parties possess a valid agreement to arbitrate in their Shareholders' Agreement, the pertinent inquiry becomes whether the dispute falls within the scope of such agreement.*

> **Odyssey Capital, L.P., et. al. v. Reddi, et. al., June 2002,**

No. 02893(Cohen, J.)(November 14, 2002 - 7 pages)

PRELIMINARY OBJECTIONS/FRAUD/OMISSION/DUTY TO SPEAK - ***An omission is actionable as fraud only when there is an independent duty to disclose the omitted information and such an independent duty exists where the party who is alleged to be under an obligation to disclose stands in a fiduciary relationship to the party seeking disclosure.***

- Where the complaint fails to allege any facts demonstrating any "overmastering influence" or "weakness, dependence or trust justifiably reposed" by GeneLink over plaintiffs, the claim for fraudulent non disclosure fails based on a lack of a duty to disclose.

- JUSTIFIABLE RELIANCE- ***Allegations that plaintiff relied upon statements made by an adversary's attorney during a settlement conference are insufficient to state a claim for fraud. Given the adversarial environment in which these statements are made, plaintiffs were not justified in relying upon his adversary attorney's representations and may amount to mere puffery.***

DePhillipo v. GeneLink, et. al., August Term 2008 No. 1128 (New, J.) (May 6, 2009 – 15 pages).

PRELIMINARY OBJECTION/GENERAL PERSONAL JURISDICTION– ***Where an individual defendant was not served in Pennsylvania, was not domiciled in Pennsylvania when served and has not consented to jurisdiction in Pennsylvania, the court lacks personal jurisdiction over the defendant.***

DePhillipo v. GeneLink, et. al., August Term 2008 No. 1128 (New, J.) (May 6, 2009 – 15 pages).

PRELIMINARY OBJECTIONS / INDIVIDUAL DIRECTORS OF CORPORATION - ***Where defendants filed an indemnity and contribution claim, as well as a misrepresentation claim, against additional defendants who were individual directors of the plaintiff corporations, and where the additional defendants filed preliminary objections to those claims, the court overruled the objections. Although the additional defendants argued that the indemnity and contribution claim merely alleged that the additional defendants breached their duties owed to plaintiffs, and that the defendant lacked standing to enforce such a derivative claim, the court allowed the joinder of the additional defendants for indemnity and contribution based on the liberal standard for preliminary objections, Pa. R. Civ. P. 2252(a), and caselaw cited by defendant. The objection to the misrepresentation claim was overruled because it was raised only in the additional defendants' reply brief and not in the preliminary***

objections.

> **AGE Institute Holdings *et al.* v. KPMG, *et al.*, May Term 2002, No. 04028 (Sheppard, J.) (June 13, 2003 Order - 2 pages)**

PRELIMINARY OBJECTIONS/INTENTIONAL INTERFERENCE WITH CONTRACTUAL RELATIONS– ***Preliminary Objections in the nature of a demurrer are overruled where the averments of the complaint alleging a claim for intentional interference with contractual relations against attorneys suggest that advice given by attorneys to a client was not privileged.***

> **Iskowitz, M.D. v. White and Williams LLP, Stephen C.Zivitz, Esquire, Joseph Dominguez, Esquire, Bruce A. Bell, Esquire, and Ryan J. Udell, Esquire, May Term 2003, No. 2926 (June 28, 2004 – 10 pages) (J. Cohen).**

PRELIMINARY OBJECTIONS/INTENTIONAL AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS– ***Where a complaint solely alleges forms of emotional distress with transitory physical phenomena plaintiff has failed to satisfy the requisite element of physical injury necessary to state a claim for Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress.***

> **Iskowitz, M.D. v. White and Williams LLP, Stephen C.Zivitz, Esquire, Joseph Dominguez, Esquire, Bruce A. Bell, Esquire, and Ryan J. Udell, Esquire, May Term 2003, No. 2926 (June 28, 2004) (J. Cohen).**

PRELIMINARY OBJECTION/INTERRELATION OF CONTRACTS/ARBITRATION- ***Where the terms of two contractual instruments before the court for interpretation, the Purchase Agreement and the Escrow Agreement, demonstrate that the two agreements form a single unified expression of the dealings between the parties, they are to be interpreted as one to determine the intent of the parties.***

> **Heck Family Partnership, et. al. v. Accupac Acquisition Inc., C/O H.I.G. Capital LLC., November Term 2004, No. 0007 May 23, 2005 – 9 pages) (Jones, J.).**

PRELIMINARY OBJECTIONS/LEGAL SUFFICIENCY/BAD FAITH– ***Where the plaintiff subcontractor alleges a bad faith claim against a prime contractor's surety, the claim is legally insufficient since section 8371 was not intended to include surety bonds.***

> **Ferrick Construction Company v. One Beacon Insurance Company, April Term 2004 No. 3858 (December 27, 2004- 6 pages) (Jones, J.).**

PRELIMINARY OBJECTIONS/LEGAL AND EQUITABLE CLAIMS—*Legal and*

equitable claims arising out of the same transaction or occurrence must be brought in a single action.

> **Top Quality Manufacturing, Inc. v. Sinkow, February Term 2004, No. 3323 (Cohen, J.) (November 3, 2004 – 4 pages).**

PRELIMINARY OBJECTIONS LEGAL SUFFICIENCY- ***Uniform Commercial Code- The Pennsylvania version of the UCC, 13 Pa. C. S. A. § 3420, displaces plaintiffs common law claims of conversion and negligence since such claims are squarely covered by its terms.***

> **Metro Waste, Inc. v. Wilson Check Cashing , Inc., March Term 2003 No 2117 (September 23, 2003) (Jones).**

PRELIMINARY OBJECTIONS/ LIQUIDATED DAMAGES - Preliminary Objections denied where Defendants argued that the limitation of damages clause contained in the agreement between the parties precluded Plaintiffs' claims for incidental and/or consequential damages as a matter of law. While a demurrer may be used to test whether or not a cause of action is stated, it may not be used to test the limits of liability. Gen. State Auth. v. Sutter Corp., 24 Pa. Commw. 391, 356 A.2d 377 (1976).

> **Perry Square Realty, Inc., et. al. v. Independence Realty, Inc., June Term, 2001, No. 02989 (Cohen, J.)(November 27 - 7 pages)**

PRELIMINARY OBJECTIONS/PRAECIPE TO OVERRULE - ***Pursuant to Philadelphia Civil Rule *1028(B), A Party May File a Precipe to Strike Preliminary Objections Where the Objector Failed to File a Motion to Determine Preliminary Objections Within 30 Days of Filing the Preliminary Objections with the Prothonotary***

> **Mogilyansky v. Svetlana Sych, June 2000, No. 3709 (Herron, J.)(January 4, 2001 – 3 pages)**

PRELIMINARY OBJECTIONS/RULE 1019 - ***Preliminary Objections Sustained Where Plaintiff Failed to Allege Whether Contract Was Oral or Written and Plaintiff Failed to Attach Contract Establishing Privity with Defendant***

> **Precision Towers, Inc. v. Nat-Com, Inc. and Value Structures, Inc., April 2002, No. 2143 (Cohen, J.) (September 23, 2002 - 9 pages)**

PRELIMINARY OBJECTION/SPECIFIC JURISDICTION- ***Specific personal jurisdiction does not exist over an out of state attorney defendant representing a corporation incorporated in Pennsylvania***

in a New Jersey action and performed all the work necessary to represent the Pennsylvania Corporation in New Jersey.

> **DePhillipo v. GeneLink, et. al., August Term 2008 No. 1128 (New, J.). (May 6, 2009 – 15 pages)**

PRELIMINARY OBJECTIONS/STANDING– ***Where the City allegedly awarded a contract to a bidder and much later rescinded the award based on the alleged misconduct by the City, the bidder has standing to sue even though the bidder failed to allege taxpayer status.***

> **Correctional Medical Care, Inc. v. City of Philadelphia et. al., August Term 2004 No. 2980 (December 20, 2004 – 6 pages) (Jones, J.).**

PRELIMINARY OBJECTIONS/TIMELINESS/SPECIFICITY - *Defendant Set Forth Just Cause for the Six-Day Delay in Filing Motion to Determine Preliminary Objections Where the Motion Package Had been Returned by the Prothonotary for Failure to Attach Copy of Attested Preliminary Objections and Defendant Promptly Refiled Complete Motion Package - Vague Allegations that Defendant/Architect Was Responsible for 47 Construction Orders Must Be Amended For Greater Specificity to Enable Defendant to Prepare a Defense*

> **Philadelphia HGI Associates, L.P. v. Cope Linder Associates, October 2000, No. 2981 (Herron, J.)(April 6, 2001 - 5 pages)**

PRELIMINARY OBJECTIONS/ PA. UNIFORM CONDOMINIUM ACT– ***A declarant bears the ultimate burden under 68 Pa. C. S. A. § 3404 (a)(1) to provide information to the purchaser even though the declarant's statement is based on a report prepared by an independent registered architect or professional engineer.***

> **Greencourt Condominium Association v. Greencourt Partners et. al., January Term 2004 No. 004045 (December 22, 2004 – 5 pages) (Cohen, J.).**

PRELIMINARY OBJECTIONS - UNJUST ENRICHMENT CLAIM – ***Where plaintiffs allege that they paid money to defendants for a worthless product, plaintiffs have alleged that they conferred a benefit on defendants for which plaintiffs may be entitled to receive restitution in quantum meruit.***

> **Toth v. Bodyonics, July Term, 2002, No. 03886 (November 6, 2003) (Cohen, J.)**

PRELIMINARY OBJECTION / VENUE - *The court sustained defendant's preliminary objection based on venue considerations and transferred the matter to the Montgomery County Court of Common Pleas where the record established that plaintiff and the individual defendant were residents of Montgomery County,*

defendant was served in Montgomery County, the transaction at issue took place in Montgomery County and Chester County, and the properties at issue are located in Montgomery County and Chester County.

Berkery v. Green, January Term 2003, No. 03975 (Sheppard, J.) (August 20, 2003 - 7 pages)

PRELIMINARY OBJECTIONS/WAIVER - *Where Defendant Fails to Brief Preliminary Objections, They Are Waived - Alternatively, Where Defendant Raises Objections Only In Its Memorandum and Not in Its Preliminary Objections, the Objections Are Waived*

ZA Consulting, LLC v. Wittman, April 2001, No. 3941 (Herron,J.)(August 28, 2001 - 8 pages)

PRELIMINARY OBJECTIONS/WAIVER - *Plaintiff Waived Its Objections to Defendants' Filing of Preliminary Objections Despite Letter Agreement that Defendant Would File an Answer Where Plaintiff Failed to File Preliminary Objections to the Preliminary Objections - By Filing a Response to the Preliminary Objections, Plaintiff Waived Its Objections to Defendants' Procedural Defects*

4701 Concord LLC v. Fidelity National Title Insurance Co. of New York, April 2001, No. 1481 (Herron, J)(August 28, 2001 - 11 pages)

PRELIMINARY OBJECTIONS/SERVICE/WRIT OF SUMMONS-*In order to determine whether the plaintiff made a good faith effort to effect service, the thrust of the inquiry is whether the plaintiff engaged in a course of conduct forestalling the legal machinery put in motion by plaintiff. Simple neglect in carrying out the responsibility to identify and comply with the requirements for service may be sufficient to constitute a lack of good faith.*

- Procedural rules relating to service of process should be strictly followed because jurisdiction of the person of the defendant cannot be obtained unless proper service is made.

Eastland Foods Management, Inc. v. One Beacon, May Term 2002, No 2116 (June 30, 2005)(Jones, J.- 8 pages).

PRELIMINARY OBJECTION/VENUE- *In an action alleging a mass conspiracy to induce investors to invest in a company knowing that the shares are worthless, venue is appropriately laid in Philadelphia when the company shares were heavily marketed to Philadelphia residents and meetings to induce Philadelphia residents to invest in the company were held in Philadelphia.*

Damerjian et. al. v. Bardelas, May Term 2008 No. 2382 (May 15, 2009 – 14 pages)(Bernstein, J.).

PRELIMINARY OBJECTION / VENUE - *Where Defendant's Preliminary Objection Asserted that the Venue Should Be Transferred Pursuant to Pa. R. Civ. P. 1006(d)(1), Court Sustained Objection and Transferred the Case Based on Considerations of Convenience to Witnesses, Ease of Accessibility to Evidence and the Complaint's Allegations of Events Which Occurred Outside Philadelphia County.*

> **Schaffroth v. Nationwide Mutual Fire Insurance Company, April Term 2003, No. 3553 October 23, 2003 – 7 pages) (Sheppard, J.)**

PRIMA FACIE TORT– *Plaintiffs have sufficiently alleged an injury, the culpable character of the conduct, and whether the conduct is justifiable under the circumstances to state a cause of action for Prima Facie Tort.*

> **Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 030042 (August 6, 2003) (Jones).**

PRINCIPAL & AGENT - *A Limited Partnership Is Chargeable with the Knowledge and Misrepresentations of its Agent Who Submitted False Affidavit to Court*

> **Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)**

PRIOR PENDING ACTION - Where the parties are the same in the second action and a prior pending action, the fraud claim raised in the second action is the same as the fraud claim dismissed in the prior action, and the relief requested in both actions is the same, the court will dismiss the second action.

> **Carson/DePaul/Ramos v. Driscoll/Hunt, October Term, 2005, No. 1090 (July 20, 2006 – 4 pages) (Sheppard, J.)**

PRIORITY –

> **Cambridge Walnut Park, LLC v. U. S. Bank National Assoc., *et al.*, May Term, 2008, No. 0517 (September 30, 2010 – 3 pages) (New, J.)**

PRIVACY/INVASION/SECLUSION - *Corporations Have No Right to Personal Privacy and Cannot Bring a Claim for Intrusion on Seclusion*

> **Academy Industries, Inc. v. PNC, N.A., May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 - 34 pages)**

PRIVILEGE –

Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)

PRIVILEGE/JUDICIAL - *Defamation Claim Cannot Be Maintained Based on the Faxing of a Complaint to the Legal Intelligencer Because the Statements in the Complaint As Well As the Activity of Faxing Them Fall Within the Scope of Judicial Privilege*

Bocchetto v. Gibson, April 2000, No. 3722 (Sheppard, J.)(MArch 13, 2002 - 19 pages)

PRIVILEGED DOCUMENTS/DISCOVERY - *An attorney who inadvertently receives confidential or privileged documents must return the documents because that attorney has ethical obligations that may surpass the limitations implicated by the attorney-client privilege and that apply regardless of whether the documents retain their privileged status - To determine whether an attorney who inadvertently receives confidential or privileged documents may not make use of the information discovered in those documents, a court considers the reasonableness of the precautions taken to prevent disclosure, the inadvertence, extent and number of disclosures, the steps taken after learning of the disclosure and the time frame in which those steps were taken, and issues of fairness and reasonableness, including the utility of extending the attorney-client privilege and the prejudice the receiving party would suffer.*

Herman Goldner Company, Inc. v. Cimco Lewis Industries, March 2001, No. 3501 (Herron, J.) (July 19, 2002 - 10 pages)

PROCESS, SERVICE/HAGUE CONVENTION - *Under Hague Convention, Parties Are Permitted to Send Judicial Documents by Postal Channels Directly to Persons Abroad Unless State of Destination Objects - Service of a Complaint on Foreign Corporation Is Valid So Long as Service Complies With the Long Arm Statute - Service Is Proper Even if Document Is Not Translated into the Official Language of the State of Destination*

Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A., January 2000, No. 3633 (Herron, J.)(October 11, 2000 - 20 pages)

PROCESS, SERVICE - *Service of Process on an Individual Defendant Outside Pennsylvania Was Invalid under Long Arm Statute where It Was Mailed to Corporate Address and Return Receipt Was Signed by Someone Other than the Defendant who Was Not Defendant's Agent –*

Under the Long Arm Statute, the Defendant or His Agent had to Sign the Return Receipt - Service by Mail at Defendant's Usual Place of Business Is Improper Because Rules Require Hand Service of Process at a Usual Place of Business - Lack of Proper Service Deprives Court of Personal Jurisdiction

> **Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)**

PROCESS/SERVICE/WAIVER - *By Appearing and Participating in the Merits of a Preliminary Injunction Hearing Without Objecting to Defective Service, Defendants Waived that Objection and Recognized the Court's Jurisdiction*

> **Elfman v. Berman et al., February 2001, No. 2080 (Herron, J.)(May 8, 2001 - 19 pages)**

PROFESSIONAL NEGLIGENCE - DAMAGES - *Under the Uniform Contribution Among Tortfeasors Act, insured's alternate claim against insurance agent must be reduced by the amount of insured's settlement of its primary claim against its insurer. Since the settlement was for more than the damages the insured demanded from the agent, the insured's damage claim against the agent was extinguished. Since the insured no longer had any damages to claim, it could not sustain its burden of proving that the agent was professionally negligent.*

> **Prima-Donna, Inc. v. Acono-Rate Ins. Agency, Inc., June Term, 2004, No. 02005 (October 24, 2006) (Bernstein, J. 6 pages).**

PRO HAC VICE – IMPROPER BEHAVIOR IN COURTROOM – *Where an attorney who was admitted pro hac vice in Pennsylvania demonstrated improper behavior during the trial, but who later testified at a hearing that he had no intention of behaving similarly in any future case in the Commonwealth, no further action was taken by the Court.*

> **Ace American Ins. Co. v. Underwriters at Lloyds and Companies, et al., July Term 2001, No. 0077 (August 7, 2008) (Abramson, Bernstein, Sheppard, J., 2 pages)**

PROMISSORY ESTOPPEL –

> **Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)**

PROMISSORY ESTOPPEL - *Under promissory estoppel, a promise which the promisor should reasonably expect to induce action or*

forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires. Trucking company that relied on promise of additional work and upgraded its fleet in reliance had a claim for promissory estoppel.

- Just as the law has consistently upheld the doctrine that, under given circumstances, a person may be estopped by his conduct, his statements, or even his silence, if another has thereby been induced to act to his detriment, so from the earliest times there was recognized the principle that an estoppel might similarly arise from the making of a promise, even though without consideration, if it was intended that the promise be relied upon and in fact it was relied upon. The basis of promissory estoppel is not so much one of contract, with a substitute for consideration, as an application of the general principle of estoppel to certain situations.

Osborne-Davis Transportation, Inc. v. Mothers Work, Inc., February Term, 2007, No. 02512 (February 20, 2008) (Bernstein, J., 5 pages).

PROMISSORY ESTOPPEL - ***A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. Where a tenant alleged that its landlord promised it a renewal lease and that the tenant relied on that promise in renovating the leased premises, the tenant made out a claim for promissory estoppel.***

Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).

PROMISSORY ESTOPPEL – DAMAGES - ***Under promissory estoppel, a promisee's recovery is ordinarily limited to the amounts lost and expended in reliance on the promise. Where a tenant alleged that its landlord promised it a renewal lease and that the tenant relied on that promise in renovating the leased premises, the tenant's recoverable damages are limited to the amount it reasonably spent to renovate the premises before it learned that its lease would not be renewed. Punitive damages may not be recovered on a promissory estoppel claim.***

Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).

PROMISSORY ESTOPPEL - ***In order to maintain an action in***

promissory estoppel, [Dr. Pym] must show that 1) [EPP] made a promise that [it] should have reasonably expected to induce action or forbearance on the part of [Dr. Pym]; 2) [Dr. Pym] actually took action or refrained from taking action in reliance on the promise; and 3) injustice can be avoided only by enforcing the promise.

John Pym. M.D. v. Einstein Practice Plan, Inc.,December Term 2003, No.3577 (Jones, J.) (7/21/04 – 4 pages)

PROMISSORY ESTOPPEL - *Promissory Estoppel Claim based on Statements of Landlord's Agent is Legally Insufficient Because Tenant has yet to Suffer Any Damage from the Agent's Statements - Where Tenant Vacated Space in Reliance on Statements of Landlord's Agent, He Suffered No Detriment and Was Not Charged Rent on Vacated Space - Speculation of Future Harm that Might Occur Should Landlord Succeed in his Action to Recover Rent Does Not Suffice for Promissory Estoppel Claim*

Holl & Associates, P.C. v. 1515 Market Street Associates, May 2000, No. 1964 (Herron, J.)(August 10, 2000 - 7 pages)

PROMISSORY ESTOPPEL - Complaint Sets Forth Viable Promissory Estoppel Claim Where It Alleges That Defendant Corporation and Its Subsidiaries Promised that Plaintiff Would Be the Manager of Certain Facilities and Plaintiff Helped Procure the Requisite Financing in Reliance On These Promises

Hospicomm, Inc. v. International Senior Development, LLC, August 2000, No. 2195 (Herron, J.)(January 9, 2001 - 14 pages)

PROMISSORY ESTOPPEL - *Complaint Set Forth Viable Claim for Promissory Estoppel as to Alleged Promises to Repay Plaintiff's Capital Contribution But Not to Alleged Promise to Complete Buyout Where Attached Exhibit/Letter of Intent Contained Conditional Language Concerning the Buyout*

Liss v. Liss, June 2001, No. 2063 (Herron, J.)(March 22, 2002 - 31 pages)

PROMISSORY ESTOPPEL - *Plaintiff May Set Forth Separate Claims for Breach of Contract and Promissory Estoppel*

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)

PROMISSORY ESTOPPEL/STATUTE OF FRAUDS - Pennsylvania's Statute of Fraud Does Not Necessarily Preclude an Action Based on Estoppel - Even if the Statute of Frauds Were Applicable, the Corporate Veil May Be Pierced Based on Allegations that Corporation That Made Promises Upon Which Plaintiffs Relied Was an Alter Ego of the Individual Defendants Who Controlled the Corporation

Fineman & Bach, P.C. v. Wilfran Agricultural Industries, Inc., March 2001, No. 2121 (Herron, J.)(July 30, 2001 - 7 pages)

PROPER PARTY– ***Defendants Preliminary Objections asserting that "CNA" is not a proper party to the proceedings since "CNA" is not a corporate entity but a trade name is overruled; a trade name satisfies the definition of corporate name as set forth in Pa. R. Civ. P. 2127, 2177.***

498 Associates, Limited Partnerships, et. al. v. American Casualty Company of Reading, Pennsylvania, et. al., March Term, 2003 No.: 2980 (August 6, 2003) (Jones).

PROPERTY - *The factors necessary in determining whether a wall is a party wall includes: the intent of the builder, the wall's location with reference to the boundary line between adjoining properties, the understanding of the adjoining owners at the time it was built, and its use for a long number of years. Based upon the fact of record, the court found the wall at issue to be a party wall, however concluded that plaintiffs' use of the wall was limited by an express easement contained within the deed.*

Turchi v. MCW Washington Square Partners, et al., August Term 2004, No. 1187 (Jones, J.)(January 5, 2006 – 8 pages).

PUBLIC UTILITY - *Class Action Complaint Against Telephone Company Dismissed Under the Filed Tariff Doctrine - Allegation that Telephone Company on Its Website Misleadingly Suggested that Nonpublished Telephone Number Service Includes Omission of Telephone Number From Bills Sent to Owners of Toll-Free Numbers Would Impermissibly Expand the Tariff's Definition of Nonpublished Telephone Service - Filed Tariff Doctrine Precludes Claims Based on Rates Approved by the Pennsylvania PUC Where Plaintiffs Essentially Seek Expansion of Rights Set Forth in a PUC Tariff*

Knipmeyer v. Bell Atlantic, et al., August 2000, No. 308 (Sheppard, J.)(May 22, 2001 - 8 pages)

PUNITIVE DAMAGES - *A plaintiff cannot recover punitive damages for an action solely sounding in breach of contract.*

Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (April 7, 2009) (Bernstein, J., 9 pages)

PUNITIVE DAMAGES - *Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. To award punitive damages, the defendant's conduct must be malicious, wanton, reckless, willful, or oppressive. A plaintiff cannot recover*

punitive damages for an action solely sounding in breach of contract.

> **Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June 10, 2008) (Bernstein, J., 8 pages)**

PUNITIVE DAMAGES – ***No independent cause of action exists for a claim of punitive damages.***

> **Hardy and B.I.C.E.P.S. v. The Trustees of the Univ. of Penn., et al., April Term 2007 No. 2178 (February 21, 2008 – 8 pages)(Sheppard, J.).**

PUNITIVE DAMAGES - *Punitive damages must be related to the injury-producing cause of action. This does not mean that specific compensatory damages must be awarded to sustain a punitive damage award. Punitive damages awarded in favor of insurer were proper where the jury's punitive damage award flowed directly from its finding of liability.*

> **Champlost Family Practice v. State Farm Ins. Co., May Term, 2002, No. 1167 (July 10, 2007)(Sheppard J. 10 pages); State Farm Mutual Automobile Ins. Co. and State Farm Fire & Casualty Co. v. Champlost Family Practice, Inc. & Champlost Family Medical Practice, P.C. & Alexander S. Fine, M.D. & Oscar Katz, January Term, 2004, No. 2669 (July 10, 2007)(Sheppard J. 10 pages).**

PUNITIVE DAMAGES – ***The standard under which punitive damages are measured in Pennsylvania requires analysis of the following factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.***

> **Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).**

PUNITIVE DAMAGES - *Punitive damages are awarded for outrageous conduct, that is, for acts done with a bad motive or with a reckless indifference to the interests of others. Punitive damages will not be assessed for a mere breach of contractual duties, where no recognized trespass cause of action arose out of the same transaction.*

> **Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).**
> ~~**as redundant of its breach of contract claim.**~~

PUNITIVE DAMAGES – ***The standard under which punitive damages are measured in Pennsylvania requires analysis of the following***

factors: (1) the character of the act; (2) the nature and extent of the harm; and (3) the wealth of the defendant.

> **Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages).**

PUNITIVE DAMAGES—*A party's continuing refusal to correct a condition leading to potential health problems despite actual notice of the condition for more than four years may constitute "reckless indifference" sufficient to impose punitive damages.*

> **North American Publishing Company v. SunGard Availability Services, LP, et al., April Term 2004, No. 8932 (Abramson, J.) (October 7, 2005 – 6 pages).**

PUNITIVE DAMAGES—*Pursuant to the Political Subdivision Tort Claims Act, punitive damages cannot be assessed against a local agency.*

> **Danlin Management Group, Inc. v. The School District of Philadelphia, et al., January Term 2005, No. 4527 (Jones, J.) (August 29, 2005 – 8 pages).**

PUNITIVE DAMAGES - *Request for Punitive Damages Cannot be Set Forth as Separate Count or Independent Cause of Action - Punitive Damages Claim is Legally Insufficient where Complaint Lacks Allegations Concerning Defendant's Motive or Reckless Actions - Where Claim at best is for Restitution based on Mutual Mistake, Punitive Damages are not available for Defendant's Mere Mistake*

> **Holl & Associates, P.C. v. 1515 Market Street Associates, May 2000, No. 1964 (Herron, J.)(August 10, 2000 - 7 pages)**

PUNITIVE DAMAGES - Pennsylvania Statutory Law Allows Court to Assess Punitive Damages Against Insurer That Has Acted in Bad Faith Toward Insured - Where Text of Count Entitled Punitive Damages Alleges Bad Faith, That Count Must Be Treated as Bad Faith Claim - When Faced with a Conflict Between the Allegations of a Count and its Title, Pennsylvania Courts Consider the Allegations, Not the Title

> **Miltenberg & Samton, Inc. v. Assicurazioni Generali, S.p.A., January Term 2000, No. 3633 (Herron, J.)(October 11, 2000 - 20 pages)**

PUNITIVE DAMAGES - *While Punitive Damages Are Not Recoverable for Breach of Contract Claim, They Are Permitted for Intentional Interference with Contract and Fraud Claims*

> ***Amico v. Radius Communication, January 2000, No. 1793 (Herron, J.)(January 9, 2001 - 8 pages)***

Waterware Corp. v. Ametek et al., June 2000, No. 3703 (Herron, J.)(April 17, 2001 - 15 pages)(Punitive damages may be asserted for intentional misrepresentation but plaintiff will ultimately have to prove defendant's reckless conduct)

PUNITIVE DAMAGES - ***Punitive Damages Are Not Available for Breach of Contract Claims***

The Brickman Group, Ltd v. CGU Insurance Co., July 2000, No. 909 (Herron, J.)(January 8, 2001 - 22 pages)

Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)

PUNITIVE DAMAGES - ***Pennsylvania Permits Punitive Damages Where the Defendant's Conduct Was Malicious, Wanton, Reckless, Willful or Oppressive - New York Permits Punitive Damages in Fraud Actions Where a Defendant's Acts Constitute Willful, Wanton, and Reckless Conduct Even If There Is No Harm Aimed at the General Public***

EGW Partners, L.P. v. Prudential Insurance, March 2001, No. 336 (Sheppard, J.)(June 22, 2001 - 17 pages)

PUNITIVE DAMAGES - ***Punitive Damages May Not Be Recovered for Either Breach of Duty of Good Faith or Breach of Contract***

Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(July 16, 2001 - 36 pages)

PUNITIVE DAMAGES– ***A court in equity may award punitive damages***.

E.I. Fan Company, L.P. v. Angelo Lighting Co., et. al., April Term 2003, No.: 0327(August 18, 2003) (Sheppard).

PUNITIVE DAMAGES – ATTORNEY MISCONDUCT - ***Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant. Punitive damages may be awarded for a breach of fiduciary duty by an attorney.***

Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).

PUNITIVE DAMAGES - ***Punitive damages may be awarded for conduct***

that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In order to award punitive damages, the defendant's conduct must be malicious, wanton, reckless, willful, or oppressive.

– BREACH OF FIDUCIARY DUTY - ***Punitive damages may be awarded for a breach of fiduciary duty by an attorney. The reasons for imposing punitive damages on an errant attorney are even more compelling than those where a non-attorney breaches a fiduciary or other tort duty to a plaintiff.***

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

PUNITIVE DAMAGES – LIMITATIONS - ***Punitive damages must bear a reasonable relationship, and must be proportionate, to the compensatory damages, if any, awarded. Furthermore, any such punitive damages must not duplicate the other damages awarded, such as any profits that the defendant be required to disgorge.***

> **Axcan Scandipharm, Inc. v. Reed Smith, LLP, October Term, 2000, No. 03827 (March 26, 2007) (Abramson, J., 10 pages).**

- Q -

QUANTUM MERUIT/PROMISSORY ESTOPPEL - ***Provider of Day-Treatment Program to Philadelphia School Students Is Entitled to Recover for Services Actually Rendered to Students Even Where the Number of Students Exceed Those Specified in the Provider's Contract with the School District Based on Theories of Quantum Meruit and Promissory Estoppel Due to the Parties' Course of Dealing and Promises by the School District - 20 P.S. Section 337(c) Authorizes Payment For the Educational Services Provided by Plaintiff Even If the Number of Students Served Exceeded the Specific Limit Set Forth in the Contract - Doctrine of Equitable Estoppel May Be Asserted Against the Commonwealth and Its Political Subdivisions Even When to do So Would Violate a Statute or Ordinance***

Visionquest v. The School District of Philaelphia, June 2000, No. 2096 (Sheppard, J.)(April 11, 2002 - 25 pages)

QUIET TITLE - ***Out-Of-Possession Plaintiff May Maintain Action to Quiet Title under Rule 1061Where Plaintiff Has No Present Right of Possession and Wishes to Reinstate First-Priority Mortgage.***

IndyMac Bank v. Bey, August 2001, No. 3200 (Sheppard, J.) (September 12, 2002 - 10 pages)

- R -

REAL CONTROVERSY REQUIREMENT – ***A court should not act where a real controversy does not exist.***

- The function of a court is to redress existing wrongs. The law is not concerned with matters that have become moot, and the rule is well and wisely established that a court will act only where a real controversy exists.

M. Kelly Tillery, Esq. v. Leonard & Sciolla, LLP, June Term 2005, No. 3085 (Sheppard, J.) (October 11, 2006 – 4 pages)

REAL PARTY IN INTEREST - ***Where It Is Unclear Under the Contract Exactly Who Is Bound, There Are Material Issues of Fact That Preclude Granting Summary Judgment***

Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)

REAL ESTATE LICENSING AND REGISTRATION ACT - ***Broker's Complaint Seeking Commission Is Dismissed Because Under the Newly Amended Real Estate Licensing and Registration Act (RELA), A Broker Agreement Must Be In Writing Or Include a Written Memorandum of the Agreement's Terms***

Roddy, Inc. v. Thackray Crane Rental, Inc., May 2001, No. 1566 (Sheppard, J.)(September 20, 2001 - 10 pages)

REAL ESTATE LICENSING AND REGISTRATION ACT - ***A Negligence Claim Based on the RELA and Defendant's Failure to Mark a Mortgage Satisfied Cannot Be Maintained Where It Is Asserted by a Third Party Becauese the RELA Was Not Intended to Protect Third Parites With Whom a Person Benefitting From a Broker's Services May Interact***

Penn Mutual Life Insurance Co. v. Ajax Management, May 2001, No. 3661 (Herron, J.)(November 16, 2001 - 6 pages)

REAL ESTATE SETTLEMENT PROCEDURES ACT ("RESPA") - ***RESPA Does Not Provide For a Private Cause of Action for Violation of Its "Good Faith Estimates" Provisions***

Koch v. First Union Corp., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)

RECALL - ***Court Lacks Authority to Order Recall of Allegedly Defective Tires***

Grant v. Bridgestone Firestone, Inc., September 2000, No. 3668 (Herron,J.) (June 12, 2001 - 10 pages)

RECALL - *Court Lacks Authority to Order Installation of Park Lock Brakes in Minivans Since This Is Effectively Ordering a Recall*

> **Solarz v. DaimlerChrysler Corp., April 2001, 2033 (Herron, J.)(March 13, 2002 - 26 pages)**

RECEIVERSHIP; DISTRIBUTION; CLAIMS; CONTRACT INTERPRETATION-

> **GE Capital Business Asset Corporation v. R3 Foods Services, Inc., August Term 2009 No. 1661, April 20, 2010 (Bernstein, J.)(5 pages).**

RECEIVER/CORPORATION - *Motion for Imposition of a Receivership on a Solvent Corporation by a Non-Shareholder of that Corporation Is Denied Because Petitioner Failed to Establish an Interest in that Corporation - On the Record Presented, Petitioner Failed to Satisfy the Standard for Imposition of a Receivership on a Solvent Corporation Where He Failed to Establish a Clear Right to Relief Based on the Wrongdoing of Respondent - The Letter of Intent Between Petitioner and Respondent Was Not a Contract and thus May Not Serve as the Basis for A Breach of Contract Claim or Alleged Wrongdoing- Where Both Fifty Percent Shareholders Reinvested the Proceeds from the Sale of Business Property Back into Their Corporation as Required by a Loan Agreement, This Reinvestment Did Not Constitute Evidence of Wrongdoing or Oppression by the Respondent Shareholder*

> **Liss v. Liss, June 2001, No. 2063 (Herron, J.)(January 29, 2003 -54 pages)**

TEMPORARY RECEIVER – *In an appropriate case a trial court has discretion to authorize a temporary receiver to seek the protection of the United State Bankruptcy Court.*

> **Davis-Giovinazzo Construction Co., Inc. v. Heritage Village Ventures, II, Inc., *et al*, November Term, 2002, No. 1247, *Superior Court Docket No. 3212 EDA 2004*, (Sheppard, Jr., J.) (October 11, 2005 9 - pages)**

RECEIVER – GROUND FOR APPOINTMENT – *The appointment of a receiver to arrange for the sale of defendants property was justified where defendants' assets continue to deteriorate, defendants dispute the amounts due to their creditors without producing documents showing that they have been overcharged, defendants have failed to obtain alternative financing, and defendants have not pointed the court to any other remedy that will accomplish the goal of determining what is owed and paying their creditors.*

Davis-Giovinazzo Construction Company, Inc. v. Heritage illage Ventures, II, Inc., November Term, 2002, No. 01247 July 20, 2005) (Sheppard, J. 8 pages) Superior Court Docket No. 3212EDA2004

RECEIVER – BOND – Plaintiff was not required to post a bond where the court appointed a receiver with respect to defendants' property after notice to defendants and a hearing. Davis-Giovinazzo Construction Company, Inc. v. Heritage Village Ventures, II, Inc., November Term, 2002, No. 01247 (July 20, 2005) (Sheppard, J. 8 pages) Superior Court Docket No. 3212EDA2004

MOTION FOR RECONSIDERATION/ SUMMARY JUDGMENT/SUPPLEMENTAL EVIDENCE- ***Where the supplemental evidence produced by Hopkins supports the proposition originally asserted by defendant, that is Marks was too disabled to return to work, and Hopkins was aware of the severity of Marks disability, the supplemental evidence produced by Hopkins failed to present a prima facie case of fraud.***

Marks v. Hopkins, June 2003 No. 3618 (February 25, 1005 – 6 pages) (Jones, J.).

RECONSIDERATION - ***Statute Limiting Time for Reconsideration of Orders to 30 Days Applies Only to Final, Appealable Orders - Motion for Reconsideration Is Denied Where Movant Presents No New Issues of Law or Fact***

Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(September 14, 2001 - 6 pages)

RECONSIDERATION - ***A Court May Reconsider An Interlocutory Order Beyond the 30 Day Limit for Reconsidering Final Orders***

The Brickman Group, Ltd. v. CGU Insurance Co., July 2000, No. 909 (Herron, J.)(March 26, 2002 - 9 pages)

RECONSIDERATION - ARBITRATION/STAY/TRCTA– An owner's claim that he will suffer severe harm and prejudice if an arbitration proceeding is not stayed will be denied since an arbitrator's jurisdiction is limited to compensation and not access to the premises under the Tenant's Right to Cable Television, 68 P.S. § 250.501- B 250.510-B.

Summit Park East Associates and Hotwire Communications LTD v. Urban Cable Television of Philadelphia, September Term 2004 No. 0139 (December 8, 2004 – 3 pages)(Sheppard, J.) Summit Park East Associates and Hotwire Communications, Ltd. v. Urban Cable Work of Philadelphia, September Term, 2004,

No. 0139 (1/26/05 – 10 pages) Opinion to Superior Court

RECONSIDERATION - FORUM NON CONVENIENS - ***Motion for Reconsideration of Petition to Dismiss Pursuant to 42 Pa. C. S. §5322(e) Denied Where Sufficiently Weighty Reasons Did Not Exist to Trump Plaintiffs' Choice of Home Forum***

Dearlove v. Genzyme Transgenics Corporation, November 2001, No. 1031 (Sheppard, J.) (December 31, 2002 - 13 pages)

RECORDING – CHAIN OF TITLE – ***The purpose behind the recording of a deed is to provide constructive notice to any subsequent purchasers or mortgagees. Where plaintiff mortgagee had record notice of mortgagor's title to property, notice of defendant's use of the property is not relevant.***

Coldwell Banker Mortgage v. Moore, August Term 2005, No. 1950 (August 2, 2007)(Sheppard, J. 7 pages).

RECOVERY OF ATTORNEY'S FEES - ***Under Pennsylvania law, a litigant cannot recover counsel fees from an adverse party unless there is express statutory authorization, a clear agreement of the parties or some other established exception.***

Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June 10, 2008) (Bernstein, J., 8 pages)

MOTION TO REDUCE JUDGMENT – ***Defendant failed to present sufficient evidence to merit a reducing of a judgment. Moreover, fact that judgment creditor may receive in the future certain funds from other parties attributable to the overall debt is not sufficient to reduce the judgment. Judgment should be reduced only after judgment creditor is in receipt of said funds.***

Mountbatten Surety Company, Inc. v. Central Environmental Services, Inc. and Richard J. Lorenz, MARCH TERM, 2002; No. 1475 (Cohen, J.) (12/29/03-4 pages).

REFORMATION OF CONTRACT; TORTIOUS INTERFERENCE WITH CONTRACT; REVERSION; BREACH OF CONTRACT; BREACH OF DUTY OF GOOD FAITH –

Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (April 15, 2010) (Bernstein, J., 10 pages)

REGULATORY TAKING - ***Under both the Fifth Amendment to the U.S. Constitution and Art. 1, § 10 of the Pennsylvania Constitution, the taking of private property by the government is unconstitutional***

without payment of just compensation. A taking occurs when an "entity clothed with the power substantially deprives an owner of the use and enjoyment of his property." Plaintiffs claim failed where they failed to plead facts which demonstrated that defendants were acting under the authority of any governmental entity.

Bethany Builders, Inc., et., et. al. v. Dungan Civil Assoc., et. al., March Term, 2001, No. 002043 (Cohen, J.)(March 13, 2003 - 9 pages)

RELEASE - *Release Provision in Settlement Agreement Is Strictly Construed and Does Not Apply to Claim for Statutory Fine For Failure to Mark Mortgage Satisfied Where That Action Had Not Accrued at the Time the Settlement Agreement Was Signed*

Mesne Properties, Inc. v. Penn Mutual Life Insurance Co., July 2000, No. 1483 (Herron, J.)(April 6, 2001 - 14 pages)

RELEASE - *Where a Provision in a Loan Document States that There Are No Claims for Set-Offs, Counterclaims, Deductions or Charges But Does Not Include the Key Word "Release," the Provision Is Not a Release from Liability for Certain Claims in Plaintiff's Complaint*

Academy Industries, Inc. v. PNC, N.A. et al., May 2000, No. 2383 (Sheppard, J.)(May 20, 2002 - 34 pages)

RELEASE - *Letter Agreement Constituted a Release of Any Additional Rental Obligations by Tenant to Landlord Based on the Ordinary Meaning of the Words of the Agreement, the Intent of the Parties ad the Conditions Surrounding the Execution of the Agreement*

Sandrow v. Red Bandana, July 2000, No. 3933 (Herron, J.)(LMay 23, 2002 - 16 pages)

RELEASE/SETTLEMENT - *Where Release in Settlement Agreement Released Defendant Limited Partnership from "All" Actions of "Any" Kind, the Clear and Unambiguous Language of the Release and Principles of Colorado Law Preclude Plaintiff's Argument that the Release Can Be Avoided Because It Was Induced by Fraud - Under Colorado Law, Integration Clauses Allow Contracting Parties to Limit Future Contractual Disputes to Issues Relating to the Express Provisions of the Contract - Parol Evidence May Not Be Used to Provide Proof of the Existence of a Prior or Contemporaneous Agreement - Where Settlement Agreement Released Defendant From All Claims, Known and Unknown, the Fraud Exception to the Parol Evidence Rule Is Inapplicable Due to the Broad Nature of the Release*

Branca v. Conley, February 2001, No. 2277 (Herron, J.)(October 30, 2001 - 11 pages)

RELEASE/SETTLEMENT - *Enforcement of Settlements is Governed by Principles of Contract Law - Where Both Parties Agree that a Settlement Has Been Reached to their Lawsuit, the Terms Are Defined in Defense Counsel's Letter - A Release Must Be Interpreted Narrowly and According to the Ordinary Meaning of the Language to Cover Only Those Matters within the Parties' Contemplation - In this Case, the Release/Settlement Applies Only to Claims Set Forth in Plaintiff's Complaint and Not Against Any Future Claims*

> **Medline Industries Inc. v. Beckett Healthcare Inc., September 2000, No. 295 (Herron, J.)(November 15, 2001 - 7 pages)**

RELEASE/SUMMARY JUDGMENT - *A Release Should Be Construed Narrowly and in light of the Circumstances at the Time of Its Execution According to the Ordinary Meaning of Its Language - Where Release Executed in 1991 Did Not Indicate That It Would Apply to Future Default, It Could Not Be Invoked as a Basis for Summary Judgment Regarding a Default that Occurred in 1994 by a Nonparty*

> ***Resource Properties XLIV v. PAID, November 1999, No. 1265 and March 2000, No. 3750 (Sheppard, J.)(June 5, 2001 - 13 pages)***

RELEASE/SUMMARY JUDGMENT - *Release Agreement Does Not Extend to Nonparty Especially Where The Agreement Explicity References Its Parties and Subject Matter*

> **Greenfield v. Alderman, May 2000, No. 1555 (Herron, J.)(July 31, 2001 - 8 pages)**

REMEDIES/APPRAISAL RIGHTS - *Shareholders' Remedies Are Not Limited to Appraisal Rights Set Forth in Subchapter D of BCL Chapter 15, 15 Pa.C.S. §§ 1571 et seq., Where They Were Not Notified of a Merger Due to Defendants' Actions - By Not Fulfilling Their Statutory Obligations, Defendants Effectively Precluded Plaintiffs From Exercising Any Appraisal Rights Available To Them - Limiting Plaintiffs to Appraisal Rights That The Defendants Made Unavailable Would Constitute Fundamental Unfairness*

> **First Union National Bank et al. v. Quality Carriers, April 2000, No. 2634 (Sheppard, J.)(October 10, 2000 - 49 pages)**

RENT VALUATION; APPRAISAL; VACATE ARBITRATION; COMMERCIAL LEASE

> **TRO Avenue of the Arts, L.P. v. The Art Institute of Philadelphia, LLC, August Term, 2009, No. 02305 (May 14, 2010) (New, J., 4 pages)**

RESCISSION - *Rescission of a Contract Is Proper Where Plaintiff Has Suffered a Breach So Material or Sustained that It Affects the Very Essence of the Contract*

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)

RESCISSION - *Recission of Signed, Executed Contract Is Precluded by Parol Evidence Rule Where Recission Is Based on the Alleged Misrepresentation that Plaintiff Would Be Compensated Appropriately For His Idea*

Babiarz v. Bell-Atlantic-Pennsylvania,, August 2000, No. 1863 (Herron, J.)(November 20, 2001 - 11 pages)

RESCISSION OF INSURANCE CONTRACTS –

Certain Underwriters at Lloyd's London v. Pawel Wodjalski, Seneca Insurance Corp. et al., September Term, 2009, No. 01347 (April 7, 2011 – 10 pages) (New, J. 10).

RESCISSION/RESTITUTION - *Plaintiffs Have Set Forth Valid Claim for Rescission by Alleging Fraud - Restitution Is Not Inconsistent with Rescission - Restitution Can Be Based on Claim for Unjust Enrichment*

Koch v. First Union Corp. et al., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)

RESIDENTIAL REAL ESTATE: PRELIMINARY OBJECTIONS; JOINDER ADDITIONAL DEFENDANTS -

Giesler, et. al. v. 1531 Pine Street et. al., November Term 2008 No. 4301 (New, J.)(February 2, 2010 - 5 pages).

RES JUDICATA –

Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 15, 2010 – 2 pages) (New, J.)

RES JUDICATA - Under the doctrine of *res judicata*, a final judgment on the merits is conclusive of the rights of the parties and can constitute a bar to a subsequent action involving the same claim, demand or cause of action and issues determined therein. In order for *res judicata* to bar relitigation of an action, there must be a concurrence of four conditions: 1) identity of the things sued upon; 2) identity of the cause of action; 3) identity of the parties to the action; and 4) identity of the quality or capacity of the parties. Once the concurrence of the identities is found to exist, it must be determined whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights.

First Republic Bank v. Brand, August Term, 2000, No. 00147

(October 7, 2005) (Abramson, J., 5 pages)

RES JUDICATA – COMPULSORY COUNTERCLAIMS – ***Where prior action involving claims on contract between the parties was dismissed without prejudice by federal court after settlement of non-contract claims, subsequent action involving contract claim that could have been asserted as compulsory counterclaim was not barred.***

– If plaintiff in prior action had obtained judgment on its contract related claims, then defendant's contract claims brought in subsequent action would have been barred under compulsory counterclaim rule.

Tutorbots, Inc. v. Einstein Academy Charter School, July Term, 2002, No. 0855 (July 18, 2005) (Jones, J. 3 pages)

RES JUDICATA - ***Where Joinder Complaint Was Dismissed for Failure to Respond to Preliminary Objections, the Order Is Not a Final Judgment on the Merits for Purposes of Res Judicata***

Integrated Project Services v. HMS Interiors, Inc., March 2001, No. 1789 (Herron, J.)(July 2, 2001 - 13 pages)

Res Judicata - - ***Under the Doctrine of Res Judicata or Claim Preclusion, this Court must Dismiss Plaintiff's Rico Claim with Prejudice in Light of the United States District Court's Prior Decision to Dismiss the Identical Claim and to Remand the Remaining State Law Claims to this Court.***

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (February 11, 2003- 10 pages).

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (April 2, 2002 - 11 pages) (Appeal to Superior Court; Docket No. 1009 EDA 2003).

RES JUDICATA - ***The dismissal of a prior action without prejudice for failure to respond to preliminary objections does not constitute res judicata of the merits of the controversy.***

Herman Goldner Co., Inc., et al. v. Cimco Lewis Industries, et. al., March Term, 2001,No. 03501 (Cohen, J.)(March 6, 2003 – 5 pages)

RES JUDICATA/COLLATERAL ESTOPPEL - ***Doctrines of Res Judicata and Collateral Estoppel Do Not Bar Plaintiff Homeowner Association's Action Alleging Improper Notice of Writ of Execution and Sheriff Sale of Their Property Because the Issue of Notice Differs From the Issues in the Prior Litigation Focusing on Liability for Unpaid Taxes***

Linda Marucci v. Southwark Realty Co., November 2001, No. 391 (Herron, J.)(May 15, 2002 - 10 pages)

RES JUDICATA/CONFESSION OF JUDGMENT - Tenant's Claims Against Landlard Are Barred by Res Judicata to the Extent that They Relate to Claims that Were Implicated in Defendant's Prior Confession of Judgment that Plaintiff Failed to Challenge with a Petition to Open or Strike

Rader v. Travelers Indemnity Co., March 2000, No. 1199 (Herron, J.)(October 25, 2001 - 8 pages)

RES JUDICATA – REQUIREMENTS - ***Strict res judicata, also known as claim preclusion, provides that where there is a final judgment on the merits, future litigation on the same cause of action is prohibited. Invocation of the doctrine of res judicata requires that both the former and latter suits possess the following common elements: identity in the thing sued upon; identity in the cause of action; identity of persons and parties to the action; and identity of the capacity of the parties suing or being sued. An action terminated by voluntary withdrawal by the plaintiff does not have res judicata effect because it cannot be viewed as a final judgment on the merits.***
– INDISPENSABLE PARTIES - ***A dismissal based upon the failure to join indispensable parties does not have res judicata effect because, in the absence of an indispensable party, the court lacks jurisdiction over the matters before it that affect the rights of the missing party. Thus the trial court must dismiss such an action without reaching the merits of plaintiff's claims since any order of the court on the merits would be null and void for want of jurisdiction.***

Monroe Court Homeowners Assoc. v. Southwark Realty Co., October Term, 2004, No. 00777 (February 7, 2005) (Cohen, J., 5 pages)

RES JUDICATA – ***The doctrine of res judicata requires that both the former and latter suits possess the following four common elements: 1) identity in the thing sued upon; 2) identity in the cause of action; 3) identity of parties to the action; and 4) identity of the capacity of the parties to sue or be sued.***
- Res judicata encompasses not only those issues, *claims* ***or defenses that were actually*** *raised* ***in the prior proceeding, but***

William Bell t/a Marcris Investments v. William Bernicker, April Term 2005, No. 1904 (Abramson, J.) (October 28, 2005 - 4 pages).

RESTITUTION - ***No Pennsylvania Case Has Adopted Restatement of Restitution §136 And It Cannot Serve as a Basis of Liability of an Employer to a Current Employee for Tortious Use of Trade Secret When the Alleged Secret Was Voluntarily Disclosed to Employer***

> ***Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)***

RESTRICTIVE COVENANT; PRELIMINARY INJUNCTION; TORTIOUS INTERFERENCE WITH CONTRACT

> **Jassin M. Jouria, M.D. v. Education Commission for Foreign Medical Graduates, August Term, 2009, No. 04291 (June 23, 2010) (Sheppard, J., 7 pages)**

RESTRICTIVE COVENANT; PRELIMINARY INJUNCTION; LACK OF ADEQUATE CONSIDERATION; UNCLEAN HANDS-

> **Tri State Paper, Inc. v. Prestige Packaging, Inc., November 2009 No. 4078, (December 30, 2009 – 5 pages) (Bernstein, J.).**

RESTRICTIVE COVENANT ***In Pennsylvania, restrictive covenants are enforceable if they are incident to an employment relationship between the parties; the restrictions imposed by the covenant are reasonably necessary for the protection of the employer; and the restrictions imposed are reasonably limited in duration and geographic extent.***

> ***It is unreasonable as a matter of law to permit an employer to retain unfettered control over an employee which it has effectively discarded as worthless to its legitimate business interests.***

> **J.J. White, Inc. v. Burke, December Term, 2008, No. 3889 (August 25, 2009)(Sheppard, Jr., J., 8 pages).**

RESTRICTIVE COVENANT –

> **Rittenhouse Dentists, P.C. v. Ira Sheres, DMD, August Term, 2008, No. 1956 (Sheppard, J.) (February 17, 2009 – 8 pages)**

RESTRICTIVE COVENANT - Restrictive covenant imposing a one-year restriction following termination from employment with a geographic scope of 150 miles is overly broad - ***Reasonableness of the duration and geographic scope of a restrictive covenant must be determined in light of the nature of the employer's interest sought to be protected - Geographic scope of restrictive covenant may be limited to extent reasonably necessary to protect employer's interest - Restrictive covenant is modified to enjoin former employee for a period of 6 months from soliciting prior customers with whom he had personally established good will for prior***

employer

Olympic Paper Co. v. Dubin Paper Co. and Brian Reddy, October 2000, No. 4384 (Sheppard, J.)(December 29, 2000 - 23 pages)

RESTRICTIVE COVENANT - *Where Complaint Alleges That Plaintiff's Former Employer Left To Work For Direct Competitors in Violation of a Restrictive Covenant Preliminary Objections Are Overruled - There Is Conflicting Precedent As to Whether A Restrictive Covenant Should be Enforced Where Defendant/Former Employee Had Little or No Contact With Clients*

Omicron Systems, Inc. v. Weiner, August 2001, No. 669 (Herron, J.)(March 14, 2002 - 14 pages)

RESTRICTIVE COVENANT - *Where Restrictive Covenant For Terminated Employee Is Unreasonably Broad, It Is Modified to Reasonable Limitations of One Year From Termination and a 25 Mile Radius from City Hall - A Balancing of Equities Dictates That Former Employee Should Not Be Enjoined From Seeking Lighting Contracts With Persons Who Have Never Been Customers of the Former Employer*

Cooper v. Cerrelli, February 2002, No. 1260 (Sheppard, J.)(July 8, 2002 - 5 pages)

RESTRICTIVE COVENANT- *Covenant not to compete for five years is much broader than necessary to protect buyers/employer where seller/employee was within Veritext's employ for five years, has not been paid a salary since April 2001 and has not been paid pursuant to the Subordinated Promissory Note. The covenant not to compete was modified to a period of one year effective from the date of seller/employee's termination.*

Reporting Services Associates, Inc., et. al. v. Veritext, L.L.C. et. al., June Term, 2003 No.: 489 (September 10, 2003) (Jones).

RESTRICTIVE COVENANT/PHYSICIAN EMPLOYMENT CONTRACT - *Corporate Name Change, Effect - Assignability of Restrictive Covenant - Breach of Contract, Criteria for Enjoining- Preliminary Injunction, Standards*

Philadelphia Ear, Nose & Throat Surgical Associates, P. C. v. Maurice Roth, M.D., January 2000, No. 2321 (Sheppard, J.)(March 13, 2000 - 22 pages)

RESTRICTIVE COVENANT/PHYSICIAN EMPLOYMENT CONTRACT - Restrictive Covenant's *Two Mile Geographic Scope Will Not Be Enforced Against Physician Where An Affiliate of the Former Employer Opened a Competing Office in that Geographic Scope Implying that There Are Sufficient Potential Patients to Support Additional Pediatric Practice - Non-Solicitation Covenant Is Enforced Against Physician Without Restricting Patients Who Wish To Be Treated by Her*

Einstein Community Health Assoc. v. Beth Shortridge, M.D., November 2000, No. 1814 (Sheppard, J.)(December 13, 2000 - 15 pages)

RESTRICTIVE COVENANT/EMPLOYMENT CONTRACT - *Non-Competition and Non-Solicitation Agreements are Enforceable to the Extent They Protect Customer Relationships that Defendant/Employee Established on behalf of her Employer - Restrictive Covenants that are Overbroad Are Modified to Prohibit Plaintiff from Dealing with Sixteen Law Firms that were Clients of her Employer - Employer Has no Legitimate Business Interest in Protecting the Identities of Clients and Hiring Contacts Known to Employee Because These are not Trade Secrets - Employer is Entitled to a Preliminary Injunction to Enforce the Modified Non-Competition and Non-Solicitation Agreements*

Robert Half of Pennsylvania, Inc. v. Shana Feight, April 2000, No. 1667 (Herron, J.)(June 29, 2000 - 35 pages)

RESTRICTIVE COVENANT/EMPLOYMENT CONTRACT - *Preliminary Injunction to Enforce Restrictive Covenant is Granted, in part, and Former Employees Are Enjoined from Competing with their Employer's Business with Two Customers as to Railcar Interiors and Uncoupling Rods for a Period of One Year - Since Plaintiff's Business Involves Railcar Interiors and Rail Coupling Rods, the Noncompetition Agreement Is Not Violated Where Defendants Work for Company Performing Other Kinds of Work - Restrictive Covenants Are Enforceable Only When Ancillary to Employment - When Parties Execute a Restrictive Covenant After the Commencement of Employment, It Is Not Ancillary Unless Support by New Consideration Such as a Raise or Change in Employment Status - Plaintiff Failed to Meet Its Burden of Showing the Existence of Trade Secrets or Specialized Training - Noncompetition and Nonsolicitation Agreements Are Enforceable to Protect the Customer Goodwill that the Defendant Employees Established on the Company's Behalf - The Duration of a Covenant is Reasonable if Limited to the Time Necessary for Company to Find a Replacement Employee - A Two Year Covenant Is Unreasonable Where It Is Not Related to a Legitimate Business Interest in Finding an Effective Replacement Employee - Defendants Failed to Establish a Constructive Termination that Might Preclude Enforcement of the Restrictive Covenant*

United Products Corp. v. Transtech Manufacturing, August 2000, No. 4051 (Sheppard, J.)(November 9, 2000 - 40 Pages)

RESTRICTIVE COVENANT - *Restrictive Covenant Is Not Enforceable Where Employer Terminates Employee For Poor Performance*

Labor Ready, Inc. v. Trojan Labor and Sally Czeponis, December 2000, No. 3264 (Sheppard, J.)(January 25, 2001 -14 pages)

RETIREMENT BENEFITS/PARTNERSHIP AGREEMENT - *Retirement Benefit Plans Are Analyzed Under Principles Applicable to Unilateral Contracts - Retirement Benefit Provision in Partnership Agreement May Be Analyzed Separately Because of Its Distinct Consideration - Under Pennsylvania Law, Retirement Payment Obligations Generally*

Vest Upon Completion of Performance - Pennsylvania Courts Have Not Addressed the Effect of a Reservation of a Right to Amend a Benefit Provision in a Partnership Agreement - Court Adopts Kemmerer Test Under Which Retirement Benefit Provision May Not Be Modified After Complete Performance by Retired Partners Unless Agreement Specifically Reserves the Right to Amend Where Performance Has Been Completed

Abbott v. Schnader Harrison Segal & Lewis LLP, June 2000, No. 1825 (Herron, J.)(February 28, 2001 - 26 pages)

REVERSION; TORTIOUS INTERFERENCE WITH CONTRACT; BREACH OF CONTRACT; BREACH OF DUTY OF GOOD FAITH; REFORMATION OF CONTRACT

Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (April 15, 2010) (Bernstein, J., 10 pages)

ROOF; INSURANCE COVERAGE; ACCIDENT; OCCURRENCE

Certain Underwriters at Lloyd's London v. Berzin, September Term, 2009, No. 01263 (June 28, 2010) (Bernstein, J., 3 pages)

RULE OF COORDINATE JURISDICTION – *The Rule of Coordinate Jurisdiction requires that judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. However, court found that Rule did not apply to trial of claims at law where earlier trial was held in connection with the appointment of a receiver/custodian. The court held that the legal conclusions of the judge at the receivership hearing were not binding upon the court in connection with the law claims, as the only claims considered and resolved at the receivership hearing included whether plaintiff was entitled to the appointment of a receiver or the imposition of a constructive trust. Plaintiff's law claims were not resolved at the receivership hearing nor were they presented for consideration, as such claims require different inquiries and different burdens of proof. Moreover, the court found that since plaintiff demanded a jury with respect to his law claims, reliance upon the receivership opinion concerning issues of credibility would deprive plaintiff of his right to a jury. However, the court held that it could still apply the summary judgment standard based on the evidence presented, which included nearly 1,000 pages of trial testimony and extensive hearing exhibits. The issue before the court was whether the current record contains any further evidence, in addition to that which was presented at the receivership hearing, to support plaintiff's law claims. The court found that, even when viewing the substantial record in the light most favorable to him, plaintiff had failed to demonstrate facts essential to any of the causes of action pled. As a result, summary judgment is granted in favor of defendant.*

Liss v. Liss, June Term 2002, No. 3502 (Jones, J.)(June 29, 2005 –18 pages).

RULE AGAINST PERPETUITIES -- ***Summary Judgment Granted Where Fraternity's Interest in the Property Is Void. Fraternity's Reversionary Interest in the Property is Correctly Classified as a Shifting Executory Interest Where the Fraternity was not the Grantor of the Property. Because the Reversionary Interest Was not Triggered Within the Twenty One Year Statutory Vesting Period, Fraternity's Interest is Void Against the Rule and University Holds Property in Fee.***

Alumni Association of Beta Thea Chapter of Sigma Pi v. Drexel University, August Term 2001, No. 3615 (Cohen, J) (January 3, 2003 - 8 Pages).

RULES OF PROFESSIONAL CONDUCT – ***A violation of the Rules of Professional Conduct alone does not give rise to a cause of action.***

– The Rules of Professional Conduct are not rules of evidence and do not have the force of substantive law.

Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)

RULE OF PROFESSIONAL CONDUCT 1.15 – ***The comment to Rule of Professional Conduct 1.15 states that a lawyer should hold property of others with the care required of a professional fiduciary.***

- Rule of Professional Conduct 1.15(c) states: When in connection with a client-lawyer relationship a lawyer is in possession of property in which two or more persons, one of whom may be the lawyer, claim an interest, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).

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SANCTIONS – ***Court revoked counsel's pro hac vice admission where it found that trial counsel's conduct – particularly his closing argument - manifested a lack of familiarity with the decorum, candor and fairness expected of attorneys practicing in a Pennsylvania courtroom. Because out-of-state counsel are not a part of the local legal community, they can rest secure in the knowledge that impropoper trial tactics will not draw the loss of credibility and reputation which usually accompany such an approach. As such, revocation of pro hac vice admission following trial was an appropriate sanction.***

> **Ace American Ins. Co. v. Underwriters at Lloyd's and Companies, et al..,July Term 2001, No. 77 (Abramson, J.) (February 8, 2007 – 14 pages).**

SANCTIONS - Attorney Fees May Not Be Awarded for the Filing of Frivolous Preliminary Objections Absent a Showing of Fraud, Dishonesty or Corrpution as Bad Faith Conduct

> **Cohen v. McClafferty, July 2000, No. 923 (Herron, J.)(June 15, 2001 - 9 pages)**

SANCTIONS - ***Plaintiff Who Obtained Injunction Ordering Repairs to Building Is Entitled to Counsel Fees and Costs as a Sanction Where Defendants' Conduct Was Dilatory, Obdurate, Vexatious, Arbitrary and in Bad Faith in Defying Injunction by Failing to Begin Repairs and in Obtaining Reconsideration of the Order Based on Affidavit Falsely Averring that Compliance With the Order Was not Possible***

> **Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(August 30, 2001 - 28 pages)**

SCANDALOUS OR IMPERTINENT ALLEGATIONS - ***Where Allegedly Scandalous and Impertinent Allegations in a Complaint Will Prejudice Defendant, They Must Be Stricken***

> **Trujillo v. State Farm Automobile Insurance Co., March 2001, No. 2047 (Herron, J.)(December 6, 2001 - 31 pages)**

SCANDALOUS OR IMPERTINENT ALLEGATIONS - ***Allegation that Defendant Insurer Violated the Ruels of Professional Conduct When It Contacted Plaintiff Directly Rather than Through His Counsel Will Not Be Stricken as Scandalous or Impertinent***

> **Legion Ins. Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(December 18, 2001 - 11 pages)**

SCANDALOUS OR IMPERTINENT ALLEGATIONS - ***Where Allegations Are Inappropriate and Immaterial to Proof of the Cause of Action They May Be Stricken***

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)

SCANDALOUS OR IMPERTINENT ALLEGATIONS/PRELIMINARY OBJECTIONS - Where Preliminary Objections Fail to Claim Prejudice Due to Scandalous or Impertinent Allegations, the Allegations Will Not Be Stricken

Legion Insurance Co. v. Doeff, May 2000, No. 3174 (Sheppard, J.)(June 6, 2001 - 12 pages)

SCANDALOUS AND IMPERTINENT MATTER - ***References to Enron style looting and illicit sexual relations were stricken from Complaint because they were immaterial and inappropriate to the proof of plaintiffs' claims for conversion and breach of fiduciary duty.***

Romy et al. v. Burke et al., May Term 2002, No. 1236 (Sheppard, J.) (May 2, 2003- 14 pages).

SECURITIES FRAUD/PENNSYLVANIA SECURITIES ACT OF 1972 - ***Complaint Does Not Set Forth Claim for Securities Fraud as to Repurchase Account Where It Fails to Allege Misrepresentations In Connection with the Securities Underlying the Repurchase Account***

IRPC, Inc. v. Hudson United Bancorp, February 2001, No. 474 (Sheppard, J.)(January 18, 2002 - 15 pages)

SERVICE OF ORIGINAL PROCESS - ***Pa. R.C.P. 402(a)(2)(iii) permits service of original process upon individuals "by handing a copy…at any office or usual place of business of the defendant to his agent or to the person for the time being in charge thereof.***

- Pennsylvania courts interpreting the phrase "person for the time being in charge" under Pa. R.C.P. 402(a)(2)(iii) have held that there must be a sufficient connection between the person served and the defendant to demonstrate that service was reasonably calculated to give the defendant notice of the action against it.

– Where a receptionist represented that she was the receptionist for everyone in the suite, the receptionist was the person in charge at the time of service and service was proper.

Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June 10, 2008) (Bernstein, J., 8 pages)

SERVICE - ***A plaintiff must make a good faith attempt to effect service of process in a timely manner where an action is commenced prior to the running of the statute of limitations but service does not occur until after the expiration of the statutory period. What constitutes a good faith effort is***

assessed on a case-by-case basis. Simple neglect and mistake to fulfill the responsibility to see that the requirements for service are carried out may constitute a lack of good faith on the part of the plaintiff.

Robinson v. Berwind Financial, L.P., November Term, 2002, No. 00220 (December 29, 2005) (Jones, J., 6 pages)

SERVICE– ***When an attorney enters his appearance on behalf of all defendants without restriction opposite the names, this appearance is good for both even though one has not been served with process.***

498 Associates, Limited Partnerships, et. al. v. American Casualty Company of Reading, Pennsylvania, et. al., March Term, 2003 No.: 2980 (August 6, 2003) (Jones).

SET-OFF; BREACH OF PARTICIPATION AGREEMENT; FORECLOSURE; UNJUST ENRICHMENT

LEM Funding XXXV, L.P. v. Sovereign Bank, September Term, 2009, No. 01296 (June 23, 1010) (Sheppard, J., 12 pages)

SETTLEMENT AGREEMENT/CONFIDENTIALITY OF MEDIATION/"BAD FAITH" DAMAGES/SANCTIONS

Guided by Pennsylvania law that requires courts to consider not only the release, but also surrounding circumstances and events, the court found that, as plaintiff's identified the plaintiff's affiliate in a specific capacity in its Complaint, the release did not include the release of that affiliate in its other capacity. Also, the court found that the parties did not intend to release plaintiff's affiliate because a cause of action by defendants against this affiliate had not accrued during the settlement negotiations that culminated in the Settlement Agreement.

Additionally, the court found that considering facts or positions that were not discussed or negotiated during the settlement process did not violate the Pennsylvania Statute that guarantees the confidentiality of mediations. Furthermore, the court found that even if it had considered communications related to the mediation in order to ascertain the intent of the parties, the purpose of the Pennsylvania statute would not be defeated, as that statute's purpose is to make confidential settlement negotiations in connection with the prosecution and trial of the underlying claim only.

The court, relying on case law which states that "[b]ad faith" on [the] part of [an] insurer is an frivolous or unfounded refusal to pay proceeds of a policy . . .", found that plaintiff's claim for bad faith damages, which was based on assertions made by defense counsel to this court, must be denied, as those assertions had nothing to do with defendant's failing to pay the second installment called for under the Settlement

Agreement. MGA Inc. Co. v. Bakos, 699 A.2d 751, 754 (Pa. Super. 1997).

As to plaintiff's prayed for sanctions, these were denied because the court found that defendants had a reasonable basis for withholding the payment and instead placing it in an escrow account.

Aetna, Incorporated v. Lexington Insurance Co., and National Union Fire Insurance Co. of Pittsburgh, October Term, 2003, No. 3572 *Superior Court Docket No. 2587EDA2005* (Sheppard, Jr., J.) (October 27, 2005 – 14 pages)

SETTLEMENTS - *Where the insured settled the underlying claims, the insured has the burden of proving what portion of the settlement amount was allocable to claims that are covered under the insurance policy.*

Aetna, Inc. v. Lexington Ins. Co., May Term, 2003, No. 03076 (May 2, 2006) (Abramson, J., 22 pages).

SETTLEMENTS - *Pennsylvania courts will enforce a two-tiered settlement that is conditioned upon recovery from an insurer, provided that the settlement is otherwise reasonable and entered into in good faith.*

Resource America, Inc. v. Lloyd's, April Term, 2003, No. 02709 (November 12, 2004- 10 pages) (Sheppard, J.)

SHAREHOLDERS'DERIVATIVE CLAIM/STANDING - *Defendants' Preliminary Objections That Shareholder Lacked Standing to Pursue Derivative Action Due to Failure to Make Demand on Corporation Is Overruled Based on the Corporation's Closely-Held Status and ALI Principle §7.01(d)*

Levin v. Schiffman and Just Kids, Inc., July 2000, No. 4442 (Sheppard, J.)(February 1, 2001 - 26 pages)

SHARES/POSSESSION - *In Pennsylvania, An Action for Possession of Corporate Shares Is Not Limited to Actions Against Corporate Office Holders*

Mogilyansky v. Sych, June 2000, No. 3709 (Herron, J.)(April 30, 2001 - 8 pages)

SHERIFF'S SALE – FRAUD - *Upon petition of any party in interest before delivery of the sheriff's deed to real property, the court may upon proper cause shown, set aside the sale and order a resale or enter any other order which may be just and proper under the circumstances. A sheriff's sale that was tainted by fraud or other wrongdoing, such as a breach of fiduciary duty, may be vacated even after the deed has been issued.*

Monroe Court Homeowners Assoc. v. Southwark Realty Co., October Term, 2004, No. 00777 (February 7, 2005) (Cohen, J., 5 pages)

SIMPLE INTEREST –

The Law Office of Douglas T. Harris, *et al.* v. Philadelphia Waterfront Partnrs, L.P., June Term, 2007; No. 2576 (October 22, 2010 – 4 pages) (Bernstein, J.)

SLANDER OF TITLE – ***Slander of title is the false and malicious representation of the title or quality of another's interest in goods or property. Section 651 of the Restatement (Second) of Torts sets forth the elements that a party must allege and prove in order to succeed in a slander of title action. One such element is the defendant's intent to affect plaintiff's interests in an unprivileged manner. A person has a conditional privilege to disparage another's property in land, chattels, or intangible things by an assertion of an inconsistent legally protected interest in himself. Plaintiff was conditionally privileged to disparage defendant's right to the property in question by the filing of a lawsuit which asserted an inconsistent legally protected interest in that same property.***

Deve Development, Inc. v. Joseph J. Gargiulo, et al., June Term 2005, No. 969 (Abramson, J.) (January 3, 2006 - 7 pages).

SLANDER OF TITLE – *Defendants' counterclaims for slander of title and tortious interference with contractual relations were both legally insufficient and unripe for disposition when brought as a counterclaim in an action where plaintiffs were seeking to assert their legal rights to the property occupied by defendants. A person is conditionally privileged to disparage another's property in land, chattels or intangible things "by an assertion of an inconsistent legally protected interest in himself." Restatement (Second) of Torts § 647. Thus, at the preliminary stage of the litigation, plaintiffs' "motive" in bring the lawsuit was to prevail on their claim and to have the court compel defendants to remove their backyard fences. Should they prevail, defendants have no rights to the parcel in question, and therefore can not bring a claim for slander of title. As such, plaintiffs' preliminary objections were sustained and the claims dismissed.*

Narducci v. Regis Development Corp., et al., March Term 2005, No. 0109(Sheppard, J.)(July 7, 2005– 4 pages).

SOVEREIGN/GOVERNMENTAL IMMUNITY—*A claim for unjust enrichment against a government entity is not subject to an immunity defense.*

Limbach Company LLC, et al. v. City of Philadelphia, et al., March Term 2003, No. 2936 (Jones, J.) (June 29, 2005 – 15 pages).

SOVEREIGN IMMUNITY - *Board of Directors of City Trusts, Girard Estate is Not a Commonwealth Agency for Purposes of Sovereign Immunity - None of Plaintiffs' Tort Claims Fall Under the Limited Waivers to Sovereign or Governmental Immunity - United States Supreme Court's Ruling that the Board was a Commonwealth Agency for Purposes of the Fourteenth Amendment is Not Dispositive as to Whether it is a Commonwealth Agency for Purposes of Sovereign Immunity - Legislative Intent Determines Whether Board Created by Statute is a Commonwealth Agency - Board is Not a Local Agency For Immunity Purposes Because it does not Exercise Governmental Functions - Home Rule Charter Explicitly Exempts the Board from a Relationship with the City*

Caplen et al. v. Richard Burick and The City of Philadelphia, Trustee Acting By the Board of Directors of City Trusts, Girard Estates, February 2000, No. 3144 (Sheppard, J.)(August 4, 2000)

SOVEREIGN IMMUNITY - *Doctrine of Sovereign Immunity Protects SEPTA Against Plaintiff Contractor's Claim for Fraudulent Misrepresentation and Punitive Damages*

JHE Incorporated v. SEPTA, November 2001, No. 1790 (Sheppard, J.)(May 17, 2002)

SPECIAL DAMAGES – Special damages must be specifically pled in a complaint where the plaintiff largely knows the information and averring it would be relatively simple and expeditious. By requiring the plaintiff to specifically plead special damages, the defendant will be more able to prepare its defense and address the issues without being forced to engage in unnecessary discovery.

Premium Assignment Corporation v. City Cab Company, Inc., March Term 2005, No. 1135(Abramson, J.)(July 15, 2005 - 4 pages).

SPECIFIC PERFORMANCE –

SPECIFIC PERFORMANCE – *The interest of an equitable owner of real property was greater than the interest of the self-identified straw party, and even though the straw party did not engage in fraud or intentional interference with the equitable owner's contract to purchase the property, the equitable owner could demand specific performance of the original land sale contract*

because she remained ready, willing, and able to specifically perform.

> **Jiang v. Collins, *et al*, January Term, 2004 No. 2286 (December 21, 2006 – 4 pages) (Abramson, J.)**

SPECIFIC PERFORMANCE – ***Specific performance is not in itself a cause of action, but is instead an extraordinary remedy that may be requested where no adequate remedy at law exists with respect to a cause of action.***

> **Berlinerblau v. The Psychoanalytic Center of Philadelphia, April Term,2005, No. 02406 (October 11, 2005 – 4 pages) Sheppard, J.,)**

SPECIFIC PERFORMANCE – ***The remedy of specific performance was appropriate because the contract was for real estate, and plaintiff proved the existence of the contract, the actual terms of the agreement, and its willingness and readiness to perform.***

> **The Partnership CDC v. Apple Storage Company, Inc., August 2004, No. 246(Abramson, J.) (July 29, 2005 - 8 pages).**

SPECIFIC PERFORMANCE - *A decree of specific performance is a matter of grace and not of right. Specific performance should only be granted where the facts clearly establish the plaintiff's right thereto, where no adequate remedy at law exists, and where justice requires it. An action for damages is an inadequate remedy when there is no method by which the amount of damages can be accurately computed or ascertained.*

> **Hebrew School Condominium Association, *et al.* v. Enrique Distefano, *et al.*, May Term 2004, No. 1886 (Cohen, J.) October 21, 2004 – 7 pages).**

SPECIFIC PERFORMANCE/REAL ESTATE—*Specific performance is not a valid remedy for breach of an oral contract to sell real estate.*

> **Rosenwald v. MGM Real Estate Investment, Inc., et al.,March Term 2004, No. 0198 (Jones, J.)(June 30, 2004 – 2 pages)**

SPECIFICITY - To Satisfy Pennsylvania's Specificity Requirements, the Facts Alleged in a Complaint Must by Sufficiently Specific to Enable a Defendant to Present a Defense

> **Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)**
>
> **Corson v. IBC, December 2000, No. 2148 (Herron,J.)(June 15, 2001 - 10 pages)**

Goldstein v. Goldstein, **January 2001, No. 3343 (Herron, J.)(June 14, 2001 - 12 pages)**

SPECIFICITY - *Class Action Plaintiff's Claim for Breach of Express Warranty in Defendant's Marketing of Propulsid Were Sufficiently Specific*

Boyd v. Johnson & Johnson, **January 2001, No. 965 (Herron, J.)(January 22, 2002 - 7 pages)**

SPECIFICITY/DAMAGES - *Allegations of "Other" Damages Are Insufficiently Specific and Must Be Stricken*

JHE Incorporated v. SEPTA, **November 2001, No. 1790 (Sheppard, J.)(May 17, 2002 - 21 pages)**

SPECIFICITY/FRAUD - *Fraud Claim Is Legally Sufficient Where the Dates and Times of Misrepresentations Are Given - Allegations Allow an Inference of Intent Which May Be Plead Generally*

Pobad Associates v. Albert Einstein Healthcare Network, **June 2001, No. 2885 (Herron, J.)(February 4, 2002 - 8 pages)**

SPECIFICITY OF A PLEADING– *Defendants' Preliminary Objections are sustained where plaintiff failed to allege any facts identifying the agent by name or appropriate description and set forth the agent's authority and how their acts fell with their authority.*

Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 030042 (August 6, 2003) (Jones).

SPECIFICITY OF PLEADING – Where complaint demonstrates that plaintiff's claims are based upon defendants' alleged breach of the written agreement between the parties, it should be pled accordingly, allowing defendants to avail themselves of all available and appropriate contractual defenses. Accordingly, plaintiff was directed to file an amended complaint to assert breach of contract action seeking equitable relief in the nature of specific performance, rather than relying upon the antiquated cause of actions of quia timet and exoneration..

Greenwich Ins. Co. v. Dollarland Properties, LLP, December Term 2002, No. 03007 (Jones, J.)(October 2, 2003– 4 pages).

SPECIFICITY/SPECIAL DAMAGES - Requirement that *Special Damages Must Be Specifically Stated Is Satisfied Where the Damages Sought for Breach of Contract Can Be Determined From the Complaint as a Whole*

U.S.Claims, Inc. v. Ostroff, Villari & Kusturiss, P.C., January 2001, No. 2025 (Herron, J.)(July 25, 2001 - 5 pages)

SPOLIATION DOCTRINE/PRECLUSION OF EVIDENCE - *Spoliation Doctrine Does Not Apply to Preclude Defense Evidence in Case Where Defendant Did Not Provide Original Tapes of a Television Program "Cooking With Mama" Where Plaintiffs Fail to Show that Defendants' Failure to Produce the Tapes Prejudiced Plaintiffs*

> **Amico v. Radius Communications, January 2000, No. 1793 (Herron, J.)(October 29, 2001 - 15 pages)**

STANDING – *The court overruled defendant's preliminary objections challenging whether the individual plaintiffs had authority to bring suit on behalf of the corporate plaintiffs. Since the underlying question raised by plaintiffs' claims involved a determination of whether individual plaintiffs or defendants own, control, and have authority to manage the corporate plaintiffs, the corporate plaintiffs must be named as parties to the action.*

> **Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (November 13, 2007) (Bernstein, J. 3 pages).**

STANDING/ASSOCIATION - *THE PCA and THE SNJCS, As Associations Representing Chiropractors, Do Not Have Associational Standing to Sue for Injunctive Relief to Compel Defendants to Comply With the Provider Contracts Since the PCA and the SNJCS Are Not Parties to the Contracts and Resolving the Breach of Contract Claim Requires the Participation of the Individual Providers*

> **Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(July 16, 2001 - 36 pages)**
>
> **Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(September 14, 2001 - 6 pages)(Motion for Reconsideration)**

STANDING/DEMAND ON CORPORATION—*In an action involving a close corporation, demand is excused if (1) there will be no multiplicity of actions, (2) the corporation's creditors will not be prejudiced, and (3) there will be no interference with a fair recovery.*

> **Top Quality Manufacturing, Inc. v. Sinkow, February Term 2004, No. 3323 (Cohen, J.) (November 3, 2004 – 4 pages).**

STANDING/NONPROFIT CORPORTION/DERIVATIVE ACTION - *Stockholders in Nonprofit Corporation Lack Standing to Bring a Direct Action for Injuries to the Corporation - Stockholders' Claims Should Be Brought as a Derivative Action*

Linda Marucci v. Southwark Realty Co., November 2001, No. 391 (Herron,J.)(May 15, 2002 - 13 pages)

STATUTE - ***in construing a statute, sections of the statute must be construed with reference to the entire statute and not alone. The court must determine legislative intent from the totality of a statute and render an interpretation which gives effect to all of its provisions.***

$.99 Stores, Inc. v. KDN Lanchester Corp., July Term 2005, No. 0728 (July 30, 2007 – 7 pages) (Sheppard, J.)

STATUTE OF FRAUDS – CONTRACT MODIFICATION - ***Under the statute of frauds, a guaranty, or promise to answer for the debt or default of another, must be in writing and signed by the party to be charged. Where the statute of frauds requires that a certain type of contract be in writing, it also requires that any modification to that contract be in writing.***

Kaplan v. Miller, March Term, 2004, No. 02783 (August 12, 2005) (Abramson, J., 7 pages)

STATUTE OF FRAUDS – LOANS - ***An agreement to lend money to a borrower in consideration for a mortgage must be in writing. None of the documents proffered by plaintiffs contained an express written promise by defendant bank to fund additional phases of the project. As a result, plaintiffs' claim for a declaratory judgment to enforce the alleged contract to lend additional monies was properly dismissed.***

DCNC North Carolina I, LLC v. Wachovia Bank, N.A., August Term, 2008, No. 01188 (June 17, 2009) (New, J. 5 pages)

STATUTE OF FRAUDS – REAL PROPERTY - ***Defendant's quiet title claim was granted and plaintiff's partition claim was denied because the parties' alleged oral agreement granting plaintiff an ownership interest in the Building was unenforceable under the Statute of Frauds. Plaintiff could not avoid the Statute of Frauds by claiming part performance of the parties' oral contract because he did not allege that he had open notorious, exclusive and continuous possession of the Building, nor did he allege such improvements and arrangements as will not reasonably admit of compensation in damages.***

– PARTNERSHIPS - ***Even though the parties' alleged oral agreement was insufficient to vest plaintiff with title to certain real property, the Statute of Frauds does not otherwise bar plaintiff from trying to enforce the parties' alleged agreement as one conveying a partnership interest to him. The fact that one partner is the exclusive owner of the alleged partnership real property does not preclude the other partner from seeking to share in the equity and/or profits associated***

with that property. Therefore, if plaintiff is able to prove the viability of the parties' partnership agreement, its terms, and his compliance with them, then he may be entitled to the accounting and dissolution he requested.

> **2300 Realty Corp. v. Corporate Realty Partners & Co., January Term, 2002, No. 01904 (October 17, 2005) (Abramson, J., 5 pages).**

STATUTE OF FRAUDS – REAL PROPERTY - ***Plaintiff may not assert a claim for quiet title/specific performance based on the parties' alleged oral partnership agreement to buy and develop certain real property because such a contract is unenforceable under the statute of frauds. Plaintiff may not avoid the statute of frauds by claiming part performance of the parties' oral contract because she does not allege that she had open, notorious, exclusive and continuous possession of the property, nor does she allege that she made improvements and arrangements that will not reasonably admit of compensation in damages.***

– PARTNERSHIPS - The statute of frauds relating to real property does not apply to the enforcement of title-holding partnership agreements because the Uniform Partnership Act permits oral partnership agreements. The terms of the Act provide the means to identify partnership property and the interests of the partners in it. As a result, plaintiff may assert a claim for breach of an alleged oral partnership agreement to buy and develop real property.

> **Barrett v. Gallagher, November Term, 2004, No. 00104 (August 31, 2005) (Jones, J., 2 pages)**

STATUTE OF FRAUDS - ***A promise to answer for the debt of another need not be in writing when it serves some pecuniary or business purpose of the promisor/guarantor.***

> **Pennsylvania Business Bank v. Franklin Career Services, LLC et al., May 2002, No. 2507 (Cohen, J.) (December 31, 2002).**

STATUTE OF FRAUDS/SURETYSHIP/LEADING OBJECT EXCEPTION - ***Under the Leading Object Exception to the Suretyship Statute of Frauds, the Statute Would Not Apply Where the Surety's Main Purpose Is His Own Pecuniary Interest or Business Advantage***

> **Baron v. Pritzker, Omicron Consulting Inc., August 2000, No. 1574 (Sheppard, J.)(March 6, 2001 - 27 pages)**

STATUTE OF LIMITATIONS – LEGAL MALPRACTICE - ***In Pennsylvania, the statute of limitations for legal malpractice actions sounding in tort is two years. Pennsylvania favors strict application of the statute of limitations.***

- In determining when the statute of limitations begins to run in a legal malpractice action, Pennsylvania follows the "occurrence rule." Under the occurrence rule, the statutory period commences upon the occurrence of the alleged breach of duty, not the realization of actual loss. An exception to the occurrence rule is the discovery rule, which applies when the injured party is unable, despite the exercise of due diligence, to know of the injury or its cause. Lack of knowledge, mistake or misunderstanding does not toll the running of the statute.

Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (April 7, 2009) (Bernstein, J., 9 pages)

STATUTE OF LIMITATIONS – BREACH OF FIDUCIARY DUTY - *A claim for breach of fiduciary duty is subject to a two-year statute of limitations.*

Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (April 7, 2009) (Bernstein, J., 9 pages)

STATUTE OF LIMITATIONS – *Four year statute of limitations applicable to breach of contract actions began to run on claim for breach of financial advisor agreement from the date of the closing on the allegedly defective loan. Plaintiff was put on notice of its claim against financial advisor when bank refused to provide entire loan amount at closing. Filing of Writ of Summons did not satisfy statute of limitations where service was not made until four months after statute had run.*

Robinson v. Berwind Financial, L.P., November Term, 2002, No. 00220 (December 29, 2005) (Jones, J., 6 pages)

STATUTE OF LIMITATIONS – *The question of whether the statute of limitations has run on a claim is ordinarily a question of law for the trial judge; however, where the issue involves a factual determination, the question is for the finder of fact.*

- The point at which the complaining party should reasonably be aware that he has suffered an injury is generally an issue of fact to be determined by the jury; only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law.

Schnader, Harrison, Segal & Lewis, LLP v. Maury Popowich v. Albert Momjian,July 2004, No. 0037, (Abramson, J.) (October 17, 2005 - 8 pages).

STATUTE OF LIMITATIONS – *Four year statute of limitations applicable to breach of contract actions began to run on claim*

for breach of financial advisor agreement from the date of the closing on the allegedly defective loan. Plaintiff was put on notice of its claim against financial advisor when bank refused to provide entire loan amount at closing.

- Filing of Writ of Summons did not satisfy statute of limitations where service was not made until four months later, after statute had run.

Robinson v. Berwind Financial, L.P., November Term, 2002, No. 00220 (August 31, 2005) (Jones, J., 4 pages)

STATUTE OF LIMITATIONS- ***Where plaintiffs allege that the filing of a lawsuit in New Mexico caused plaintiffs to suffer substantial harm, the statute of limitations begins to run from the date the lawsuit was filed.***

- Where the plaintiffs admit that they were injured by the filing of a lawsuit and were aware that they were injured from the filing, the discovery rule does not toll the running of the statute of limitations where the plaintiff fails to allege a new injury.

Malewicz v. Michael Baker Corp., December 2002 No. 01741 (February 15, 2005) (Jones, J.).

STATUTE OF LIMITATIONS - ***Subsequent modifications to surety agreement which was signed under seal does not transform the twenty (20) year statute of limitations for documents signed under seal to a four (4) year statute of limitations for breach of contract where the modifications were not signed under seal.***

Wachovia v. Rosen, February Term 2003, No. 04126 (Cohen, J.)(June 21, 2004 - 4 pages).

STATUTE OF LIMITATIONS - ***court found limitations provision contained within insurance policy to be valid and enforceable and served as a bar to Plaintiffs' claims for breach of contract and declaratory judgment. While a contractual limitations clause may be tolled where criminal charges are filed against the insured who is thereby induced to refrain from bringing suit, no such evidence existed at bar.***

Margaret Autobody, Inc. v. Universal Underwriters Group, et al.,May Term 2002, No. 1750 (Jones, J.)(April 12, 2004 – 9 pages).

STATUTE OF LIMITATIONS - ***court found limitations provision contained within mortgage documentation to be valid and enforceable and served as a bar to Plaintiff's negligence and promissory estoppel claims against First Union.***

Avondale Rentals v. Roser & Einstein, et al., July Term

2001, No. 2563(Cohen,J.)(January 8, 2004 – 3 pages).

STATUTE OF LIMITATIONS/BAD FAITH - *The Six Year "Catch-All" Statute of Limitations Applies to Bad Faith Claims While the 4 Year Statute of Limittions Applies to Bar Plaintiff's Contract Claims - Where Plaintiff Fails to File Preliminary Objections to Preliminary Objections Asserting Statute of Limitation Defense, the Court May Consider the Merits*

Trujillo v. State Farm Mutual Insurance Co., May 2001, No. 2047 (Herron, J.)(December 6, 2001 -31 pages)

STATUTE OF LIMITATIONS/CONTRACTS - *When a Contract Lacks a Fixed Date for Payment And Is Thus Deemed a Continuous Contract, the Statute of Limitations Does Not Begin Until Breach or Termination of the Contract*

RRR Management Co., Inc. v. Basciano et al., January 2001, No. 4039 (Sheppard, J.)(March 4, 2002 - 21 pages)

STATUTE OF LIMITATIONS – DECLARATORY JUDGMENT - *A cause of action for a declaratory judgment does not arise or accrue until an 'actual controversy' exists. In a case involving a claim for wrongful denial of coverage, the 'actual controversy' surrounding the interpretation of the insurance policy at issue does not arise until the insurer denies the insured's request for coverage.*

Vasile Marincas v. U.S. Mail Delivery System, Inc., *et al.*, March Term, 2004, No. 3123 (Sheppard, Jr., J.) (July 20, 2004 – 5 pages).

STATUTE OF LIMITATIONS – DECLARATORY JUDGMENT - *A cause of action for a declaratory judgment does not arise or accrue until an 'actual controversy' exists. In a case involving a claim for wrongful denial of coverage, the 'actual controversy' surrounding the interpretation of the insurance policy at issue does not arise until the insurer denies the insured's request for coverage.*

Vasile Marincas v. U.S. Mail Delivery System, Inc., *et al.*, March Term, 2004, No. 3123 (Sheppard, Jr., J.) (10/15/04 – 4 pages).

STATUTE OF LIMITATIONS/DISCOVERY RULE—*The existence of a fiduciary relationship does not substitute for the plaintiff's duty to adequately pursue the cause of her injury under the discovery rule.*

Johnson v. Marrs et al., July Term 2002, No. 4706 (Jones, J.) (April 20, 2005 – 6 pages).

STATUTE OF LIMITATIONS/DISCOVERY RULE—*The discovery rule tolls the statute of limitations until the complainant reasonably knows that he or she has been injured by another party's conduct.* —*The discovery rule protects claimants against the inability to discover facts, not legal conclusions.*

Johnson v. Marrs et al., July Term 2002, No. 4706 (Jones, J.) (December 27, 2004 – 15 pages).

STATUTE OF LIMITATIONS/DISCOVERY RULE/NEGLIGENCE - *Plaintiff Failed to Provide Sufficient Evidence to Invoke the Discovery Rule Where the Record Shows that Plaintiff Possessed the Requisite Degree of Knowledge in November 1989 Concerning the "Ponding" Problem with Its Roof But It Failed to Exercise Due Diligence in Investigation the Source of the Problem Until 1996 - Plaintiff's Negligence Claim Is Barred by the 6 Year Statute of Limitations - Discovery Rule in Pennsylvania Does Not Apply to Breach of Warranty or Breach of Contract Claims - Discovery Rule Does Apply to Contract Actions Alleging Latent Real Estate Construction Defects*

Assumption of the Blessed Virgin Mary Church of the Archdiocese of Philadelphia v. PFS Corporation and Neshaminy Electrical Contractors, February 2001, No. 1078 (Sheppard, J.)(June 18, 2002 - 16 pages)

STATUTE OF LIMITATIONS/DISCOVERY RULE/NEGLIGENCE - *The Statute of Limitations on a Professional Negligence Claim Does Not Begin to Run Until All the Elements of the Claim Have Occurred - The Discovery Rule and Its Diligence Requirement Is Relevant Only After Injury Has Materialized and Impacts Whether the Statute of Limitations Is Triggered Upon Injury or Upon Plaintiff's Discovery of Injury - Where Plaintiff Was Noticed of Insurance Policy's Potential Rejection of Claims but Before Actual Rejection Occurred, the Statute of Limitations Is Not Triggered Because There Has Been No Injury.*

M&M High Inc. v. Essex Insurance Co., July 2001, No. 0997 (Cohen, J.) (November 18, 2002 - 9 pages)

STATUTE OF LIMITATIONS – FRAUDULENT CONCEALMENT - *A defendant may not invoke the statute of limitations if, through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. The doctrine does not require fraud in the strictest sense encompassing an*

intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception. The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence.

- In order to find fraudulent concealment, the plaintiff must show that, in addition to committing the acts that constitute the wrong for which plaintiff is suing, defendant did or said something that amounts to concealment of the wrongdoing.

Nestle USA, Inc v. Wachovia Bank, N.A., August Term, 2005, No. 01026 (November 5, 2007) (Sheppard, J., 4 pages)

STATUTE OF LIMITATIONS – FRAUDULENT CONCEALMENT – ***Where client testified that attorney repeatedly advised client that claims made by adversary in underlying litigation, based on lease drafted by attorney, were "ludicrous," it was for finder of fact to determine if client was given such advice, and it was then for court to determine if an estoppel resulted from such facts. STATUTE OF LIMITATIONS – DISCOVERY RULE - Once the trial court in the underlying action indicated that client's adversary's claims had merit, by finding the language of the lease drafted by attorney to be ambiguous, client knew or should have known through the diligence that a reasonable person would have exercised under the circumstances that it had been injured by attorney's drafting of lease. Therefore, the statute of limitations on client's malpractice claims began to run at that point, if not before.***

Crown, Cork & Seal v. Montgomery McCracken Walker & Rhodes, LLP, December Term, 2002, No. 03185 (CN 111978) (May 25, 2005 – 3 pages) (Jones, J.)

STATUTE OF LIMITATIONS – INSURANCE COVERAGE - ***A cause of action for breach of contract accrues for statute of limitations purposes when plaintiff first could have maintained its action to a successful conclusion. In order for an insured to recover from an insurer for breach of a contract of insurance, the insured must have sustained a covered loss which the insurer refuses to pay. In most coverage cases, the statute of limitations starts to run from the date of the denial of coverage letter because it is issued after the loss occurs.***

-Where an insurer preemptively denies coverage in the face of pending settlement negotiations, which negotiations subsequently lead to a settlement agreement under which the insured agrees to pay the underlying claim, the statute of limitations does not begin to run until the settlement is finalized and/or paid because it is not until that time that the insured suffers a loss.

Aetna, Inc. v. Lloyd's Underwriters, May Term, 2005, No. 03879 (February 13, 2008) (Sheppard, J., 7 pages)

STATUTE OF LIMITATIONS – MALPRACTICE - ***The right to maintain a cause of action for legal malpractice arises only when all the elements of the claim have been satisfied, including the requirement that the wrongful conduct have caused appreciable damage to plaintiff.***

Pennsylvania courts have not adopted the continuous representation rule under which a plaintiff's claim for malpractice accrues upon the termination of the professional relationship giving rise to the malpractice action.

Generally, the statute of limitations begins to run when the plaintiff is first informed that there is a contrary interpretation of the document that defendant-attorneys drafted, not when subsequent litigation regarding that document is filed or is concluded.

Where defendant, through fraud or concealment, caused the plaintiff to relax its vigilance or deviate from its right of inquiry, the defendant is estopped from invoking the bar of the statute of limitations

Crown Cork & Seal, Co., Inc. v. Montgomery, McCracken, Walker & Rhoads, LLP, December Term, 2002, No. 03185 (December 29, 2003) (Jones, J.)

STATUTE OF LIMITATIONS/UNJUST ENRICHMENT - ***Unjust Enrichment Claims Are Governed by a 4 Year Statute of Limitations that Accrues on the Date When the Relationship Between the Parties Terminated - Where Movant Fails to Present Facts as to the Date of Termination of a Relationship, Summary Judgment Predicated on the Statute of Limitations May Not Be Granted***

Resource Properties XLIV v. PAID, November 1999, No. 1265 and March 2000, No. 3750 (Sheppard, J.)(June 5, 2001 - 13 pages)

STATUTORY CONSTRUCTION ACT; PLURALITY OPINION; AUTHORITY FOR THE CREATION OF PRIVILEGE; ATTORNEY-CLIENT PRIVILEGE; WORK PRODUCT PRIVILEGE;

Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)

STATUTORY INTERPRETATION – ***The best indication of legislative intent of a statute is the plain language of a statute.***

Victory Clothing Co., Inc. d/b/a Torre Clothing v. Wachovia Bank, N.A., February 2004, No. 1397, Control No. 071103 (Abramson, J.) (August 29, 2005 - 7 pages).

STAY PENDING APPEAL - ***Motion for Stay Pending Appeal Denied Where Petitioner Fails to Make Strong Showing that it Will Prevail on the Merits - Preliminary Injunction May Not be Defeated Merely by***

Raising Unsupported Defense - Petitioner's Fraud Defense Was Not Viable Due to Scant Evidence - Under "Preponderance of the Evidence" Standard Petitioner Failed to Establish Fraud Defense

TJS Brokerage & Co., Inc. v. Hartford Casualty Insurance Co. and Peterman Co., December 1999, No. 2755 (Herron, J.)(July 21, 2000 - 8 pages)

STRIKE THE DEFAULT JUDGMENT – *A petition to strike will be denied where the defendant has failed to provide any allegations that would support the position that the factual record contains a defect.*

76 Carriage Company, Inc. v. Torgro Limousine Service, Inc., March Term 2007 No. 3432; Superior Court Docket No. 263EDA2007 (February 27, 2008 – 5 pages) (Sheppard, J.).

STRIKE JUDGMENT – ***A petition to strike a judgment may only be granted when there is an apparent defect on the face of the record. In considering the merits of a petition to strike, the court will be limited to a review of only the record as filed by the party in whose favor the warrant is given, i.e., the complaint and the documents which contain confession of judgment clauses. A court's order that strikes a judgment annuls the original judgment and the parties are left as if no judgment had been entered.***

PIDC Regional Development Corporation v. Allen Woodruff, July Term 2005, No. 1360 (Abramson, J.) (November 28, 2005 - 7 pages).

SUBORDINATION –

Cambridge Walnut Park, LLC v. Municipal Capital Appreciation Partners I, LP, *et al.*, October Term, 2007, No. 1102 (November 10, 2010 – 10 pages) (New, J.)

Cambridge Walnut Park, LLC v. U. S. Bank National Assoc., *et al.*, May Term, 2008, No. 0517 (September 30, 2010 – 3 pages) (New, J.)

SUBROGATION - *Where Insurance Policy Provides that Insurer May Assert Rights of Those Who Have Rights to Recover Damages from Others If Insurer Has Tendered Payments, Summary Judgment May Not Be Granted Where There Is a Material Issue of Fact as to Whether Payments Were Actually Tendered*

Fidelity & Guaranty Ins. Co. v. Growth Evolution, Inc., May 2000, No. 1772 (Herron, J.)(December 18, 2001 - 8 pages)

SUBROGATION/EQUITABLE - *Equitable Subrogation Claim May Be Maintained Where Assignee Has Satisfied the Entire Debt by Paying*

the Purchase Price on Notes and Has Succeed to the Subrogation Rights on Those Notes

> ***Resource Properties XLIV v. PAID,*** ***November 1999, No.1265 and March 2000, No.3750 (Sheppard, J.)(June 5, 2001 - 13 pages)***

SUCCESSOR LIABILITY – *Two references to "merger" which were made at deposition were insufficient evidence of successor liability to withstanding summary judgment.*

> **Crown, Cork & Seal v. Montgomery McCracken Walker & Rhodes, LLP, December Term, 2002, No. 03185 (CN 112002) (May 25, 2005 – 5 pages) (Jones, J.)**

SUFFICIENCY OF PLEADINGS FOR FRAUD/UTPCPL CLAIMS - *Element of Intent Must Be Alleged in Claims of Common Law Fraud, Fraudulent Misrepresentation, and UTPCPL Claims for Deceptive or Fraudulent Practices - Intent Element Pleading Required by Law Is State of Mind of the Defendant As To the Falsity of the Misrepresentation at the Time It Uttered Such Misrepresentation In Addition to Intent That Customers Rely on Misrepresentation - Where Defendant Does Not Object to Allegations of State of Mind of Defendant as to the Misrepresentation at the Time It Was Made As Being Insufficiently Pled, It Waives Such Preliminary Objection.*

> **Oppenheimer v. York, March 2002, No. 4348 (Sheppard, J.) (October 25, 2002 - 15 pages)**

SUMMARY JUDGMENT, MORTGAGE FORECLOSURE, CONFESSION OF JUDGMENT, COLLATERAL ESTOPPEL–

> **TD Bank v. Joint Theater Center, Inc. *et. al*., February 2009 No. 3713 (New, J.) (February 23, 2010, 5 pages)**
>
> **TD Bank v. Joint Theater Center, Inc., February Term 2009 No. 4008 (New, J.) (July 8, 2010, 5 pages).**

SUMMARY JUDGMENT/ADDITIONAL INSURED- *A question of fact exists as to whether a Consultant on the project is an additional insured on a policy of insurance where the contract specifically required the consultant to be identified as an additional insured and the certificate of insurance specifically identified the consultant as an additional insured but the terms of the policy did not appeared to exclude the consultant as an additional insured.*

> **Bedwell et. al. v. D. Allen Brothers et. al., November Term No. 1328 (December 6, 2006)(Abramson, J.).**

SUMMARY JUDGMENT/AMENDMENT/STATUTE OF LIMITATIONS- *Where an*

amended complaint is filed approximately four years beyond the prescribed four year statutory period, the action is barred by the applicable statue of limitations since the amendment does not relate back but constitutes a new cause of action.

Just Wood Industries v. Coaba Door, S.A., December Term 2004 No. 0213 (April 24, 2006 – 4 pages)(Bernstein).

SUMMARY JUDGMENT/ARBITRATION- ***Judicial inquiry into whether an issue is subject to arbitration is limited to determining (1) whether a valid agreement to arbitrate exists between the parties and if so whether (2) whether the dispute involved is within the scope of the arbitration provision.***

-A valid arbitration agreement exists between the parties a party has certain rights and obligations under the agreement including the obligation to submit a dispute to arbitration.

-Where the defendant business entities are essentially successors to a single family business which share the same or similar holders of interest, management, legal and accounting staff and some of the business entities agreements contain valid arbitration agreements, the interest of all the parties would better be served if the matter were remanded to arbitration.

Sherman v. Keller, November Term 2007 No. 2473 (March 27, 2008 – 6 pages) (Abramson, J.).

SUMMARY JUDGMENT/ASSIGNMENT/ATTORNEY FEES- ***The right to claim attorney fees was not assigned where the clear language of the assignment is silent as it pertains to the right to claim attorney fees.***

26 E. Oregon Avenue L.P. c/o Stein & Silverman, P.C. v. Fidelity National Title Ins., June Term 2003 No. 2383 (October 18, 2004) (Jones, J.)

SUMMARY JUDGMENT/BAD FAITH- ***Since the court found that the denial of coverage was proper and reasonable, there is no bad faith in that denial and summary judgment on all claims relating to the denial of coverage is appropriate.***

Universal Teleservices Arizona, LLC. v. Zurich American Insurance Company, et. al., November Term, 2002, No. 1670 (March 4, 2004)(Cohen).

SUMMARY JUDGMENT—BAILMENT. ***An armored transport company is liable for breach of an express or implied bailment agreement if it receives from a bank a stated amount of money contained in an intact and sealed pouch, exercises exclusive control over it, and discovers not only that the pouch contains less than the stated amount, but also that the pouch has been slit and is no longer intact.***

First Penn Bank, Inc. v. AT Systems Atlantic, Inc. and Wachovia Bank, N.A. September Term, 2005, No. 3084 (May 29, 2007 – 5 pages), (Bernstein, J.)

SUMMARY JUDGMENT/BREACH OF AGREEMENT OF SALE/UNDUE INFLUENCE– ***A contract that is the product of a confidential relationship is presumptively voidable unless the party seeking to sustain the validity of the transaction affirmatively demonstrates that it was fair under all of the circumstances and beyond the reach of suspicion.***

- Confidential Relationship. ***Relying upon complaint allegations that plaintiff was in a weakened state and that defendant exercised overmastering influence over her in the transaction she now seeks to void is not sufficient to withstand the entry of summary judgment. Mere mental weakness if it does not amount to inability to comprehend the contract and is unaccompanied by evidence of imposition or undue influence is insufficient to set aside a contract.***

Christopher v. Hurwitz, October Term 2004 No. 2449 (June 21, 2006 – 10 pages) (Abramson, J.).

SUMMARY JUDGMENT/BREACH OF CONTRACT– ***A client may maintain a breach of contract claim against an attorney for failure to fulfill his or her contractual duty to provide the agreed upon services in a manner consistent with the profession at large and the client need not allege the attorney failed to follow a specific instruction.***

Itskowitz v. White and Williams, May Term 2003 No. 2926 November 11,2005 – 10 pages)(Abramson, J.).

SUMMARY JUDGMENT/BREACH OF CONTRACT/SUBCONTRACTOR-Materialman– ***Where the invoice specifically and unambiguously provides that payment for material used on a construction site is due "Net 30 days" and no evidence exists suggesting the materialman agreed to wait until the subcontractor was paid to get paid, summary judgment should be entered in favor of the materialman.***

/Payment Bond– ***Where a materialman did not have a direct contractual relationship with the general contractor the materialman is precluded from seeking payment under a payment bond which was purchased for the benefit of subcontractors, materialmen or labors with direct contractual relationships with the general contractor.***

Crossing Construction Co., Inc. v. Degussa Corporation, July Term 2003 No. 2699 (December 27, 2005 – 9 pages) (Sheppard, J.).

Summary Judgment—Breach of Fiduciary Duty. ***Under the law of Delaware, an insurer owes no fiduciary duty to an insured because***

the parties' interests in such a contractual relationship are not aligned.

> **The Pyrites Company, Inc. v. Century Indemnity Company *et al.*, January Term, 2003 No. 4514(December 12, 2007 – 5 pages)(Sheppard, J.)**

SUMMARY JUDGMENT/BREACH OF FIDUCIARY DUTY-*At summary judgment plaintiff may not rest upon the mere allegations or denials of the pleadings but must file a response identifying one or more issues of fact arising from evidence in the record controverting the evidence cited in support of the evidence or that the evidence in the record establishes the facts essential to the cause of action which the motion cites as not having been produced.*

- In order to establish a claim for breach of fiduciary duty the critical question is whether the relationship goes beyond mere reliance on superior skill and into a relationship characterized by overmastering influence on one side and weakness, dependence or trust, justifiably reposed on the other side. Thus, the fact that defendant was hired to run the plaintiff's department in a law firm alone without evidence of overmastering influence, weakness, trust or dependence is insufficient to prove a claim for breach of fiduciary duty

> **Edelstein & Diamond L.P. v. Orloff, January Term 2004 No. 1310 (June 30, 2005) (Jones, J.) (7 pages).**

SUMMARY JUDGMENT/BREACH OF SURETY AGREEMENT- The clear language of the surety bond precludes Plaintiff's claims for payment since the bond inured to the benefit of the owner and not the labor or materialmen.

> **United Electric Company, LP d/b/a Magic Aire v. Allstates Mechanical Ltd, d/b/a Allstates Construction Group and RLI Insurance Company, October Term No. 015555 CN 020728/020729 June 17, 2004) (J. Jones).**

SUMMARY JUDGMENT/BREACH OF SURETY AGREEMENT- *The clear language of the surety bond precludes Plaintiff's claims for payment since the bond inured to the benefit of the owner and not the labor or material men.*

> **United Electric Company, LP d/b/a Magic Aire v. Allstates Mechanical Ltd, d/b/a Allstates Construction Group and RLI Insurance Company, October Term No. 1555 (June 17, 2004 – 3 Opinions) (J. Jones).**

SUMMARY JUDGMENT – Breach of Warranty –

> **Lenwayne LLP v. Thirfty Car Sales Inc., *et al.* February**

Term, 2003, No. 0129(Cohen, J.) (December 23, 2004 – 3 pages)

SUMMARY JUDGMENT: BURDEN OF THE NON-MOVING PARTY TO COME FORWARD WITH SUFFICIENT EVIDENCE OF DAMAGES; EXPERT OPINION TESTIMONY: MUST BE BASED UPON FACTS CONTAINED IN THE RECORD.

Main Line Elder Care Associates, Inc. v. Donald Lloyd Harjes *et al.*, January Term, 2009, No. 02860, (Bernstein, J.) (September 30, 2011 - 12 pages).

SUMMARY JUDGMENT/COMMERCIAL DISPARAGEMENT– ***Although the torts of commercial disparagement and defamation are similar each protects different and distinct interest. The tort of defamation seeks to protect against damage to one's reputation while the tort of commercial disparagement protects a vendor from pecuniary loss suffered because statements attacking the quality of goods have reduced their marketability.***

Abbadon Corporation v. Crozer-Keystone Health System, et. al., 0801-4415 (November 13, 2009 – 8 pages) (New, J.).

SUMMARY JUDGMENT/COMMERCIAL LEASE/GOOD FAITH AND FAIR DEALING- ***Defendant did not breach the covenant of good faith and fair dealing where the lease and the amendment to the lease unambiguously made the payment of percentage rent conditional upon the gross receipts of the leased premises reaching a specific breakpoint.***

Erie Plaza Partners, L.P. v. Save-A-Lot Food Stores, December Term 2003 No. 1376 (November 4, 2004- 8 pages) (Jones, J.).

SUMMARY JUDGMENT/COMMISSION/UNJUST ENRICHMENT– ***Where the payment of commissions is set forth in an express contract, a claim for unjust enrichment does not exist.***

Situs Properties, Inc. v. Peter Roberts Enterprises, June Term 2003 No. 2119 (January 26, 2005)(Jones, J.).

SUMMARY JUDGMENT/CONSTRUCTION/RELEASES–***A party cannot evade the clear language of a release by contending that it did not subjectively intend to release a claim in dispute. The subcontractor should reserve its right to bring the claim contemporaneous with the signing of the partial releases. An ex post facto attempt to preserve a claim months after the subcontractor became aware of the claim and after it signed partial releases is ineffective to revive a claim that has already been barred.***

Kleinknecht Electric Company v. Jeffrey M. Brown Associates,

Inc. et. al., September Term 2003 No. 4997 (April 10, 2006) (Bernstein, J.).

SUMMARY JUDGMENT/CONTRACT/INTENTIONAL INTERFERENCE - *Where Plaintiff Has Not Completed Relevant Discovery and There Are Disputed Material Facts as to Actual Legal Damages and Defendants' Actions, Summary Judgment on the Attorney/Plaintiff's Intentional Interference with Contractual Relations Claim Cannot Be Granted*

Golomb & Honik, P.C. v. Ajaj, November 2000, No. 425 (Herron, J.)(June 19, 2001 - 6 pages)

SUMMARY JUDGMENT/CONTRACT INTERPRETATION

Windsor Associated Ltd. Parnership v. Central Parking System of PA, Inc., April Term, 2009 No. 1431 (June 13, 2011 – 5 pages) (Bernstein, J.)

SUMMARY JUDGMENT—CONTRACT INTERPRETATION - *Where a provision in a lease agreement provides that Tenant has the right of first refusal if the Landlord wishes to sell the leased property, and an option to buy the property regardless of the Landlord's wishes, then the Tenant's right to buy the property is absolute.*

Where a provision in a lease agreement provides that Tenant-Buyer of a leased property must finance a specific percentage of the purchase by the Landlord-Seller, who shall take back a purchase money mortgage constituting a first lien on the property, the court will give effect to such a provision.

Recovery of Costs, Expenses and Attorney's Fees Under a Contract - Where a contract provides that a party shall recover costs and expenses, including reasonable attorney's fees, in the even of default by the other party in the contract, the court shall give effect to such a provision.

Res judicata Where a lease agreement is found to be in full force and effect by a court in a prior action, such a finding will not be disturbed by another court in a subsequent action.

Ashburner Concrete & Masonry Supply, Inc. v. Emedio and Rosemarie Capponi H/W, January Term 2006, No. 2374 (May 3, 2007 – 6 pages), (Abramson, J.)

SUMMARY JUDGMENT/CONTRACT INTERPRETATION/ADHESION- *Where Plaintiffs have not presented any evidence to suggest that distributors were forced to enter into an Agreement or that an Agreement was not the subject of negotiation or that the distributors were not represented or advised by counsel, a contract of adhesion does not exist.*

- Where the terms of a written contract are clear, this court must afford a construction in accord with the plain meaning of the language used.

Beauford v. Tasty Baking Company, July Term 1999 No. 0394 (December 13, 2006 – 7 pages) (Bernstein, J.).

SUMMARY JUDGMENT/CONTRACTUAL INDEMNIFICATION– *Where the contractual indemnification provisions clearly and unambiguously state that the Subcontractor agreed to indemnify the Contractor for the Contractor's negligence, the court is required to enforce the contract.*

Bedwell et. al. v. D. Allen Brothers et. al., November Term No. 1328 (December 6, 2006)(Abramson, J.).

SUMMARY JUDGMENT/DECLARATORY JUDGMENT - *Material Issues of Fact as to When the Condition of a Patient Seeking Emergency Medical Treatment Has Stablized Preclude Granting Summary Judgment on Hospital's Request for a Declaratory Judgment as to (1) Whether Hosptial or Health Maintenance Organization Must Obtain Informed Consent Before Transfers to Another Hospital and (2) Whether HMO Must Pay Hospital for Medically Necessary Services Whether the Services Are Rendered Before or After Stablization*

Temple University v. Americhoice, January 2001,No. 2283 (Herron, J.)(September 17, 2001 - 11 pages)

SUMMARY JUDGMENT/DECLARATORY JUDGMENT/OBLIGATION OF INSURER TO PAY FEES OF INDEPENDENT COUNSEL/CONFLICT OF INTEREST –

Yaron v. Darwin National Insurance Company, April Term, 2010, No. 0502 (July 5, 2011 – 9 pages) (New, J.)

SUMMARY JUDGMENT/DECLARATORY JUDGMENT/PERMISSIVE USER- *Genuine issues of material facts preclude the entry of summary judgment where a user of the automobile was given permission in limited circumstances to operate the automobile.*

Atlantic States Insurance Company v. Hunt, et. al., February Term 2004, No. 2642 (October 12, 2004 – 4 pages)(Jones, J).

SUMMARY JUDGMENT/DEFAMATION– *A privilege is not abused when a consultant hired by an employer to interview employees regarding internal policies on hiring contractors when the consultant does not interview the contractor or is hostile toward the employee during the interviews.*

Summary Judgment/Defamation/ABUSE- *Abuse of a conditional privilege is indicated when the publication is actuated by malice or negligence, is made for a purpose other than that for which the privilege is given, or to a person not reasonably believed to be necessary for the accomplishment of the purpose of the privilege or included defamatory matter not reasonably believed to be necessary for the accomplishment of the purpose.*

Summary Judgment/Defamation/PRIVILEGE- ***The publisher of defamatory matter is not liable if publication was made subject to a privilege and the privilege was not abused. Communications which are made on a proper occasion, from a proper motive, in a proper manner and which are based upon reasonable cause are privileged.***

Abbadon Corporation v. Crozer-Keystone Health System, et. al., 0801-4415 (November 13, 2009 – 8 pages) (New, J.).

SUMMARY JUDGMENT – DEPOSITION TESTIMONY - ***The court cannot rely upon the deposition testimony of the moving party's agent to grant summary judgment on the issue of whether an oral agreement was reached by the parties, Therefore, the court could not find that plaintiff was estopped from claiming otherwise.***

Aetna, Inc. v. Lloyd's Underwriters, May Term, 2005, No. 03879 (February 13, 2008) (Sheppard, J., 7 pages)

SUMMARY JUDGMENT/DUTY TO DEFEND/ADDITIONAL INSURED- ***Where the complaint alleges that the injuries arose from the insured's conduct, the existence of other potential causes do not foreclose a finding that a duty to defend exists.***

Summary Judgment/Duty to defend- ***Where the policy specifically requires that an additional insured be identified in either the schedule contained on the endorsement or on the declaration page of the policy and the additional insured is not so identified, the insurance company does not have a duty to defend for the claimed loss.***

1930-34 Associates, L.P. v. BVF Construction Co., et. al., September 2005 No. 908 Control No 111380 (June 6, 2007 – 6 pages) (Sheppard, J.).

SUMMARY JUDGMENT/DUTY TO DEFEND- ***When a subcontractor fails to procure the necessary insurance required under the subcontract agreement, the subcontractor becomes responsible for the resultant damages, such as the defense costs in the underlying action.***

1930-34 Associates, L.P. v. BVF Construction Co., et. al., September 2005 No. 908 Control Nos. 102131/112313/111387 (June 6, 2007 – 7 pages) (Sheppard, J.).

SUMMARY JUDGMENT/DUTY TO DEFEND- ***Where the underlying action fails to allege that plaintiff suffered any physical or bodily harm or any property damage as defined by the policy, Ohio Casualty Insurance Company does not have a duty to defend.***

Ohio Casualty Insurance Company v. Gurotzian Enterpises, October Term 2003 No. 3375 (December 27, 2004 – 7 pages)

(Jones, J.).

SUMMARY JUDGMENT/DUTY TO DEFEND- *Where the underlying action fails to allege "Occurrence" as defined by the policy, Merchants & Businessmen's Insurance Company does not owe plaintiffs a duty to defend.*

> **GE Aquarium, Inc. v. Harleysville Mutual Insurance Company, June Term 2003 No. 0038 (December 27, 2004- 12 pages) (Jones, J.).**

SUMMARY JUDGMENT/COLLATERAL ESTOPPELS- *Where a workers' compensation judge has decided an identical issue as that presented before this court, the parties in the workers' compensation action had a full and fair opportunity to litigate the issue, the order issued by the worker' compensation judge's order became final, a party is barred by the doctrine of collateral estoppel from re-litigating the issue.*

> **Letwin et. al. v. Rain and Hale, LLC, et. al., August Term 2007 No. 2316 (June 17, 2009 – 10 pages) (New, J.).**

SUMMARY JUDGMENT/DUTY TO DEFEND- *An insurer does not owe a plaintiff a duty to defend where the allegations contained within the workers' compensation petition relate to the employment activities performed by the petition for the plaintiff and where specific exclusions exist within the policy for work related claims.*

> **Letwin et. al. v. Rain and Hale, LLC, et. al., August Term 2007 No. 2316 (June 17, 2009 – 10 pages) (New, J.).**

SUMMARY JUDGMENT/FAILURE TO RESPOND TO FACTUAL ALLEGATION/DEFAULT-

> **TD Equip v. Patrick, August Term 2010; No. 3245 (August 1, 2011 – 4 pages)) (Bernstein, J.)**

SUMMARY JUDGMENT/FRANCHISE- *Where a lease agreement entered into between the parties grants permission and does not require use of a service mark, the services provided by the party are not identified to the public under the service mark, the services are not associated with nor do they conform to quality standards established by the owner of the service mark and substantial control over the operation of the business is not provided, a franchise is not eatablished.*

> **Mercy Health System of Southeastern Pennsylvania v. Metropolitan Partners Realty, Inc., November 2001 No. 3046**

March 6, 2005 – 13 pages)(Jones, J.).

SUMMARY JUDGMENT/FRAUD - *Summary Judgment May Not Be Granted Where There Are Material Issues of Fact Concerning Fraud Claim Against Defendant Based on Representations About the EPA Registration of a Product for Public Health Claims*

Textile Biocides, Inc. v. Avecia, Inc., January 2000, No. 1519 (Herron, J.)(July 26, 2001 - 46 pages)

SUMMARY JUDGMENT/FRAUD/SUFFICIENCY OF THE EVIDENCE- *Plaintiff buyer failed to produce sufficient evidence as the nonmoving party that the realtors involved in the transaction were aware that mold existed on the purchased property prior to the sale.*

Fraud/Parole Evidence- *In real estate inspection cases, an exception exists for the admission of parole evidence to prove fraud in the inducement. The exception requires a balancing between the extent of the party's knowledge of objectionable conditions derived from a reasonable inspection against the extent of the coverage of the contract's integration clause.*

Jeffries-Baxter v. Incognito, January Term 2004 No. 4181 (September 26, 2005 – 11 pages) (Jones, J.).

SUMMARY JUDGMENT/FRAUDULENT INDUCEMENT– *Plaintiff may not bring a claim for fraud in the inducement based on defendant's oral representations as to no future renovations at a mall when the lease agreement allows renovations to occur.*

Star Bakery, et. al. v. Preit Services, December Term 2006 No. 2556 (September 29, 2008 – 6 pages) (Bernstein, J.).

SUMMARY JUDGMENT - HEARSAY - *Plaintiffs' testimony, that third parties told plaintiffs that defendants made defamatory statements about plaintiffs, was inadmissible hearsay and would not defeat motion for summary judgment.*

Hydrair, Inc. v. National Environmental Balancing Bureau, February Term, 2000, No. 02846 (Cohen, J.) (July 17, 2003- 12 pages).

SUMMARY JUDGMENT—ILLEGAL CONTRACT FOR ARCHITECTURAL SERVICES - *A contract for architectural services provided by one who is not a registered architect is illegal and void.*

Only architectural firms that comply with 63 Pa. § 34.13 may offer architectural services to the public.

MSWPA, Inc. and Michael S. Williams v. Dan M. Achek and Achek Design and Construction, Co. Inc., June Term, 2005 No.

973. (March 23,2007 – 7 pages) (Abramson, J.)

SUMMARY JUDGMENT/INSURANCE/PRIOR NOTICE- A cause of action relates back to a prior action outside the policy period when the parties are the same, when the claims arise from the same transaction, where the alleged acts occurred at the same time and where there is a common scheme or plan.

Executive Risk Indemnity Inc. v. Cigna Corporation, November Term 2004 No. 1495 March 19, 2007 – 22 pages (Bernstein, J.).

SUMMARY JUDGMENT/INSURANCE/CONTRACT EXCLUSION- Even though complaints in the underlying action allege claims for RICO and breach of contract, the insurance claim is excluded where the all the payments in the settlement were a direct result of the insured's breaches of its contracts with physicians, capitation contracts with physicians and third party administration contracts with employees on insurance contracts with Cigna members.

Executive Risk Indemnity Inc. v. Cigna Corporation, November Term 2004 No. 1495 March 19, 2007 – 22 pages (Bernstein, J.).

SUMMARY JUDGMENT/INSURANCE/ATTORNEY FEE AND COSTS- Where the insured fails to produce any evidence detailing how the attorney fee and defense costs are attributable to non covered claims and covered claims, summary judgment is appropriate.

Executive Risk Indemnity Inc. v. Cigna Corporation, November Term 2004 No. 1495 March 19, 2007 – 22 pages (Bernstein, J.).

SUMMARY JUDGMENT/INSURANCE CONTRACT INTERPRETATION/ASSAULT AND BATTERY EXECLUSION

First Financial Insurance Company v. Liberty Owners, LLC, *et al.* June Term, 2009, No. 2231 (February 14, 2011 – 5 pages) (New, J.

SUMMARY JUDGMENT/INSURANCE/CONTROL OF DEFENSE- *The court will not find a conflict of interest between an insured and an attorney retained by an insured where the insured has not directed the court to any fact of record that would establish an actual conflict and suggest that the attorneys retained by the insurer will subordinate their ethical obligation to the insured to some sense of duty owing to the insurance carrier.*

Kvaerner U.S. Inc. and Kvaerner Holdings Inc. v. One Beacon Insurance Co. et. al., April, Term 2003 No. 0940 (August 19, 2005 – 14 pages) (Sheppard, Jr., J.).

SUMMARY JUDGMENT/INSURANCE COVERAGE/DENIAL Letter/Waiver/Estoppel– ***With respect to waiver, the Pennsylvania Supreme Court stated that no party is required to name all his reasons at once and the assignment of one reason for refusal to pay cannot be a waiver of any other existing reason, unless the other is one which could have been remedied or obviated and the adversary was so far misled or lulled into security by silence as to such reason that to enforce it now would be unfair or unjust.***

- To make out a claim for estoppel, there must be such conduct on the part of the insurer as would, if the insurer were not estopped, operate as a fraud on some party who has taken or neglected to take some action to his own prejudice in reliance in reliance thereon.

- Where an insurer fails to identify a possible exclusion in a denial letter, the insurer did not waive and the insurer is not estopped from raising said exclusion where the denial letter did contain a "catch all" statement that the insurer reserved its right to raise other issues or defenses that might affect coverage and where the exclusion was raised as defense in its new matter.

1804-14 Green Street Associates, L.P. v. Erie Insurance Exchange, June Term 2006 No. 1763 (August 21, 2008)(Abramson, J.).

SUMMARY JUDGMENT/INSURANCE COVERAGE/NOTICE-*Pennsylvania employs a two prong test to determine whether late notice permits an insurance company to reject an otherwise legitimate claim, breach of the notice provision and prejudice as a result of the breach.*

- Where the insured waited two years before making a claim to the insurance company for failed air conditioning compressors and thirteen months for a spoilage claim, the court found as a matter of law that the notice provision was breached.
- The insurer is prejudiced and therefore justified in denying coverage for failure to provide "prompt" notice where the insured discarded the failed compressors before giving the insurer an opportunity to inspect and investigate the cause of the compressors failure to determine whether the units were a covered loss under the policy or subject to an exclusion in the policy such as wear and tear, rust and corrosion. However, where the insured retained a representative sample of the spoiled product, the insurer was not prejudiced and a denial of coverage was not justified.

Frankford Candy & Chocolate Company v. Valiant Insurance Company, August Term 2004 No. 1534 (January 24, 2006)(Abramson, J.).

SUMMARY JUDGMENT/INSURANCE COVERAGE/ALTERATION OF MEDICAL RECORDS- ***Regardless of how the insured classifies his changes made to a patient's chart, any changes constitute alterations under the terms of the medical malpractice policy.***

- Before the court can void a policy for alteration of medical records, the court must first determine whether the alterations made by the insured interfere with the insurer's ability to defend the underlying medical malpractice action.

Eastern Dentist Insurance Company v. Jones, April Term 2004 No. 2398 (June 30, 2005) (Jones, J.) (7 pages).

SUMMARY JUDGMENT/INSURANCE/DECLARATORY JUDGMENT- ***Allegations of harassment consisting of physical assault, verbal and physical threats and shooting and pointing of a BB gun constitutes intentional conduct excluded from coverage under the policy despite plaintiffs' description of the acts as "negligent, careless or intentional".***

SUMMARY JUDGMENT/INSURANCE/DECLARATORY JUDGMENT/NEGLIGENT SUPERVISION- ***If the language of the intentional act exclusion of the policy imposes a joint obligation on the insurers then the prohibited acts of one insured bars all others from coverage. Consequently a claim for negligent supervision is not subject to coverage under the policy.***

Prudential Property & Casualty Insurance Co. v. Bryan, May Term 2004 No. 0621 (January 19, 2004 – 7 pages) (Sheppard, Jr., J.).

Prudential Property & Casualty Insurance Co. v. Laura and Jay Bryan, Stacy Miller and Barbara Westerfer, May Term, 2004, No. 0621 (Sheppard, Jr., J.) (3/4/05 – 8 pages) Opinion to Superior Court Docket no. 492 EDA 2005.

SUMMARY JUDGMENT/INSURANCE/DUTY TO DEFEND- ***Where the loss suffered by Plaintiff was caused by weather conditions, heavy rain and wind, and the defective design of the roof, the loss is specifically excluded from coverage under the terms of the policy which excludes coverage for a loss caused by same.***

Summary Judgment/Insurance/ Evidence- Where the Plaintiff failed to come forward with any evidence to rebut Defendant's claim that the roof was defective, summary judgment is appropriate.

Goldstein Rosenbergs Raphel Sacks, Inc. v. Erie Insurance Exchange, May Term 2004 No. 1203 (May 27, 2005 – 8 pages) (Jones, J.).

SUMMARY JUDGMENT/INSURANCE/DUTY TO DEFEND- ***Where the Penn National Personal Auto Policy issued to Gittman excluded from coverage any bodily injury arising from the maintenance or use of any vehicle while any person is employed or otherwise engaged in***

any business and Gittman was operating his employer's vehicle at the time of the accident, Penn National Mutual Casualty Insurance Company does not owe Gittman a duty to defend or a duty to indemnify.

> **Pennsylvania National Mutual Casualty Insurance Company v. Gittman, November 2004, No. 4380 (May 25, 2005 – 3 pages) (Jones, J.).**

SUMMARY JUDGMENT/INSURANCE/EXCLUSION– ***Where a complaint in the underlying action alleges negligence on the part of the bar for failing to supervise, train, hire and control the person that caused decedent's death, the assault and battery exclusion bars coverage notwithstanding the averments of negligence where the exclusion is written broadly to encompass the negligent conduct alleged therein.***
- An insurance company does not have a duty to defend or indemnify a bar for a liquor liability claim asserted in an underlying action where the policy contains an exclusion for liability for the sale or service of alcoholic beverages.

> **Regis Insurance Company v. 1717 Wolf Street, et. al., August Term 2005 No. 4387 (January 30, 2007 – 7 pages)(Sheppard, J.)**

SUMMARY JUDGMENT/INSURANCE/INDEMNIFICATION- ***The duty to indemnify is not determined on the basis of whether the factual allegations of the complaint potentially state a claim against the insured. Rather, there must be a determination that the insurer's policy actually covers a claimed incident.***

> **Regis Insurance Company v. Slack's Hoagie Shack, Corp. et. al., October Term 2005 No. 4110 (March 6, 2007 – 5 pages)(Sheppard, Jr., J.).**

SUMMARY JUDGMENT/INDEMNIFICATION/EMPLOYEE EXCLUSION- ***The employee exclusion bars coverage for an injury to an employee even where the employee violates a positive order intimately connected with the employee's work duties.***

> **Regis Insurance Company v. Slack's Hoagie Shack, Corp. et. al., October Term 2005 No. 4110 (March 6, 2007 – 5 pages)(Sheppard, Jr., J.).**

SUMMARY JUDGMENT/INSURANCE POLICY - ***Summary Judgment May Not Be Granted Where There are Material Issues of Fact Concerning Whether Security Guard Company's Plant Protection Services - Namely, First Aid, Fire Fighting - Were Performed "in connection with security guard services" For Purposes of Extending Coverage - Summary Judgment May Not Be Granted Where There are Material Issues of Fact***

Concerning Whether Security Guard Company is "engaged in the business of providing" Medical Services For Purposes of Extending Coverage

Patricia M. Egger, Administratrix of the Estate of Charles Egger v. Gulf Insurance Company, et al., May 2001, No. 1908 (Sheppard, J.) (September 11, 2002 - 16 pages)

SUMMARY JUDGMENT/INTERPRETATION INSURANCE CONTRACT- ***Where the language of the policy exclusion is clear and unambiguous any claim in any way involving the same fact, circumstance, or situation as is the subject of pending litigation is to be excluded from coverage.***

Universal Teleservices Arizona, LLC. v. Zurich American Insurance Company, et. al., November Term, 2002, No. 1670 (March 4, 2004)(Cohen).

SUMMARY JUDGMENT/LEGAL MALPRACTICE/CAUSATION- ***To succeed with a legal malpractice claim against Saul Ewing, plaintiff was required to prove that he had a viable cause of action against the defendant in the underlying action and that the attorney hired was negligent in prosecuting or defending that case. This is often referred to as proving the "case within the case".***

- Where a plaintiff could not have been damaged because the claim alleged factually did not exist, plaintiff could not have a viable cause of action against the defendant attorney for malpractice.

- A plaintiff in a legal practice action cannot rely upon an advocate's presentation of evidence and argument in the underlying action when in fact a claim does not exist.

Still v. Saul Ewing, LLP, July Term 2007 No. 3737 (September 10, 2009- 11 pages) (Bernstein, J.).

SUMMARY JUDGMENT/LEGAL MALPRACTICE/EXPERT TESTIMONY- ***A breach of contract claim in a legal malpractice action does require expert testimony where the contract claim does not allege a failure to follow a specific instruction or a breach of a specific provision of the contract but alleges claims that sound in negligence.***

- A jury does not possess a sufficient fund of common knowledge concerning the practice of law to justify an inference of negligence from defendant Attorneys alleged failure to timely preserve a cause of action and therefore expert testimony is required.

- Where a plaintiff fails to produce any expert testimony as to the standard of care under which defendants should have concluded themselves and as to any deviation from the standard of care, as a matter of law plaintiffs failed to establish a prima facie case warranting a grant of summary judgment.

Parkinson, et. al. v. Kitteridge Donley, Elson, Fullem & Embick, LLP, March Term 2005 No. 0506 (July 11, 2006 – 8 pages)(Abramson, J.).

SUMMARY JUDGMENT/LEGAL MALPRACTICE- ***A key element of any action for professional malpractice is the establishment of a duty by the professional to the claimant. Absent duty there can be no breach and no negligence.***

- An implied attorney client relationship exists if the following are shown: (1) the purported client sought advice or assistance from the attorney: (2) the advice sought was within the attorney's professional competence; (3) the attorney expressly or impliedly agreed to render such assistance; and (4) it was reasonable for the putative client to believe the attorneys were representing him.

SUMMARY JUDGMENT/CONDOMINIUM – ***A Condominium created pursuant to the provision of the Uniform Condominium Act, 68 P.S. section 101 et. seq. does not automatically impose a fiduciary obligation upon the owners of the condominium. In order for a fiduciary obligation to exist, the condominium must function as a condominium.***

Greencort Condominium Association v. Greencort Partners et. al., 0401-4045 (Abramson, J.)(October 4, 2005 15- pages).

SUMMARY JUDGMENT/LIMITATION OF LIABILITY CLAUSE- ***Where a limitation of liability clause is clear, unambiguous and the subject of a private contract between two sophisticated business entities dealing at arm's length, the court will give effect to the limitation of liability clause.***

Flatrock Partners, L.P. v. Kasco-Chip Construction, J.V. et. al., July Term 2003 No. 1194 (February 13, 2007 – 6 pages)(Abramson, J.).

SUMMARY JUDGMENT/MORTGAGE FORECLOSURE - ***In a mortgage foreclosure action, summary judgment may be granted where the mortgagors admit that the mortgage is in default, that they have failed to pay interest on the mortgage, and that the recorded mortgage is in a specified amount.***

Beal Bank v. PIDC Financing Corporation, August Term 2001, No. 02522 (Sheppard, J.) (September 9, 2002 - 17 pages)

SUMMARY JUDGMENT/NANTY GLO- ***Since plaintiff failed to allege facts sufficient to make out a prima facie case of fraud and intentional misrepresentation, summary judgment is appropriate even though the moving party has only set forth the pleadings and depositions of his witnesses in support thereof.***

Marks v. E. Hopkins Co., Inc. et. al., June Term 2003 No. 2618 (August 19, 2004 – 4 pages) (Jones, J.).

SUMMARY JUDGMENT - ORAL TESTIMONY - ***Summary judgment may not be granted where the moving party relies exclusively upon oral testimony, through affidavits or depositions, to establish the absence of a genuine issue of material fact, except where the testimony offered in support of summary judgment constitutes an adverse admission of a non-moving party.***

Calbar, Inc. v. Andrews Sprinkler Co., October Term 2002, No. 0846 (Sheppard, J.) (August 29, 2003).

SUMMARY JUDGMENT - PA. CONTRACTOR AND SUBCONTRACTOR PAYMENT ACT- ***The Pennsylvania Contractor and Subcontractor Payment Act only applies to real property located within the Commonwealth of Pennsylvania.***

Kleinknecht Electric Company v. Jeffrey M. Brown Associates, Inc. et. al., September Term 2003 No. 4997 (April 10, 2006) (Bernstein, J.).

SUMMARY JUDGMENT/REAL ESTATE LICENSING AND REGISTRATION ACT/EXCLUSIVE AGENCY AGREEMENT- ***Where the defendant entered into an exclusive agency agreement with broker for a period of one year, the broker procured the tenant during the term of the agency agreement and subsequently the tenant purchases the property in question, the broker is entitled to a commission regardless of when the sale occurred since the agreement specifically directed the payment of same.***

Situs Properties, Inc. v. Peter Roberts Enterprises, June Term 2003 No. 2119 (January 26, 2005)(Jones, J.).

SUMMARY JUDGMENT/ RES JUDICATA- ***The doctrine of res judicata provides that a final judgment on the merits by a court of competent jurisdiction will bar any future suit between the parties in connection with the same cause of action that either was raised or could have been raised in the prior proceeding.***

- Application of the doctrine of res judicata requires the concurrence of four conditions between the present and the prior action: (1) identity of the thing sued upon; (2) identity of the cause of action; (3) identity of parties or their privies; and (4) identity of the quality or capacity of the parties suing or being sued.

- Where the underlying events giving rise to the legal claims in the actions are identical, where the same contracts are at issue, where the parties seek to determine whether the parties breached the respective contracts, where the parties seek the same monetary compensation, where the actions share the same witnesses, documents and facts, the doctrine of res judiciata

applies.

> **Hart Reconstruction Corp. v. Century General Construction & Contracting et. al., October Term 2007 No. 1975 (January 23, 2009 – 7 pages) (New, J.).**

SUMMARY JUDGMENT/RES JUDICATA- ***The fact that a plaintiff alleges a different legal theory in one case as opposed to an earlier action does not give rise to a different cause of action.***

- A prior court's finding that a claim was untimely advanced and rejected does not preclude the application of res judicata. The claim presented has already been decided and are not open to reexamination by the court.

> **Still v. Regulus, 0501-0136 (October 30, 2006 – 8 pages)(Bernstein, J.).**

SUMMARY JUDGMENT—*RESPONDEAT SUPERIOR* ***The owner of a money depot used by banks to store excess cash is liable under respondeat superior to a bailor who entrusted its cash to a party acting as an agent of the owner.***

> **First Penn Bank, Inc. v. AT Systems Atlantic, Inc. and Wachovia Bank, N.A. September Term, 2005, No. 3084 (May 29, 2007 – 5 pages), (Bernstein, J.)**

SUMMARY JUDGMENT/SCOPE OF DEFENSE/ NUMBER OF OCCURRENCES- ***"Occurrence" is determined by the cause or causes of the resulting injury. Thus, the inquiry used to determine the number of occurrences is whether "there is but one proximate, uninterrupted, and continuing cause which resulted in all of the injuries and damage."***

- Where the insureds' activities which triggered the underlying claims arose from the construction of furnaces at different sites, at different times and for varying lengths of time, the claims for each separate construction site or premise are considered to be a separate, single occurrence under the applicable policy.

SUMMARY JUDGMENT/SHAREHOLDER INSPECTION OF DOCUMENTS- ***A shareholder of a corporation who instituted suit pursuant to 15 Pa. C.S. § 1508 (B) to inspect the corporate records has stated a proper purpose for such inspection when he seeks to determine the value of his shares.***

> **Marks v. Hopkins, June Term 2003 No. 3618 (July 21, 2004 – 6 pages)(Jones, J.).**

SUMMARY JUDGMENT – STANDARD - ***Summary judgment is granted when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact. The moving party has the***

burden of proving the non-existence of any genuine issue of fact. The non-moving party must demonstrate that there is a genuine issue for trial and may not rest on averments in its pleadings. The trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.

Harleysville Mutual Insurance Co. v. Erie Ins. Exchange, October Term 2006, No. 2028 (October 7, 2008) (New, J., 8 pages)

SUMMARY JUDGMENT – STANDARD - ***Summary judgment is granted when the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits demonstrate that there exists no genuine issue of material fact. The moving party has the burden of proving the non-existence of any genuine issue of fact. The non-moving party must demonstrate that there is a genuine issue for trial and may not rest on averments in its pleadings. The trial court must resolve all doubts against the moving party and examine the record in a light most favorable to the non-moving party. Summary judgment may only be granted in cases where it is clear and free from doubt that the moving party is entitled to judgment as a matter of law.***

Guarantee Title & Trust Co. v. Security Search & Abstract Co., May Term 2007, No. 1345 (August 4, 2008) (Bernstein, J., 7 pages)

SUMMARY JUDGMENT – STANDARD - ***After the relevant pleadings are closed, but within such time as to not to unreasonably delay trial, any party may move for summary judgment in whole or in part as a matter of law (1) whenever there is no genuine issue of any material fact as to a necessary element of the cause of action or defense which could be established by additional discovery or expert report, or (2) if, after the completion of discovery relevant to the motion, including the production of expert reports, an adverse party who will bear the burden of proof at trial has failed to produce evidence of facts essential to the cause of action or defense which in a jury trial would require the issues to be submitted to a jury.***

- Summary judgment should be granted only where the moving party demonstrates that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law.

Harleysville Mutual Insurance Co. v. Rite Aid Corporation, et al., February Term 2007, No. 3801 c/w October Term 2007, No. 3816 (July 9,2008) (Sheppard, J., 8 pages)

SUMMARY JUDGMENT/STANDARD – ***In order for a motion for summary judgment to be granted the moving party has the burden of proving to the Court that there is no genuine issue as to any material fact. Further, the Court must view the record in the most favorable light for the non-moving party and only when the facts are so clear that reasonable minds cannot differ, may a trial court properly enter summary judgment. The conclusion that no genuine issue of a material fact is present must be supported by pleadings, depositions, answers to interrogatories, admissions on file, and affidavits.***

BURDEN - Because there was a dispute between the parties concerning the terms of the agreement, the amount of the payment, and the date on which the payment amount was due, movant had not met its burden of proving that there were no genuine issues of material fact.

Diamond-Huntbach Construction Corporation v. Lovett, Inc., October Term 2004, No. 2186 (Abramson, J.) (November 28, 2005 - 6 pages).

SUMMARY JUDGMENT/STATUTE OF LIMITATIONS/BOND- ***Where the parties contractually agree to modify the statute of limitations to a shorter period than that provided by the applicable statute of limitations, the agreement between the parties is valid and enforceable provided it is not manifestly unreasonable.***

Motion for Summary Judgment/ Statute of Limitations/ Transfer of Erroneously Filed Matters- ***Where a plaintiff erroneously files a complaint in federal court within the applicable statute of limitations but the complaint is dismissed for lack of jurisdiction by the federal court, plaintiff may effect a transfer of the action to the state court by complying with the provisions set forth in 42 Pa. C.S. A. § 5103 (b) and the state court will treat the matter as if originally filed in state court.***

MOTION FOR SUMMARY JUDGMENT/ STATUTE OF LIMITATIONS/ TRANSFER OF ERRONEOUSLY FILED MATTERS– ***Where a plaintiff failed to comply with the requirements of 42 Pa. C.S. A. § 5103 (b), promptly file a certified transcript of the final judgment of the federal court and a certified transcript of the pleadings from the federal action, and filed a new action in state court, summary judgment was granted since the action did not relate back to the old action and was time barred.***

Falcone, Inc. v. The Insurance Company of The State of Pennsylvania, June Term 2004 No. 3157 (May 23, 2005 – 11 pages) (Jones, J.).

SUMMARY JUDGMENT/STATUTE OF LIMITATIONS/DISCOVERY RULE- ***In an accountant malpractice action, the discovery rule does not apply to toll the statute of limitations where the audit notice and the subsequent delinquent notices should have prompted plaintiffs to***

conduct some independent inquiry or investigation to ascertain whether the audit was complete.

SUMMARY JUDGMENT/STATUTE OF LIMITATIONS/ESTOPPEL– ***In an accountant malpractice action, defendants are not estopped from raising the statute of limitations as bar to plaintiffs' claims since plaintiffs failed to produce clear, precise and convincing evidence that of affirmative, independent and continuous acts by defendants to divert plaintiffs attention that the City audit was complete.***

> **IEJ Corporation and Ilyas M. Shah, a/k/a Alberto DelBello v. Irving Laserow, CPA and Bassman, Laserow, Sternberg & Buckman, P.C. a/k/a Bassman, Laserow & Co., March Term 2004 No. 1128 (October 25, 2005)(Sheppard, J.).**
> **Appeal of Order of October 25, 2005 Superior Court Docket No 3208 EDA 2005 (Sheppard, J.) (Superior Court Opinion 1/10/06 – 11 pages).**

SUMMARY JUDGMENT/STATUTE OF LIMITATIONS– ***Defendants delay in filing a counterclaim due to a pleading dispute arising from the original complaint does not toll the statute of limitations for purposes of filing a counterclaim.***

> **United Electric Company, LP d/b/a Magic Aire v. Allstates Mechanical Ltd, d/b/a Allstates Construction Group and RLI Insurance Company, October Term No. 1555 (June 17, 2004 – 3 Opinions) (J. Jones).**

SUMMARY JUDGMENT/STATUTE OF LIMITATIONS– **Defendants delay in filing a counterclaim due to a pleading dispute arising from the original complaint does not toll the statute of limitations for purposes of filing a counterclaim.**

SUMMARY JUDGMENT/UNJUST ENRICHMENT– ***Although the City of Philadelphia has a Federal Constitutional Duty to ensure that the needed medical care is in fact provided to pretrial detainees, the Constitution does not dictate how the cost of that care should be allocated between the City and the provider.***

> **Temple University Hospital, Inc. v. City of Philadelphia, March Term 2003 No. 1794 (January 3, 2006 – 7 pages)(Jones, J.).**

SUMMARY JUDGMENT/TORTIOUS INTERFERENCE/CONTRACT - ***Contractor's Claim for Tortious Interference with Contract Against Building Consultant to Surety Is Dismissed Where Consultant Was Justified to Assist Surety by Apprising It of the Status of the Construction Project and Where the Contract at Issue Had Terminated Before Defendant Became Involved with the Project***

> **San Lucas Construction Co. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(October 11, 2001 - 10 pages)**

SUMMARY JUDGMENT/UCC/STATUTE OF FRAUDS- ***Where it is undisputed that the defendant accepted and received the goods delivered by plaintiff, the UCC statute of frauds defense does not apply since acceptance and receipt of goods is an exception to the statute of frauds defense.***

> **Di Giorgio Corporation v. Dis Food Corporation, et. al., May Term 2004 No. 3202 (May 25, 2005 – 8 pages) (Jones, J.).**

SUMMARY JUDGMENT/TORTIOUS INTERFERENCE- ***When the evidence discloses only that defendant breached his contracts with plaintiff and that as an incidental consequence thereof plaintiff's business relationships with third parties have been affected, an action lies in contract only.***

> **Star Bakery, et. al. v. Preit Services, December Term 2006 No. 2556 (September 29, 2008 – 6 pages) (Bernstein, J.).**

SUMMARY JUDGMENT/WAIVER- ***Where the plaintiff possessed a contractual right to convert one defendant to another defendants agreement, plaintiff waived its right to do so when its course of performance from the date one of the defendants was acquired to the date the contracts were terminated was in contravention of the agreement.***

- Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.

> **AmerisourceBergen v. CuraScript, et. al., July Term 2006 No. 2272 (August 28, 2007 – 7 pages)(Abramson, J.).**

SUMMARY JUDGMENT/WAIVER OF DEFENSE COSTS- ***The issuance of a reservation of rights letter by an insurer to an insured as well as a perceived conflict of interest does not constitute a breach of contract justifying a rejection of a proffered defense by the insurer.***

> **Bedwell et. al. v. D. Allen Brothers et. al., November Term No. 1328 (December 6, 2006)(Abramson, J.**

SUMMARY JUDGMENT - ***Summary judgment may be granted in favor of a defendant where all parties are involved in prior lawsuits regarding the ownership of a property, where the issue of which party owned the property was essential to the prior lawsuits, the parties were identical, and the prior lawsuits ended in determinations that the defendant was the sole owner of the property.***

> **Nguyen, et al. v. Quach, November Term 2004 No. 3568**

(Abramson, J.) (June 6, 2007 – 7 pages).

SUMMARY JUDGMENT - ***Since both parties rely upon affidavits to support their positions regarding whether money is due from defendant to plaintiff under the parties' agreement, this ~~the court cannot rule on that~~ issue is not susceptible to~~at~~ summary judgment under the rule stated in Nanty-Glo.***

Koken v. Commonwealth Professional Group, Inc., April Term, 2004, No. 05968 (February 9, 2006) (Sheppard, J. 8 pages).
~~as redundant of its breach of contract claim.~~

SUMMARY JUDGMENT - ***In refusing to address the facts and documents relied upon by plaintiff in the numbered paragraphs of its motion, defendant has failed to identify one or more issues of fact arising from evidence of record controverting the facts and documents referenced in the motion. Therefore, those facts and documents are deemed admitted and summary judgment may properly be entered against defendant with respect to them.***

The Pyrites Company, Inc. v. Century Indemnity Company, January Term, 2003, No. 04514 (August 30, 2005) (Sheppard, J., 5 pages).

SUMMARY JUDGMENT – *Merely stating that there are material issues in dispute and citing to various attached exhibits does not automatically create a barrier to the granting of summary judgment if the evidence cited is without substance.*

BDGP, Inc., et al. v. Independent Mortgage Co., et al., January Term 1999,No. 0812 (Cohen, J.)(March 31, 2004 - 12 pages).

SUMMARY JUDGMENT - ***Summary Judgment May Not Be Granted Where There Are Material Issues of Fact Concerning Agent's Authority To Sign Disputed Copier Lease***

Copelco Capital, Inc. v. Point Breeze Performing Arts Center, September 2000, No. 1269 (Herron, J.)(July 12, 2001 - 4 pages)

SUMMARY JUDGMENT - ***Summary Judgment May Not Be Granted as to Corporation's Defamation Claim Based on Statements in a Series of Research Reports and/or Press Releases Concerning the Development of an Anti-viral Drug Because the Sixteen Statements at Issue Are Arguably Either Assertions of Fact or Opinions Which Can Reasonably Be Construed as Implying Undisclosed Facts that May Have a Derogatory Meaning***

Hemispherx Biopharma, Inc. v. Asensio, July 2000, No. 3970(Herron, J.)(September 6, 2001 - 17 pages)

SUMMARY JUDGMENT - *Summary Judgment Is Denied in Declaratory Judgment Action Where Deposition Testimony Creates Genuine Issues of Material Fact Concerning Whether the Nuisance and Incidents Alleged in the Insured's Complaint Occurred During the Policy Period*

Diamond State Insurance Co. v. NUFAB Corp., April 2000, No. 395 (Herron, J.)(October 7, 2001 - 4 pages)

SUMMARY JUDGMENT - *Disputed Issues of Fact Preclude Summary Judgment on Claim for Management Fees*

RRR Management Co., Inc. v. Basciano et al., January 2001, No. 4039 (Sheppard, J.)(March 4, 2002 - 21 pages)

SUMMARY JUDGMENT - *Summary Judgment Is Granted When Plaintiff/Purchaser of an Electrical Contracting Company Fails to Present Facts In Addition to the Averrals in the Complaint for Claims of Fraud, Breach of Fiduciary Duty and Breach of Contract*

DeStefano & Associates v. Roy Cohen et al., June 2000, No. 2775 (Herron, J.)(May 23, 2002 - 11 pages)

SUMMARY JUDGMENT - *Defendant's motion for summary judgment on plaintiffs' claims of breach of contract, breach of covenant of good faith and fair dealing and unjust enrichment relating to defendant's cancellation of plaintiffs' stock options was denied because it was not clear as a matter of law that the cancellation was justified by the pertinent stock option plan documents.*

Dearlove v. Genzyme Transgenics Corporation, November Term 2001, No. 01031 (Sheppard, J.) (July 9, 2003 - 20 pages)

SUMMARY JUDGMENT

Synnestvedt & Lechner v. Green Machine Corp., *et al.* January Term, 2006, No. 0208 c/w January Term, 2006, No. 0763, (Bernstein, J.) (March 9, 2007 – 7 pages)

APPLICATION FOR SUPERSEDEAS – *Upon appellants' application for a supersedeas stay of the trial court's order pending appeal, the court denied the application for failure to demonstrate the criteria enunciated by the Pennsylvania Supreme Court in Pennsylvania Public Utility Commission v. Process Gas Consumers Group, 502 Pa. 545, 467 A.2d 805 (1983).*

Gregg v. Independence Blue Cross, December Term 2000, No. 3482 c/w
Good v Independence Blue Cross, December Term 2002, No. 0005;

Pennsylvania Orthopaedic Society v. Independence Blue Cross, December Term 2002, No. 0002 (Sheppard, Jr., J.) (April 30, 2004 – 2 pages)

SURETY - *Surety's Motion for Judgment on the Pleadings is Granted Because as a Matter of Law Exculpatory Clauses in Indemnity Agreement Absolve It from Liability for Any Conduct Short of Deliberate and Willful Malfeasance - Indemnity Agreement Authorized Surety to Take Control of the Construction Work and Contract Proceeds Where Plaintiff/General Contractor Was in Default of its Construction Contract or Failed to Pay Sub-contractors*

San Lucas Construction Co., Inc. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(March 14, 2001 - 17 pages)

SURETY - Where Guaranty By Its Express Terms Reveals that It is a Surety and Not a Special Guaranty, An Assignee May Sue the Individual Guarantors Pursuant to It - A Special Guaranty, in contrast, Is a Guaranty Available Only to the Particular Person to Whom It Is Offered

Harbour Hospital Services, Inc. v. GEM Laundry, July 2000, No. 4830 & August 2000, No. 207 (Sheppard, J.)(July 18, 2001 - 27 pages)

SURPLUS LINES LAW - *Under the Surplus Lines Law, if insurance is placed with an ineligible insurer everyone involved in the placement may be found liable if a claim is not paid. If insurance is placed with an eligible insurer, only the producing broker and the surplus lines licensee may be liable if they failed to comply with the various requirements of the Surplus Lines Law.*

Under the Surplus Lines Law, a nonadmitted insurer becomes generally eligible if it satisfies the requirements of Section 1605. Only after satisfying the additional criteria of Section 1604 may a policy be procured from an otherwise eligible nonadmitted insurer in any particular case.

$.99 Stores, Inc. v. KDN Lanchester Corp., July Term 2005, No. 0728 (July 30, 2007 – 7 pages)(Sheppard, J.)

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TENDER OFFER - *Petition to Enjoin Tender Offer Is Denied Where Plaintiff Does Not Meet Burden of Proof that the Private Placement Memorandum Contained Materially False, Deceptive Disclosures or that the Offer Was Coercive*

> **Wurtzel v. Park Towne Place Assocs. Ltd. Partnership, June 2001, NO. 3511 (Herron, J.)(January 11, 2002)**

TERMINATION OF BROKER

> **Mar-Dru, Inc. v. Hutamaki Food Services, Inc., May Term, 2005, No. 1476 (December 1, 2010 – 5 pages) (New, J.)**

TERMINATION EXCLUSIVE RIGHT TO SELL/ COMMISSION– *A Realtor is not entitled to commissions for the sale of realty which occurred after the expiration of the one year term.*

> **Harry H. Higgins Realtor, Inc. v. Philadelphia Housing Corp., December Term 2001, No. 004106 (December 22, 2003) (Jones).**

THIRD PARTY BENEFICIARY - *If defendant's obligation to pay plaintiff had not been based on third party's obligation to pay plaintiff, plaintiff would have failed the third party beneficiary test and would not have been permitted to assert a claim under the contract between defendant and third party.*

> **Ramos/Carson/DePaul v. Phillies, January Term, 2005, No. 02703 (November 24, 2008) (New, J., 8 pages).**

THIRD-PARTY BENEFICIARIES - *A party becomes a third party beneficiary only where both parties to the contract express an intention to benefit the third party in the contract itself, unless, the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties, and the performance satisfies an obligation of the promisee to pay money to the beneficiary or the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.*

- Under Pennsylvania law, a third party beneficiary's rights and limitations in a contract are the same as those of the original contracting parties.

> **Tower Investments, Inc., et al. v. Rawle & Henderson, LLP, et al., May Term, 2007, No. 3291 (March 3, 2008) (Bernstein, J., 9 pages)**

THIRD PARTY BENEFICIARY - *In order to satisfy third party*

beneficiary test, the alleged beneficiary must prove that recognition of a right to performance in it is appropriate to effectuate the intention of the parties and either that the promisee owed the alleged beneficiary money, which does not appear to be the case, or that the circumstances indicate that the promisee intended to give the alleged beneficiary the benefit of the promisor's waiver of the indemnification provisions.

Orianna Assoc. LLC v. Transamerica Occidental Life Ins. Cos., August Term, 2003, No. 02250 (May 29, 2007- 15 pages) (Sheppard, J.)

THIRD PARTY BENEFICIARY - ***In order to have standing to bring claims as third party beneficiaries of the Condominium's insurance policy, plaintiff unit owners must establish that they meet the requirements of the Restatement of Contracts. Under the Restatement, a promise in a contract between promisor and promissee creates a duty in promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty.***

- Unless otherwise agreed between the Condominium and its insurer, each plaintiff unit owner is an intended beneficiary if recognition of a right to performance in the plaintiffs is appropriate to effectuate the intention of the Condominium and its insurer and either

(a) the performance of the promise will satisfy an obligation of the Condominium to pay money to the plaintiff unit owners; or

(b) the circumstances indicate that the Condominium intends to give the plaintiff unit owners the benefit of the promised performance.

- In order to bring a third party beneficiary claim, the plaintiff unit owners must establish that recognition of a right to performance in them is appropriate to effectuate the intention of the Condominium and the insurer in entering into the insurance policy. The plaintiff unit owners have not proffered any evidence to show that the Condominium and the insurer intended to give the plaintiff unit owners the right to demand payment of insurance proceeds directly from the insurer. Instead, it appears that the parties' intentions when entering into the insurance policy were to satisfy the statutory obligations imposed upon the Condominium under the Uniform Condominium Act.

Hebrew School Condo Assoc. v. DiStefano, May Term, 2004, No. 01886 (December 11, 2006) (Abramson, J., 6 pages).

THIRD PARTY BENEFICIARY - ***Subcontractor claimed to be third party beneficiary of payment provisions of contract between owner and general contractor. Subcontractor satisfied first requirement for recognition of beneficiary status because the promissor/owner's performance of the promise to pay will satisfy an obligation of the promissee/general contractor to pay money to the subcontractor.***

– Subcontractor claimed to be third party beneficiary of payment provisions of contract between owner and general contractor. Subcontractor was unable to satisfy the second requirement for recognition of beneficiary status because subcontractor offered no evidence that recognition of a right to performance in the subcontractor was appropriate to effectuate the intention of the owner and the general contractor. Instead, the evidence showed that the owner's and the general contractor's intention was to avoid the payment of certain taxes by structuring the payment provisions as they did.

– Subcontractor claimed to be third party beneficiary of payment provisions of contract between owner and general contractor. However, in that contract the owner and general contractor specifically disclaimed any intention to benefit third parties by stating that: "Nothing in the Contract Documents shall be deemed to give any third party any claim or right of action against the [owner or general contractor.]"

Carson/DePaul/Ramos v. The Phillies, L.P., January Term, 2005, No. 02703 (October 17, 2006) (Abramson, J., 4 pages).

THIRD PARTY BENEFICIARY – ***Court found that plaintiff was not third party beneficiary of lease where lease contained no express intention by contracting parties to benefit plaintiff and where circumstances at bar were no "so compelling" as to warrant the imposition of third party beneficiary status upon plaintiff.***

Bancol Marketing Corp. v. Penn Warehousing & Distribution, Inc. et al., November Term 2004, No. 1257 (Jones, J.)(August 31, 2005 – 4 pages).

THIRD PARTY BENEFICIARY – ***A sub-subcontractor is not a third party beneficiary of a contract between the general contractor and another subcontractor, unless such third party beneficiary relationship is specifically contemplated between both parties to the contract at the time of the contract's creation and appears in the contract.***

– A sub-subcontractor could not recover as a third party beneficiary where the subcontract in question contemplated neither the sub-subcontractor by name nor by the type of work that the sub-subcontractor performed.

Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).

THIRD-PARTY BENEFICIARY—*Under Massachusetts law, a party must establish that it is the beneficiary of a particular contractual provision, not the contract as a whole, to seek relief pursuant to the provision.*

A.T. Chadwick Co. v. PFI Construction Corp. and Process Facilities, Inc., September Term 2003, No. 1998 (Jones, J.) July 30, 2004 – 10 pages).

THIRD PARTY BENEFICIARY -Insured indemnitee was not a third-party beneficiary of either the insurance contract and/or the risk assessment contract where indemnitee was not mentioned in either contract and there was no other evidence that insured and insurer had intended indemnitee to be third-party beneficiary of contracts.

Acme-Hardesty Co. et al. v. Wenger et al., February Term 2001, No.1799 (Sheppard, J.) (January 31, 2003).

THIRD PARTY: BREACH. ***A party becomes a third party beneficiary to a contract only when the contracting parties express an intention to benefit the third party, unless the circumstances are so compelling that recognition of the beneficiary's right is appropriate to effectuate the intention of the parties and the performance satisfies an obligation of the promisee to pay money to the beneficiary, or the circumstances indicate that the promisee intends to give the benefit of the promised performance to the beneficiary.***

JOA Case Management Solutions v. School District of Philadelphia and Sedgwick Claims Management Services, Inc., April Term 2005, No. 2290 (March 13, 2006 – 4 pages) (Abramson, J.)

TIMELINESS/POST-TRIAL MOTION - ***Motion for New Trial Based on Newly Discovered Evidence Is Dismissed as Untimely Where Plaintiff Failed to Raise This Issue Either With the Appellate Courts or the Trial Court During the Pendency of the Appeal***

Rohm & Haas Co. v. Continental Casualty Co., November 1991, No. 3449 (Herron, J.)(February 26, 2002 - 17 pages)

TIME IS OF THE ESSENCE – ***Time may be made of the essence of the performance of a contract for the sale of realty by an express provision to that effect, and such a provision is valid and enforceable.***

Louise Hillier v. M.I.S.I, LP, et al., January 2004, No. 0513, (Abramson, J.) (January 27, 2006 - 8 pages).

TORTIOUS INFRINGMENT OF RIGHT OF PUBLICITY/SUMMARY JUDGMENT- ***Since plaintiff consented to the use of her name, indicia of identity or likeness her claim for tortious infringement of right of publicity must be dismissed.***

Welker v. Mychak et. al., September Term 2003 No. 4221 (November 22, 2004((Cohen, J.).

TORTIOUS INTERFERENCE –

Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)

TORTIOUS INTERFERENCE WITH CONTRACT; PRELIMINARY INJUNCTION; RESTRICTIVE COVENANT

Jassin M. Jouria, M.D. v. Education Commission for Foreign Medical Graduates, August Term, 2009, No. 04291 (June 23, 2010) (Sheppard, J., 7 pages)

TORTIOUS INTERFERENCE - *Under the gist of the action doctrine, a party may not recast a breach of contract claim into a claim based on tortious interference with business relations where the dispositive facts in the tort-based claim are the same as those in the breach of contract claim.*

Penn's Market I, Penn's Market II, Kurt L. McLaughlin and Herbert J. Farber Associates, Inc., v. Harleysville Insurance Company, Harleysville Mutual Insurance Company and Harleysville Group, Inc., February Term 2005, No. 0557 (May 3, 2006- 13 pages) (Abramson, J.)

TORTIOUS INTERFERENCE WITH CONTRACT – *The elements of a cause of action for interference with contractual relations are as follows: (1) the existence of a contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct.*

- Pennsylvania law permits an intentional interference action based on both existing and prospective contractual relationships.

- A prospective contractual relation is something less than a contractual right, something more than a mere hope, although the term admittedly has an evasive quality, eluding precise definition. Although a prospective contractual relation is not based on a certain *contractual* ***right, it must be grounded in the reasonable likelihood or*** *probability* ***of an enforceable contractual relationship. A plaintiff may recover for intentional interference with a prospective contractual relation when, but for the wrongful acts of the defendants, it is reasonably probable that a contract would have been entered. This is an objective standard which must be supplied by adequate proof.***

Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).

TORTIOUS INTERFERENCE WITH CONTRACT – *PRIVILEGE TO COMPETE* - *Cable television provider did not tortuously interfere with satellite television provider's exclusive contract with landlord or satellite television provider's existing or prospective contracts with tenants where cable television provider engaged in installation activities mandated by the Tenants' Right to Cable Television Act, as well as other normal competitive activities.*

Viking Communications, Inc. v. SAS-1600 Arch Street, LLP, March Term, 2003, No. 02975 (May 3, 2006) (Bernstein, J., 8 pages).

TORTIOUS INTERFERENCE/BREACH OF CONTRACT – *Plaintiffs, in this consolidated matter, claimed that blanket e-mails that were sent to merchants who were processing their credit card sales with plaintiff Global Payments Direct f/k/a National Data Payments Systems, Inc., by Global and plaintiff EVS Holding Company, Inc., d/b/a GoEMerchant.com ("GoE"), constituted tortious interference with the contracts between Global and these merchants and GoE and these merchants.*

The court held that the blanket e-mail sent by GoE that attempted to persuade the merchants to switch to a different credit card processor was tortious interference because GoE, the defending party to this claim, did not have a "legally protected interest" with regard to the contracts between these merchants and Global, despite GoE's assertion that the communication was privileged because GoE was communicating with merchants that had contracted with Global because these merchants had initially signed on with GoE and then contracted separately with Global for their credit card processing.
GoE's claim for tortious interference was denied as Global had a contractually-based right to terminate merchants and GoE did not produce sufficient evidence at trial proving an intent on the part of the Global to harm GoE. Sufficient evidence was presented at trial indicating that Global terminated certain merchants in an attempt to stop mounting losses.
The court held that Global breached its contract with GoE by not paying residuals owed to GoE prior to GoE's termination of the contract between itself and Global. The court, in coming to this conclusion, was not persuaded that a set off provision, absent in the contract, was a term "essential to a determination of [the parties'] rights and duties" as there were alternatives mechanisms by which Global could have collected monies due to losses that were determined to be the result of "errors or negligence" on the part of GoE.
The court denied Global's breach of contract claim because Global failed to perform the duties set out in the contract between

Global and GoE.

> **Global Payments Direct f/k/a National Data Payment Systems, *et al.* v. EVS Holding Company, Inc. d/b/a GoEMerchant.com., *et al.* C.C.P. Numbers 0208-1373 consolidated with 0205-3449 Sheppard, Jr., J.) (August 29, 2005 – 51 pages).**

TORTIOUS INTERFERENCE - *In determining whether an actor's conduct in intentionally interfering with a contract or a prospective contractual relation of another is improper or not, consideration is given to the following factors: (a) the nature of the actor's conduct; (b) the actor's motive; (c) the interests of the other with which the actor's conduct interferes; (d) the interests sought to be advanced by the actor; (e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other; (f) the proximity or remoteness of the actor's conduct to the interference; and (g) the relations between the parties. Such factual issues cannot be resolved at the preliminary objection stage.*

> **Polydyne v. City of Philadelphia, February Term, 2001, No. 3678 (June 7, 2005) (Abramson, J., 6 pages).**

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS—*To prove a tortious interference claim, there must be an existing contract.*

> **Pollack v. Skinsmart Dermatology and Aesthetic Center P.C., September Term 2002, No. 2167 (Cohen, J.)(October 22, 2004 – 10 pages).**

TORTIOUS INTERFERENCE WITH CONTRACT – *When the allegations and evidence only disclose that defendant breached his contracts with plaintiff and that, as an incidental consequence therefore, plaintiff's business relationships with third parties have been affected, the action lies only in contract for defendant's breaches and the consequential damages, if any, may be adjudicated only in that action.*

> **BDGP, Inc., et al. v. Independent Mortgage Co., et al., January Term 1999,No. 0812 (Cohen, J.)(March 31, 2004 - 12 pages).**

TORTIOUS INTERFERENCE – NEW YORK LAW - *Under New York law, tortious interference with a contract requires: 1) the existence of a valid contract between the plaintiff and a third party; 2) defendant's knowledge of that contract; 3) defendant's intentional procurement of the third-party's breach of the contract without justification; 4) actual breach of the contract; and 5) damages resulting therefrom.*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater**

Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)

TORTIOUS INTERFERENCE – PRIVILEGE TO COMPETE - ***One's privilege to engage in business and to compete with others implies a privilege to induce third persons to do their business with him rather than with his competitors. So long as it is not alleged to have done anything illegal or otherwise improper, tenant's competitor was privileged to negotiate with tenant's landlord for lease.***

Rick's Original Philly Steaks, Inc. v. Reading Terminal Market Corp., July Term, 2007, No. 03822 (February 20, 2008) (Bernstein, J., 10 pages).

TORTIOUS INTERFERENCE - ***The elements of a cause of action for intentional interference with existing or prospective contractual relations are: (1) the existence of a contractual, or prospective contractual relation between the complainant and a third party; (2) purposeful action on the part of the defendant, specifically intended to harm the existing relation, or to prevent a prospective relation from occurring; (3) the absence of privilege or justification on the part of the defendant; and (4) the occasioning of actual legal damage as a result of the defendant's conduct. Plaintiffs failed to present any evidence of any "purposeful action" taken by any defendant to interfere with the proposed merger.***

- Where the evidence presented at trial demonstrated that defendants' interests were at all times entirely aligned with one of the negotiating parties, that defendants had legitimate business reasons, and contractual or fiduciary obligations, to express their honest opinion regarding the proposed merger, and there was no evidence that any of them actually interfered with the proposed merger, nor that they counseled the negotiating party to terminate the negotiations, nor even that they expressed any opinion to the negotiating party that the negotiations should cease, there was no showing of purposeful action or tortious interference with the proposed merger

– **CORPORATE AGENTS -** ***Even if evidence of purposeful action had been presented, the defendants' agency relationship with the negotiating party rendered their honest advice and counsel privileged and justified. Essential to a right of recovery for tortious interference is the existence of a contractual relationship between the plaintiff and a "third person" other than the defendant. By definition, this tort necessarily involves three parties. The tortfeasor is one who intentionally and improperly interferes with a contract between the plaintiff and a third person. A corporation is a creature of legal fiction which can "act" only through its officers, directors and other agents.***

Acts of a corporate agent which are performed within the scope of his or her authority are binding upon the corporate principal. Where a plaintiff has entered into a contract with a corporation, and that contract is terminated by a corporate agent who has acted within the scope of his or her authority, the corporation and its agent are considered one so that there is no third party against whom a claim for contractual interference will lie.

> **Pennsylvania Business Bank v. Franklin Career Services, LLC, May Term, 2002, No. 02507 (January 14, 2008) (Bernstein, J., 11 pages)**

TORTIOUS INTERFERENCE - ***In order to make out a claim for such intentional interference with contract, plaintiff must point to evidence of record that defendant intentionally and improperly interfered with the performance of a contract between plaintiff and a third party by inducing or otherwise causing the third party not to perform the contract, as well as pecuniary loss resulting to plaintiffs from the failure of the third party to perform the contract.***

> **Romy v. Burke, May Term, 2002, No. 01236 (January 20, 2005) (Sheppard, J., 7 pages)**

TORTIOUS INTERFERENCE – ***Party claiming tortious interference with prospective contractual relations must set forth at least one prospective relationship with which opposing party allegedly interfered, as well as describe the means of such interference in more detail.***

> **Philadelphia Regional Port Authority v. Carusone Construction Company, July Term, 2003, No. 02701 (April 14, 2004) (Sheppard, J.)**

TORTIOUS INTERFERENCE -- ***Motion for Reconsideration of Summary Judgment is Denied Where it is Alleged that a Parent Company Interfered with its Subsidiary's Contract to Promote a Real Estate Investment Fund. Under New York law, Summary Judgment may be Granted Where a Defendant has a Legitimate Economic Interest in the Affairs of Another and Plaintiff fails to Provide Evidence that Defendant Acted with Malice or Employed Illegal Means to Interfere with Plaintiff's Contract.***

> **EGW Partners, L.P. v. Prudential Insurance Co. of America and Prudential Securities, Inc., March Term 2001, No. 0336 (Sheppard, Jr., J.) (March 28, 2003 - 7 pages).**

TORTIOUS INTERFERENCE - BURDEN OF PROOF - ***Plaintiff has burden of proving lack of privilege in connection with its claims for***

tortious interference with prospective and existing contracts.

Hydrair, Inc. v. National Environmental Balancing Bureau, February Term, 2000, No. 02846 (Cohen, J.) (July 17, 2003 - 12 pages).

TORTIOUS INTERFERENCE WITH CONTRACT; REVERSION; BREACH OF CONTRACT; BREACH OF DUTY OF GOOD FAITH; REFORMATION OF CONTRACT

Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (April 15, 2010) (Bernstein, J., 10 pages)

TORTIOUS INTERFERENCE/CONTRACT - Building Consultant for Surety Company Is Not Liable for Tortious Interference with Contract Where It Was Legally Justified to Assist Surety by Apprising It of the Status of Construction Project

San Lucas Construction Co., Inc. v. St. Paul Mercury Insurance Co., February 2000, No. 2190 (Sheppard, J.)(October 11, 2001)

TORTIOUS INTERFERENCE/CONTRACT- *Plaintiff* Lawyer Sets Forth Claim for Tortious Interference with Contractual Relations When He Alleges that Defendant Purposefully Acted to Hartm Plaintiff's Relationship with a Client Union Through Fraudulent Misrepresentations About his Professional Completence that Caused Him Damage

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

TORTIOUS INTERFERENCE/CONTRACT - *Contractor Sets Forth Viable Claim for Tortious Interference with Contractual Relations by Alleging that Sucontractor Falsely Misrepresented to Customers that the Contractor Over-billed for Services Performed*

Middletown Carpentry Inc. v. C. Arena & Co., Inc., June 2001, No.2698 (Sheppard, J.)(November 21, 2001 - 12 pages)

TORTIOUS INTERFERENCE WITH CONTRACT - *Plaintiff's claim for tortious interference with contract was sufficient where plaintiff alleged that defendants impaired collateral that was subject to security agreement between plaintiff and third party.*

Pennsylvania Business Bank v. Franklin Career Services, LLC et al., May 2002, No. 2507 (Cohen, J.) (December 31, 2002).

TORTIOUS INTERFERENCE WITH CONTRACT - - *an Employee Acting Within the Scope of His Employment Was Not Separately Liable in Tort for Causing His Employer's Breach of Contract.*
- - a Wholly Owned Corporation Was Not Separately Liable in Tort for Causing its Sole Controlling Shareholder's Breach of Contract.

Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (February 11,2003- 10 pages).
Werther et al. v. Rosen et al., May Term 2002, No. 001078 (Sheppard, J.) (April 2, 2002 - 11 pages) (Appeal to Superior Court; Docket No. 1009 EDA 2003).

TORTIOUS INTEFERENCE/CONTRACTUAL RELATIONS - *Plaintiff Landlord Fails to Set Forth Claim for Tortious Interference With Contractual Relations Where Complaint Against Defendant for Erecting a Fence on Adjacent Property Does Not Establish How Defendant Interfered with Plaintiff's Contractual Relationship with a Third Party*

Kali Dave, Ltd. V. CVS Corporation and Frank Facciolo, May 2001, No. 819 (Herron, J.)(November 6, 2001 - 6 pages)

TORTIOUS INTERFERENCE/CONTRACTUAL RELATIONS - *In Pennsylvania, partners are jointly liable for debts and obligations owed by the partnership. 15 Pa.C.S.A. § 8327. Thus, a partner cannot be regarded as a third party to a contract entered into by its partnership for purposes of a tortious interference claim.*

Vine Street Food Co., LLC v. Mini Mall West, Inc., et. al., December 2001, No. 03996 (Sheppard, J.)(November 12, 2002 - 5 pages)

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS - *The mere expression of an opinion by a City Councilman to the parties ultimately responsible for making the decision regarding the assignment of a city lease does not warrant liability for interference with contractual relations, absent evidence of impropriety by the Councilman.*

DeSimone, et al. v. Philadelphia Authority For Industrial Development, et al., November Term, 2001, No. 00207 (Cohen, J.)(June 10, 2003 - 13 pages).

TORTIOUS INTERFERENCE WITH CONTRACT – NECESSITY OF PLEADING CONTRACT – *In order to make out a claim for tortious interference*

with prospective contract, plaintiff must allege facts showing that there was a reasonable probability that it would have entered into a specific contract with a third party and, but for the actions of defendant, plaintiff would have done so. Vague allegations of injury to "business relations," reputation, or good will is not sufficient damage upon which to base a claim for interference with contract.

WRH Mortgage, Inc. v. Corecare Systems, Inc., et al., May Term, 2003, No. 01453 (Cohen, J.) (September 4, 2003)

TORTIOUS INTERFERENCE – FAILURE TO STATE A CLAIM - ***Where it is not alleged that defendant was successful in his interference, no pecuniary loss is claimed by plaintiff, and the tortious interference count is merely duplicative of the plaintiff's defamation count, the tortious interference count must be dismissed as premature and redundant.***

Carescience v. Panto, September Term 2002, No. 04583 (Jones, J.) (September 23, 2003).

TORTIOUS INTERFERENCE WITH CONTRACT - LITIGATION AS INTERFERENCE -*Where a claim for tortious interference is predicated upon identical facts to those which would support a malicious use of process claim, the tortious interference claim must be dismissed as unripe if the comparable Dragonetti claim is not yet viable due to the pendency of the underlying action.*

WRH Mortgage, Inc. v. Corecare Systems, Inc., et al., May Term, 2003, No. 01453 (Cohen, J.) (September 4, 2003)

TORTIOUS INTERFERENCE – PLEADING - ***In order to assert a claim for tortious interference with existing or prospective contractual relations, plaintiff must identify the particular contracts with which defendant allegedly interfered.***

Raskin, Liss & Franciosi, P.C. v. Franciosi, December Term, 2004, No. 02364 (April 6, 2005) (Abramson, J., 4 pages).

TORTIOUS INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS - ***It Is Not Necessary to Identify Specific Prospective Contracts to Set Forth A Claim for Tortious Interference with Prospective Relations Where Complaint Alleges that Defendant's Conduct Barred Plaintiff From Doing Business in Its Territory - Punitive Damages May Be Claimed for Tortious Interference With Contract***

Hydrair, Inc. v. National Environmental Balancing Bureau, February 2000, No. 2846 (Herron, J.)(April 23, 2001 - 19 pages)

TORTIOUS INTERFERENCE WITH CONTRACTUAL RELATIONS - *Landlord was*

entitled under terms of the commercial lease to refuse to consent to, and thereby interfere with, assignment of lease from tenant to third party.

421 Willow Corp. et al. v. Callowhill Center Assoc. et al., MAY TERM, 2001, Nos. 1848 and 1851 (Cohen, J.) (May 23, 2003- 14 pages)

TORTIOUS INTERFERENCE/CORPORATE OPPORTUNITY - *Claim for Tortious Interference with Corporate Opportunity is Stricken Where Complaint Fails to Allege the Defendants Took Purposeful Action Specifically Intended to Harm Plaintiffs' Business Relations with Prospective Third Parties*

Harbour Hospital Services v. GEM Laundry, July 2000, No. 4830 & August 2000, No. 207 (Sheppard, J.)(July 18, 2001 - 27 pages)

TORTIOUS INTERFERENCE - PRIVILEGE - *Where trade association expressly reserved the right to decertify its members, and where there was no evidence that trade association abused its own procedures or acted from any improper motive in decertifying plaintiff member, trade association was privileged to do so and was not liable for tortious interference in doing so.*

Hydrair, Inc. v. National Environmental Balancing Bureau, February Term, 2000, No. 02846 (Cohen, J.) (July 17, 2003 - 12 pages).

TRADEMARKS – *Under 15 U.S.C.S. §1125, the Federal Lanham Act, it is forbidden for any person in connection with any goods or services used in commerce to make a false or misleading representation regarding the nature, quality or characteristics of his or another persons goods or services, or commercial activities.*

Warfield Philadelphia LP v. Trustees of the University of Pennsylvania, *et al*. March Term, 2007, No. 0154 (May 28, 2009) (Sheppard, Jr., J., 9 pages)

TRADE SECRETS—*Confidentiality of patient information makes a collection of such information a trade secret for purposes of misappropriation.*

Pollack v. Skinsmart Dermatology and Aesthetic Center P.C., September Term 2002, No. 2167 (Cohen, J.) October 22, 2004 – 10 pages).

TRADE SECRETS/CUSTOMER & PRICE LISTS - *Petitioner Failed to Establish that Its Price and Customer Lists Are Particular or*

Unique to Its Business Or That It Invested Time, Effort or Resources in Developing These Lists As To Deserve Protection as a Trade Secret or Confidential Information

Olympic Paper Co. v. Dubin Paper Co. & Brian Reddy, October 2000, No. 4384 (Sheppard, J.)(December 29, 2000 - 23 pages)

TRADE SECRETS/NOTE PURCHASERS - ***Plaintiff's Allegations that Defendant Bank's Disclosure of Confidential Information to Prospective Note Purchasers Constitutes Misappropriation of Trade Secrets Do Not Present a Viable Claim Where the Relevant Agreement Allows the Disclosure of Such Information to Prospective Note Purchasers***

Philadelphia Plaza - Phase II v. Bank of American National Trust and Savings Association, May 2002, No. 332 (Herron, J.)(May 30, 2002 - 15 pages)

TRADE SECRETS/RAILCAR INTERIORS - ***Trade Secrets Must Be the Particular Secrets of the Complaining Employer, Not General Secrets of the Trade in Which He is Engaged - Trade Secrets Are Protected Under the Common Law of Trade Secrets - Confidentiality Agreements in Employment Contracts Do Not Create Or Broaden the Protection, but Are Evidence of the Confidential Nature of the Data Involved - Trade Secrets Are an Issue of Fact and the Plaintiff Has the Burden of Establishing Trade Secret Status - Plaintiff Failed to Establish that the Design of its Products Are Trade Secrets Where These Products Are in Public View and Susceptible to Reverse-Engineering - The Design of Plaintiff's Spare Parts Is Not a Trade Secret Because A Third Party, by definition, Initially Designed and Produced an Original of the Part that Requires Replacement - The Kitting Process Is Not a Trade Secret Where Plaintiff Presented No Evidence of Secret Procedures and Where the Kitting Process Is Known in the Transit and Automobile Industries - Customer Lists Are at the Periphery of Trade Secret Law and Are Not Entitled to Protection if the Customer Identities Would Be Generally Known to all Firms in the Same Business as the Employer - Identities of Railcar Parts Suppliers Are Not Trade Secrets When Available through the Thomas Registry and Easily Obtainable in the Industry - Plaintiff Company Failed to Offer Concrete Evidence About Its Business that Might Constitute a Trade Secret Such as Profit Margins, Business Plans or Outstanding Bids***

United Products Corp. v. Transtech Manufacturing, Inc., August 2000, No. 4051 (Sheppard, J.)(November 9, 2000 - 40 pages)

TRADE NAMES/UNFAIR COMPETITION - ***Plaintiff Failed to Establish Clear Right to Relief on Unfair Competition Common Law Claim Where No Proof of Was Presented that Confusion Was Likely Between Its Trade Name and Defendant's Trade Name - Likelihood of Confusion with Geographic Terms Is Determined by Whether That Term Has Acquired a Secondary Meaning***

Medical Resources Inc.v. Bruce Miller and Northeast Open MRI, Inc., November 2000, No. 2242 (Sheppard, J.)(January 29, 2001 - 14 pages)

TRADE SECRETS - *Under Either Pennsylvania or Washington law, an Employer Is Entitled to Protect Its Trade Secrets - Employer Has Burden of Establishing Existence of Trade Secrets - Trade Secrets Must Be Particular Secrets Not Information Generally Known in the Industry or Ascertainable Through Proper Means - Employer Failed to Meet Burden of Proving that Worker Salaries, Invoicing Practices or Worker Identities Are Trade Secrets*

Labor Ready, Inc. v. Trojan Labor and Sally Czeponis, December 2000, No. 3264 (Sheppard, J.)(January 25, 2001 -15 pages)

TRADE SECRETS - *Names of Key Referring Physicians on a Computer Designated Imaging Center Information System Are Not Trade Secrets in the Field of Diagnostic Imaging Centers that Provide Magnetic Resonance Imaging Absent Proof of Use of Specific Referring Physician Statistics or Insurance Information -*

Medical Resources v. Bruce Miller and Northeast Open MRI, November 2000, No. 2242 (Sheppard, J.)(January 29, 2001 - 14 pages)

TRADE SECRETS - *Plaintiff Cannot Sustain Causes of Action For Misappropriation of Trade Secret Since He Alleges that He Voluntarily Disclosed His Idea for the Benefit of his Employer/defendant and He is Still an Employee of the Defendant*

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)

TRANSFER OF STATE LAW CLAIMS FROM FEDERAL COURT—*Stringent precedent requires parties seeking to transfer state law claims dismissed in federal court on jurisdictional grounds to comply with the promptness and material requirements of 42 Pa. C.S. §5103.*

Northwestern Human Services, Inc., et al. v. McKeever, et al., October Term 2004, No. 1936 (Abramson, J.) (September 12, 2005 – 8 pages).

TRANSFER FROM FEDERAL COURT - *Transfer of Case from Federal Court Was Sufficiently Prompt and in Compliance with 42 Pa.C.S.A. § 5103 Where Plaintiff Filed Certified Copies of the Federal Docket But Not of the Pleadings Filed in Federal Court at the time of the Transfer but Subsequently Filed Copies of these Pleadings in State Court Less Than 3 Months After the Federal Dismissal*

Hemispherx Biopharma, Inc. v. Manuel Asensio, et al., July

2000, No. 3970 (Sheppard, J.)(February 14, 2001 - 29 pages)

TRIAL/QUIET TITLE/LACHES- ***Laches bars relief when the complaining party is guilty of a lack of due diligence in failing to promptly institute the action to the prejudice of another. Mere passage of time is insufficient to warrant the application of the doctrine. It must appear that the opposing party has been injured or has been materially prejudiced because of the delay.***

- Laches will not be imputed to one in peaceable possession of land for delay in resorting to a court of equity to establish his right to legal title. The possession is notice to all of the possessor's equitable rights, and he need only assert them when he may find occasion to do so. Peaceable possession of real estate is such as is acquiesced in by all other persons including rival claimant and not disturbed by a forcible attempt at ouster nor by adverse suits to recover the possession of the estate.

-The doctrine of laches does not apply to a Homeowners Association who have had possession of the parking lot from the moment the declaration was executed, whose possession was constant and continuous and was notice to all of its legal right to ownership.

- Attempts by the Homeowners' Association to acquire legal title to the parking lot did not disturb the Homeowners' Association peaceable possession of the parking lots since their possession was never threatened by anyone holding an adverse interest or by a rival claimant.

Hawthorne Homeowners Association, Inc. v. Hawthorne Community Council, Inc., et. al., February Term 2008 No. 3237 (September 24, 2009 – 12 pages)(New, J.).

TRIAL/QUIET TITLE/BONA FIDE PURCHASER – ***The purchaser of the parking lot properties prior to the sheriff sale was not a bona fide purchaser of value since he purchased the properties with actual and constructive knowledge of the Homeowners' Association's interest in the properties.***

Hawthorne Homeowners Association, Inc. v. Hawthorne Community Council, Inc., et. al., February Term 2008 No. 3237 (September 24, 2009 – 12 pages)(New, J.).

TRIAL OPINION – UNJUST ENRICHMENT –

Barbara Howarth v. Stephen Hill, *et al.*, February Term, 2010, No. 2089 (March 22, 2011 – 4 pages) (Bernstein, J.)

TRIAL/WRONGFUL USE OF CIVIL PROCESS/ATTORNEY/ FAILURE TO FOLLOW CLIENT'S INSTRUCTION/ IMPROPER PURPOSE-

Morello v. Anastasio, July Term 2009 No. 1230 (April 6, 2011 – 8 pages)(Bernstein, J.)

- U -

UCC – CONVERSION CLAIM - Under Section 3-420, an action for conversion of an instrument may not be brought by the issuer or drawer of the instrument. Plaintiff, as the issuer/drawer of the check was barred from bringing its conversion claim against the depositary bank.

> **Shamis v. Citizens Bank, Legg Mason Walker Wood, Inc., Fox Int'l Relations Inc., Michael Lisitsa & Michael Kogan, December Term, 2004, No. 973 (July 10, 2007)(Sheppard J. 7 pages).**

UCC/NEGOTIABLE INSTRUMENTS – STATUTE OF LIMITATIONS - *In an action against a bank for negligence under Sections 3404 and 3405 of the UCC, check issuer's cause of action arose, and 3 year limitations period began to run, on each of the checks at issue when the bank accepted each check for deposit.*

> **Nestle USA, Inc v. Wachovia Bank, N.A., August Term, 2005, No. 01026 (November 5, 2007) (Sheppard, J., 4 pages)**

UCC/NEGOTIABLE INSTRUMENTS – STATUTE OF LIMITATIONS - DISCOVERY RULE - *The discovery rule does not apply to claims asserted under Article 3 of the UCC, including negligence claims brought under Sections 3404 and 3405.*

> **Nestle USA, Inc v. Wachovia Bank, N.A., August Term, 2005, No. 01026 (November 5, 2007) (Sheppard, J., 4 pages)**

UCC/NEGOTIABLE INSTRUMENTS – STATUTE OF LIMITATIONS – FRAUDULENT CONCEALMENT - *The 3 year statute of limitations applicable to negligence claims asserted under Sections 3404 and 3405 of the UCC can be tolled due to the defendant's fraudulent concealment of its wrongful acts.*

> **Nestle USA, Inc v. Wachovia Bank, N.A., August Term, 2005, No. 01026 (November 5, 2007) (Sheppard, J., 4 pages)**

UCC/WRONGFUL DISHONOR – *Where a dishonored check was drawn on the account of a small business entity, such as a closely held corporation, the wrongful dishonor can result in some actionable damage to persons who control the corporation even if the account is in the entity's name. In such instances, evidence may be presented to show that the person injured bore such a close relationship to the corporation that he or she should be permitted to bring an action for wrongful dishonor under UCC § 4-402. Such evidence can include the failure to issue stock, undercapitalization of the business or corporation, the person's guarantee of the business' obligations, or the fact that the bank, in some way, treated the person and the business as a*

single entity.

Jana, et al. v. Wachovia, N.A., et al., January Term 2005, No. 2800 (December 15, 2006 – 10 pages (Sheppard,J.)

UNAUTHORIZED PRACTICE OF LAW - *Since defendant is an attorney admitted in at least one jurisdiction, he cannot be guilty of unauthorized practice of law.*

- Plaintiffs purchased defendant's legal services for commercial purposes, so they did not have standing to bring a claim for unauthorized practice of law under the Unfair Trade Practices and Consumer Protection Law.

Harris v. Philadelphia Waterfront Partners, L.P., June Term, 2007, No. 02576 (Jan. 26, 2009) (Bernstein, J., 4 pages).

UNCLEAN HANDS; LACK OF ADEQUATE CONSIDERATION; RESTRICTIVE COVENANT; PRELIMINARY INJUNCTION -

Tri State Paper, Inc. v. Prestige Packaging, Inc., November 2009 No. 4078, (December 30, 2009 – 5 pages) (Bernstein, J.).

UNCLEAN HANDS - *Allegation that Preliminary Injunction Requested by Tenants Should Not Be Issued Because of Their Unclean Hands in Installing a Kitchenette on the Premises Without a License to do So Is Without Merit - To Show Unclean Hands, Defendant Must Show that Tenants Acted Unfairly or With Fraud, Deceit or Iniquity in the Matter In Which They Seek Relief*

Elfman v. Berman, February 2001, No. 2080 (Herron, J.)(October 2, 2001 - 9 pages)

UNCLEAN HANDS - *Defense of Unclean Hands Not Applicable Where Alleged Misconduct of Plaintiff or Its Assignor, Even If Proven to Rise to the Level of Fraud or Deceit, Do Not Relate Directly to the Debt Owed By Defendants - Alleged Misconduct Also Does Not Impact on Satisfaction of Assignor's Obligations to Owner.*

Resource Properties XLIV v. PAID et al., November 1999, No. 1265 and Resource Properties XLIV v. Growth Properties, Ltd., et al., March 2000, No. 3750 (Sheppard, J.)(August 2, 2002- 23 pages)

UNCLAIMED PROPERTY LAW - *Commonwealth Failed to State Cognizable Claim Under the Unclaimed Property Law, 72 P.S. §§ 1301.1 et seq. Because the Tangible Property That Is Claimed Must Be Inside the Commonwealth and Here Northern Illinois District Court Holds Jurisdiction Over the Relevant Funds*

Commonwealth of Pennsylvania v. BASF Corporation, April 2000,

NO. 3127 (Herron, J.)(March 15, 2001 - 34 pages)

UNFAIR COMPETITION: Where a defendant moved for summary judgment on the issue of unfair competition, and there was no indication that the defendant had caused unnecessary confusion by leaving a former employer to work for a current employer, summary judgment could be granted on the issue of unfair competition.

Fibonacci Group, Inc. v. Finkelstein & Partners, LLP, et al., January Term 2005, No. 1399 (Abramson, J.)(January 31, 2007 – 12 pages).

UNFAIR TRADE PRACTICES –*A private right of action under the UTPCPL is available for "…a person who purchases or leases goods or services primarily for personal, family or household purposes…" 73 Pa.C.S.A. § 201-9.2. The proposed Medical Provider Class members were not purchasers of the insurance policies in question and therefore lack standing under the UTPCPL.*

Silverman, et al. v. Rutgers Insurance Co., June Term 2003, No. 0363 (Jones, J.)(March 31, 2004 - 11 pages).

UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW (UTPCPL) – STANDING - *The limited circumstances under which a private person may bring a claim under the UTPCPL are specifically set forth in Section 9.2 (a), which, in relevant part, provides that: "Any person who leases or purchases goods or services primarily for personal, family or household purposes and thereby suffers any ascertainable loss of money or property, real or personal, as a result of the use or employment by any person of a method, act or practice declared unlawful by section 3 of this act, may bring a private action to recover actual damages or one hundred dollars ($100), whichever is greater."*

- The UTPCPL unambiguously permits only persons who have purchased or leased goods or services primarily for personal, family or household purposes to sue.

Erie Ins. Exchange v. Steven Sze, et al., January Term 2008, No. 4100 (August 4, 2008) (Abramson, J., 8 pages)

UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW - *Complaint Set Forth Viable Claim Under UTPCPL by Alleging that Defendant/Drug Manufacturer Engaged in Deceptive Campaign of Suppressing Its Own Research that There Were Bioequivalent Drugs to its Product Synthroid*

Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW - *Plaintiffs' Allegations That Defendants Improperly Limited Coverage for*

Chiropractic Services By Allowing Non-qualified Personnel to Make Treatment Decisions, Relying on Improper Guidelines to Make Medical Necessity Determinations, Failing to Disclose Those Guidelines and Misrepresenting the Terms and Conditions of Their Health Care Plans Are Sufficient To Allege Misfeasance and Make Out a Cause of Action Under the UTPCPL - Nonfeasance Alone Is Not Sufficient To Set Forth a Claim Under the UTPCPL

Pennsylvania Chiropractic Association v. Independence Blue Cross, August 2000, No. 2705 (Herron, J.)(July 16, 2001 - 36 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW - *Plaintiffs Have Set Forth All Elements of Fraud as Required by the Catch-All Provision of the UTPCPL by Pleading, inter alia, that Defendants Engaged in Fraudulent Conduct and Plaintiffs Detrimentally Relied on Defendant's Misrepresentations as to Closing Costs*

Koch v. First Union Corp., May 2001, No. 549 (Herron, J.)(January 10, 2002 - 26 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW - *Allegation that Plaintiffs Sustained Out-of-Pocket Expenses in Replacing Defendants' Defective Tire Was an "Ascertainable Loss" Sufficient to Sustain a Claim Under the UTPCPL - Allegation that Defendants Actively and Intentionally Concealed the Defects of the Tires Allows Plaintiffs to Pursue UTPCPL Claim - Attorney Fees May Be Awarded for Successful UTPCPL Claim*

Grant v. Bridgestone Firestone, September 2000, No. 3668 (Herron, J.)(January 10, 2001 - 13 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW - *Class Action Claim for Breach of Express Warranty in the Marketing of Propulsid Is Legally Insufficient Where Complaint Fails to Allege that Plaintiff Ever Heard or Read Any of the Allegedly Defective Warranties*

Boyd v. Johnson & Johnson, January 2001, No. 965 (Herron, J.)(January 22, 2002 - 7 pages)

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION ACT - *Under Pennsylvania Law a Manufacturer Has a Duty to Inform Ordinary Consumers of Allegedly Known Safety Defects in their Automobiles. The Economic Loss Doctrine Does Not Bar an Unfair Trade Practice and Consumer Protection Act ("UTPCPL") Claim for Deceptive Practices Where the Plaintiff's Only Remedy Lies in the UTPCPL. Federal Preemption Bars Use of the UTPCPL to Prosecute Fraudulent Statements Made to a Federal Agency.*

Zwiercan, et al. v. General Motors Corp., et al., June Term 1999, No. 3235 (Cohen, J.) (September 11, 2002) (16 pages)

PA. UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW- ***Plaintiffs/consumers claim against drug manufacturer for violations of the Pa. Unfair Trade Practices and Consumer Protection Law are barred by the "learned intermediary doctrine."***

Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/ASCERTAINABLE LOSS - Plaintiff Sets Forth the Requisite "Ascertainable Loss" for a UTPCPL Claim Where By Alleging that She Must Incur Costs to Remedy the Defective Fron Seats in Her Automobile Because They Fail to Provide Adequate Protection from the Impact of Rear-End Collisions

Zwiercan v. General Motors, Inc., June 1999, No. 3235 (Herron, J.)(May 22, 2002 - 8 pages)

UNFAIR TRADE PRACTICES AND CONSUMER PROTECTION LAW -- ***Renewed Motion for Summary Judgment is Denied Where an Automobile Manufacturer Allegedly Failed to Disclose Known Material Safety Defects that are Likely to Cause Serious Bodily Harm or Death. A Manufacturer Has a Duty to Disclose Known Safety Defects that are Likely to Cause Serious Bodily Harm. Under the UTPCPL Plaintiff is Entitled to a Presumption of Reliance Upon Establishing that a Manufacturer Intentionally Withheld Disclosure of a Material Potentially Life Threatening Safety Defect from Ordinary Consumers.***

(Cross Reference Zwiercan v. General Motors, June 1999, No. 3235 (Cohen, J.)(September 11, 2002 - 16 pages).

Zwiercan, *et al.* v. General Motors Corp., *et al.*, June Term, 1999, No. 3235 (Cohen, J.) (March 20, 2003 - 6 pages).

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/CATCH-ALL PROVISION/CONSUMER LEASING ACT - ***Plaintiff Who Alleges That the Early Termination Formula in Defendant's Standard Motor Vehcile Lease Was Unfair and Deceptive Fails to Set Forth Viable Claim Under the UTPCPL Because the Early Termination Formula Is Clearly Set Forth in the Lease and Cannot Be Construed as Deceptive - An***

Alleged Violation of the Federal Consumer Leasing Act Does Not Constitute a Per Se Violation of the UTPCPL Where Neither Statute Provides that a Violation of the CLA Is a Per Se Violation of the UTPCPL

Abrams v. Toyota Motor Credit Corp., April 2001, No. 503 (December 5, 2001 - 23 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/CLASS CERTIFICATION - ***Class Action by Homeowners Against Loan Broker Who Charged a Mortgage Broker Fee Cannot Be Certified Because Plaintiffs' Claims Do Not Present Predominating Common Questions of Fact and Law - A Private Class Action Plaintiff Asserting a Claim Under Section 9.2 of the UTPCPLL Must Show a Causal Connection Between the Unlawful Practice and Plaintiffs' Loss - Proving that an Agency Relationship Existed Between the Class Members and Defendant Loan Borkers Raises Individual Factual Questions***

Floyd v. Clearfield, February 2001, No. 2276 (Herron, J.)(October 8, 2001 - 15 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/DAMAGES - ***To Support a UTPCPL Claim, Plaintiff Must Allege Ascertainable Losses While a Claim for Breach of Warranty Requires Manifest Injury***

Solarz v. DaimlerChrysler Corp., April 2001, No. 2033 (Herron, J.)(March 13, 2002 - 26 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/DECEPTIVE CONDUCT - ***Because a Claim Under the Catch-All Provision of the UTPCPL as Amended in 1996 Can be Premised on Fraudulent or Deceptive Conduct, Class Action Plaintiffs Do Not Have to Allege Each Element of Common Law Fraud If they Are Asserting Deceptive Conduct - Plaintiffs Must Still Show that They Were Damaged by Defendant's Deceptive Conduct - Plaintiffs Must Show Reliance If They Are Alleging Fraudulent Misrepresentation, Fraud, or False Advertising under the UTPCPL***

Weiler v. Smithkline Beecham Corp., March 2001, No. 2422 (Herron, J.)(October 8, 2001 - 14 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/FALSE ADVERTISING/WRITTEN WARRANTIES/INTERNET ADS/FRAUD - ***Class Action Complaint Set Forth Valid Claim for False Advertising Under UTPCPL by Alleging that Defendant Falsely Advertised that Its Product Cold-Eeze Had Beneficial Health Effects Against Colds, Pneumonia and Allergies and that There Was a Scientific Basis for Claiming These Benefits - These Allegations Would Support Inference That Ads Made a Difference in Some Consumer's Decision to Buy Cold-Eeze and Increased Both Demand and Price for the Product - Plaintiffs Do Not***

Have to Allege that They Personally Saw or Relied on the Advertisement - Television and Radio Ads Do Not Constitute Writings for the Purposes of a Breach of Written Warranty Claim Under the UTPCPL - Internet Ads Fall Within Definition of a Writing Under the UTPCPL as Words and Letters in a Visible Medium that Can Be the Basis for a Claim of Breach of Written Warranty - Complaint Failed to Set Forth Claim of Fraud Under UTPCPL Because It Did Not Allege All Elements of Common Law Fraud, in particular, Justifiable Reliance

Tesauro v. The Quigley Corporation, August 2000, No. 1011 (Herron, J.)(April 9, 2001 - 12 pages)

UNFAIR TRADE PRACTICES & CONSUMER PROTECTION LAW/PRIVATE ACTION - *Where Plaintiffs in Class Action Allege General Damages But Fail to Allege That They Personally Suffered Damages Due to Defendant's Violation of UTPCPL, Demmurrer Is Sustained*

Grant v. Bridgestone Firestone, September 2000,No. 3668 (Herron,J.)(June 12, 2001 - 10 pages)

UNFAIR TRADE PRACTICE & CONSUMER PROTECTION LAW/SUMMARY JUDGMENT/CLASS ACTION - *Summary Judgment Is Entered Against Plaintiff Who Claimed that Defendant Breached the UTPCPL Where Plaintiff Fails to Show That She Suffered a Loss of Money or Property as a Result of Saturn's Representation that her 1996 Saturn Had Been Treated with Scotchgard or Another Stain Resistant Chemical - Plaintiff's Failure to Present Evidence that the Scotchgard Representations Formed a Basis of the Bargain for Her 1996 Saturn Purchase Is Another Basis for Granting Summary Judgment to Preclude Her Claim*

Green v. Saturn Corp., January 2000, No. 685 (Herron,J.)(October 24, 2001 - 16 pages)

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST - *A security interest "attaches" to the collateral of a debtor when it becomes enforceable against the debtor. Typically, this requires that the debtor own the collateral in which it is conveying an interest, that the creditor make a loan, and that the debtor sign a security agreement. Once the security interest has "attached," it is effective between the debtor and the creditor. In order to compete effectively with third parties, the secured interest must then be "perfected."*

USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST – FINANCING STATEMENT - *The general rule is that a financing statement must be filed in order to perfect all security interests.*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

UNIFORM COMMERCIAL CODE – ARTICLE 9 – CONFLICTING SECURITY INTERESTS - *When there is more than one perfected security interest, the security interests rank according to priority in time of filing or perfection. "Filing" refers to the filing of an effective financing statement, whereas "perfection" refers to the acquisition of a perfected security interest, i.e., one that has attached and as to which any required perfection step has been taken. A perfected security interest has priority over a conflicting unperfected security interest.*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

UNIFORM COMMERCIAL CODE – ARTICLE 9 – KNOWLEDGE OF ANOTHER'S SECURITY INTEREST - *A secured creditor's knowledge of another's security interest in the same collateral is irrelevant. Whichever secured party first perfects its security interest takes priority. It makes no difference whether that secured party knows of the other security interest at the time it perfects its own.*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST – AUTOMATIC PERFECTION - *Although the general rule is that a financing statement must be filed in order to perfect a security interest, there are certain exceptions in which perfection is automatic. One such exception is that perfection is automatic upon attachment for the sale of a "payment intangible."*

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008)**

(Sheppard, J., 15 pages)

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST – PAYMENT INTANGIBLE – ***A "payment intangible" under Article 9 of the U.C.C. is considered a type of "general intangible." A "general intangible" means "any personal property, including things in action, other than accounts, chattel paper, commercial tort claims, deposit accounts, documents, goods, instruments, investment property, letter-of-credit rights, letters of credit, money, and oil, gas, or other minerals before extraction. The term includes payment intangibles and software." The "general intangible" category is the residual category of personal property that is not included in the other defined types of collateral. A "payment intangible" is defined as "a general intangible under which the account debtor's principal obligation is a monetary obligation." Perfection is automatic for the sale of a "payment intangible."***

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST – ACCOUNT - ***The term "account" is defined under Article 9 of the U.C.C. as "a right to payment of a monetary obligation, whether or not earned by performance,…for services rendered or to be rendered." If "accounts" are sold, a financing statement must be filed to perfect the buyer's interest in them.***

> **USClaims, Inc. and USClaims of America, Inc. v. Michael Flomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)**

UNIFORM COMMERCIAL CODE – ARTICLE 9 – SECURITY INTEREST – AUTOMATIC PERFECTION – SECTION 9-309(2) - ***Section 9-309(2) of Article 9 provides a second exception to the general rule that a financing statement must be filed in order to perfect a security interest. That section provides that "an assignment of accounts or payment intangibles which does not by itself or in conjunction with other assignments to the same assignee transfer a significant part of the assignor's outstanding accounts or payment intangibles" perfects automatically when it attaches. The purpose of this particular exception is to save from ex post facto invalidation casual or isolated assignments – assignments which no one would think of filing. Any person who regularly takes assignments of any debtor's accounts or payment intangibles should file.***

- The appropriate tests to be applied in interpreting U.C.C. § 9-309(2) are the "percentage test" and the "casual and isolated transaction test." The casual and isolated transaction test requires the Court to examine the circumstances surrounding the transaction, including the status of the assignee, to determine whether the assignment was, in fact, casual and isolated. The underlying rationale behind this test is that it would not be unreasonable to require a secured creditor to file if he regularly takes assignments of a debtor's accounts, but it would be unreasonable if this was not a usual practice. In contrast, the percentage test focuses on the size of the assignment in relation to the size of the outstanding accounts or payment intangibles of the assignor. Both tests need to be reviewed in conjunction with all of the facts and circumstances involved in the relationship between the parties and the transactions in which they are engaged.

USClaims, Inc. and USClaims of America, Inc. v. Michael lomenhaft, Esq., Flomenhaft & Cannata, LLP, Stillwater Asset-Backed Fund, LP, the Oxbridge Group, LLC, and Brian Spira, September Term 2007, No. 2629 (May 14, 2008) (Sheppard, J., 15 pages)

UNIFORM TRADE SECRETS ACT/PREEMPTION—*To the extent a cause of action and its remedy are based upon the misappropriation of a trade secret, they are barred by the Uniform Trade Secrets Act.*

Firstrust Bank v. James Didio, et al., March Term 2005, No. 200 (Jones, J.) (July 27, 2005 – 7 pages).

THE UNFAIR INSURANCE PRACTICES ACT AND THE DEPARTMENT OF INSURANCE REGULATIONS – *can only be enforced by the State Insurance Commissioner and not by way of private action.*

Staples v. Assurance Company of America, October Term, 2003 No. 1088 (Sheppard, J., 4 pages) (June 14, 2004)

UNIFORM COMMERCIAL CODE – CONVERSION - *The law applicable to conversion of personal property applies to instruments. An instrument is also converted if it is taken by transfer, other than a negotiation, from a person not entitled to enforce the instrument or a bank makes or obtains payment with respect to the instrument for a person not entitled to enforce the instrument or receive payment.*

- Plaintiff claims that the checks were delivered to defendant, who was acting as agent for the plaintiff at the time, but who improperly deposited the checks in his own company's bank account. Therefore, plaintiff may assert a claim for conversion against the bank where that account is held.

Dowana v. Boykai, October Term, 2006, No. 01409 (July 18,

2007) (Bernstein, J., 6 pages).

UNIFORM COMMERCIAL CODE – NEGLIGENCE - ***Common law negligence claims are displaced by the provisions of the UCC concerning the wrongful payment of negotiable instruments. No cause of action exists for common law negligence that causes only economic loss.***

- Plaintiff has asserted a claim for comparative negligence under § 3404 of the UCC, where it alleges that defendant bank failed to exercise ordinary care in permitting the individual defendant to deposit checks that were made out to plaintiff into an account with a name different than plaintiff's.

- Plaintiff has asserted a claim for comparative negligence under § 3405 of the UCC, where it alleges that defendant bank failed to exercise ordinary care in permitting the individual defendant to deposit checks that were made payable to his employer, plaintiff, into account that did not belong to plaintiff.

Dowana v. Boykai, October Term, 2006, No. 01409 (July 18, 2007) (Bernstein, J., 6 pages).

UNIFORM COMMERCIAL CODE – WARRANTIES - ***Where defendant bank did not transfer checks to plaintiff, it cannot be liable to plaintiff for breach of transfer warranties. It is not liable for breach of presentment warranties either because plaintiff was not the drawee of the checks.***

Dowana v. Boykai, October Term, 2006, No. 01409 (July 18, 2007) (Bernstein, J., 6 pages).

UNIFORM COMMERCIAL CODE – SALES – ***Dealer with whom original purchaser entrusted vehicle could transfer good title to subsequent purchaser, even though dealer and/or original purchaser may have been involved in theft of vehicle.***

– SECURED TRANSACTIONS – ***Subsequent purchaser who purchased used vehicle from dealer took title subject to secured interest granted by original purchaser. Transfer from dealer to buyer in ordinary course of business did not extinguish existing security interest because dealer did not create that security interest.***

Walden v. Mercedes Benz Credit Corp., June Term, 2004, No. 4641 (April 27, 2005) (Sheppard, J., 5 pages)

UNIFORM COMMERCIAL CODE - Plaintiff Who Alleges That the Early Termination Formula in Defendant's Standard Motor Vehicle Lease Constitutes a Provision for Liquidated Damages That Is Unreasonable Does Not Set Forth a Viable Claim Under Section 2A-504 of the UCC Because this Section Only Applies Where the Lessor Withholds or Stops Delivery of the Leased Goods

Abrams v. Toyota Credit Corp., April 2001, No. 503 (December 5, 2001 -23 pages)

UNIFORM COMMERCIAL CODE - *Corporation's Claims Against Bank for Failure to Alert It to Embezzlement by Plaintiff's Agent Were Not Legally Insufficient by Virtue of Being Displaced by the UCC Where Bank Does Not Challenge the Viability of the Claim Under the UCC But Objects Only to the Plaintiff's Failure to Identify the Particular UCC Provision at Issue*

IRPC, Incorporated v. Hudson Bancorp, February 2001, No.474 (Sheppard, J.)(January 18, 2002 - 15 pages)

UNIFORM FIDUCIARIES ACT - *While it is true that the UFA shields depositary banks from liability in certain instances, the UFA does not relieve a bank from liability unless the fiduciary actually has authority to endorse the instrument at issue, and the bank has no actual knowledge that the fiduciary is breaching his duty.*

UNIFORM FIDUCIARIES ACT - *The UFA bars claims based upon negligence.*

Sine, et. al. v. PNC Bank, N.A., November Term, 2001 No. 03221 (Cohen, J.)(November 15, 2002 - 6 pages)

UNJUST ENRICHMENT –

Anthony Biddle Contractors, Inc. v. Preet Allied American Street, L.P., *et al.*, March Term, 2009, No. 0323 (September 22, 2010 – 5 pages) (Bernstein, J.)

UNJUST ENRICHMENT; SET-OFF; BREACH OF PARTICIPATION AGREEMENT; FORECLOSURE

LEM Funding XXXV, L.P. v. Sovereign Bank, September Term, 2009, No. 01296 (June 23, 1010) (Sheppard, J., 12 pages)

UNILATERAL CONTRACTS - *Retirement Benefit Plan in Partnership Agreement Should Be Analyzed Under Principles Applicable to Unilateral Contracts*

Abbott v. Schnader Harrison Segal & Lewis LLP, June 2000, No. 1825 (Herron, J.)(February 28, 2001 -26 pages)

UNJUST ENRICHMENT - *The elements of unjust enrichment include: benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.*

Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June

10, 2008) (Bernstein, J., 8 pages)

UNJUST ENRICHMENT AS ALTERNATIVE TO BREACH OF CONTRACT - *Although it is true that a plaintiff cannot recover on an unjust enrichment claim that is based upon a breach of a written contract, Pennsylvania Civil Procedure Rule 1020 allows a plaintiff to plead causes of action in the alternative. A plaintiff may properly plead causes of action for breach of contract and unjust enrichment in the same complaint.*

Villar Management, LLC v. Villa Development, LLC and Laurence Andrew Mester, October Term 2007, No. 1319 (June 10, 2008) (Bernstein, J., 8 pages)

UNJUST ENRICHMENT – *Where a written contract is produced, a plaintiff may still plead both breach of contract and unjust enrichment causes of action under Rule 1020 of the Pennsylvania Rules of Civil Procedure.*

Chapski and Lee v. The Moravian At Independence Square Condominium Assoc., et al, July Term 2007 No. 4086 (November 30, 2007 – 11 pages) (Sheppard, J.).

UNJUST ENRICHMENT – *Plaintiff failed to meet his burden of proof with respect to his unjust enrichment claim because he has failed to demonstrate that the value of his services exceeded sums he had already been paid by defendants.*

Williams v. Hopkins, et al., August Term 2005, No. 3953 (Bernstein, J.)(April 5, 2007 – 6 pages).

UNJUST ENRICHMENT—*In the construction context, a claim for unjust enrichment requires a demonstration that there was a direct contractual relationship between the subcontractor and the owner,that the owner misled the subcontractor, or that the owner request the subcontractor's performance.*

Limbach Company LLC, et al. v. City of Philadelphia, et al., March Term 2003, No. 2936 (Jones, J.) (June 29, 2005 – 15 pages).

UNJUST ENRICHMENT – *A sub-subcontractor whose construction costs have not been repaid may maintain claims against both the owner and the general manager of the construction site to avoid their unjust enrichment from retaining the benefits of the sub-subcontractor's work without such sub-subcontractor recouping its costs.*

Samuel Grossi & Sons, Inc., v. United States Fidelity & Guaranty Co., et al., September Term 2004, No. 3590 (Sheppard, J.)(June 27, 2005 – 18 pages).

UNJUST ENRICHMENT – PLEADING - ***A claim for unjust enrichment requires that plaintiff plead 1) benefits conferred on defendant by plaintiff, 2) appreciation of such benefits by defendant, and 3) acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. In this case, the alleged benefit conferred on defendant law firm was the improper use of plaintiff-attorney's name.***

> **Raskin, Liss & Franciosi, P.C. v. Franciosi, December Term, 2004, No. 02364 (April 6, 2005) (Abramson, J., 4 pages).**

UNJUST ENRICHMENT - ***A claim for unjust enrichment requires that plaintiff plead the following elements: benefits conferred on defendant by plaintiff, appreciation of such benefits by defendant, and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value. Where unjust enrichment is found, the law implies a contract, which requires that the defendant pay to plaintiff the value of the benefit conferred.***

> **Goldenberg v. Royal Petroleum Corp., September Term, 2003, No. 04168 (December 16, 2004) (Jones, J., 5 - pages)**

UNJUST ENRICHMENT - ***The issue of whether defendants was unjustly enriched cannot be decided on the basis of the pleadings alone. Instead, the parties must submit evidence as to whether defendants received more in premiums and commissions than it should have for less insurance than it promised to obtain, i.e., whether defendant would have been entitled to more, less, or the same amount if it had procured the promised insurance for plaintiff.***

> **Cutting Edge Sports, Inc. t/a Softball America v. Bene-Marc, Inc. v. North American Sports Federation and Northland Insurance Company, March Term 2003, No. 1835 –** ***CONTROL NO. 052277*** **(Cohen, J.) (9/28/04 – 4 pages)**

UNJUST ENRICHMENT—*Absent any factual importance, a doctor's ethical responsibilities to his or her patients does not impact the elements of an unjust enrichment claim.*

> **Pollack v. Skinsmart Dermatology and Aesthetic Center P.C., September Term 2002, No. 2167 (Cohen, J.)(October 22, 2004 – 10 pages).**

UNJUST ENRICHMENT - ***While plaintiff cannot ultimately recover on both theories of contract and unjust enrichment, plaintiff may plead unjust enrichment in the alternative along with a claim for***

breach of contract.

A claim for unjust enrichment requires that plaintiff plead the following elements: benefits conferred on defendant by plaintiff; appreciation of such benefits by defendant; and acceptance and retention of such benefits under such circumstances that it would be inequitable for defendant to retain the benefit without payment of value.

Robinson v. Berwind Financial LP, November Term, 2002, No. 00220 (January 12, 2004) (Jones, J.)

UNJUST ENRICHMENT - *Valid Claim for Unjust Enrichment Is Set Forth Where Complaint Alleges that Plaintiff Conferred Benefits on Defendant by Providing Medical Equipment and Services and Defendant Retained These Benefits Without Payment*

Apria Healthcare Inc. v. Tenet HealthSystem, Inc., February 2000, No. 289 (Herron, J.)(February 12, 2001 - 10 pages)

Tesauro v. The Quiqley Corporation, August 2000, No. 1011 (Herron, J.)(April 9, 2001 - 12 pages)(Complaint set forth claim for unjust enrichment by alleging that plaintiff bestowed the benefit of money on defendant for a product that was purported to be a health remedy but was not)

UNJUST ENRICHMENT - *Claim For Unjust Enrichment May Be Plead in the Alternative to a Breach of Contract Claim*

Commonwealth of Pennsylvania v. BASF Corporation, April 2000, No. 3127 (Herron, J.)(March 15, 2001 - 34 pages)

Babiarz v. Bell Atlantic-Pennsylvania, Inc., August 2000, No. 1863 (Herron, J.)(July 10, 2001 - 38 pages)(While plaintiff may plead alternative causes of action for breach of contract and unjust enrichment, he cannot recover on a claim for unjust enrichment if such claim is based on breach of written contract)

UNJUST ENRICHMENT - *Claims for Unjust Enrichment and, in the alternative, Breach of Contract May Be Set Forth in the Same Complaint - A Claim for Unjust Enrichment May Not Be Based on a Breach of a Writtin Contract - Claim of Unjust Enrichment Lacks Specificity Where It Fails to State When Written Contracts Were Not in Effect*

Corson v. IBC, December 2000, No. 2148 (Herron, J.)(June 15, 2001 - 10 pages)

Gregg v. IBC, December 2000, No. 3482 (Sheppard, J.)(June 14, 2001 - 20 pages)

UNJUST ENRICHMENT - *Special Damages Such as Those for Unjust Enrichment Must Be Set Forth with Specificity - Request for Damages*

Is Sufficiently Sufficient Where It Is Alleged that Information Necessary to Compute Damages is in Exclusive Control of Defendant

Goldstein v. Goldstein, January 2001, No. 3343 (Herron, J.)(June 14, 2001 - 12 pages)

UNJUST ENRICHMENT - *Claim for Unjust Enrichment Is Set Forth Where Complaint Alleges that Plaintiff Provided Defendant with Covers But Did Not Receive Payment for Them*

Thermacon Enviro Systems v. GMH Assocs., March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages)

UNJUST ENRICHMENT - *Claim for Unjust Enrichment May Be Alleged as an Alternative to Breach of Contract - Claim of Unjust Enrichment Is Sufficiently Specific Where It Allows Defendant to Frame a Defense and Is Not a Subterfuge*

PDP Enterprises, Inc. v. Northwestern Human Services, Inc., January 2001, No. 509 (Herron, J.)(August 31 , 2001 -10 pages)

UNJUST ENRICHMENT - *Claim for Unjust Enrichment Is Legally Insufficient Where Plaintiffs Fail to Allege that They Conferred a Benefit on the Defendant, the Defendant Appreciated the Benefit and the Defendant Retained the Benefit Under Circumstances that Would Make It Inequitable for the Defendant to Retain It Without Payment*

Phillips v. Selig, July 2000, No. 1550 (Sheppard, J.)(September 19, 2001 - 20 pages)

UNJUST ENRICHMENT - *Action for Unjust Enrichment Is Not Viable When the Claim Is Based on a Written Contract*

Babiarz v. Bell-Atlantic Pennsylvania, August 2000, No. 1863 (Herron, J.)(November 20, 2001 - 11 pages)

Abrams v. Toyota Motor Credit Corp., April 2001, No. 503 (December 5, 2001 - 23 pages)(lease)

UNJUST ENRICHMENT - *Claim for unjust enrichment is appropriate as an alternative theory in a breach of contract action, but was unnecessary in action where plaintiffs allege damages for torts committed against them by defendants.*

Romy et al. v. Burke et al., May Term 2002, No. 1236 (Sheppard, J.) (May 2, 2003- 14 pages).

UNJUST ENRICHMENT - *Borrowers were entitled to plead claim for unjust enrichment as an alternative to their breach of contract claim against Bank, but Borrowers could not ultimately recover on both theories.*

Nicholas A. Clemente, Esq. et al. v. Republic First Bank, December Term, 2002, No. 00802 (Jones, J.) (May 9, 2002)

UNJUST ENRICHMENT - ***Where landlord properly terminated commercial lease early due to tenant's breach, tenant was not entitled to reimbursement for value of the improvements it made which were retained by landlord.***

421 Willow Corp. et al. v. Callowhill Center Assoc. et al., MAY TERM, 2001, Nos. 1848 and 1851 (Cohen, J.) (May 23, 2003- 14 pages)

UNJUST ENRICHMENT- ***Allegations by plaintiff/consumers that a prescription drug is not safe and that the pharmaceutical company promoted the drug knowing it is not safe are insufficient to state a claim for unjust enrichment.***

Consolidated class actions: Albertson, et. al. v. Wyeth, Inc., August Term, 2002, No. 2944, Finnigan, et. al. v. Wyeth Inc., August Term 2002, No. 0007, and Everette v. Wyeth, Inc., December Term 2002, No. 0935 (Sheppard, J) (July 8, 2003- 24 pages).

UNJUST ENRICHMENT - ***Although plaintiff cannot ultimately recover under both theories of contract and unjust enrichment, plaintiff may plead unjust enrichment in the alternative to a claim for breach of contract.***

Street v. Siemens Medical Solutions Health Services Corp. et al., March Term, 2003, No. 0885 (Jones, J.) (July 8, 2003).

UNJUST ENRICHMENT/QUANTUM MERUIT - ***Claims for Unjust Enrichment and Quantum Meruit Are Viable Where Complaint Alleges that Defendants Benefitted from Plaintiff's Legal Services But Did Not Pay for Them***

Fineman & Bach, P.C. v. Wilfran Agricultural Industries, Inc., March 2001, No. 2121 (Herron, J.)(July 30, 2001 - 7 pages)

UNJUST ENRICHMENT/QUANTUM MERUIT - ***Archdiocese Set Forth Valid Claim for Unjust Enrichment When It Alleged that It Was Forced to Pay Another Contractor that Should Have Been Covered under Contract With Defendant and Defendant Benefited by the Money It Saved in Not Performing Under the Contract - While Causes of Action for Breach of Contract and Unjust Enrichment Can Be Set Forth in the Same Complaint, Plaintiffs Cannot Recover on a Claim for Unjust Enrichment if Such Claim Is Based on Breach of a Written Contract***

Honeywell International Inc. v. Archdiocese of Philadelphia,

May 2001, No. 2219 (Herron, J.)(October 24, 2001 - 7 pages)

UNJUST ENRICHMENT– ***Plaintiffs are not permitted to use the claim for unjust enrichment as a means to collect damages which are not permitted under Pennsylvania's anti trust law.***

Stutzle, et. al. v. Rhone –Poulenc S. A., et. al., October Term, 2002 No. 002668 (September 29, 2003) (Cohen).

UNTIMELY FILING OF PLEADINGS. ***Under the Pennsylvania Rules of Civil Procedure, the Court may chose to disregard any error or defect of procedure which does not affect the rights of the parties.***

JOA Case Management Solutions v. School District of Philadelphia and Sedgwick Claims Management Services, Inc., April Term 2005, No. 2290 (March 13, 2006 – 4 pages) (Abramson, J.)

UNTIMELY FILING - *Summary Judgment Motion Will Not Be Dismissed as Untimely Where Movant Gives Good Cause for the Delay and the Other Party Fails to Show Prejudice*

First Republic Bank v. Brand, August 2000, No. 147 (Herron, J.)(January 8, 2002 - 11 pages)

UTPCPL – *Where plaintiff softball leagues/teams purchased commercial liability insurance, they did not do so for personal, family or household purposes, so they are precluded from asserting a claim against the defendants under the UTPCPL.*

Cutting Edge Sports, Inc. v. Bene-Marc, Inc., March Term, 2003, No. 01835 (May 2, 2006) (Abramson, J., 5 pages).

UTPCPL - *Plaintiff failed to state a valid claim under the UTPCPL where the goods in question were not purchased for "personal, family or household purposes" but rather for commercial resale.*

Plate Sales, Inc./Wilmington Steel v. Marathon Equipment Co., November Term, 2003, No. 3714 (April 16, 2004 – 3 pages) (Cohen, J.)

UTPCPL - *The UTPCpL is inapplicable to claim relating to the purchase of insurance where such insurance was purchased for solely for commercial purposes.*

Margaret Auto Body, et. al. v. Universal Underwriters Group, et. al., May Term, 2002, No. 1750 (Jones, J.)(January 10, 2002 - 4 pages)

UTPCPL-*Plaintiffs failed to state a claim under the UTPCL for false advertising where they failed to allege any facts which demonstrate*

that they heard or relied upon any of defendant's advertising; individual representations made by defendant upon which Plaintiffs allegedly relied do not constitute "advertising" as intended by the UTPCPL.

Thompson v. Glenmede Trust Company, February Term, 2002, No. 04428(Cohen, J.)(February 18, 2003 - 3 pages)

UTPCPL-*Plaintiffs failed to state a claim under the UTPCL for false advertising where they failed to allege any facts which demonstrate that they heard or relied upon any of defendant's advertising; individual representations made by defendant upon which Plaintiffs allegedly relied do not constitute "advertising" as intended by the UTPCPL.*

Thompson v. Glenmede Trust Company, February Term, 2002, No. 04428(Cohen, J.)(February 18, 2003 - 3 pages)

UTPCPL/JURY DEMAND - *The UTPCPL Does Not Include A Right to a Jury Trial.*

Oppenheimer v. York, March 2002, No. 4348 (Sheppard, J.) (October 25, 2002 - 15 pages)

- V -

VACATE ARBITRATION; RENT VALUATION; APPRAISAL; COMMERCIAL LEASE

> **TRO Avenue of the Arts, L.P. v. The Art Institute of Philadelphia, LLC, August Term, 2009, No. 02305 (May 14, 2010) (New, J., 4 pages)**

VACATE ARBITRATION DECISION; PARTNERSHIP DISPUTE; ARBITRATION CLAUSE; APPRAISER -

> **Spencer v. Spencer, August Term 2007 No. 2066, April 13, 2010 – 4 pages) (New, J.)**

VACCINE ACT - ***Under the National Childhood Vaccine Injury Act of 1996,42 U.S.C. §§ 300aa-1, et seq., a claimant may not file a state or federal civil action for more than $1000 for a vaccine related injury unless that person has first filed a petition in Vaccine Court within 36 months of the injury.***
VACCINE ACT - ***Court found the Vaccine Act applied where plaintiffs alleged that they were "poisoned" by the substance of thimerosal added to a series of vaccines.***

> **Ashton, et al. v. Aventis Pasteur, Inc. et al., July Term, 2002, No. 04026(Cohen, J.)(May 22, 2003 - 11 pages).**

VENUE—*A part of a transaction is neither a transaction nor an occurrence for purposes of venue under the Rules of Civil Procedure.*

> **Northwestern Human Services, Inc., et al. v. McKeever, et al., October Term 2004, No. 1936 (Abramson, J.) (September 12, 2005 – 8 pages).**

VENUE—*Whether a corporation regularly conducts business in a county is a question of fact. Affidavit of defendant corporation used to challenge venue insufficient when it is not clear and specific on the full extent of the corporation's business activities in Pennsylvania.*

> **A.T. Chadwick Co. v. PFI Construction Corp. and Process Facilities, Inc., September Term 2003, No. 1998 (Jones, J.) (July 30, 2004 – 10 pages).**

VENUE—*To determine the location of a "transaction or occurrence" for purposes of venue, Pennsylvania courts examine the elements of the cause of action.*

McNamara v. Kearney, et al., March Term 2004, No. 4598 (Jones, J.)(June 30, 2004 – 2 pages)

VENUE- ***A surplus lines insurer failed to satisfy the "regularly conducts business" test of Pa. R. Civ. P. 2179 when it failed to present evidence as to the amount of surplus insurance policies issued in Philadelphia per year and the amount of revenue grossed from those policies.***

Morrow Equipment Company v. Lexington Insurance Company and Blue Ridge Erector's, Inc., April Term 2003, No. 0824, (January 13, 2004- 9 pages) (Sheppard).

VENUE - ***Where Complaint Alleges that Corporation "did substantial business in Philadelphia County," Preliminary Objections Asserting Improper Venue Under Pa.R.C.P. 2179(a)(2) Raise Issues of Fact as to Whether Corporation "Regularly Conducts Business in the County" -Under this Rule, Plaintiff Does Not Have to Show that the Corporation Is Regularly Conducting Business at the Time the Complaint Is Filed - Venue Might Be Predicated on Past Corporate Activity***

Acme Markets, Inc. v. Dunkirk et al., February 2000, No. 1559 (Herron, J.)(September 18, 2000 - 34 pages)

VENUE - ***Where There Is an Issue of Fact as to Whether a Corporation Regularly Conducts Business in Philadelphia, Discovery Must Be Ordered***

Mesne Properties, Inc. v. Penn Mutual Life Insurance Co., July 2000, No. 1483 (Herron, J.)(April 6, 2001 - 14 pages)

Thermacon Enviro Systems, Inc. v. GMH Associates, March 2001, No. 4369 (Herron, J.)(July 18, 2001 - 12 pages (where there is an issue of fact as to venue and whether plaintiff's claims arose out of transactions within Philadelphia, discovery must be ordered)

VENUE - Venue Is Proper Where a Corporation Regularly Conducts Business in Philadelphia - Under the Regularly Conducts Business Test of Rule 2179(a)(2), the Contacts Do Not Have to Be Related to the Cause of Action - Where a Corporation's Purpose Is to Own and Rent Real Estate, the Quantity of Its Contacts with Philadelphia Is Sufficient Where the Corporation Owns and Rents 25 Properties in the City From Which It Derives $1 Million in Rent Per Year - Where Defendant Fails to Show that Plaintiff's Choice of Forum Is Vexatious, Oppressive or Inconvenient, Petition to Transfer Under Rule 1006(d)(1) Is Denied

PDP Enterprises, Inc. v. Northwestern Human Services, Inc., January 2001, No. 509 (Herron, J.)(August 31, 2001 -10 pages)

VENUE - ***Under Pa.R.C.P. 2103 (b), An Action Against a Political Subdivision Located in Delaware County May Only Be Brought in Delaware County - Community College Falls Within Definition of Political Subdivision - Since Venue Is Proper in Delaware County, The Action Will Be Transferred to That County Rather Than Be Dismissed***

> **Official Committee of Unsecured Creditors of Downingtown Industrial and Agricultural School v. Delaware County Community College, October 2001, No. 3513(Herron J.) June 11, 2002 - 5 pages)**

VENUE - ***Venue Is Improper Where Defendants Do Not Regularly Conduct Business in Philadelphia - None of the Defendants Have a Physical Presence in Philadelphia Since They Do Not Own Property, Operate a Branch or Maintain Assets in the County - Merely Advertising in a Local Newspaper Is Not Sufficient to Establish that Defendants Regularly Conduct Business in Philadelphia***

> **Medical Staffing Network Inc. v. Keystone Care Corp., July 2001, No. 1641 (Herron, J.)(July 8, 2002 - 9 pages)**

VENUE - ***Venue is Proper Where the Breach of Contract Claim Asserting Failure to Pay for Services Rendered Arose in Philadelphia Because Payment, In the Absence of a Contrary Agreement, Would Be Due at Plaintiff's Principal Place of Business Which is Undisputed as Being in Philadelphia - Factual Assertions Made By Defendant Who Failed to Attach Notice to Plead to Objections Must Be Disregarded - Factual Averments Made By Respondent Will Also Be Disregarded Where Response Was Not Accompanied By Verification.***

> **Duane Morris v. Nand Todi, October 2001, No. 1980 (Cohen, J.) (September 3, 2002 - 10 pages)**

VENUE - ***Venue Is Improper Where Defendants Did Not Regularly Conduct Business In Philadelphia Notwithstanding That Limited Pre-Incorporation Activities Did Take Place In Philadelphia and Original Articles of Incorporation Showed Philadelphia Address - Record Demonstrates That Corporation Moved and Conducted Its Business In Montgomery County - Mere Physical Presence of Individual Defendant Who Runs Separate and Distinct Business and Was Served In Philadelphia Is Not Sufficient to Find Venue in Philadelphia Proper***

> **Feltoon v. James A. Nolen, et al., March 2002, No. 4314 (Sheppard, J.)(November 1, 2002 - 11 pages)**

VENUE – CORPORATIONS - ***A personal action against a corporation or similar entity may be brought in a county where it regularly conducts business. Even if one corporate defendant does not do business in Philadelphia County, venue in Philadelphia County would be proper with respect to it if venue is proper with respect to co-defendant corporation.***

Toth v. Bodyonics, July Term, 2002, No. 03886 (November 6, 2003) (Cohen, J.)

VENUE/FORUM SELECTION CLAUSE - ***Forum Selection Clause in Subcontract Is Not Applicable Where The Claims at Issue in the Law Suit Are Independent of that Subcontract - Application of the Forum Selection Clause Would Not Be Reasonable Where Its Enforcement Would Preclude Plaintiff from Suing Jointly and Severally Liable Defendants in the Same Forum***

Gary Lorenzon Contractors, Inc. v. Allstates Mechanical Ltd. December 2000, No. 1224 (Sheppard, J.)(May 10, 2001 - 9 pages)

VENUE/FORUM SELECTION CLAUSE - ***Forum Selection Clause Is Enforced Where It has Been Freely Agreed Upon by the Parties and Where It is Not Unreasonable at the Time of Litigation - In the Absence of Fraud, Failure to Read a Provision Is Not an Excuse or Defense to a Forum Selection Clause - Maryland Is Not an Unreasonable Forum For This Case***

Nelson Medical Group v. Phoenix Health Corporation, December 2001, No. 3078 (Sheppard, J.)(May 28, 2002 - 6 pages)

VENUE/FORUM SELECTION CLAUSE - ***Forum Selection Clause in Document Attached to the Contract is Not Applicable Where the Parties Did Not Freely Agree to the Clause - Court - Ordered Discovery Revealed That There Was No Meeting of the Minds as to Venue Despite the Forum Selection Clause Purpoting to Be Part of the Contract that was Executed by Both Parties Where the Forum Selection Clause Was Not Separately Executed.***

Alti v. Dallas European, April 2002, No. 2843 (Cohen, J.) (September 30, 2002 - 5 pages).

VENUE/IMPROPER - ***In an Action Against A Partnership, Venue Is Proper Under Rule 2130(a) Where the Quality of a Partnership's Actions in the Forum in Advertising and Meeting Clients in Philadelphia Is in Direct Furtherance of the Partnership's Purpose - The Quality Prong of Rule 2130(a) Is Satisfied Where 27% of the Defendant's Clients Are in Philadelphia and They Generate 33% of Its Total Billings***

Marvin Levey v. Cogen Sklar LLP, July 2001, No. 2725 (Herron,

J.)(April 11, 2002 - 8 pages)

VENUE/IMPROPER/TESTAMENTARY TRUST - *Under 20 Pa.C.S.A. Section 721, the Venue Over the Adminstration of Real and Personal Property Held In a Testamentary Trust Is Exclusively in the County Where the Situs of the Trust Is Located and Where the Will Was First Probated - Where Girard Trust Owns Property in Schuylkill County and The Cause of Action at Issue Relates to Coal Refuse Banks on the Property, Venue Is Proper in Philadelphia Under the Relevant Statute*

City of Philadelphia v. Mammoth Coal Co., May 2001, No. 2799 (Herron, J.)(April 11, 2002 - 7 pages)

VENUE – PARTNERSHIPS - *Venue in an action against a partnership mall owner lies in and only in the county where the mall property, which is the subject of the suit, is located. However, if corporate general partner had remained a party to the action, then venue would also have been appropriate in the county where the general partner's registered office is located.*

Kmart of Pennsylvania, L.P. v. McDade Mall Assoc, L.P., November Term, 2004, No. 03258 (March 24, 2005 – 3 pages) (Sheppard, J.)

VENUE/UNJUST ENRICHMENT - *Where Plaintiffs Allege that Defendant Corporation Was Unjustly Enriched by Their Purchase of Stock, Venue Under Pa.R.C.P. 2179(4) Is Proper Where the Transaction That Is the Basis of the Unjust Enrichment Claim Occurred - Venue Is Proper In the County in which Defendants Were Unjustly Enriched or at the Principal Place of Business Where Monetary Benefits Were Realized - The Actual Sale of Stock in Philadelphia Is Merely a "Part of the Transaction" for the Purposes of this Test*

Stein et al. v. Crown American Realty Trust, January 2001, No. 1016 (Sheppard, J.)(October 3, 2001 - 7 pages)

VOLUNTARY PAYMENT RULE - *Under the Voluntary Payment Rule, Where One Voluntarily and Without Fraud or Duress Pays Money to Another with Full Knowledge of the Facts, the Money Paid Cannot Be Recovered*

Abrams v. Toyota Motor Credit Corp., April 2001, No. 503 (December 5, 2001 - 23 pages)

- W -

WAGE PAYMENT AND COLLECTION LAW ("WPCL") - *Since parties' did not have a valid employment agreement, plaintiff was not entitled to protection under WPCL.*

> **Williams v. Hopkins, et al., August Term 2005, No. 3953 (Bernstein, J.)(April 5, 2007 – 6 pages).**

WAGE PAYMENT AND COLLECTION LAW - *The Wage Payment and Collection Law provides employees a statutory remedy to recover wages and other benefits that are contractually due to them.*

> **Marla Welker v. Samuel Mychak, Patrick Geckle, Mychak, P.C., et al., September 2003, No. 4221, (Abramson, J.) (September 12, 2006 - 26 pages).**

WAGE PAYMENT AND COLLECTION LAW - *Plaintiff Has a Viable Claim Under the WPCL Where Complaint Alleges that Defendant/Employer Offered 6,000 Stock Options Pursuant to an Offer of Employment But Then Failed to Grant 4,000 of those Options*

> **Denny v. Primedia Argus Research Laboratories, April 2000, No. 3792 (Sheppard, J.)(May 2, 2001 - 9 pages)**

WAGE PAYMENT AND COLLECTION LAW – DEFENSES - *A good faith dispute or contest as to the amount of wages due or a good faith assertion of a right of set-off or counter-claim may serve as a proper defense to a claim for wages and penalties under the WPCL. However, defendants' mere assertion of such a good faith defense is not a sufficient basis upon which to dismiss a WPCL claim at the preliminary objection stage.*

- LIABLE PARTIES - *If attorneys exceeded their role as mere counsel for the corporate employer, and attorneys made the decision to terminate plaintiff-employees, then plaintiffs may be able to recover from attorneys. Likewise, if other agents of corporate employer held policy-making positions with corporate employer, and those agents made the decision to terminate plaintiffs, then plaintiffs may be able to recover from those other agents.*

> **Blaeuer, *et al.* v. Romy, M.D., *et al.*, October Term, 2003, Number 4034 (March 23, 2004 – 5 pages) (Sheppard, Jr., J.)**

WAIVER - *Absent an express provision against assignment, the rights and duties under an executory bilateral contract which does not involve personal skill, trust, or confidence may be assigned without the consent of the other party so long as it does not materially alter the other party's duties and*

responsibilities.

-Waiver is a voluntary and intentional abandonment or relinquishment of a known right. Waiver may be established by a party's express declaration or by a party's undisputed acts or language so inconsistent with a purpose to stand on the contract provisions as to leave no opportunity for a reasonable inference to the contrary.

-When implied waiver is relied upon as a defense, the elements of estoppel must be present. The two essential elements of equitable estoppel are inducement and justifiable reliance on that inducement.

Philadelphia Waterfront Partners, L.P. v. Churchill Development Group, LLC, January Term, 2007, No. 03811 (January 21, 2009) (Bernstein, J., 10 pages).

WAIVER – *It is well settled that waiver may be established by conduct inconsistent with claiming the waived right or any failure to act evincing an intent not to claim the right. Redevelopment Authority's failure to raise alleged contractual ambiguities forty years and four amendments after the execution of the agreement between the parties constitutes waiver. Court prohibited Redevelopment Authority from invoking the original contract language to assert the contract is void under such circumstances.*

Redevelopment Authority of the City of Philadelphia v. New Eastwick Corp., et al., April Term 2003, No. 2087 (Sheppard, J.)(March 23, 2004 –11 pages).

WAIVER– *A delay of less than three months does not constitute a significant passage of time to waive a party's right to object to counsel.*

Malewicz v. Michael Baker Corporation, et. al., December Term 2002, No.: 1741, Control Number 031219 (August 8, 2003) (Jones).

WAIVER/EQUITABLE ESTOPPEL - *Where Facts Are Unclear in Management Fee Dispute As to Whether Plaintiff Waived Management Fees or Is Equitably Estopped, Summary Judgment May Not Be Granted*

Rohm & Haas Co. v. Continental Casualty Co., November 1991, No. 3449 (Sheppard, J.)(February 26, 2002 - 17 pages)

WAIVER OF APPELLATE ISSUES – When an appellant fails to serve a court-ordered Pa. R.A.P. 1925(b) statement upon the trial court judge and file such with the clerk of courts, the issues are waived as if the appellant failed to file a Pa. R.A.P. 1925(b) statement at all.

- A Rule 1925(b) statement of matters complained of on

appeal is not a vehicle in which** issues **not previously asserted may be raised for the** first **time.

> **Carusone Construction, Inc. v. Colonial Surety, et al., May Term 2002, No. 3588(Abramson, J.) (August 2, 2005, 2 pages).**

WAIVER OF UNINSURED-MOTORIST COVERAGE - *In a car rental contract, a waiver of uninsured-motorist coverage is invalid if it fails to mirror the language of 75 Pa. C.S. §§ 1731(b.1), 1731(b.2).*

> **State Farm Mutual Automobile Insurance Company v. Avis Rent-A Car Systems, LLC *et al.*, No. 2752 (July 2007 – 5 pages) (Sheppard, J.)**

WARRANTY/BREACH - *Where Plaintiffs in Class Action Allege General Damages But Fail to Allege that They Personally Suffered Damages Due to Defendant's Breach of Warranty, Demurrer is Sustained*

> **Grant v. Bridgestone Firestone, Inc., September 2000, No. 3668 (Herron, J)(June 12, 2001 - 10 pages)**

WARRANTY/BREACH - *Claims for Breach of Warranty Are Not Limited to Claims Under the UCC or Involving Sales*

> **Stonhard v. Advanced Glassfiber Yarns, Inc., April 2001, No. 2427 (Herron, J.)(November 21, 2001 - 7 pages)**

WARRANTY/BREACH/NOTICE - *Demurrer Asserting Lack of Notice Overruled Where the Filing of Complaint May Be Deemed Sufficient for Notice Requirement - Allegation that Requests for Reimbursement for Alleged Deficiencies is Also Sufficient for Notice*

> **Precision Towers, Inc. v. Nat-Com, Inc. and Value Structures, Inc., April 2002, No. 2143 (Cohen, J.) (September 23, 2002 - 9 pages)**

WARRANTY/EXPRESS - *Class Action Claim for Breach of Express Warranty in the Marketing of Propulsid Is Legally Insufficient Where the Complaint Fails to Allege that Plaintiffs Ever heard or Read Any of the Allegedly Defective Warranties*

> **Boyd v. Johnson & Johnson, January 2001, No. 965 (Herron, J.)(January 22, 2002 - 7 pages)**

WARRANTY, IMPLIED/MERCHANTABILITY—*Narrowness of definition of "fit for ordinary purposes" cannot be determined at preliminary objection stage.*

Beckermayer v. AT&T Wireless, August Term 2002, No. 0469 (Jones, J.) (October 22, 2004 – 10 pages).

WARRANTY,IMPLIED/FITNESS FOR PARTICULAR PURPOSE/MERCHANTABILITY - *To Maintain A Claim for Breach of Implied Warranty, Plaintiffs Must Allege Damages - Where Class Action Plaintiffs Fail to Allege That They Personally Suffered Damages Due to the Lack of a Park Lock Brake in Their MiniVan, Their Claim Is Dismissed - Filing Complaint Was Adequate Notice for Breach of Express and Implied Warranty Claims - Class Action Plaintiffs Fail to Set Forth Claim for Breach of Implied Warranty of Fitness for Particular Purpose Because Providing "Safe and Reliable Family Transportation" Is Not a Particular Purpose of a MiniVan But Its Ordinary Purpose - Class Action Plaintiffs Set Forth a Viable Claim For Breach of Implied Warranty of Merchantability Where They Allege That a MiniVan Without Park Lock Brakes Was Not Fit for the Ordinary Purpose For Which Such Goods Are Sold Which Is Safe, Reliable Family Transportation - The Ordinary Purpose of a MiniVan Cannot Be Limited to Transportation Rather Than Reliable Family Transportation*

Solarz v. DaimlerChrysler, April 2001, No. 2033 (Herron, J.)(March 13, 2002 - 26 pages)

WARRANTY, MAGNUSON MOSS WARRANTY ACT/TYING—*Under Magnuson Moss, making effectiveness of warranty contingent on use of branded service is a violation of the act.*

Beckermayer v. AT&T Wireless, August Term 2002, No. 0469 (Jones, J.) October 22, 2004 – 10 pages).

WARRANTY/MERCHANTABILITY/DEFECT - *To Establish a Claim for Breach of Warranty of Merchantability, Plaintiff Must Establish A Manifestation of the Defect in the Product*

Zwiercan v. General Motors, Inc., June 1999, No. 3235 (Herron,J.)(May 22, 2002 - 8 pages)

WARRANTY/MERCHANTABILITY/NOTICE/- *Filing of Complaint Constitutes Sufficient Notice of the Breach of the Implied Warranty of Merchantability as to Cold-Eeze Products - Action by FTC Against Defendant Also Served to Alert Defendant of Potential Problems With Its Product*

Tesauro v. Quigley, August 2000, No. 1011 (Herron, J.)(July 9,

2002 - 11 pages)

WARRANTY, IMPLIED/BREACH/SUMMARY JUDGMENT - ***Summary Judgment on Breach of Warranty Claim Based on Defendant's Allegedly Defective Steel Ingot Is Denied Where There Are Material Issues of Fact as to Whether the Steel Used Was Defective or Whether Subsequent Processilng by Other Defendants Caused the Crankshaft's Damage - Where Ohio and Kentucky Law Apply, Breach of Implied Warranty Claim Is Dismissed For Lack of Privity of Contract Among the Parties - Although Pennsylvania, Kentucky and Ohio Law Recognize the Right of a Consumer to Recover Economic Loss From A Manufacturer of a Defective Product, These Jurisdictions Differ as to the Requirement of Privity of Contract in Assertilng Breach of Warranty Claims - Under Pennsylvania and Ohio Law, Privity Is Not Required for Asserting a Claim of Breach of Warranty Based on Tort But Under Kentucky Law Privity Is Required***

Teledyne Technologies Inc. v. Freedom Forge Corporation, May 2000, No. 3398 (Sheppard, J.)(April 19, 2002 - 38 pages)

WARRANTY/LETTER OF CREDIT - ***No Breach of Warranty Claim Pursuant to Pennsylvania's version of the U.C.C. is Supportable Where Confirming Bank Withdrew Its Draw on Standby Letter of Credit***

Sorbee International Ltd. v. PNC Bank, N.A., et al., May 2001, No. 806 (Herron, J.) (July 16, 2001 - 9 pages)

WARRANTY/PLEADING RELIANCE - ***Where Plaintiff Alleges that Defendant Made False Statements About Its Products on Its WebSite and in User Manuals, the Court May Reasonably Infer Customer Reliance for Purposes of Overruling a Preliminary Objection on Grounds of Insufficiency of Pleadings of Elements of Breach of Express Warranty.***

Oppenheimer v. York, March 2002, No. 4348 (Sheppard, J.) (October 25, 2002 - 15 pages)

WARRANTY/IMPLIED - ***Allegations of Implied Warranty of Fitness Not Adequately Pled Where Plaintiff's Alleged Particular Purpose Is Merely a Characteristic of How the Defendant's Product Performs in its Ordinary Purpose - Efficiency Is Not a Particular Purpose Of A Heating and Ventilating Unit.***

Oppenheimer v. York, March 2002, No. 4348 (Sheppard, J.) (October 25, 2002 - 15 pages)

WRITING/FAILURE TO ATTACH - ***Preliminary Objection Asserting Failure to Attach Writing Will Be Overruled Where Complaint Alleges That Document Is in the Possession of the Defendant And Substantial Portions of Related Documents Were Attached***

> **Goldner Company, Inc. v. Cimco Lewis Indus.,** **March 2001, No. 3501 (Herron, J.)(September 25, 2001 - 7 pages)**

WORK PRODUCT DOCTRINE - ***Documents Not Sufficiently Identified as Subject to Work Product Doctrine or Reflecting Mental Impressions or Litigation Strategy of Attorney of Record***

> **Gocial, et al. v. Independence Blue Cross and Keystone Health Plan East, Inc.,December 2000, No. 2148 (Herron, J.) (September 4, 2002 - 9 pages)**

WORKERS' COMPENSATION – WAIVER OF IMMUNITY - ***In order to avoid the ambiguities which grow out of the use of general language, contracting parties must specifically use language which demonstrates that a named employer agrees to indemnify a named third party from liability for acts of that third party's negligence which result in harm to the employees of the named employer. Absent this level of specificity in the language employed in the contract of indemnification, the Workers' Compensation Act precludes any liability on the part of the employer.***

> **Integrated Project Services v. HMS Interiors, Inc., March Term 2001, No.1789 (Cohen, J.) (10/21/04 - 7 pages).**

WORKERS COMPENSATION/IMMUNITY - ***Employer/Subcontractor Is Not Immune From Suit by Employee Under Workers Compensation Act Where Employer Expressly Agrees in Written Contract to Indemnify Third Party***

> **Integrated Project Services v. HMS Interiors, Inc., March 2001, No. 1789 (Herron, J.)(July 2, 2001 - 13 pages)**

WORK PRODUCT PRIVILEGE; AUTHORITY FOR THE CREATION OF PRIVILEGE; STATUTORY CONSTRUCTION ACT; PLURALITY OPINION; ATTORNEY-CLIENT PRIVILEGE

> **Kolar v. Preferred Unlimited, Inc., et al., July Term, 2008, No. 02472 (June 22, 2010) (Bernstein, J., 11 pages)**

WRIT OF SEIZURE - ***Motion by Client for Issuance Writ of Seizure for***

Copies of File Retained by Law Firm Is Denied Because Law Firm May Retain Copy of File That Is Copied at Its Own Expense

Quantitative Financial Strategies, Inc. v. Morgan Lewis & Bockius, LLP, December 2001, No. 3809 (Herron, J.)(March 12, 2002 - 22 pages)

WRITING/ATTACHMENT - *Under Pa.R.C.P. 1019, A Writing Must Be Attached to a Complaint Only Where It Forms the Basis of the Claim - Copy of Web Page Does Not Have to Be Attached to Complaint Where It Serves Merely as Evidence of the Disputed Activity*

Omicron Systems, Inc. v. Weiner, August 2001, 669 (Herron, J.)(March 14, 2002 - 14 pages)

WRONGFUL USE OF CIVIL PROCEEDINGS/STANDING - *An action under 42 Pa.C.S.A. § 8351 for wrongful use of civil proceedings cannot be maintained by one who is not an original party to the underlying action. Mere adversity of interest relative to the initiator of the underlying action is insufficient to establish standing.*

Iama, Inc. and Louise Milanese v. Law Offices of Peter Meltzer, et. al., September Term, 2002, No. 100827 (Jones, J.)(March 17, 2003 - 8 pages)

WRONGFUL USE OF CIVIL PROCEEDINGS - *In order to recover under § 8351, plaintiff must demonstrate that: 1) the underlying proceeding terminated in their favor; 2) the defendant caused those proceedings to be instituted without probable cause; and 3) malice. Plaintiffs have failed to meet the threshold requirements necessary to sustain a cause of action for wrongful use of civil proceedings where they failed to demonstrate that theyt obtained a favorable termination in a wrongfully instituted action.*

Iama, Inc. and Louise Milanese v. Law Offices of Peter Meltzer, et. al., September Term, 2002, No. 4141 (Jones, J.)(March 17, 2003 - 8 pages)

WRONGFUL TERMINATION – PUBLIC POLICY - *Wrongful discharge in violation of public policy occurs when an employee is discharged for refusing to commit a crime. Putting a defective catheter on the market could have constituted the sale of an adulterated device, which is a prohibited act subject to criminal penalties. If employee was terminated for scrapping the defective devices, he may have been discharged for refusing to commit a crime.*

Hokanson v. Vygon US, LLC, February Term, 2009, No. 03158 (August 28, 2009) (Bernstein, J., 4 pages).

WRONGFUL TERMINATION – AT WILL EMPLOYMENT- *Wrongful termination claim would not be dismissed even though plaintiff employee had a written contract with his former employer. The contract*

expressly stated that either party could terminate. Therefore, employee was "at will" for the purpose of bringing a wrongful termination claim.

Hokanson v. Vygon US, LLC, February Term, 2009, No. 03158 (August 28, 2009) (Bernstein, J., 4 pages).

- Z -

ZONING - ***No private right of action against private individuals or entities exists for an alleged violation of either the Pennsylvania Municipalities Planning Code or the Philadelphia Zoning Code.***

Bethany Builders, Inc., et., et. al. v. Dungan Civil Assoc., et. al., March Term, 2001, No. 002043 (Cohen, J.)(March 13, 2003 - 9 pages)

ZONING - ***When a zoning designation on a split-zoned property covers twenty percent or less of the area of a parcel, the more restrictive zoning requirements shall not apply in terms of use control or zoning control on the entire lot, but shall control only that portion of the lot so zoned. In such cases, the portion of the parcel that is subject to the more restrictive zoning requirements may be used as a driveway and as street frontage for the larger, less restrictively zoned, portion of the property.***

It is impossible to escape the conclusion that the Code Bulletin, which was issued by defendant after plaintiff's zoning application was filed, was special legislation, unjustly discriminatory, arbitrary, unreasonable, and confiscatory in its application, in that it was aimed at plaintiff's particular piece of property.

Where no public hearings were held on, or public notice given of, a proposed zoning ordinance prior to the filing of plaintiff's permit application, the ordinance was not pending at the time of plaintiff's filing and could not be applied retroactively to plaintiff's application.

It shall be the duty of any officer, department, board or commission having requested and received legal advice from the Law Department regarding his or its official duty, to follow the same. In this case, there is no evidence that a Senior Attorney at the Law Department was acting in anything other than her official capacity as an agent of the Law Department when she issued her opinion to defendant. Therefore, her advice constituted advice from the Law Department, which defendant was duty bound to follow.

Land Endeavor 0-2, Inc. v. City of Philadelphia, February Term, 2005, No. 00814 (April 13, 2006) (Sheppard, J., 10 pages). Commonwealth Court Docket No. 268CD2006