

COMMERCE CASE MANAGEMENT PROGRAM DECISIONS: INJUNCTIONS

by

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I. INTRODUCTION AND OVERVIEW

When a plaintiff seeks to prohibit an action by the defendant, preliminary injunctive relief may be sought pursuant to Rule 1531(a) of the Pennsylvania Rules of Civil Procedure. The Philadelphia Commerce Court has in general articulated in injunction cases the following standard that a party seeking a preliminary injunction must meet: 1) that the injunction is necessary to prevent immediate and irreparable harm which cannot be compensated by monetary damages; 2) that greater injury would result by refusing to grant the injunction than by granting it; 3) that the injunction properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct; 4) that the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity; and 5) that the plaintiff's right to relief is clear, and the wrong is manifest.

The Commerce Court's most frequently cited sources for this standard are the Supreme Court of Pennsylvania's opinions in Valley Forge Historical Society v. Washington Memorial Chapel² and School District of Wilkinsburg v. Wilkinsburg Education Association.³ The Commerce Court has on a few occasions cited to the Supreme Court of Pennsylvania's more recent opinion in Warehime v. Warehime⁴ which

² 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981).

³ 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995).

⁴ 580 Pa. 201, 860 A.2d 41, 46-7 (2004).

sets forth a six-part test for preliminary injunctive relief.⁵ Instead of altering the standard, however, the additional element from Warehime (“that the injunction will not adversely affect the public interest”) is merely an express recognition of the public interest considerations already implied in the traditional standard set forth in Valley Forge, Wilkinsburg and their progeny.

The aforementioned standard is virtually the same where a plaintiff seeks a mandatory preliminary injunction. A request for a mandatory preliminary injunction differs from the typical request for a preliminary injunction in that the former compels a defendant to perform an act, while the latter seeks to restrain the defendant from acting. The standard is different only insofar as the plaintiff must, in general, make an especially strong showing that its right to relief is clear.⁶ Thus, a plaintiff seeking a mandatory preliminary injunction carries a heavier burden of proof.

Heavier still is the burden that a plaintiff carries when seeking a “permanent injunction.” Whereas preliminary injunctions (including mandatory) are geared to remedy present or impending harm, “permanent” or “final” injunctions close the books on certain injurious activities *in omne tempus*. The Commerce Court has stated that “[a] final injunction is warranted if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law,” and that unlike a preliminary injunction, “a final

⁵ See, e.g. Franklin Capital Partners v. MooseCorp. II, May Term 2006, No. 3660, 2006 Phila. Ct. Com. Pl. LEXIS 361 (C.C.P. Phila. Sept. 11, 2006); Warehouse Tech., Inc. v. Lift, Inc., January Term 2006, No. 2827, 2006 Phila. Ct. Com. Pl. LEXIS 47 (C.C.P. Phila. Jan. 27, 2006); Kim v. Choi, July Term 2005, No. 3410, 2005 Phila. Ct. Com. Pl. LEXIS 372 (C.C.P. Phila. August 9, 2005).

⁶ Creative Print Group, Inc. v. Country Music Live, Inc. and Mark Michaels, May Term 2000, No. 0283, 2000 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. June 13, 2000).

injunction does not turn on the presence of imminent or irreparable harm.”⁷ Further, plaintiffs must allege and show “an urgent necessity to avoid injury which cannot be compensated by damages.”⁸ Finally, the Court has noted that “while a preliminary injunction requires a party to establish a reasonable likelihood of success on the merits, a party seeking a permanent injunction must establish his or her claim absolutely.”⁹

In applying the preliminary injunction standard, the Commerce Court has held that a plaintiff must meet all the elements of the standard; i.e., the failure to satisfy any element is fatal to the request for injunctive relief. The Commerce Court has held that parties cannot contract to create a right to injunctive relief where an injunction would otherwise be inappropriate.¹⁰

In reviewing each element of the preliminary injunction standard the Commerce Court has articulated several critical elements of proof.

First, the ability to collect monetary damages as a remedy for an alleged harm can be fatal to the request.¹¹ However, the Commerce Court has articulated exceptions to this rule for the following circumstances: where a threat of monetary loss is “so great that it threatens the existence of a business,” or where the defendants have taken money which

⁷ Polydyne, Inc. v. City of Phila., No. 3678, 2001 Phila. Ct. Com. Pl. LEXIS 54, (C.C.P. Phila. August 6, 2001)(McInerney, J.), vacated and remanded by Polydyne, Inc. v. City of Phila., 795 A.2d 495, 2002 Pa. Commw. LEXIS 175 (Pa. Commw. Ct., 2002).

⁸ Sigma Supplies Corp. v. Progressive Halcyon Ins., August Term 2003, No. 02968, 2004 Phila. Ct. Com. Pl. LEXIS 43 (C.C.P. Phila. April 23, 2004).

⁹ Polydyne, Inc., *supra* note 6.

¹⁰ Philadelphia Ear, Nose & Throat Surgical Associates, P.C. v. Maurice Roth, M.D., January Term 2000, No. 2321, 2000 WL 1007179, 2000 Pa. Dist. & Cnty. Dec. LEXIS 355 (C.C.P. Phila. March 13, 2000)(Sheppard, J.) *citing* Dice v. Clinicop, Inc., 887 F. Supp. 803 (W.D. Pa. 1995).

¹¹ See, e.g., Warehouse Tech, *supra* note 4.

“unquestioningly belong[s]” to the party seeking injunctive relief.¹² Second, a number of cases examine whether injunctive relief would restore the parties to the status quo. Most critical to this analysis seems to be an inquiry into the “last actual, peaceable and lawful non-contested status which preceded the pending controversy.”¹³

In examining whether a plaintiff has established that he or she is likely to prevail on the merits, the Commerce Court will analyze the elements of the claims set forth in the underlying complaint. This is particularly the case when a plaintiff predicates injunctive relief on violations of restrictive covenants, non-compete agreements or trade secrets.¹⁴ In these circumstances the Court will analyze the scope and enforceability of the agreement at issue and whether the claimed “trade secret” qualifies for protection under Pennsylvania law.

Even if the moving party has successfully met the standard, a preliminary injunction will still not be issued unless proper bond is posted in accordance with Rule 1531(b) of the Pennsylvania Rules of Civil Procedure. That provision specifically states:

¹² Franklin Capital Partners v. MooseCorp. II, May Term 2006, No. 3660, 2006 Phila. Ct. Com. Pl. LEXIS 361 (C.C.P. Phila. Sept. 11, 2006); See also Mozenter v. Trigiani, May Term 2002, No. 0595; June Term 2002, No. 0605, 2003 Phila. Ct. Com. Pl. LEXIS 59 (C.C.P. Phila. April 2, 2003).

¹³ Reporting Services, Inc. v. Veritext L.L.C., June Term 2003, No. 489, 2003 Phila. Ct. Com. Pl. LEXIS 66 (C.C.P. September 10, 2003); Elfman v. Berman, February Term 2001, No. 2080; April Term 2001, No. 1299, 2001 Pa. Dist. & Cnty. Dec. LEXIS 359 (C.C.P. Phila. May 8, 2001); Fidelity Burglar & Fire Alarm Co., Inc. v. Defazio, June Term 2000, No. 3060, 2000 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. Aug. 4, 2000).

¹⁴ See, e.g., Labor Ready, Inc. v. Trojan Labor and Sally Czeponis, December Term 2000, No. 3264, 2001 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. January 25, 2001); Philadelphia Ear, Nose & Throat Surgical Associates, P.C. v. Maurice Roth, M.D., January Term 2000, No. 2321, 2000 Pa. Dist. & Cnty. Dec. LEXIS 355 (C.C.P. Phila. March 13, 2000); United Products Corp. v. Transtech Manufacturing, Inc., August Term 2000, No. 4051, 2000 Phila. Ct. Com. Pl. LEXIS 91 (C.C.P. Phila. November 9, 2000).

Except when the plaintiff is the Commonwealth of Pennsylvania, a political subdivision or a department, board, commission, instrumentality or officer of the Commonwealth or of a political subdivision, a preliminary or special injunction shall be granted only if

(1) the plaintiff files a bond in an amount fixed and with security approved by the court, naming the Commonwealth as obligee, conditioned that if the injunction is dissolved because improperly granted or for failure to hold a hearing, the plaintiff shall pay to any person injured all damages sustained by reason of granting the injunction and all legally taxable costs and fees, or

(2) the plaintiff deposits with the prothonotary legal tender of the United States in an amount fixed by the court to be held by the prothonotary upon the same condition as provided for the injunction bond.

While an inexact science, the Commerce Court often looks to the particular facts of each case for guidance in setting the amount for bond. For example, in Asian Bank v. 224 E. 13th Street Realty Corp.,¹⁵ the Court granted the plaintiff's petition for injunctive relief and required it to post a bond in an amount equivalent to one month's rent under the lease agreement in dispute. Further, in Fidelity Burglar & Fire Alarm Co., Inc. v. Defazio,¹⁶ the Court set the bond in an amount equal to the value of a computer that was allegedly taken from the plaintiff by a former employee. Other times, however, the Court announces a more generic rationale in fixing the amount for a bond.¹⁷

¹⁵ May Term 2005, No. 1031, 2005 Phila. Ct. Com. Pl. LEXIS 256 (C.C.P. Phila. June 6, 2005).

¹⁶ Supra note 11.

¹⁷ See, e.g., Elfman v. Berman, supra note 11 (bond set by balancing the equities involved in the case to cover reasonably foreseeable damage); Jewelcor Management, Inc. v. Thistle Group Holdings, Co., March Term 2002, No. 2623, 2002 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. March 26, 2002) (\$500 bond "sufficient to sustain the Injunction").

In reviewing the Commerce Court's opinions in this area we have for purposes of organization divided the opinions into eight (8) categories: 1. Injunctions Against Partners (former and current) in a Shared Business; 2. Enjoining the Award of a Public Works Contract; 3. Corporate Shareholders' Disputes; 4. Trouble in the Landlord-Tenant Relationship; 5. Former Employees: Violations of Restrictive Covenants and Trade Secrets; 6. Failure to Financially Compensate or Provide Services; 7. Insurance Related Disputes; and 8. Miscellaneous.

Using the aforementioned organization we first provide a synopsis of the Court's cases and then a summary of each case.

II. SYNOPSIS OF CASES

1. Injunctions Against Partners (former and current) in a Shared Business

Cerelli v. Cooper, February Term 2002, No. 1260 (C.C.P. Mar. 8, 2002) (McInerney, J.) (The Court granted injunctive relief for board members attempting to oust another board member suspected of mishandling finances, and denied injunctive relief for the board member being ousted). For full summary, see page 12. This Opinion is currently unavailable on the Commerce Court website.

Hamdan v. Alwalidi, April Term 2001, 2001 WL 1807393, 2005 Pa. Super. LEXIS 515 (C.C.P. Phila. Nov. 2, 2001) (Herron, J.) (The Court denied injunctive relief for a cab driver trying to protect his company's assets after the dissolution of a partnership with another cabdriver). For full summary, see page 16. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/hamden11.pdf>.

Mozenzer v. Trigiani, May Term 2002, No. 0595; June Term 2002, No. 0605, 2003 WL 1861578, 2003 Phila. Ct. Com. Pl. LEXIS 59 (C.C.P. Phila. April 2, 2003) (Sheppard, J.) (The Court denied a preliminary injunction for an attorney who sought legal fees generated after the formal termination of his relationship with a previously-shared client). For full summary, see page 17. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/moz-op.pdf>.

Pence v. Petty, December Term 2000, No. 593, 2001 WL 1807778, 2001 Phila. Ct. Com. Pl. LEXIS 48 (C.C.P. Phila. February 6, 2001)(Herron, J.) (The Court denied injunctive relief for a business shareholder seeking to prevent another shareholder from selling her interest to a third party because the share transfer agreement was oral and thus unenforceable). For full summary, see page 19. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/pence.pdf>.

Sagot Jennings & Sigmond v. Sagot, April Term 2002, No. 3099, 2003 WL 1873298, 2003 Phila. Ct. Com. Pl. LEXIS 68 (C.C.P. Phil. April 2, 2003) (Sheppard, J.) (The Court granted a modified preliminary injunction in spite of an agreement to arbitrate all disputes where a former partner in a law firm embarked on an elaborate scheme to defraud the firm). For full summary, see page 21. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/sag-spct.pdf>.

Tillery v. Leonard & Sciolla, LLP, June Term 2005, No. 3085, 2006 WL 2947671, 2006 Phila. Ct. Com. Pl. LEXIS 387 (C.C.P. Phila. October 12, 2006) (Sheppard, J.) (The Court declined to amend a prior Order that denied a Petition for Preliminary Injunction for being moot). For full summary, see page 23. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/050603085.pdf>.

2. **Enjoining the Award of a Public Works Contract**

Buckley v. City of Philadelphia, March Term 2002, No. 1894, 2002 WL 1472334, 2002 Phila. Ct. Com. Pl. LEXIS 45 (C.C.P. Phila. May 22, 2002) (Herron, J.) (The Court enjoined the awarding of a construction project to a company that supplied a defective bid). For full summary, see page 24. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/buck2.pdf>.

Carr & Duff, Inc. v. SEPTA, February Term 2002, No. 4101, 2002 WL 746385, 2002 Phila. Ct. Com. Pl. LEXIS 47 (C.C.P. Phila. April 12, 2002) (Sheppard, J.) (The Court denied injunctive relief for a construction company seeking to enjoin a state transportation authority from awarding a bid contract). For full summary, see page 27. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/ca-op.pdf>.

MC Painting Corporation v. School District of Philadelphia, June Term 2000, No. 2265, 2000 WL 33711069, 2000 Phila. Ct. Com. Pl. LEXIS 102 (C.C.P. Phila. June 20, 2000) (Herron, J.) (The Court denied a preliminary injunction for a painting company that had failed to meet the bid requirements for a contract with the city's school district). For full summary, see page 29. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/mcpaint.pdf>

Polydyne, Inc. v. City of Phila., No. 3678, 2001 WL 1807900, 2001 Phila. Ct. Com. Pl. LEXIS 54, (C.C.P. Phila. August 6, 2001) (McInerney, J.), vacated and remanded by **Polydyne, Inc. v. City of Phila.**, 795 A.2d 495, 2002 Pa. Commw. LEXIS 175 (Pa. Commw. Ct., 2002) (The Court denied permanent injunctive relief to a disappointed contract bidder who alleged that the bidding process was corrupt). For full summary, see page 32. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/polydyne.pdf>.

Rogers v. School District of Philadelphia, June Term 2000, No. 2387, 2000 WL 33711075, 2000 Phila. Ct. Com. Pl. LEXIS 94 (C.C.P. Phila. June 6, 2000) (Herron, J.) (The Court granted a preliminary injunction for public contract bidders that objected to the awarding of the contract to a company that failed to meet the bid requirements). For full summary, see page 36. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/school.pdf>.

Zinn Construction v. School Board of Philadelphia, June Term 2000, No. 3369, 2000 WL 33711083, 2000 Phila. Ct. Com. Pl. LEXIS 93 (C.C.P. Phila. July 10, 2000) (Herron, J.) (The Court denied a petition for injunctive relief for a disappointed contract bidder that failed to meet the bid requirements). For full summary, see page 38. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/zinn.pdf>.

3. **Corporate Shareholders' Disputes**

Franklin Capital Partners v. MooseCorp. II, May Term 2006, No. 3660, 2006 WL 2663732, 2006 Phila. Ct. Com. Pl. LEXIS 361 (C.C.P. Phila. Sept. 11, 2006) (Abramson, J.) (The Court denied a preliminary injunction for limited partners in a partnership seeking to freeze certain monies and to have other funds be repaid to the partnership). For full summary, see page 39. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/060503660.pdf>.

Jewelcor Management, Inc. v. Thistle Group Holdings, Co., March Term 2002, No. 2623, 2002 WL 576457, 2002 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. March 26, 2002) (Herron, J.) (The Court granted a preliminary injunction for shareholders that were constructively prevented from nominating individuals to the board of directors). For full summary, see page 41. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/jewel3.pdf>.

Kessler v. Broder, November Term 2002, No. 4183, 2003 WL 21782433, 2003 Phila. Ct. Com. Pl. LEXIS 61 (C.C.P. Phila. July 28, 2003) (Sheppard, J.) (The Court affirmed an Order granting a Preliminary Injunction for a minority shareholder group that was denied a lucrative business opportunity by the majority shareholders). For full summary, see page 43. This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/kes-op.pdf>.

Wurtzel v. Park Towne Place Apartments Limited Partnership, June Term 2001, No. 3511, 2001 WL 180 7405, 2001 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. Sept. 11, 2001) (Herron, J.) (The Court enjoined a corporate merger that was inconsistent with the terms of a partnership agreement). For full summary, see page 45. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/wurtz831.pdf>.

4. **Trouble in the Landlord-Tenant Relationship**

Asian Bank v. 224 E. 13th Street Realty Corp., May Term 2005, No. 1031, 2005 WL 1423256, 2005 Phila. Ct. Com. Pl. LEXIS 256 (C.C.P. Phila. June 6, 2005) (Jones, J.) (The Court granted a preliminary injunction for a bank being threatened with a judgment for possession by its landlord). For full summary, see page 47. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/051202397.pdf>.

Careers USA, Inc. v. Kennedy Blvd. Assoc., November Term 2001, (Westlaw citation unavailable), 2002 Phila. Ct. Com. Pl. LEXIS 49 (C.C.P. October 30, 2002) (Herron, J.) (The Court granted the petition for a preliminary injunction for a commercial property tenant who was complaining of severe water leaks). For full summary, see page 50. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/careerop.pdf>.

Elfman v. Berman, February Term 2001, No. 2080; April Term 2001, No. 1299, 2001 WL 1807940, 2001 Pa. Dist. & Cnty. Dec. LEXIS 359 (C.C.P. Phila. May 8, 2001) (Herron, J.) (The Court granted a preliminary injunction for tenants of a commercial property against a landlord who refused to comply with the leasing agreements). For full summary, see page 51. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/elfman2.pdf>.

5. Former Employees: Violations of Restrictive Covenants and Trade Secrets

Farm Journal, Inc. v. Tribune Entertainment Co., December Term 2005, No. 2397, 2006 WL 1484909, 2006 Phila. Ct. Com. Pl. LEXIS 217 (C.C.P. Phila. May 25, 2006) (Sheppard, J.) (The Court denied a mandatory preliminary injunction for a farming-related multi media company seeking to halt the broadcast of a program with similar agricultural content to, and the former hosts of, one of its own programs). For full summary, see page 55. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/051202397.pdf>.

Fidelity Burglar & Fire Alarm Co., Inc. v. Defazio, June Term 2000, No. 3060, 2000 WL 33711036, 2000 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. Aug. 4, 2000) (Herron, J.) (The Court granted a preliminary injunction for a business seeking to have a former employee return a company computer). For full summary, see page 59. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/fidelity.pdf>.

Innaphase Corp. v. Meric Overman, July Term 2003, No. 2807, 2004 WL 237718, 2004 Phila. Ct. Com. Pl. LEXIS 83 (C.C.P. September 10, 2003) (Sheppard, J.) (The Court affirmed its denial of a Petition for Preliminary Injunction for a corporation seeking to enforce a non-disclosure and developments agreement with a former employee). For full summary, see page 61. This Opinion is available at http://fjd.phila.gov/pdf/cpcvcomprg/innaphase-op_to_superior_ct.pdf.

Labor Ready, Inc. v. Trojan Labor and Sally Czeponis, December Term 2000, No. 3264, 2001 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. January 25, 2001) (Sheppard, J.) (The Court denied the Petition for Preliminary Injunction for a company seeking to enforce a restrictive covenant against its former employee). For full summary, see page 65. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/lr0012-3264.pdf>.

Medical Resources, Inc. v. Miller, No. 2242, 2001 WL 1807934, 2001 Phila. Ct. Com. Pl. LEXIS 109 (C.C.P. Phila. Jan. 29, 2001) (Sheppard, J.) (The Court denied injunctive relief to the former employer of an employee who opened up a competing MRI business). For full summary, see page 69. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/mr0011-2242.pdf>.

Olympic Paper Co. v. Dubin Paper Co. & Brian Reddy, October Term 2000, No. 4384, 2000 WL 33711064, 2000 Pa. Dist. & Cnty. Dec. LEXIS 189 (C.C.P. Phila. Dec. 29, 2000) (Sheppard, J.) (The Court granted a preliminary injunction enjoining a former employee from soliciting customers of his former employer for a period of six months). For full summary, see page 71. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/oly.pdf>.

Philadelphia Ear, Nose & Throat Surgical Associates, P.C. v. Maurice Roth, M.D., January Term 2000, No. 2321, 2000 WL 1007179, 2000 Pa. Dist. & Cnty. Dec. LEXIS 355 (C.C.P. Phila. March 13, 2000) (Sheppard, J.) (The Court denied the Petition for Preliminary Injunction for an organization of doctors that could not establish that the practice of its former employee would cause irreparable harm). For full summary, see page 73. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/philaearnosethroat.pdf>.

Reporting Services, Inc. v. Veritext L.L.C., June Term 2003, No. 489, 2003 WL 22183927, 2003 Phila. Ct. Com. Pl. LEXIS 66 (C.C.P. September 10, 2003) (Jones, J.) (The Court granted a Preliminary Injunction in part and denied it in part for an employee who wanted to be relieved from the restrictions imposed by a covenant not to compete entered into after the sale of his business). For full summary, see page 78. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/reporting-services-op.pdf>.

United Products Corp. v. Transtech Manufacturing, Inc., August Term 2000, No. 4051, 2000 WL 33711051, 2000 Phila. Ct. Com. Pl. LEXIS 91 (C.C.P. Phila. November 9, 2000) (Sheppard, J.) (The Court granted the Petition for Preliminary Injunction for a manufacturer seeking to enforce a restrictive covenant against its former employees). For full summary, see page 82. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/unitedff.pdf>.

6. Failure to Financially Compensate or Provide Services

Fennell v. Van Cleef, May Term 2000, No. 2754, 2000 WL 33711077, 2000 Phila. Ct. Com. Pl. LEXIS 98 (C.C.P. Phila. May 31, 2000) (Herron, J.) (The Court denied the Petition for Preliminary Injunction for a consulting firm seeking compensation from a co-producer of a charity event). For full summary, see page 90. This Opinion is currently unavailable on the Commerce Court website.

Kim v. Choi, July Term 2005, No. 3410, 2005 WL 1953037, 2005 Phila. Ct. Com. Pl. LEXIS 372 (C.C.P. Phila. August 9, 2005) (Abramson, J.) (The Court denied a Motion for Emergency Injunctive Relief because the breach of contract could be compensated by monetary damages and the misrepresented terms of the contract violated the public interest). For full summary, see page 93. This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/050703410.pdf>.

Warehouse Tech., Inc. v. Lift, Inc., January Term 2006, No. 2827, 2006 WL 224271, 2006 Phila. Ct. Com. Pl. LEXIS 47 (C.C.P. Phila. Jan. 27, 2006) (Bernstein, J.) (The Court denied injunctive relief because future harm to the buyer who failed to receive goods from the seller was fully compensable by monetary damages). For full summary, see page 95. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/060102827.pdf>.

7. **Insurance Related Disputes**

Great American Alliance Ins., Co. v. Program JHE, Inc., April Term 2002, No. 2565, (Westlaw citation unavailable), 2002 Phila. Ct. Com. Pl. LEXIS 67 (C.C.P. Phila. November 21, 2002) (Cohen, J.) (The Court granted the preliminary injunction for an insurance company that sought an accounting of a financially troubled insured party and its obligee). For full summary, see page 97. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/gramer1.pdf>.

Sigma Supplies Corp. v. Progressive Halcyon Ins., August Term 2003, No. 02968, 2004 WL 960011, 2004 Phila. Ct. Com. Pl. LEXIS 43 (C.C.P. Phila. April 23, 2004) (Sheppard, J.) (The Court held that injunctive relief is not available to eliminate a possible, remote future injury or invasion of rights and denied a request for injunctive relief). For full summary, see page 99. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/050603085.pdf>.

TJS Brokerage & Co. v. Hartford Insurance Co., December Term 1999, No. 2755, 2000 WL 1060645, 2000 Pa. Dist. & Cnty. Dec. LEXIS 313 (C.C.P. Phila. April 24, 2000) (Herron, J.) (The Court granted a preliminary injunction in part, and denied it in part for a brokerage firm seeking full coverage from its insurance company after its office was vandalized). For full summary, see page 100. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/tjspi3.pdf>.

8. **Miscellaneous**

Creative Print Group, Inc. v. Country Music Live, Inc. and Mark Michaels, May Term 2000, No. 0283, 2000 WL 33711090, 2000 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. June 13, 2000) (Sheppard, J.) (The Court denied the Petition for a Preliminary Injunction for a print agency that failed to demonstrate a clear right to relief because its services had been effectively terminated). For full summary, see page 106. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/creat-ff.pdf>.

DeStefano & Associates v. Cohen, June Term 2000, No. 2775, 2002 WL 1472340, 2002 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. May 23, 2002) (Herron, J.) (The Court granted a Motion for Summary Judgment for an attorney representing sellers in a business sale against buyer because buyer failed to meet burden of proof necessary to grant a permanent injunction). For full summary, see page 110. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/destef5.pdf>.

Lewis v. Bayer Corp., August 2001 Term, No. 2353, 2002 WL 1472339, 2002 Phila. Ct. Com. Pl. LEXIS 87 (C.C.P. Phila. June 12, 2002) (Sheppard, J.) (The Court denied the Motion for Preliminary Injunction for a class of prescription drug consumers in a class action against the manufacturer, seeking to prevent the manufacturer from contacting physicians who prescribed the drugs). For full summary, see page 112. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/lewis.pdf>.

Philadelphia Plaza-Phase II v. Bank of America National Trust & Savings Assoc., May Term 2002, No. 332, 2002 WL 1472338, 2002 Phila. Ct. Com. Pl. LEXIS 13 (C.C.P. Phila. May 30, 2002) (Herron, J.) (The Court denied injunctive relief for a loan borrower seeking to restrain the lender from soliciting buyers for the loan and revealing the borrower's confidential business information, two actions that were permitted by express terms of the loan agreement). For full summary, see page 116. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/phil530.pdf>.

Solarz v. DaimlerChrysler Corp., No. 2033, 2002 WL 452218, 2002 Phila. Ct. Com. Pl. LEXIS 34 (C.C.P. Phila. March 13, 2002) (Herron, J.) (The Court denied injunctive relief where the request of a class of minivan owners was within the primary jurisdiction of a governmental agency). For full summary, see page 119. This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/solarz3.pdf>.

III. OPINION SUMMARIES

1. **Injunctions Against Partners (former and current) in a Shared Business**

Cerelli v. Cooper, February Term 2002, No. 1260 (C.C.P. Mar. 8, 2002) (McInerney, J.) (The Court granted injunctive relief for board members attempting to oust another board member suspected of mishandling finances, and denied injunctive relief for the board member being ousted). This Opinion is currently unavailable on the Commerce Court website.

Petitioner Michael Cerelli (“Cerelli”) founded the companies Bravo Productions, Inc. and Explosion Lighting and Draping Company (together, “Bravo”). Cross-petitioners Jeffrey Cooper (“Cooper”) and Rocco Tatasciore (“Tatasciore”) joined Bravo as shareholders on or about January 1, 1999. Cerelli, Cooper and Tatasciore each owned

one third of the total issued and outstanding stock of Bravo, and together the three were the sole directors of Bravo.

Bravo had considerable financial problems in the new millennium. In the third-quarter of 2001, Bravo was indebted to Commonwealth Bank under a \$600,000 face amount loan and a line credit of \$200,000. Cerelli, Cooper and Tatasciore, and each of their spouses had guaranteed the loan. Commonwealth Bank made a demand for repayment of the indebtedness, and, when it was not repaid, confessed judgment on all parties for approximately \$750,000.

Subsequent to the confession of judgment against them, Cooper and Tatasciore developed concerns about Cerelli's management of the companies and requested detailed information about the business from Cerelli. On November 20, 2001, Cerelli, Cooper and Tatasciore entered into a "Stock Purchase Agreement" (the "Agreement"), pursuant to which Bravo would repurchase the stock of Cooper and Tatasciore within two years of the execution of the Agreement for \$50,000 apiece. The Agreement was signed by all three, but not at the same time or place. The Agreement purported to make Cerelli the sole shareholder and sole director of Bravo.

Cooper and Tatasciore did not receive the requested financial information subsequent to the confession of judgment before signing the Agreement. Sharon Rofe ("Rofe"), Bravo's bookkeeper from April 9, 2000 through October 2001, had been instructed by Cerelli not to give any financial information to Cooper or Tatasciore. When Cooper and Tatasciore finally received the financial information, well after the signing of the Agreement, their concerns about the way Cerelli was running the business were aggravated. Specifically, Cooper and Tatasciore suspected that Cerelli was using

company funds for personal expenses. Additionally, it appeared that Cerelli had been paying himself dividends, which the other shareholders did not receive, and had unilaterally raised his salary in 2001.

On February 4, 2002, Cooper and Tatasciore scheduled a special meeting of the Board of Directors of Bravo for the morning of February 6, 2002. Cooper, as Secretary, gave notice of the special meeting by fax to Cerelli. On the evening of February 4, 2002, Cerelli responded that he would not attend the meeting as scheduled. Thereafter, Tatasciore, with the approval of Cooper, withdrew all the available funds from the bank accounts of Bravo at Commonwealth Bank and Commerce Bank. On February 7, 2002, Cooper faxed a letter to Cerelli stating that a Board of Directors meeting should take priority over all other business of the company, and offered to convene a meeting at a date, time, and place of Cerelli's choosing at any time up to noon on February 11, 2002.

A meeting was held on February 8, 2002, at the Conshohocken Marriott, attended by Cooper, Tatasciore and Cerelli. At the meeting, the Board adopted two resolutions, by votes of two to one, to remove Cerelli as President of Bravo for cause and directing Cerelli to return all company property in his possession.

Cooper then moved to preliminarily enjoin Cerelli: 1) from acting as an officer of Bravo; 2) from managing or interfering in the management or operation of the company; and 3) from retaining custody of any of the property of Bravo. Cerelli filed a cross motion for a preliminary injunction, seeking to enjoin Cooper from, among many other things, depriving him of his rights as a shareholder in Bravo, preventing him from participation in management of the companies and depriving him of continued employment.

The Court used the four-part preliminary injunction test from Valley Forge to analyze both petitions.¹⁸ In finding that Cooper was entitled to a preliminary injunction, the Court first reasoned that a majority of the Board of Directors had voted to remove Cerelli as President of Bravo and to have him return any and all company property in his custody, and such action was in accord with Bravo's Bylaws. Thus, the Court found that Cooper had established a clear right to relief. The Court also found that the loss of confidence in Bravo by its clients, consultants, banks, and employees due to the unresolved dispute between the parties constituted immediate and irreparable harm. Furthermore, the Court found that the damage to the business relationship with the bank, as creditor of the shareholders, could not be measured or compensated by money damages. Finally, the Court found that the balance of harms weighed in favor of granting Cooper's petition and not Cerelli's, and that granting relief to Cooper would return the parties to the status quo prior to the dispute.

Because Cerelli was unable show harm that could not be remedied by money damages, and because the requisites of a preliminary injunction are cumulative, the Court found that he had failed to establish his right to a preliminary injunction. Thus, the Court granted Cooper's, and denied Cerelli's, petition for a preliminary injunction.

¹⁸ "The petitioner has a clear right to relief; the preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; a greater injury will result by refusing to issue the injunction; and the injunction will restore the parties to the status quo as it existed prior to the wrongful conduct." Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981).

Hamdan v. Alwalidi, April Term 2001, 2001 WL 1807393, 2005 Pa. Super. LEXIS 515 (C.C.P. Phila. Nov. 2, 2001) (Herron, J.) (The Court denied injunctive relief for a cab driver trying to protect his company’s assets after the dissolution of a partnership with another cab driver). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/hamden11.pdf>.

In Hamdan, the Plaintiffs Ibrahim Hamdan (“Hamdan”) and Northeast Taxi Coach sought to restrain and enjoin Hassan Alwalidi (“Alwalidi”) and Northeast Coach Inc. from disposing of the assets of Northeast Taxi Coach, including the phone number and the PUC approved taxicab color scheme.

On January 18, 2000, Hamdan and Alwalidi entered into an agreement to create Northeast Taxi Coach, Inc. Alwalidi, however, denied that he had signed the Articles of Incorporation while Hamdan maintained that he did. Additionally, Hamdan testified that, pursuant to the terms of their agreement, he had given Alwalidi \$1000 and a 1994 Chevrolet. Alwalidi denied having received either of these items. The partnership later dissolved, and Hamdan filed this petition for preliminary injunction.

Under Pennsylvania law, a court will grant a preliminary injunction, if:

1. The petitioner has a clear right to relief;
2. The preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
3. A greater injury will result by refusing to issue the injunction;
4. The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; and
5. The wrong is actionable and the injunction is reasonably suited to abate that wrong.¹⁹

The Court found that the Plaintiffs failed to satisfy the first two requirements. In assessing the Plaintiffs’ right to relief, the Court found that based on the evidence, it was

¹⁹ New Castle Orthopedic Assoc. v. Burns, 481 Pa. 460, 392 A.2d 1383 (Pa. 1978).

not clear whether the phone number had ever been transferred to Hamdan or Northeast Taxi Coach, Inc. Furthermore, there was no mention in the agreement that the phone number or the PUC color scheme would be transferred to Northeast Taxi Coach, Inc. Thus, the Court found there was no clear right to relief.

The Court noted that the plaintiff had the burden of showing that the harm could not be compensated by damages. The Court found that, due to the existence of significant alternative sources of business, the Plaintiffs had failed to demonstrate what immediate and irreparable harm they would suffer. Finally, the Court found that any harm suffered by the Plaintiffs would be best remedied by monetary damages.²⁰

Having found that the Plaintiffs had failed to satisfy the first two requirements, the Court did not address the final three prongs of the preliminary injunction test since “[t]he requisites of a preliminary injunction are cumulative, and if one element is lacking, relief may not be granted.”²¹ For the foregoing reasons, the Court denied the petition for preliminary injunction.

Note: In a decision without a published opinion, the Superior Court of Pennsylvania vacated and remanded this decision on January 25, 2005.

Mozenter v. Trigiani, May Term 2002, No. 0595; June Term 2002, No. 0605, 2003 WL 1861578, 2003 Phila. Ct. Com. Pl. LEXIS 59 (C.C.P. Phila. April 2, 2003) (Sheppard, J.) (The Court denied a preliminary injunction for an attorney who sought legal fees generated after the formal termination of his relationship with a previously-shared client). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/moz-op.pdf>.

Petitioner Robert Mozenter, Esquire (“Mozenter”) and defendant Joel Trigiani, Esquire (“Trigiani”) originally shared office space but practiced law independent of one

²⁰ Schaeffer v. Frey, 403 Pa. Super. 560, 565, 589 A.2d 752, 755 (Pa. Super. 1991).

²¹ Norristown Mun. Waste Auth. v. West Norriton Twp. Mun. Auth., 705 A.2d 509, 512 (Pa. Commw. 1998).

another. In 1996, Mozenter was asked by a representative of Local Union # 322 (“the Union”) to perform certain legal services. Mozenter discussed the arrangement with Trigiani, and the two reached an oral agreement that they would share the representation of the Union and split the compensation 50/50, regardless of who performed the work. Mozenter and Trigiani established a joint checking account bearing both of their names for all revenue generated from the representation of the Union.

From 1998 through 2002, Trigiani performed approximately 99% of the work for the Union. In 2001, the oral agreement between Mozenter and Trigiani was modified from an equal split of the revenue gained from the representation of the Union to Trigiani receiving 60% and Mozenter 40%. On April 5, 2002, Trigiani expressed his intention to terminate his relationship with Mozenter. Mozenter responded four days later with a demand that he continue to receive 40% of all Union revenues, regardless of Trigiani’s intention to dissolve their business relationship. On April 18, 2002, the Union voted unanimously to terminate its prior relationship with both Mozenter and Trigiani, and to retain Trigiani as its sole counsel.

On June 5, 2002, Mozenter filed a Complaint in Equity alleging breach of contract and conversion, and simultaneously filed a motion for a preliminary injunction. Mozenter’s injunction asked the Court to place all fees generated from the legal representation of the Union in escrow pending adjudication of the merits of the underlying claims.

In analyzing Mozenter’s request for relief, the Court employed the five-part test for establishing a right to a preliminary injunction:

- 1) that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;

- 2) that greater injury will occur from refusing the injunction than from granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
- 5) that the plaintiff's right to relief is clear.²²

The Court denied the request for an injunction, finding that Mozenter had failed to establish both the first and fifth parts of the test. With respect to the first part of the test, the Court found that Mozenter had failed to establish the existence of irreparable harm because he was unable to show that his alleged loss was not entirely ascertainable or compensable by money damages. Only “when there is proof that the threatened monetary loss is so great as to threaten the existence of the business” will such an action meet the threshold of “irreparable harm,” and the Court found that the required standard was not established in the instant case.²³ With respect to the fifth part of the test, the Court found that Mozenter had failed to establish “a clear right to relief,” as he could not show that he was entitled to any portion of the legal fees generated by Trigiani after April 18, 2002, when Trigiani was appointed sole counsel by the Union’s unanimous vote.

Pence v. Petty, December Term 2000, No. 593, 2001 WL 1807778, 2001 Phila. Ct. Com. Pl. LEXIS 48 (C.C.P. Phila. February 6, 2001) (Herron, J.) (The Court denied injunctive relief for a business shareholder seeking to prevent another shareholder from selling her interest to a third party because the share transfer agreement was oral and thus unenforceable). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/pence.pdf>.

Plaintiff Sheri Pence (“Pence”) and defendant Julie Petty (“Petty”) were formerly equal interest shareholders of the Martini Café. In November 2000, Petty sold her shares

²² Valley Forge Hist. Soc. v. Wash. Mem. Chapel, 493 Pa. 491, 426 A.2d 1123, 1128 (1981).

²³ Three County Services, Inc. v. Philadelphia Inquirer, 337 Pa. Super. 241, 486 A.2d 997, 1001 (1995).

in the business to Renee Verker for one dollar. Pence filed a petition for preliminary injunction seeking to bar Renee and Michael Verker from exercising any ownership interest in the restaurant.

There was no written agreement between Petty and Pence restricting the transfer of shares. However, Pence alleged that she and Petty had an oral shareholders agreement in which they agreed to give the other a first option to buy any shares before selling to a third party. The Petition for Preliminary Injunction asked the court to enforce this agreement, thereby barring Renee and Michael Verker from entering the premises of the Martini Café.

The Court may grant an injunction only if a plaintiff establishes, among other things, a clear right to relief for an actionable wrong.²⁴ In order to show that she had a clear right to relief, Pence was required to establish that the first option agreement was enforceable against Renee Verker. The Court held that Pence could not make such a showing because an oral transfer restriction is unenforceable against a transferee who does not actually know of the restriction at the time of transfer.²⁵ Thus, even accepting that Petty and Pence had an oral agreement restricting the transfer of the shares to third parties, Section 1529(f) provides that oral agreements may only be enforced against transferees with actual knowledge of the restriction.

Since there was no evidence that Renee Verker had actual knowledge of the unwritten transfer restriction, Pence could not enforce the oral agreement. For this

²⁴ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

²⁵ 15 Pa. C.S.A. § 1529(f).

reason, Pence failed to establish a clear right to relief and the Court denied her Petition for Preliminary Injunction.

Sagot Jennings & Sigmond v. Sagot, April Term 2002, No. 3099, 2003 WL 1873298, 2003 Phila. Ct. Com. Pl. LEXIS 68 (C.C.P. Phil. April 2, 2003) (Sheppard, J.) (The Court granted a modified preliminary injunction notwithstanding an agreement to arbitrate all disputes where a former partner in a law firm embarked on an elaborate scheme to defraud the firm). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/sag-spct.pdf>.

Defendant Neil Sagot (Sagot) is a former partner of the Plaintiff-law firm Sagot Jennings & Sigmond (“SJS”), now known as Jennings Sigmond (“JS”). Prior to April 17, 2002, the parties had been negotiating procedures for Sagot to leave the firm, but those efforts were unsuccessful. JS alleged that on the night of April 17, Sagot went to the law firm offices and took from the premises firm possessions and files. Sagot maintained that he had a right to do so. JS alleged that Sagot deposited some of the checks made out to the firm in his own individual account, that he interfered with the distribution of mail to the firm’s offices, that he was incurring “suspiciously high costs during his last days at [the firm],” and other acts detrimental to JS. JS filed suit against Sagot on April 19, 2002 (“Suit I”).

JS filed a subsequent suit on June 24, 2002 (Suit 2), alleging that two associates at the firm, Laura Brooke (“Brooke”) and Stuart Phillips (“Phillips”), had been working in concert with Sagot to take the firm files and possessions on the night of April 17, and to subsequently defraud JS of substantial sums of money.

Suit 1 was filed in equity, and JS sought injunctive relief to compel, among other things, “an accounting of all items removed from [JS’s] premises, non-destruction of such items, a return of all such items, [and] delivery of mail interfered with and the reversal of the interference with [JS’s] mail.” Suit 2 was a civil complaint alleging, among other

things, common law fraud, conversion and breach of the duty of loyalty. Sagot moved to compel arbitration pursuant to an arbitration clause found in the agreement creating the firm. JS nonetheless asked the Court for injunctive relief pending arbitration. JS cited to Ortho, a Third Circuit case, for the proposition that an injunction is appropriate where it is essential to preventing irreparable harm and maintaining the status quo pending arbitration.²⁶

The Court first noted that the Pennsylvania Superior Court had previously cited to Ortho in deciding that injunctive relief should be available even in the presence of an arbitration agreement to preserve the status quo prior to adjudication or arbitration. To a limited extent, the Court agreed with JS that irreparable harm was likely if the injunction was not granted. The Court found that JS's "concern over the destruction of files taken from its offices and the costs incurred toward the cases of disputed clients [was] legitimate," and that "if not enjoined, [Sagot] may act in such a way that the above information, which is essential to an arbitrator's decision, and which [JS] claims to be solely in [Sagot's] possession and/or control, could be disposed in part or in whole when the case comes before arbitration."

Thus, in spite of the arbitration agreement, the Court found that an injunction limited to the above property and information was appropriate.

²⁶ Ortho Pharmaceutical Corp. v. Amgen, Inc., 882 F.2d 806 (3d Cir.1989).

Tillery v. Leonard & Sciolla, LLP, June Term 2005, No. 3085, 2006 WL 2947671, 2006 Phila. Ct. Com. Pl. LEXIS 387 (C.C.P. Phila. October 12, 2006) (Sheppard, J.) (The Court declined to amend a prior Order that denied a Petition for Preliminary Injunction for being moot). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/050603085.pdf>.

M. Kelly Tillery (“Tillery”) was a partner in the law firm of Leonard, Tillery & Sciolla, LLP from 1982 to April 2005. In April 2005, Tillery left the law firm to practice at another firm in Philadelphia. In June 2005, Tillery filed a Complaint and Petition for Preliminary Injunction, alleging that his former firm Leonard and Sciolla (“L&S”) refused to turn over to him certain emails and electronic files that were stored on the firm’s computers. Two hearings were held on the Petition for Preliminary Injunction. At the conclusion of the hearings, the parties were to try to work out an agreement pending the exchange of the information. The ruling on the Petition was held in abeyance while the parties attempted to resolve their dispute.

Subsequently, L&S produced the information Tillery sought in his Petition for Preliminary Injunction. In light of this production, the Court found that the Petition had become moot and therefore denied the Petition on May 24, 2006.

Tillery filed a Motion for Reconsideration, seeking to amend the Order denying the Petition for Preliminary Injunction to state that the Order did not preclude a later claim for damages. While all of the information sought in the Petition was turned over, Tillery claimed that the information was turned over approximately one year after it was initially requested. As a result of this delay, Tillery claimed that his clients may have been harmed and that any such harm would subject him to a claim for damages in the future.

Tillery conceded that he had not, at the time of his filing, suffered any damages, and further acknowledged that it was possible that such proceedings for damages may never be initiated. Recognizing that “[t]he function of a court is to redress existing wrongs . . . [t]he 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,”²⁷ the Court declined to amend the May 24, 2006 Order denying the Petition for Preliminary Injunction.

2. Enjoining the Award of a Public Works Contract

Buckley v. City of Philadelphia, March Term 2002, No. 1894, 2002 WL 1472334, 2002 Phila. Ct. Com. Pl. LEXIS 45 (C.C.P. Phila. May 22, 2002) (Herron, J.) (The Court enjoined the awarding of a construction project to a company that supplied a defective bid). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/buck2.pdf>.

Plaintiff Buckley & Company, Inc. (“Buckley”) is a Pennsylvania corporation in the construction business. Defendant Rockport Construction Company, Inc. (“Rockport”) is also a Pennsylvania corporation in the construction business. Defendant City of Philadelphia (“the City”) solicited sealed bids for a project that involved the construction of an asphalt multipurpose trail and associated lighting along the east bank of the Schuylkill River in Philadelphia.

The Invitation for Bids, issued under the provisions of the United States Department of Transportation (“U.S.DOT”), contained instructions to prospective bidders, including a section entitled “Disadvantaged Business Enterprise (DBE) Requirements for PennDOT/FHWA Funded Projects” (“DBE Requirements”). Because the project was federally funded, the City needed an approval from PennDOT before

²⁷ Silver v. Zoning Board of Adjustment, 381 Pa. 41, 45, 112 A.2d 84, 87 (Pa. 1955).

making a contract award on the project. The DBE Requirements included a “goals” section, which stated in pertinent part that the City “has established in connection with this contract, the goal of 10% of the total dollar amount of the contract for the utilization of firms owned and controlled by socially and economically disadvantaged persons.” The DBE Requirements also provided that “any DBE that is listed on the ‘Schedule for Participation’ ... must be certified by PennDOT at the time of bid opening in order to be counted toward the participation goals established for the contract.”

The bids for the construction project were received and opened on January 29, 2002. Both Buckley and Rockport had submitted bids, along with five other firms. Rockport’s bid of \$6,398,427 was the lowest of all the bidders. Its bid contained the requisite Schedule for Participation, which indicated participation by two DBE firms: American Indian Builder’s & Suppliers, Inc. (“American Indian”) and L & R Construction Co., Inc. (“L & R”). On its face, Rockport’s bid, through its Schedule for Participation, appeared to meet the 10% DBE participation goal. However, questions remained as to whether American Indian was actually certified as a “Regular Dealer” in specific items it proposed to supply, i.e., precast concrete coping, stainless steel railing and low bulkhead railings. This distinction was important because Rockport’s Schedule for Participation represented American Indian as a “Regular Dealer” of those items, and without that classification, Rockport’s bid would not satisfy the 10% DBE participation goal and thus would be defective.

On or about February 5, 2002, the City’s Minority Business Enterprise Council (“MBEC”) determined that Rockport was both responsible and responsive and had satisfied the requisite DBE participation goal. On February 7, 2002, Buckley sent a

protest letter to Harry Hillock (“Hillock”), the City’s Deputy Procurement Commissioner, asserting that Rockport’s apparent low bid should be rejected for failure to meet the DBE requirements under PennDOT regulations with respect to American Indian.

Significantly, government entities normally investigate and/or review American Indian’s DBE certification status every one or two years. At the time of the bid opening, American Indian was certified by PennDOT as a DBE firm. However, PennDOT’s DBE Directory for Regular Dealers specifically listed American’s Indian’s work classifications to include only asphalt, electrical, pipe and plumbing supplies, steel, precast catch basins/risers, and coatings/lumber. American Indian was not listed for “precast concrete coping,” “stainless steel railing” or “low bulkhead railings” as was indicated in Rockport’s Schedule for Participation. Regardless of that fact, on March 11, 2002, PennDOT wrote to the City and indicated that it had reviewed the DBE firms listed for the construction project and that it approved the participation by American Indian and L & R. On March 14, 2002, the City made its award of the contract to Rockport.

Buckley then sought to enjoin the City from executing or taking any other actions in furtherance of the contract on the Schuylkill River Project. The Court found that Buckley had established each of the five prerequisites for obtaining a preliminary injunction.²⁸ First, the Court found that Buckley had shown a reasonable likelihood of

²⁸ To be entitled to a preliminary injunction, the plaintiff must prove the following elements: “1) that relief is necessary to prevent immediate and irreparable harm which could not be remedied by damages; 2) that greater injury would result by refusing such relief than by granting it; 3) that the injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct; 4) that the injunction is reasonably suited to abate such activity; and 5) that the plaintiff’s right to relief is clear and the alleged wrong is manifest.” Singzon v. Department of Public Welfare, 496 Pa. 8, 10, 436 A.2d 125, 126 (1981).

success on the merits because Rockport's bid was "materially defective where it failed to meet the 10% DBE participation goal because American Indian could not be considered a regular dealer in the precast concrete copings to be supplied for the Project." Second, the Court found that "absent the injunction, irreparable harm would result by Rockport's gaining an unfair competitive advantage that offends the purpose of competitive bidding."²⁹ Third, the Court found that "the balance of harms weighs in favor of granting the injunction to protect the taxpayers' right to a fair bidding process." Fourth, the Court found that the injunction would preserve the status quo, as the City "would be prevented from executing or proceeding on the contract award." Finally, the Court found that injunctive relief was appropriate "to protect the integrity of the competitive bidding process."

Finding all elements satisfied, Buckley's petition for a preliminary injunction was granted and bond was set at \$1,000, to be paid within ten days of the Court's order.

Carr & Duff, Inc. v. SEPTA, February Term 2002, No. 4101, 2002 WL 746385, 2002 Phila. Ct. Com. Pl. LEXIS 47 (C.C.P. Phila. April 12, 2002) (Sheppard, J.) (The Court denied injunctive relief for a construction company seeking to enjoin a state transportation authority from awarding a bid contract). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/ca-op.pdf>.

In July 2002, defendant Southeastern Pennsylvania Transportation Authority ("SEPTA") advertised a public works project ("the project") and invited competitive bids for the project. In August, SEPTA advertised a separate invitation for prime electrical contractor bids for the project. The bid instructions for the project required that "[t]he Bid Bond must be issued by a fully qualified surety company acceptable to SEPTA and...authorized under 31 CFR Part 223 as possessing a Certificate of Authority as

²⁹ The Court cited Shaeffer v. the City of Lancaster, 754 A.2d 719, 2000 WL 639940, at *2 (Pa.Comm. Ct. 1997), for this proposition.

described hereunder.” On December 20, SEPTA publicly opened the sealed bidders’ proposals for the project, with the three lowest bidders as follows: Fairfield bid at \$54.7 million; Balford Beatty bid at approximately \$61.8 million; and Petitioner Carr & Duff bid at approximately \$65.5 million. As the lowest bidder, it was SEPTA’s intent to award the contract to Fairfield. Fairfield’s bid bond for the project was signed by Joan Bagnall, a Houston, Texas resident given power of attorney to execute bonds on behalf of Liberty Mutual.

On February 27, 2002, Carr & Duff filed a petition for a preliminary injunction seeking to enjoin SEPTA from awarding the contract for the project to Fairfield. Carr & Duff alleged that the bid submitted by Fairfield violated Pennsylvania law and could not be accepted by SEPTA as a valid bid because Ms. Bagnall did not possess a valid agent or non-resident agent certificate of qualification from the Insurance Department of the Commonwealth of Pennsylvania. In support of their allegation, Carr & Duff argued that Ms. Bagnall was performing the activities of an “agent” when she executed and delivered the bid bond and therefore, she was required to have a certificate of qualification as defined by 31 Pa.Code § 39.1.

In order for the Court to have granted the preliminary injunction, Carr & Duff would have had to show the following:

- 1) that relief is necessary to prevent immediate and irreparable harm which could not be remedied by damages;
- 2) that greater injury would result by refusing such relief than granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately prior to the alleged wrongful conduct;
- 4) that the injunction is reasonably suited to abate such activity; and,

- 5) that the plaintiff's right to relief is clear and the alleged wrong is manifest.³⁰

The Court found that Carr & Duff had failed to show that their right to relief was clear and that the alleged wrong was manifest, which, like each element of the preliminary injunction test, is dispositive if not satisfied. The Court supported its conclusion by stating that surety bonds do not constitute insurance, and that "Pennsylvania law does not require an employee of a surety company to be registered as an insurance agent pursuant to the Insurance Code for a bond executed by that employee to be enforceable." Furthermore, the Court found that Carr & Duff's argument that Fairfield's bid lacked an enforceable bond was overcome by Liberty Mutual's power of attorney authorizing Ms. Bagnall to act on its behalf in executing bonds. Therefore, the Court denied the injunction requested by Carr & Duff.

MC Painting Corporation v. School District of Philadelphia, June Term 2000, No. 2265, 2000 WL 33711069, 2000 Phila. Ct. Com. Pl. LEXIS 102 (C.C.P. Phila. June 20, 2000) (Herron, J.) (The Court denied a preliminary injunction for a painting company that had failed to meet the bid requirements for a contract with the city's school district). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/mcpaint.pdf>.

Defendant School District of Philadelphia ("the School District") solicited sealed bids on the painting contract for an elementary school in Philadelphia. Along with the Invitation to Bid, the School District included Instructions to Bidders. According to the Instructions, each bid had to be properly signed to be considered a "bid," the signature had to be by the person(s) legally authorized to bind the Bidder to a contract, and each bid had to be accompanied by a Consent of Surety letter. The School District also

³⁰ Singzon v. Commonwealth of Pennsylvania, Dept. of Public Welfare, 496 Pa. 8, 11, 436 A.2d 125, 126 (1981).

expressly reserved the right to “reject a bid not accompanied by the required bid security or by other data required by the Bidder Documents.”

On February 23, 2000, Plaintiff MC Painting Corporation (“MC Painting”) submitted a bid in response to the Invitation to Bid. On that same date, the School District opened its bids and informed MC Painting that it was the lowest bidder for the contract with a bid of \$216,257.00. Shortly thereafter, MC Painting took several steps in preparation for the painting of the elementary school. On April 19, 2000, the School District informed MC Painting that its bid was being rejected as non-responsive for failing to include a Consent of Surety letter and for failing to sign the bid, two bid requirements listed in the Instructions. On April 24, 2000, the School District awarded the painting contract to Applewood Enterprises, Inc. (“Applewood”).

On May 16, 2000, MC Painting filed a petition for a preliminary injunction. It requested that it be awarded the painting contract for the Project and, in the alternative, that the School District be enjoined from awarding the contract to any bidder other than the party whose bid is most advantageous to the School District and in a manner consistent with the terms of the invitations for bids and the applicable statutes and regulations.

The Court outlined the five requisite elements for demonstrating the right to a preliminary injunction from Wilkinsburg.³¹ The Court first noted that a party seeking to enjoin the award of a public contract can establish the requisite “clear right to relief” by showing irregularities in the bidding process.³² The Court also noted that its scope of review was limited to determining whether the School District’s rejection of MC Painting’s bid was a manifest abuse of discretion or purely an arbitrary execution of the School District’s duties or functions.³³

The Court held that MC Painting had failed to establish a clear right to relief because its bid, though the lowest in monetary value, did not comply with the mandatory bid instructions since the bid was not signed and failed to include a Consent of Surety letter. The Court also held that it was uncertain that the alleged wrong was actionable since the School District was presumed to have acted within its discretion and MC Painting had failed to demonstrate otherwise. Finally, the Court held that the balance of harms weighed in favor of denying the injunction since the School District had already awarded the painting contract to Applewood and any attendant delay arising from the injunction could put a fiscal strain on taxpayers or result in additional litigation between

³¹ “(1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) that greater injury will occur from refusing the injunction than by granting it; (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and (5) that the plaintiff’s right to relief is clear.” School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995).

³² See American Totalisator Co., Inc., v. Seligman, 489 Pa. 568, 576-77, 414 A.2d 1037, 1041 (1980).

³³ See id.

Applewood and the School District. Thus, MC Painting's petition for a preliminary injunction was denied.

Polydyne, Inc. v. City of Phila., No. 3678, 2001 WL 1807900, 2001 Phila. Ct. Com. Pl. LEXIS 54, (C.C.P. Phila. August 6, 2001) (McInerney, J.), vacated and remanded by Polydyne, Inc. v. City of Phila., 795 A.2d 495, 2002 Pa. Commw. LEXIS 175 (Pa. Commw. Ct., 2002) (The Court denied permanent injunctive relief to a disappointed contract bidder who alleged that the bidding process was corrupt). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/polydyne.pdf>

Plaintiff, Polydyne, Inc. ("Polydyne"), is a Delaware corporation that engages in the business of manufacturing polymers for use in solid waste water treatment plants. Polydyne is authorized to do business in the Commonwealth of Pennsylvania, and, in particular, Philadelphia. Defendant Philadelphia Water Department, Biosolids Recycling Center ("BRC") is a department of the City of Philadelphia at which waste water or sludge is treated through a process which separates solid waste material from the sludge. The separation process occurs at two distinct locations involving two differently composed sludge types: the Northeast ("NE") sludge and the Southeast/Southwest ("SE/SW") sludge. In processing both types of sludge, the BRC operates centrifuges to separate the solids from the waste water in a "dewatering process." This process uses polymers of the type manufactured by companies such as Polydyne.

Defendant Wayne Laraway ("Laraway") is the owner and principal of MPL Services, Inc. and EKR Resources, LLC., two completely separate companies. Before holding those positions, Laraway had worked for Cytec, a manufacturer of polymer, from 1992 to 1996. Laraway was laid off from Cytec at some point in 1996, but he still retained 5,335 shares of Cytec stock until sometime in December 2000, and was due to receive a pension from Cytec upon reaching the age of sixty-five.

Before the year 2000, the most recent public bid for Polymer was in 1996. That bid was won by Polydyne. The 1996 bid award was expected to cost the city of Philadelphia approximately \$1.5 million per year, but, by the end of the contract the cost was \$2.6 million per year. That increased cost was due to the failure of the original polymer used by Polydyne, and the need for a substitute polymer during the course of the contract. This polymer problem was one of several during the 1996 bid that prompted the City of Philadelphia to hire an independent technical consultant.

MPL and EKR (“Laraway”) were hired by BRC to assist in conducting the year-2000 polymer plant scale trials, and also to interpret the data collected in those trials. James Golembeski (“Golembeski”) is the plant manager of the BRC. He is responsible for overseeing the engineering aspects of the facility, and was instrumental in the hiring of Laraway’s services for the 2000 polymer plant scale trials. The BRC was under time pressure to hire Laraway, and it did not have time to go through an extensive contract approval process with the Solicitor’s Office. Beginning in May or June 1999, the BRC began planning its official polymer plant scale trial. The trials were to be conducted at the BRC by the BRC and Laraway, rather than by the Polymer vendors or manufacturers. By removing the vendors from this process, the BRC hoped to achieve its goal of reaching a fairer and more realistic result than that of the previous trial.

On January 7, 2000, the BRC distributed the Application Package for the polymer trials to all prospective bidders. As a preliminary matter, the BRC excluded “mannich” polymers from consideration during the scale trials because they had not performed satisfactorily in the past. Specifically, Polydyne had used mannich polymers at the 1996 trials and during the first part of the subsequent contract with the BRC.

Four polymer manufacturers were able to meet the requirements in the Application Package and participate in the 2000 trials: Polydyne, Cytec, CIBA and Stockhausen. According to the package, the bid would be awarded to the lowest responsible bidder, and the City of Philadelphia reserved the right to reject any and all bids. Prior to the unofficial vendor-conducted trials, Polydyne contested the use of Laraway's services by the BRC because of his connection with Cytec. Louis Applebaum, the city's Procurement Commissioner, rejected Polydyne's concerns as "speculative."

On May 1 to May 5, the BRC conducted the official polymer plant scale trials. Laraway was present at the trials to assist the BRC personnel with the actual "fieldwork" in conducting the trials. Ultimately the decision on how the official trials were conducted rested with Douglas Cowley ("Cowley"), an engineering specialist at the BRC. At the conclusion of the official trials, the BRC and Laraway evaluated the data in order to determine appropriate bid dosages for each manufacturer's polymer product. Based upon the data collected, the dosages in both the NE and SE/SW sludge resulted in CIBA having the best performing product, with Polydyne coming in second and Cytec and Stockhausen trading off for third and fourth between the two sludge types.

By letter dated August 17, 2000, the Procurement Department mailed a formal invitation to bid to each of the four manufacturers. The BRC's ultimate award of the bid was to be determined by a calculation involving the performance results from the official trials and the unit price for each manufacturer's polymer product on a pounds-per-dry-ton basis. Each manufacturer had total control and discretion over the unit price of its polymer product.

Cytec ended up being the lowest responsible bidder, and on September 6, 2000, it was awarded the contract. Polydyne's protest of the award came after Polydyne had lost the contract. After continual rejection of its protests by the City of Philadelphia, Polydyne sought preliminary and permanent injunctive relief to, among other things, void the award of the contract to Cytec. Polydyne's allegations centered on conflicts of interest in the bidding process due to the previous employment relationship between Cytec and Laraway.

The Court first noted that "[a] final injunction is warranted if such relief is necessary to prevent a legal wrong for which there is no adequate redress at law,"³⁴ and that unlike a preliminary injunction, "a final injunction does not turn on the presence of imminent or irreparable harm."³⁵ Further, the Court noted that "while a preliminary injunction requires a party to establish a reasonable likelihood of success on the merits, a party seeking a permanent injunction must establish his or her claim absolutely."

The Court denied Polydyne's request for a permanent injunction. First, it found that nothing in the bid specifications or in the actual bid gave Cytec an unfair competitive advantage over the other manufacturers. Next, it found that Polydyne could not show that Laraway had a material interest in awarding the contract to Cytec. The Court also reasoned that if Laraway had a bias in favor of Cytec, it would seem logical that their performance results would not have been so poor. "Taking all the evidence together," the Court stated, "it appears that Cytec won the Polymer Purchase Contract because it had

³⁴ Berger by and Through Berger v. West Jefferson Hill School Dist., 669 A.2d 1084, 1086 (Pa.Comm. Ct. 1995).

³⁵ Soja v. Factoryville Sportsmen's Club, 361 Pa. Super. 473, 478, 522 A.2d 1129, 1131 (1987).

the lowest price, and not because of any perceived unfair advantage.” Thus, because Polydyne could not establish its claim “absolutely,” its petition for a permanent injunction was denied.

Rogers v. School District of Philadelphia, June Term 2000, No. 2387, 2000 WL 33711075, 2000 Phila. Ct. Com. Pl. LEXIS 94 (C.C.P. Phila. June 6, 2000) (Herron, J.) (The Court granted a preliminary injunction for public contract bidders that objected to the awarding of the contract to a company that failed to meet the bid requirements). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/school.pdf>.

Plaintiff Devine Brothers, Inc. (“Devine”) is a Pennsylvania Corporation engaged in mechanical contracting work. Plaintiff Raymond Rogers (“Rogers”) is a former employee of Devine. Defendant Allstates Mechanical, Ltd. (“Allstates”) is also in the mechanical contracting business. In January of 2000, Defendant School District of Philadelphia (the “School District”) solicited sealed bids for the construction of a new elementary school at Fourth and Lehigh Avenue in Philadelphia. The School District solicited separate proposals for the heating, ventilation and air-conditioning (“HVAC”) work, due to the statutory requirement that all construction work on school buildings in excess of ten thousand dollars must be performed under separate contract.

In its solicitation for HVAC bids, the School District supplied all prospective bidders with a written Invitation to Bid and Instructions to Bidders (the “Instructions”), which set forth the requirements to be included in all bids submitted. The Instructions required that: 1) each bid be accompanied by a bid bond security in the amount of ten percent of the proposal; 2) that each bid be submitted on forms identical to those included in the bidding documents; and 3) that each bidder submit a Non-Discrimination Notice form at some point during the bidding/award process.

On February 23, 2000, both Devine and Allstates submitted sealed bids for the HVAC work. On that same date, the School District opened the HVAC bids, and

Allstates' bid in the amount of \$2,749,000 was the lowest. Devine's bid was the second lowest, in the amount of \$2,884,000. However, while Devine's bid proposal package had included a Non-Discrimination Notice form and a bid bond security in the amount of ten percent of the bid (\$288,400), Allstates' bid proposal package included neither.

In March of 2000, a meeting took place between the School District and Devine representatives where discussions were held concerning the HVAC contract and Devine was informed that the School District's legal department was reviewing Allstates' bid bond. On April 7, 2000, the School District announced its intention to award the HVAC contract to Allstates. Plaintiffs Rogers and Devine then moved to preliminarily enjoin the School District from awarding the HVAC contract to Allstates on the grounds that Allstates' bid failed to comply with the Instructions.

The Court first outlined the five requisite elements for demonstrating the right to a preliminary injunction from Wilkinsburg.³⁶ The Court noted that the crux of this controversy turns on whether the plaintiffs have shown a clear right to relief. Based on the evidence submitted, the Court found that the Plaintiffs had shown a "reasonable likelihood of success on the merits"³⁷ in proving that Allstates' bid proposal was defective for failure to provide the requisite bid security. The Court also found that irreparable harm would result if the School District was not enjoined from awarding the

³⁶ "(1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) that greater injury will occur from refusing the injunction than by granting it; (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and (5) that the plaintiff's right to relief is clear." School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995).

³⁷ Lewis v. City of Harrisburg, 158 Pa. Commw. 318, 324, 631 A.2d 807, 810 (1993).

HVAC contract to Allstates because Allstates would have gained an unfair competitive advantage that offends the purpose of competitive bidding. The Court further stated that if the injunction were refused, the advantage conferred upon Allstates would inflict greater injury on the Plaintiffs as taxpayers than would any alleged delay that might result from granting the injunction. Moreover, the Court found that granting the preliminary injunction would preserve the status quo since the School District would be prevented from awarding the contract to Allstates, when such an award would most likely be voided on appeal or at a final hearing. Finally, the Court found that the injunction was reasonably suited to abate the Defendants' conduct. Having found that Plaintiffs met all five elements of the preliminary injunction test, the Court granted injunctive relief.

Zinn Construction v. School Board of Philadelphia, June Term 2000, No. 3369, 2000 WL 33711083, 2000 Phila. Ct. Com. Pl. LEXIS 93 (C.C.P. Phila. July 10, 2000) (Herron, J.) (The Court denied a petition for injunctive relief for a disappointed contract bidder that failed to meet the bid requirements). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/zinn.pdf>.

Plaintiff Zinn Construction, Inc. ("Zinn") unsuccessfully bid for a contract with Defendant School Board of Philadelphia ("the School"). Thereafter, Zinn filed a petition for injunctive relief against the School, requesting that it be awarded the contract despite the School's decision.

Identifying the requisite elements for a preliminary injunction from Wilkinsburg³⁸ in a footnote, the Court denied Zinn's petition for lack of a "clear right to relief." The

³⁸ "(1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages; (2) that greater injury will occur from refusing the injunction than by granting it; (3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct; (4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and (5) that the plaintiff's right to relief is clear." School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 338, 667 A.2d 5, 6 n.2 (1995).

Court's determinative finding was that the School "acted within its discretion in rejecting [Zinn's bid] as non-responsive, where Zinn had only been in business as a contractor in this type of construction for one year and it did not literally meet the five-year experience requirement, as set forth in the bidding specifications." Moreover, the Court reasoned that it was not even in a position to review the School's rejection of Zinn's bid absent "bad faith, fraud, capricious action or abuse of power." Thus, Zinn's petition for injunctive relief was denied.

3. Corporate Shareholders' Disputes

Franklin Capital Partners v. MooseCorp. II, May Term 2006, No. 3660, 2006 WL 2663732, 2006 Phila. Ct. Com. Pl. LEXIS 361 (C.C.P. Phila. Sept. 11, 2006) (Abramson, J.) (The Court denied a preliminary injunction for limited partners in a partnership seeking to freeze certain monies and to have other funds be repaid to the partnership). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/060503660.pdf>.

Petitioners Franklin Capital Partners, Inc. ("Franklin") and Manayunk Investors Limited Partnership ("Manayunk") are limited partners of defendant Flatrock Partners, L.P. ("the Partnership"). Defendant MooseCorp II, Inc. ("MooseCorp") is the general partner of the Partnership, and defendant Albert M. Greenfield ("Greenfield") is the president of MooseCorp.

On April 3, 2001, the Partnership acquired certain real property located at 2 Leverington Avenue, Philadelphia for the purpose of developing three rental commercial spaces and fifty-nine rental residential apartments to be known as "The Watermill at Manayunk" (the "Project"). By settlement agreement dated May 1, 2006, the Partnership settled outstanding litigation with the general contractor of the Project for \$3.9 million. On May 30, 2006, petitioners commenced a civil action against the Partnership, alleging

breach of contract, breach of fiduciary duty and breach of a rent agreement. Petitioners sought declaratory judgment, an accounting and injunctive relief.

The Court denied petitioners' motion for a TRO to freeze the use of the \$3.9 million by the Partnership, but ordered a hearing on the injunction. Prior to the hearing, Petitioners modified their request for injunctive relief. The request as modified sought a prohibitory injunction enjoining the Partnership from making any distribution of funds to Greenfield or any Affiliate, and a mandatory injunction requiring Greenfield to repay, or cause to be repaid, approximately \$1.6 million to the Partnership.

In order for the Court to have granted the injunction, Petitioner was required to establish the "six essential prerequisites" for such relief:

- 1) absent an injunction, the plaintiff will suffer an immediate and irreparable harm which cannot be adequately compensated by monetary damages;
- 2) that such harm to plaintiff is greater than any harm that any interested party will suffer if the injunction is granted;
- 3) that the injunction will return the parties to the status quo that existed before the occurrence of any wrongful conduct;
- 4) that the plaintiff is likely to succeed on the merits of the underlying claim;
- 5) that the injunction sought is reasonably suited to abate the offending activity; and
- 6) that the injunction will not adversely affect the public interest.³⁹

In denying Petitioner's request for a mandatory preliminary injunction, the Court held that petitioners were unable to establish the existence of irreparable harm not fully compensable by monetary damages. The Court stated that Petitioners had failed to establish either: 1) a threat of monetary loss "so great that it threatens the existence of a business"; or 2) that the defendants had taken money which "unquestioningly belong[ed]" to petitioners. Thus, Petitioners had failed to satisfy either of the two

³⁹ Warehime v. Warehime, 580 Pa. 201, 860 A.2d 41, 46-7 (2004).

exceptions to the bar on injunctive relief for harm that is fully compensable by monetary damages. The Court further concluded that “[a]llegations of improper distribution of partnership funds without more are insufficient to prove irreparable harm.”

Jewelcor Management, Inc. v. Thistle Group Holdings, Co., March Term 2002, No. 2623, 2002 WL 576457, 2002 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. March 26, 2002) (Herron, J.) (The Court granted a preliminary injunction for shareholders that were constructively prevented from nominating individuals to the board of directors). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/jewel3.pdf>

Thistle Group Holdings, Co. (“Thistle”) is a publicly traded Pennsylvania corporation that operates primarily through Roxborough Manyunk Bank (“the Bank”). Jewelcor Management, Inc. (“JMI”) is an owner of 500 shares of Thistle common stock. The Thistle by-laws (“the By-laws”) state that its annual shareholders’ meeting is to be held “on such date and time as may be determined by the Board of Directors and stated in the notice of such meeting.” The By-laws also state that notice of the annual meeting must be given at least ten days before the meeting.

On January 20, 2002, the Thistle Board of Directors (“the Board”) determined that the 2002 shareholders’ meeting would be held on April 17, 2002. On January 23, Thistle informed ADP Proxy Services (“ADP”) that the meeting would be held on April 17, 2002. ADP then passed an informal notice regarding the meeting date to certain banks and brokers who held Thistle common stock. On February 13, 2002, JMI provided Thistle with a notice that it planned to nominate three individuals for election to the Board at the meeting. Relying on the information obtained from ADP, JMI prepared a proxy solicitation schedule based on the April 17, 2002 meeting date.

The Board met again on February 20, 2002, and authorized moving the meeting to April 3, 2002. Thistle asserted that the move was orchestrated to avoid a lengthy proxy fight that would distract Thistle from focusing on core banking issues to its detriment.

Conversely, JMI asserted that the rescheduled meeting date was a deliberate move by Thistle to prevent JMI from nominating individuals to the Board. JMI asserted that because responses to its proxy solicitation would not be received until April 4, 2002, at the earliest, JMI would not be able to nominate individuals to the Board if the meeting was on April 3, 2002. Thus, JMI sought to preliminarily enjoin Thistle from holding the shareholder's meeting before April 17, 2002.

The Court used the four-part preliminary injunction test from Valley Forge to analyze JMI's petition.⁴⁰ The Court first found that while Thistle's change of the date for the shareholders' meeting was not illegal, it was improper and inequitable because it amounted to a manipulation of the election to perpetuate its own control of the corporation. The Court next found that JMI would suffer immediate and irreparable harm because the April 3, 2002, meeting date would make it impossible for it to continue its proxy battle in favor of its own nominees. The Court, citing to Valley Forge, then found that the injunction would preserve the status quo because the last date that the meeting was to be held on April 17 was "the last actual, peaceable and lawful non-contested status which preceded the pending controversy."⁴¹ Finally, the Court found that greater injury would result from refusing to grant the injunction than from denying it. The Court dismissed Thistle's argument that JMI and the Bank's positions were harmful to the corporation, stating that "a corporation's directors may not muzzle a shareholder simply

⁴⁰ "The petitioner has a clear right to relief; the preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; a greater injury will result by refusing to issue the injunction; and the injunction will restore the parties to the status quo as it existed prior to the wrongful conduct." Valley Forge Historical Society v. Washington Memorial Chapel, 493 Pa. 491, 500, 426 A.2d 1123, 1128 (1981).

⁴¹ Id. at 501, 1129.

because they deem the shareholder's views to be bad." Finding that JMI had satisfied each of the requisite elements, the Court then granted the petition for a preliminary injunction.

The Court then reasoned that a \$500 bond posted by JMI would be "sufficient to sustain the Injunction."

Kessler v. Broder, November Term 2002, No. 4183, 2003 WL 21782433, 2003 Phila. Ct. Com. Pl. LEXIS 61 (C.C.P. Phila. July 28, 2003) (Sheppard, J.) (The Court affirmed an Order granting a Preliminary Injunction for a minority shareholder group that was denied a lucrative business opportunity by the majority shareholders). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/kes-op.pdf>.

The plaintiffs, known collectively as the "Kessler Group," are minority shareholders in the four defendant corporations ("defendant corporations"). The majority shareholders, the "Broder Group," own approximately⁴² 62.5 percent of the shares of the defendant corporation, with the Kessler Group owning the remaining 37.5 percent. Prior to November 2002, the Kessler Group and the Broder Group served as directors of the defendant corporations. The Kessler Group contends that it had an oral agreement with the Broder Group to allocate the MRI reads from the MRI centers in proportion to their respective ownership in the defendant corporations. Approximately one third of the reads were performed by the Kessler Group, and the rest by the Broder Group. The reads allocated to the Kessler Group were reduced to approximately ten to twelve percent, then the allocation ceased entirely.

On November 27, 2002, the Kessler Group filed a Complaint and a Petition for an Injunction and Appointment of a Custodian ("Injunction Petition") against the Broder Group. The Complaint asserted causes of action for breach of fiduciary duty,

⁴² The defendants submitted a Petition for Reconsideration or a Stay of Preliminary Injunction Pending Appeal, which the court subsequently denied.

interference with actual and prospective contractual relations, misappropriation of trade secrets, procurement of business information by improper means, conversion, unfair competition, fraud, unjust enrichment, civil conspiracy, and a request for injunctive relief.

On January 9, 2003, the court entered an Order which granted an injunction in part, and denied it in part. The court ordered that the defendants make available to plaintiffs the corporate books and records, and denied the request for a Custodian. On May 13, 2003, the court held a second hearing, and entered an Order requiring the defendants to assign one-third of the MRI reads to the plaintiffs commencing on June 2, 2003.

In their appeal of the May 13, 2003 decision, the defendants argued that the preliminary injunction should be vacated because the plaintiffs suffered only monetary losses. Citing Santoro v. Morse,⁴³ the court stated that “[i]n the commercial context, the impending loss of a business opportunity or market advantage may aptly be characterized as irreparable injury for the purpose of an injunction.” The impending loss of a business opportunity or market advantage was found to be sufficient for injunctive relief. Here, the Court found that since MRI reading is a referral based business, which relies upon the continuing relationships with physicians, harm to the Kessler Group would be irreversible. Furthermore, since the amount of business lost would be conjecture, the court could not adequately determine money damages.

The Court further found that the injunction would restore the parties to the status quo as it existed prior to when the Broder Group ceased giving reads to the Kessler

⁴³ 2001 PA Super 223, 781 A.2d 1220, 1229 (2001).

Group. The Order to assign one-third of the reads to the Kessler Group reestablished the previous allocation.

For these reasons, the Court found the injunction to be reasonably suited to abate the injury to the Kessler Group, and therefore affirmed the Order granting the Preliminary Injunction.

Wurtzel v. Park Towne Place Apartments Limited Partnership, June Term 2001, No. 3511, 2001 WL 180 7405, 2001 Phila. Ct. Com. Pl. LEXIS 79 (C.C.P. Phila. Sept. 11, 2001) (Herron, J.) (The Court enjoined a corporate merger that was inconsistent with the terms of a partnership agreement). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/wurtz831.pdf>.

Plaintiff Alan Wurtzel (“Wurtzel”) was a limited partner in defendant Park Towne Place Associates Limited Partnership (“the Partnership”) since 1986. The Partnership owned an apartment complex in Philadelphia, and it sold 380 limited partnership units to investor limited partners for \$75,000 to \$100,000 per unit. Wurtzel bought one unit. Defendant PTP Properties, Inc. (“PTP”) is the sole general partner of the Partnership. On February 26, 1999, PTP became a wholly owned subsidiary of defendant AIMCO Properties (“AIMCO”).

In March 1999, Equity Resources Boston Fund (“Equity”) offered to buy partnership units from the limited partners for \$5,000 per unit. AIMCO offered \$8,208 per unit, and their offer contained a statement that the general partner believed AIMCO’s price to be fair. Equity then increased its offer to \$12,000 per unit, and AIMCO responded by increasing its offer to \$48,533, once again with a statement that the general partner believed AIMCO’s price to be fair. In February 2001, AIMCO increased its offer to \$66,788 per unit. At this point, some limited partners sold their partnership units to AIMCO.

By May 29, 2001, AIMCO owned 58.14% of the limited partnership units. At or around that time, the Partnership sent a letter to the limited partners announcing that it would merge with Park Towne Place Transitory Company, LLC, an entity wholly owned by AIMCO. The letter also announced that the merger would force the minority limited partners to give up their interests in exchange for either \$81,422 in cash per unit or AIMCO partnership units at another location. Wurtzel initiated a class action on behalf of the minority limited partners claiming breach of fiduciary duty, breach of the partnership agreement and fraud. Wurtzel also petitioned for a preliminary injunction to enjoin the Partnership from merging with AIMCO.

The Court granted Wurtzel's petition for a preliminary injunction after finding that the five requisite elements had been satisfied.⁴⁴ First, the Court found that Wurtzel's right to relief for an actionable wrong was clear because a supermajority of the limited partners (two thirds) had not agreed to the merger as required by a 1996 amendment to the Partnership agreement. Furthermore, the Court found that PTP breached its fiduciary duty of full and fair disclosure to the limited partners by not informing them that they could vote on the merger.

Second, the Court found that the deprivation of Wurtzel's right to vote on the merger constituted irreparable harm. While the Court was unable to find a published,

⁴⁴ In order for a petitioner to be entitled to a preliminary injunction, that petitioner must satisfy all prongs of a five part test: "1) The activity sought is actionable and the petitioner has a clear right to relief therefrom; 2) The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; 3) The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; 4) Greater injury will result from refusing to issue the injunction than from issuing it; and 5) The injunction is reasonably suited to abate the activity in question." School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n., 542 Pa. 335, 337 n.2, 667 A.2d 5, 6 n.2 (1995).

Pennsylvania appellate-level state court opinion on that issue, it reasoned that under Delaware law, “the deprivation of a shareholder’s right to vote is irreparable harm.”⁴⁵ Third, the Court found that an injunction barring PTP from undertaking the merger would preserve the status quo and was reasonably suited to abate the defendants’ wrongs, as it would only extend the relief already granted to Wurtzel by a Temporary Restraining Order entered on June 29, 2001. Finally, the Court found that Wurtzel would suffer greater injury than the defendants were injunctive relief denied. The Court stated that “[p]reliminarily enjoining the merger will not prevent AIMCO from trying the merger if the court later vacates the injunction,” whereas “allowing the merger to take place will definitely deprive Wurtzel and the other minority limited partners of their right to approve or disapprove the merger—a harm that is imminent and not repairable by damages.”

Therefore, the Court found that Wurtzel had satisfied each element of the preliminary injunction test and his petition was granted.

4. Trouble in the Landlord-Tenant Relationship

Asian Bank v. 224 E. 13th Street Realty Corp., May Term 2005, No. 1031, 2005 WL 1423256, 2005 Phila. Ct. Com. Pl. LEXIS 256 (C.C.P. Phila. June 6, 2005) (Jones, J.) (The Court granted a preliminary injunction for a bank being threatened with a judgment for possession by its landlord). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/051202397.pdf>.

Petitioner Asian Bank is a community bank serving the Asian population in Philadelphia, with its only branch located at 1010 Arch Street. On February 20, 1998, Asian Bank had entered into a lease agreement for the first floor of an eight-story

⁴⁵ R.D. Hubbard v. Hollywood Park Realty Enters., 1991 WL 3151, at *5 (Del.Ch.). Delaware law is relevant to this case because it governs the construction and enforcement of the agreement, including the rights of a limited partner to vote on a merger.

building with its owner, defendant 224 East 13th Street Realty Corporation's ("Realty Corp.") predecessor-in-interest, 1010 Arch Street Partners ("Partners"). The lease provided for an initial term of ten years, and a minimum rent of \$10,416.67 per month. The lease also contained a provision stating that "[t]he failure of Tenant to pay Landlord within five (5) days of the due date of any installment of Minimum or, following the ten (10) days written notice by Landlord, the failure of Tenant to pay Additional Rent or other monetary charge due from Tenant hereunder," constitutes an "Event of Default." During the course of the lease, ownership of the leased property changed hands from Partners to Realty Corp.

Due to an oversight, Asian Bank mailed a check for April's Minimum Annual Rent to Realty Corp. on April 7, 2005, which Realty Corp. did not receive until April 8 (three days late). By letter dated that same day, Realty Corp. attempted to terminate the lease agreement with Asian Bank and accelerate all remaining rent. Realty Corp.'s basis for the "termination notice" was nonpayment of rent for April 2005 and additional rent first billed on March 16, 2005. However, Asian Bank mailed the minimum and additional rent payment before Realty Corp. had sent the termination notice. Further, Realty Corp. never sent a ten-day notice to Asian Bank regarding the additional rent as required by the lease. Because Realty Corp. misaddressed the original termination notice, Asian Bank did not receive it until April 11. Since the date of the termination notice, Realty Corp. had threatened Asian Bank several times to confess judgment for possession and accelerated rent. Asian Bank filed a petition for a preliminary injunction in order to prevent Realty Corp. from doing so.

In order for the Court to grant the injunction, Asian Bank was required to establish the essential prerequisites for such relief, i.e. that:

- 1) The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
- 2) Greater injury will result from refusing to issue the injunction than from issuing it;
- 3) The injunction will properly restore the parties to the status quo as it existed prior to wrongful conduct;
- 4) The activity sought to be restrained is actionable, the right to relief is clear, and the wrong is manifest; and
- 5) The injunction is reasonably suited to abate the activity in question.⁴⁶

The Court found that Asian Bank had satisfied each of these elements. Initially, the Court found that the threatened confession of judgment would have a “devastating effect on Asian Bank’s business,” and that “unless appropriately restrained, Realty Corp.’s actions will cause immediate and irreparable harm to Asian Bank and its customers for which there is no adequate remedy at law.” The Court also found that the *status quo* would be preserved, as the injunction would not prevent Realty Corp. from confessing judgment in the event of any future breaches of the lease. In terms of a “clear right to relief,” the Court found that Asian Bank’s default under the lease was “questionable at best,” and stated that it had “grave concerns as to the validity and lawfulness of Realty Corp.’s actions.”

Therefore, the Court granted Asian Bank’s Petition and required it to post a bond in the amount of \$10,416.67, which was equivalent to one month’s rent under the lease.

⁴⁶ School Dist. v. Wilkinsburg Educ. Ass’n, 542 Pa. 335, 667 A.2d 5, 6 n.2 (Pa.1995).

Careers USA, Inc. v. Kennedy Blvd. Assoc., November Term 2001, (Westlaw citation unavailable), 2002 Phila. Ct. Com. Pl. LEXIS 49 (C.C.P. October 30, 2002) (Herron, J.) (The Court granted the petition for a preliminary injunction for a commercial property tenant who was complaining of severe water leaks). This Opinion is available at <http://fd.phila.gov/pdf/cpcvcomprg/careerop.pdf>.

Careers USA, Inc. (“Careers”), an employment agency, entered into a commercial lease with defendant, Kennedy Boulevard Associates, I.L.P. (“Kennedy”) for use of a portion of retail space. On November 6, 2001, Careers filed a petition for preliminary injunction alleging that Kennedy failed to investigate and permanently repair water leaks and flooding emanating from two walls of the building. Additionally, Careers alleged that Kennedy was responsible for failing to correct a rodent infestation problem.

In determining whether to grant the preliminary injunction, the Court first cited the five elements a plaintiff must establish to obtain injunctive relief:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- 5) that the plaintiff’s right to relief is clear.⁴⁷

Specifically, Careers argued that Kennedy had breached the terms of the lease between the parties by: failing to provide Careers with usable retail space; failing to use diligent efforts to locate and repair leaks within 210 days; and failing to ensure that Careers’ quiet enjoyment of the premises had not been breached. Kennedy admitted that

⁴⁷ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

water leaked into the premises, but claimed that it made efforts, albeit unsuccessful, to solve the problem and that there had been no resulting decrease in use of the premises.

The Court found that the testimony supported the plaintiff's claims. The Court found that Kennedy's efforts to repair the water leaks were reactive and too late. It was only after Careers started litigation that Kennedy hired an engineer.

For the foregoing reasons, the Court granted the petition for preliminary injunction, and ordered that any further rent paid by Careers was to be placed in escrow. If Kennedy failed to permanently remedy the water leak within 120 days, Careers would then be empowered to apply the rent held in escrow to investigate and permanently repair the leak whereupon Careers would resume making its rent payments directly to Kennedy.

The Court declined to find that the evidence was sufficient to support Careers' claim that Kennedy was responsible for the rodent infestation.

Elfman v. Berman, February Term 2001, No. 2080; April Term 2001, No. 1299, 2001 WL 1807940, 2001 Pa. Dist. & Cnty. Dec. LEXIS 359 (C.C.P. Phila. May 8, 2001) (Herron, J.) (The Court granted a preliminary injunction for tenants of a commercial property against a landlord who refused to comply with the leasing agreements). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/elfman2.pdf>.

Petitioners Joel Elfman, DDS ("Elfman") and Pennsylvania Federation Brotherhood of Maintenance of Way Employees ("Penn Fed") leased office space in a Philadelphia high-rise ("the building"). Elfman is a pediatric dentist and Penn Fed a labor union. Each had entered into a lease agreement with their original landlord, Arnold Berman ("Berman"), which provided, among other things, covenants by Berman to provide elevator service, heat and air conditioning, cleaning and a right to "quiet enjoyment." Penn Fed's lease also included a covenant by Berman to provide potable running water. Elfman and Penn Fed's leases were to run until June 30, 2003 and September 30, 2004, respectively.

Under Berman's tenure as landlord, the conditions of the high-rise deteriorated: only one of four elevators "worked" (it actually broke down often and had no working emergency telephone), cleaning services ceased, unpaid phone bills led to fire alarm dysfunction and there was falling exterior masonry, etc. On February 20, 2001, Elfman filed a complaint and a petition for a preliminary injunction against Berman.

On March, 31, 2001, Berman sold the building to 1930-34 Associates, a limited partnership whose sole limited partner was John Turchi, Jr. ("Turchi"). Turchi planned to convert the building to residential use, but could not do so while the tenants' leases were in effect. To circumvent the leases, Turchi changed the locks on the building and intentionally allowed the building to fall into disrepair so that it could be closed down by the City of Philadelphia Department of Licenses and Inspections ("L & I"). On April 4, 2001, Turchi was successful in having the building closed by L & I.

On April 6, 2001, Elfman amended his complaint against Berman to add Turchi and 1930-34 Associates as defendants, and filed a petition for a temporary restraining order and preliminary injunction. That day, the Court issued the temporary restraining order which directed Turchi to "take all steps necessary to immediately" get the building up and running again. Elfman posted \$1000 bond in accordance with the Court's Order.

From the time of the issuance of the temporary restraining order until the hearing on Elfman's petition for a preliminary injunction, which now included Pen Fed as a petitioner, Turchi did nothing to comply with the temporary restraining order. On May 8, 2001, the Court granted the preliminary injunction, which ordered Turchi and 1930-34 Associates to comply with the terms of Elfman and Penn Fed's lease agreements.

The Court employed a four-part test to determine whether the petitioners were entitled to injunctive relief: whether

- 1) the petitioner has a clear right to relief;
- 2) the preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
- 3) a greater injury will result by refusing to issue the injunction; and
- 4) the injunction will restore the parties to the status quo as it existed prior to the wrongful conduct.⁴⁸

In addition, before the injunction issued could become effective, the petitioners were required to file a bond with the prothonotary.⁴⁹

The Court found that both petitioners had a clear right to relief. The leases and testimony unequivocally demonstrated that in obtaining the building from Berman, Turchi and 1930-34 Associates had covenanted to provide Elfman and Penn Fed with heat, elevator service, regular cleaning services and potable running water, and that those covenants were breached. The Court also found that the leases contained implied covenants (as well as the express covenant in Elfman's) of quiet enjoyment which had been breached. The Court relied on several critical facts to support its findings, including Turchi's constructive eviction of the petitioners, the failure to provide essential services, the willful neglect of the building, the failure to comply with the city code such that L & I shut down the building and failing to take all necessary steps to remove violations of the code such that L & I would re-open the building.

⁴⁸ Valley Forge Hist. Soc. v. Washington Mem. Chapel, 493 Pa. 491, 426 A.2d 1123, 1128 (1981). Although Valley Forge discusses five separate prerequisites for injunctive relief, here the Court has included one ("the activity sought to be restrained is actionable, and that the injunction issued is reasonably suited to abate such activity") within another ("the petitioner has a clear right to relief"). Hence, only four prerequisites for injunctive relief are announced by the Court.

⁴⁹ Pa.R.C.P. § 1531(b).

The Court also found that the petitioners had established immediate and irreparable harm, and that the harm could not be remedied by damages. In determining whether the harm could be remedied by damages, the Court looked to “the unbridled threat of the continuation of the violation.”⁵⁰ The Court found that in the absence of a preliminary injunction, Elfman would be unable to treat half of his patients and would be required to refer those patients to other dentists. The Court reasoned that “[t]his threat of continued interruption of the relationship between a doctor and his patients presents an irreparable harm that cannot be remedied by damages.” As to Penn Fed, the Court found that it would suffer an immediate and irreparable harm by being “unable to fulfill its obligations to its membership.”

The Court found that the preliminary injunction would restore the status quo, that being the “last actual, peaceable and lawful non-contested status which preceded the pending controversy.”⁵¹ The Court found that the last non-contested status was the time when Berman was honoring the covenants in the leases, and a return to the status quo would require Turchi, in turn, to honor those covenants.

Finally, the Court found that the petitioners would suffer a greater injury were the injunction not issued. The Court found this prerequisite easily met, as Turchi presented no testimony as to any harm he would suffer if the injunction was issued. Conversely, the Court was presented sufficient evidence showing that in the absence of an injunction, the injury to Elfman and Penn Fed would be substantial and could not be remedied by damages.

⁵⁰ West Penn Specialty MSO, Inc. v. Nolan, 1999 PA Super 218, 737 A.2d 295, 299 (Pa.Super.1999).

⁵¹ Valley Forge, 426 A.2d at 1129.

In balancing the equities involved in the case, the Court set a bond of \$1000 from each petitioner to cover reasonably foreseeable damage. The Court also imposed a ten-day deadline on Turchi and 1930-34 Associates to comply with its order, and a fine of \$500 for each day subsequent to the deadline that the order was not complied with.⁵²

5. Former Employees: Violations of Restrictive Covenants and Trade Secrets

Farm Journal, Inc. v. Tribune Entertainment Co., December Term 2005, No. 2397, 2006 WL 1484909, 2006 Phila. Ct. Com. Pl. LEXIS 217 (C.C.P. Phila. May 25, 2006) (Sheppard, J.) (The Court denied a mandatory preliminary injunction for a farming-related multi media company seeking to halt the broadcast of a program with similar agricultural content to, and the former hosts of, one of its own programs). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/051202397.pdf>.

Petitioner Farm Journal, Inc. (“Farm Journal”) is a multi media company in Pennsylvania devoted to improving the livelihood of farmers, whose CEO is Andrew J. Weber (“Weber”). Defendant Tribune Entertainment Company (“TEC”) is a Delaware Corporation headquartered in Chicago, whose president and CEO is Richard H. Askin (“Askin”). WGN (AM 720) (“WGN”), a sister company of TEC, is the leading radio

⁵² On June 6, 2001, the Court granted Turchi’s motion for reconsideration, vacating the preliminary injunction and scheduling a new hearing. On June 21, 2001, the Court granted Elfman’s motion for clarification of its reconsideration order. (Opinion available at <http://fjd.phila.gov/pdf/cpcvcomprg/elfop601.pdf>). The order clarified that the new hearing would be restricted to four issues: 1) the changed circumstances due to Penn Fed’s having allegedly removed its property from the building; 2) the impossibility of Turchi’s performance within the time allowed by the original preliminary injunction order; 3) evidence about Turchi’s “state of mind,” which the Court found would impact the equitable determination of whether to impose fines for non-performance; and 4) evidence about ownership of the building to clarify the issue of proper naming of defendants in the action.

In spite of Turchi’s new evidence, on August 30, 2001, the Court again granted Elfman’s petition for a preliminary injunction (Penn Fed had settled prior to the hearing). (Opinion available at <http://fjd.phila.gov/pdf/cpcvcomprg/elf830.pdf>). On October 2, 2001, the Court granted similar injunctive relief for two other commercial tenants in the building, John Blatteau Associates, Inc., and JBA Interiors., incorporating all relevant facts from its original order granting Elfman and Penn Fed injunctive relief. (Opinion available at <http://fjd.phila.gov/pdf/cpcvcomprg/elf102.pdf>).

broadcaster of agribusiness news in the Midwest, whose Vice President and General Manager is Thomas E. Langmyer (“Langmyer”). Orion Samuelson (“Samuelson”) and Max Armstrong (“Armstrong”) are employees of WGN, but not of TEC. HYP is an independent company that contracted with TEC to produce an agricultural news program called U.S. Farm Report. Under the terms of the HYP contract with TEC, HYP contracted out the services of Samuelson and Armstrong for exclusive network and syndicated television work on the U.S. Farm Report. WGN permitted Samuelson and Armstrong to simultaneously work for HYP and WGN.

On April 14, 2005, Farm Journal purchased U.S. Farm Report from TEC for 2.6 million dollars. The sale agreement (“the Agreement”) contained a non-compete provision, which provided that:

Neither TEC nor any Affiliates of TEC shall engage in any television business the same or substantially similar to the production of U.S. Farm Report or the exploitation of U.S. Farm Report as it is now being conducted by TEC.

“Affiliate” was defined in the Agreement to mean, “with respect to any specified Person, any other Person directly or indirectly controlling, or controlled by, or under direct or indirect common control with, such specified Person.” The term “Person” was defined to include both “individuals” and “other entities.” WGN was not aware of the transaction between Farm Journal and TEC before it closed. Langmyer was not aware that the Agreement contained a non-compete provision. Farm Journal never asked Samuelson and Armstrong to sign a non-compete agreement, and they continued to work for WGN after the sale of U.S. Farm Report.

On July 8, 2005, Farm Journal terminated the contract with HYP to produce U.S. Farm Report, which had the effect of terminating Samuelson and Armstrong’s exclusive

services to U.S. Farm Report. Farm Journal attempted to re-contract with Samuelson and Armstrong, but the pair declined, refusing to commute to Farm Journal's production facility in South Bend, Indiana. In the second week of August 2005, Farm Journal began airing U.S. Farm Report with a new host.

Following Samuelson and Armstrong's departure from U.S. Farm Report, they created an LLC called OMAX, which was to produce their new TV show called "This Week in AgriBusiness." On September 28, 2005, Farm Journal informed TEC about Samuelson and Armstrong's intention to launch a competing show. Thereafter, Weber called Askin and informed him that Farm Journal would view the launch of the competing show as a violation of TEC's obligations under the Agreement, in which it agreed that none of its "Affiliates" would compete against U.S. Farm Report. On November 19, 2005, the first episode of "This Week in AgriBusiness" aired on satellite radio. After the program aired, Samuelson and Armstrong learned for the first time that a non-compete clause existed in the Agreement between TEC and Farm Journal. In December 2005, Farm Journal filed a Petition for a mandatory preliminary injunction against TEC to halt the airing of "This Week in AgriBusiness," alleging a violation of the non-compete provision in the Agreement.

In order for the Court to have granted the injunction, Farm Journal was required to establish the essential prerequisites for such relief, i.e. that:

- 1) relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
 - 2) greater injury will occur from refusing the injunction than from granting it;
 - 3) the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
 - 4) the wrong is actionable and the plaintiff's right to relief is clear;
- and

5) the injunction is reasonably suited to abate that wrong.⁵³

Initially, the Court reviewed the issue of whether the covenant not to compete in the Agreement between TEC and Farm Journal embraced Samuelson and Armstrong's program entitled "This Week in AgriBusiness." In holding that the covenant not to compete did not apply, the Court reasoned that Samuelson and Armstrong could only be considered "Affiliates" for purposes of the covenant not to compete when they were under the common control of WGN. Since neither WGN nor TEC employed the pair with respect to their production of "This Week in AgriBusiness," Farm Journal could not show that its right to relief was clear.

Furthermore, the Court suggested that extending the covenant not to compete to Samuelson and Armstrong's outside work would be unreasonable and contrary to public policy, an implicit element within the framework of the preliminary injunction test. The Court stated that "[r]estrictive covenants are not favored in Pennsylvania and have been historically viewed as trade restraints that can prevent employees from earning a living."⁵⁴ Finally, the Court found that greater injury would occur if the injunction were granted for Farm Journal, as Samuelson and Armstrong would suffer significant economic harm if they were forced to halt the broadcasting of "This Week in AgriBusiness."

Therefore, the Court denied Farm Journal's Petition for a mandatory preliminary injunction.

⁵³ School Dist. v. Wilksburg Educ. Ass'n, 542 Pa. 335, 667 A.2d 5, 6 n.2 (Pa.1995).

⁵⁴ See Jacobson & Co. v. Int'l Env't Corp., 427 Pa. 439, 235 A.2d 612 (Pa.1967).

Fidelity Burglar & Fire Alarm Co., Inc. v. Defazio, June Term 2000, No. 3060, 2000 WL 33711036, 2000 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. Aug. 4, 2000) (Herron, J.) (The Court granted a preliminary injunction for a business that sought the return of a company computer from a former employee). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/fidelity.pdf>.

Fidelity Burglar & Fire Alarm Co., Inc. (“Fidelity”) filed a Petition for Preliminary Injunction requiring that Defendant William DeFazio (“DeFazio”) return to Fidelity a computer (“Computer”) formerly owned by Digitech Security (“Digitech”). The Court granted the Preliminary Injunction ordering the return of the Computer.

In October 1999, Digitech was owned by DeFazio. Fidelity and DeFazio agreed that Fidelity would purchase the assets of Digitech (“Assets”). The Computer was included among the Assets. Following the purchase of the Assets, DeFazio worked at Fidelity. In April 2000, DeFazio left his job with Fidelity and took the Computer with him without the permission of Fidelity. The Computer contained information that could pose a serious risk to the security of certain Fidelity accounts.

Citing Valley Forge Hist. Soc. V. Washington Mem. Chapel,⁵⁵ the Court applied a four-part test to determine if the petitioner was entitled to the preliminary injunction:

1. The petitioner has a clear right to relief;
2. The preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
3. A greater injury will result by refusing to issue the injunction; and
4. The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct.

In order to show a clear right to relief, the petitioner is required to show only that substantial legal questions must be resolved to determine the rights of the respective

⁵⁵ 493 Pa. 491, 500, 426 A. 2d 1123, 1128 (Pa. 1981).

parties and need not prove the merits of the underlying claim.⁵⁶ That is, a preliminary injunction differs from a permanent injunction in that the petitioner need not prove his claim absolutely. Given that the Computer was sold to Fidelity, and removed without permission by DeFazio, the Court found that Fidelity demonstrated a clear right to relief.

In order to establish immediate and irreparable harm, the petitioner has the burden of showing that the harm cannot be remedied by damages.⁵⁷ The Court found that DeFazio could use the information on the Computer to disrupt Fidelity's alarm network and threaten the integrity of Fidelity's systems. Additionally, DeFazio could divert clients from Fidelity using the business information on the Computer, leading to a loss of business for Fidelity. The Court therefore found that, in the absence of a preliminary injunction, Fidelity could suffer immediate and irreparable harm.

In assessing the restoration of the status quo, which the Court defined as "the last actual, peaceable and lawful non-contested status which preceded the pending controversy,"⁵⁸ the Court found that the Computer was in the possession of Fidelity in the last non-contested status, and therefore the granting of a preliminary injunction would restore the status quo.

The fourth requirement for a court to grant a preliminary injunction is that the Plaintiff must show that there would be greater injury resulting from failing to grant the injunction than from granting it.⁵⁹ The Court found that if it structured the injunction to allow DeFazio access to his personal information on the Computer, the harm would be

⁵⁶ Chmura v. Deegan, 398 Pa. Super. 532, 535, 581 A. 2d 592, 593 (Pa. Super 1990).

⁵⁷ Schaeffer v. Frey, 403 Pa. Super. 560, 565, 589 A.2d 752, 755 (Pa. Super 1991).

⁵⁸ Valley Forge, 426 A.2d at 1129.

⁵⁹ DiLucente Corp. v. Pennsylvania Roofing Co., Inc., 440 Pa. Super. 450, 455, 655 A.2d 1035, 1037 (Pa. Super. 1995).

minimal. In contrast, the harm to Fidelity by not granting the preliminary injunction would be substantial.

Lastly, the Court addressed the amount of bond that Fidelity would be required to file with the prothonotary under Pa. R.C.P. 1531(b). In determining the amount of the bond, the trial court is required to balance the equities involved and “require a bond which would cover damages that are reasonably foreseeable.”⁶⁰ The Court found that any reasonably foreseeable damages were unlikely to exceed the value of the Computer itself and, accordingly, the Court set the bond at \$501.00.

For the foregoing reasons, the Court granted Fidelity’s request for a preliminary injunction, but required Fidelity to copy all of DeFazio’s personal information on the Computer and turn the information over to DeFazio.

Innaphase Corp. v. Meric Overman, July Term 2003, No. 2807, 2004 WL 237718, 2004 Phila. Ct. Com. Pl. LEXIS 83 (C.C.P. September 10, 2003) (Sheppard, J.) (The Court affirmed its denial of a Petition for Preliminary Injunction for a corporation seeking to enforce a non-disclosure and developments agreement with a former employee). This Opinion is available at http://fjd.phila.gov/pdf/cpevcomprg/innaphase-op_to_superior_ct.pdf.

Innaphase Corporation (“Innaphase”) develops, sells and provides consulting services for software applications and services to the Laboratory Information Management System (“LIMS”) market and the pharmaceutical market. Approximately eighty percent of Innaphase’s revenues were generated from the pharmaceutical market and twenty percent from the non-pharmaceutical market.

LabWare is a corporation which engages in similar business activities. It services the pharmaceutical industry as well as a broad spectrum of other industries, such as food

⁶⁰ Greene Cty. Citizens United by Cumpston v. Greene Cty. Solid Waste Auth., 161 Pa. Commw. 330, 336, 636 A.2d 1278, 1281 (Pa. Commw. 1994).

and beverage, petrochemical, chemical and industrial, environmental, metals, forensics, contract services and tobacco. As of September 2003, approximately seventeen percent of LabWare's revenues were generated from the pharmaceutical market with the remaining eighty-three percent generated from other markets.

In May 2001, Innaphase hired Meric Overman ("Overman") for the position of Director of Customer Implementation. As a condition of employment, Overman executed a Non-Disclosure and Developments Agreement ("Agreement"). In November 2002, Innaphase promoted Overman to the position of Vice President of Customer Services. This position required Overman to supervise a team of deployment specialists who introduced software to clients' sites, adapted software to clients' needs and provided customer support.

Prior to his employment with Innaphase, Overman had been employed by LabWare. In June 2003, Overman was contacted by LabWare with an offer of employment. On July 8, 2003, Overman notified Innaphase he was resigning in order to return to work at LabWare. Despite an arbitration clause in Overman's employment contract that required that all employment disputes would be submitted to arbitration, Innaphase filed a Petition for Preliminary Injunction to enforce the Agreement. Innaphase sought to preliminarily and permanently enjoin Overman from: (1) working or consulting for LabWare and its corporate affiliates; (2) seeking or accepting employment with any LIMS competitor; (3) soliciting current or potential Innaphase customers and employees; (4) misappropriating Innaphase's trade secrets; (5) removing Innaphase's information or other property; and (6) unfairly competing in violation of the Agreement. Innaphase further sought a court order directing Overman to pay all profits wrongfully derived as a

result of a breach of the Agreement, as well as compensatory damages, consequential damages, punitive damages and counsel fees.

On July 24, 2003, the Court issued a Special Injunction to enjoin Overman from commencing work at LabWare until further Order from the Court. On August 12, 2003, Innaphase filed a Petition to Compel Arbitration. On September 11, 2003, the Court held a hearing on Innaphase's Petition for Preliminary Injunction and Petition to Compel Arbitration. The Court vacated its earlier Special Injunction, denied the Preliminary Injunction, and granted the Petition to Compel Arbitration.

In its appeal, Innaphase argued that the Court abused its discretion in denying the preliminary injunction. Pennsylvania law requires the Court to apply a four-prong test to determine whether an injunction is warranted. The burden of proof is on the party requesting the preliminary injunction, and requires the petitioner to show that injunctive relief:

- 1) is necessary to prevent immediate and irreparable harm which could not be compensated by damages;
- 2) greater injury [will] result by refusing it than by granting it;
- 3) . . . properly restores the parties to their status as it existed immediately prior to the alleged wrongful conduct; and
- 4) the activity sought to be restrained is actionable.⁶¹

The parties did not dispute that the Agreement was enforceable. Rather, the issue presented was whether enjoining Overman from working for LabWare was necessary to prevent immediate and irreparable harm to Innaphase. Innaphase relied on two particular provisions of the Agreement: (1) Overman's agreement to keep "confidential information and trade secrets" of Innaphase confidential for sixty months after the term of the

⁶¹ Harsco Corp. v. Klein, 395 Pa. Super. 212, 576 A.2d 1118 (Pa. Super. 1990) citing Blair Design and Construction Co. v. Kalimon, 366 Pa. Super. 194, 199, 530 A.2d 1357, 1359 (Pa. Super. 1987).

Agreement; and (2) Overman's agreement to "not engage in any other employment . . . relating to an endeavor that would be competitive . . . with any of the business activities of Innaphase."

With respect to the confidentiality issue, Pennsylvania law permits an employer to protect its confidential information, but "[g]enerally, the information must be a particular secret of the employer, not a general trade secret, and must be of particular importance to the conduct of the employer's business."⁶² Innaphase argued that Innaphase and LabWare have common customers, and that if Overman disclosed his knowledge of Innaphase's four software programs to LabWare, Overman would divulge "confidential information and trade secrets" to the severe detriment of Innaphase.

The Court rejected Innaphase's argument, finding that the evidence did not establish that the information acquired by Overman while at Innaphase was necessarily confidential information. For this reason, the Court did not find that enjoining Overman from working at LabWare was necessary to prevent immediate and irreparable harm resulting from the disclosure of confidential information and trade secrets which could not be compensated by damages. Further, the Court noted that it deemed "Overman to be a credible witness, and believes that he will comply with the confidentiality agreement with Innaphase."

The Court then addressed Innaphase's second argument that Overman agreed to "not engage in any other employment . . . relating to an endeavor that would be competitive . . . with any of the business activities of Innaphase." Innaphase argued that Overman's position with LabWare would require substantial customer interaction, and

⁶² Bell Fuel Corp. v. Cattolico, 375 Pa. Super. 238, 544 A.2d 450, 460 (Pa. Super 1988).

Overman could use his knowledge and understanding of Innaphase's software to the detriment of Innaphase, thereby severely prejudicing Innaphase's ability to compete.

Overman, however, testified that his position with LabWare would not relate to an endeavor that would be competitive with Innaphase's business activities because he would be dealing only with information relating to LabWare's products, not Innaphase's products. Based on this testimony, the Court found the evidence insufficient to demonstrate that enjoining Overman from working at LabWare was necessary to prevent immediate and irreparable harm that could not be compensated by damages.

The Court further noted that Innaphase primarily focused its business in the pharmaceutical industry, which was a relatively small portion of LabWare's business. Thus, the competition between the two companies was limited. The Court balanced the potential harm as a result of this competition against the potential injury to Overman were he to be enjoined from working at LabWare. The Court determined this potential injury to be great, and did not find that there was sufficient evidence to demonstrate that the injury to Innaphase would be greater were the preliminary injunction denied.

For the foregoing reasons, the Court affirmed its September 11, 2003 decision to deny the Petition for Preliminary Injunction.

Labor Ready, Inc. v. Trojan Labor and Sally Czeponis, December Term 2000, No. 3264, 2001 Phila. Ct. Com. Pl. LEXIS 99 (C.C.P. Phila. January 25, 2001) (Sheppard, J.) (The Court denied the Petition for Preliminary Injunction for a company seeking to enforce a restrictive covenant against its former employee). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/lr0012-3264.pdf>.

Sally Czeponis ("Czeponis") worked for Labor Ready, Inc. for six months. On November 17, 2000, Labor Ready terminated Czeponis, alleging that she was behind on her invoices. Labor Ready further alleged that Metro Machine, a client account managed by Czeponis, was dissatisfied with her performance. Following her termination,

Czeponis went to work for Trojan Labor, a competitor of Labor Ready. Her position with Trojan Labor was essentially the same as her position with Labor Ready, and was also on site at Metro Machine.

Labor Ready sued Czeponis, alleging breach of her restrictive covenant, misappropriation of trade secrets and tortious interference. Labor Ready also sought a preliminary injunction barring Czeponis from working for Trojan Labor.

As part of her employment agreement with Labor Ready, Czeponis signed a confidentiality agreement. The employment agreement, in addition to defining the terms of employment, designated Washington law as governing the interpretation of the contract. For this reason, the Court applied both Pennsylvania and Washington law to its analysis of Labor Ready's claims.

Labor Ready was required, under Pennsylvania law, to show a clear right to relief for an actionable wrong.⁶³ The Court held that for Labor Ready to have a clear right to relief, it must show that the covenant is enforceable, that Czeponis misappropriated trade secrets, or that Czeponis tortiously interfered with Labor Ready's relationship with Metro Machine.

In assessing Labor Ready's trade secret claim, the Court held that it need not decide whether to apply Washington or Pennsylvania law because the law of either state would yield the same result. With or without a confidentiality agreement, Labor Ready

⁶³ School District of Wilksburg v. Wilksburg Education Association, 542 Pa. 335, 338, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

would be entitled to protect its trade secrets from disclosure.⁶⁴ The determination of whether particular information is a trade secret is a factual question, and the plaintiff has the burden of proving both that trade secrets existed and that the defendant misappropriated the trade secrets.⁶⁵

The Court held that Labor Ready had not met its burden. Trade secrets, in both Pennsylvania and Washington, must be particular secrets of the complaining employer, rather than information generally known in the trade or readily ascertainable through proper means.⁶⁶ The Court found that the information that Labor Ready alleged was unique and requiring protection was, in fact, generally known in the temporary labor industry or readily ascertainable through proper means. In so finding, the Court held that Labor Ready had failed to show that Czeponis knew of any Labor Ready trade secrets, and therefore rejected Labor Ready's right to relief under this claim.

The Court next looked at whether the non-competition agreement was enforceable. Under both Washington and Pennsylvania law, a restrictive covenant is enforceable to protect the client goodwill that the departing employee created on behalf

⁶⁴ Bell Fuel Corp v. Cattolico, 375 Pa. Super. 238, 253-54, 544 A.2d 450, 458 (Pa. Super. 1988); Ed Nowogroski Ins., Inc. v. Rucker, 137 Wn.2d 427, 436-437, 971 P.2d 936, 941-42 (Wash. 1999)(en banc).

⁶⁵ Christopher M's Hand-Poured Fudge v. Hennon, 699 A.2d 1272, 1275 (Pa. Super. 1997); Ed Nowogroski Ins., Inc., 971 P.2d at 652.

⁶⁶ See Spring Steels, Inc. v. Malloy, 400 Pa. 354, 358162 A.2d 370, 372-73 (Pa. 1960)(finding that steel manufacturing process was not a trade secret where other firms besides plaintiff used the process); Boeing Co. v. Sierracin Corp., 108 Wn.2d 38, 48, 738 P.2d 665, 674 (Wash. 1987)(en banc)(stating that trade secret law protects information that is novel and undisclosed).

of the employer.⁶⁷ Labor Ready terminated Czeponis for her poor performance and because Metro Machine was dissatisfied with its relationship with her. Therefore, the Court found that Labor Ready had determined that Czeponis had not created goodwill with Metro Machine, and that there was no goodwill to protect by enforcing the contract. By firing Czeponis for poor performance, Labor Ready had implicitly acknowledged that Czeponis' worth to Labor Ready was insignificant.⁶⁸ The Court therefore found that the restrictive covenant was unenforceable because Labor Ready was seeking to restrain Czeponis to protect an interest it had admitted was worthless.

Lastly, the Court held that there was no credible evidence to demonstrate that Czeponis had tortiously interfered with Labor Ready's current and future labor relations with Metro Machine. Competition with Labor Ready alone is not actionable. Labor Ready failed to show that Czeponis had used wrongful means, and therefore the Court rejected Labor Ready's right to relief on its tortious interference claim.

Having rejected Labor Ready's claims that Czeponis had access to trade secrets, that Czeponis had tortiously interfered with Labor Ready's business relationship with Metro Machine, and that enforcing the restrictive covenant was reasonable and necessary to protect Labor Ready's business or goodwill, the Court found that Labor Ready had not

⁶⁷ Perry v. Moran, 109 Wn.2d 691, 698-99, 748 P.2d 224, 228-29 (Wash. 1987)(en banc); John G. Bryant Co. v. Sling Testing and Repair, Inc., 71 Pa. 1, 7-9, 369 A.2d 1164, 1167-68 (Pa. 1977).

⁶⁸ See Insulation Corp. of America v. Brobston, 446 Pa. Super. 520, 532-535, 667 A.2d 729, 735-37 (Pa. Super. 1995)(holding that once an employer has fired an employee for poor performance, the need to protect the employer from the former employee is diminished by the fact that the employee's worth to the corporation is presumably insignificant).

shown a clear right to relief. Accordingly, the Court denied Labor Ready's Petition for Preliminary Injunction.

Medical Resources, Inc. v. Miller, No. 2242, 2001 WL 1807934, 2001 Phila. Ct. Com. Pl. LEXIS 109 (C.C.P. Phila. Jan. 29, 2001) (Sheppard, J.) (The Court denied injunctive relief to former employers of an employee who opened up a competing MRI business). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/mr0011-2242.pdf>.

Plaintiffs Medical Resources and ATI (collectively, "Plaintiffs") are in the business of operating diagnostic imaging centers that provide MRI procedures throughout the Delaware Valley, including Northeast Imaging. Northeast is located at 8001 Roosevelt Boulevard in Philadelphia and offers eight MRI modalities, including an open MRI modality. Defendant Bruce Miller ("Miller") has worked in the imaging/MRI business since 1989, and was employed by ATI between 1993 and May 1997, and thereafter at Medical Resources until November 2000. While with Medical Resources, Miller was an at-will employee and was not bound by any restrictive covenant not to compete.

Plaintiffs keep track of referring physician information on a computer system designated Imaging Center Information System ("ICIS"). As a member of Northeast Imaging's administrative staff, Miller accessed ICIS information once or twice a month. Beginning in June 1999, Miller began taking steps toward opening his own MRI center: Miller formed a corporation, purchased an MRI magnet, rented office space and had a "brainstorming session" with Roger Reilly, the chief salesperson at Northeast Imaging, about a list of prospective referring doctors for his new enterprise.

In June 2000, Medical Resources requested that Miller sign a confidentiality and non-competition covenant. Miller refused to sign, and on September 21, he informed Medical Resources that he was opening a competing MRI center. Miller's last day of

employment with Medical Resources was September 28. Miller opened his MRI office on November 20, 2000, at 8400 Roosevelt Boulevard, a site between four and five-tenths of a mile from Northeast Imaging. Miller's company trades under the name "Open MRI Northeast" and provides only the open MRI modality, whereas Northeast Imaging provides seven additional modalities.

Plaintiffs sought a preliminary injunction to enjoin Miller from using their trade secrets, doing business with any of their referring doctors and customers, hiring their employees and continuing to trade under the name "Open MRI Northeast." In spite of what the Court believed to be "a far cry from what one expects from and hopes for in an employee," it found that Plaintiffs did not show a clear right to relief on the merits of the case, and thus denied the petition for a preliminary injunction.⁶⁹

Plaintiffs had attempted to demonstrate their clear right to relief on three grounds: 1) trade secrets; 2) an agent's duty of loyalty; and 3) Pennsylvania's common law of unfair competition. With respect to trade secrets, the Court found that Plaintiffs were unable to produce evidence that Miller made use of ICIS information or any other confidential business information. Next, the Court found that while "Miller's conduct was, from one perspective reprehensible," there was no evidence that he competed with the Plaintiffs during his term of employment. The Court specifically pointed to the fact

⁶⁹ In order for a petitioner to be entitled to a preliminary injunction, that petitioner must satisfy all prongs of a five part test: "1) The activity sought is actionable and the petitioner has a clear right to relief therefrom; 2) The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; 3) The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; 4) Greater injury will result from refusing to issue the injunction than from issuing it; and 5) The injunction is reasonably suited to abate the activity in question." School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n., 542 Pa. 335, 337 n.2, 667 A.2d 5, 6 n.2 (1995).

that Miller's employment with Medical Resources was terminated on September 28, 2000, and he did not open his business until two months later. Finally, the Court found that Plaintiffs had failed to provide evidence that any other MRI provider, referring physician or the public was likely to confuse the name "Open MRI Northeast" with "Northeast Imaging."⁷⁰

Therefore, because the Court found each of Plaintiffs' arguments to be without merit, Plaintiffs could not show a clear right to relief and their petition for a preliminary injunction was denied.

Olympic Paper Co. v. Dubin Paper Co. & Brian Reddy, October Term 2000, No. 4384, 2000 WL 33711064, 2000 Pa. Dist. & Cnty. Dec. LEXIS 189 (C.C.P. Phila. Dec. 29, 2000) (Sheppard, J.) (The Court granted a preliminary injunction enjoining a former employee from soliciting the customers of his former employer for a period of six months). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/oly.pdf>.

Plaintiff Olympic Paper Company ("Olympic") engages in the business of selling disposable paper products for restaurant and food service clientele. Olympic is located in Philadelphia and transacts business in a geographic radius of 100 miles, including locations in Delaware, Maryland and New Jersey. Defendant Dubin Paper Company ("Dubin") directly competes with Olympic in the paper products business, a business that the Court described as "highly competitive and price and quality sensitive." Defendant Brian Reddy ("Reddy") was employed by Olympic from sometime in 1995 until his termination on September 15, 2000. During that time period Reddy had climbed the

⁷⁰ Factors considered by Pennsylvania courts in determining the likelihood of confusion are: "a) the degree of similarity between the designation and the trade-mark or trade name in (i) appearance, (ii) pronunciation, (iii) verbal translation of the pictures or designs involved, [and] (iv) suggestion; b) the intent of the actor in adopting the designation; c) the relation in use and manner of marketing between the goods or services marketed by the actor and those marketed by the other; (d) the degree of care likely to be exercised by the purchaser." Conti v. Anthony's Shear Perfection, Inc., 350 Pa.Super. 606, 611, 504 A.2d 1316, 1319 (1986).

ranks at Olympic, starting out as a truck driver and then moving to customer service representative, then purchasing agent, and finally, sales representative. Before becoming a sales representative with Olympic, Reddy had been required to sign a noncompete agreement, and later an employment agreement that contained a restrictive covenant and a provision protecting Olympic's confidential information.

Approximately three weeks after Reddy's termination by Olympic, he began working as a sales representative for Dubin. Olympic claimed that Reddy, in violation of his employment agreement with Olympic, did not return Olympic's price list after he was terminated. Further, while at Dubin, Reddy contacted or attempted to contact as least twenty of Olympic's customers. In response to these actions, Olympic sought a preliminary injunction enjoining Reddy and those acting in concert with him from directly or indirectly soliciting business from twenty-nine customers of Olympic until September 15, 2001, and to return to Olympic any price lists or company documents.

The Court found that Olympic had satisfied each element of the test for preliminary injunctive relief, and thus Olympic's petition was granted, with certain modifications.⁷¹ First, the Court found that Reddy had violated the restrictive covenant in his employment agreement with Olympic, and that this established irreparable harm to

⁷¹ In order for a petitioner to be entitled to a preliminary injunction, that petitioner must satisfy all prongs of a five part test: "1) The activity sought is actionable and the petitioner has a clear right to relief therefrom; 2) The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; 3) The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; 4) Greater injury will result from refusing to issue the injunction than from issuing it; and 5) The injunction is reasonably suited to abate the activity in question." School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n., 542 Pa. 335, 337 n.2, 667 A.2d 5, 6 n.2 (1995).

Olympic under Pennsylvania law.⁷² The Court also found that the clear violation of the restrictive covenant by Reddy established a clear right to relief for Olympic. Next, the Court found that “the balance of harms waives in favor of granting the injunction since its denial could permit Reddy and Dubin to exploit and undermine certain of Olympic’s customer relationships” and the harm to Reddy or Dubin in granting the petition would be minimal. As to the third element, the Court found that “a preliminary injunction where Reddy and Dubin would be prohibited from contacting [Reddy’s former clients with Olympic] would restore the status quo that existed before Reddy had contacted them after his employment had ended with Olympic.” Finally, the Court found that if modified, the preliminary injunction would reasonably be suited to abate the activity in question. The Court limited the number of customers that Reddy was prohibited from contacting to fourteen, and reduced the requested time period for that prohibition from one year to six months.

The Court set the bond amount at \$25,000, to be paid within five days of its order.

Philadelphia Ear, Nose & Throat Surgical Associates, P.C. v. Maurice Roth, M.D., January Term 2000, No. 2321, 2000 WL 1007179, 2000 Pa. Dist. & Cnty. Dec. LEXIS 355 (C.C.P. Phila. March 13, 2000) (Sheppard, J.) (The Court denied the Petition for Preliminary Injunction for an organization of doctors that could not show that its former employee practicing elsewhere would cause irreparable harm). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/philaearnosethroat.pdf>.

On January 20, 2000, Philadelphia Ear, Nose and Throat Surgical Associates, P.C. (PENT) filed a Complaint against Maurice Roth, M.D. (Roth), seeking damages for

⁷² The Court quoted the Pennsylvania Supreme Court’s decision in John G. Bryant Co., 471 Pa. 1, 7, 369 A.2d 1164, 1167 (1977), for this proposition: “it is not the initial breach of a covenant which necessarily establishes the existence of irreparable harm but rather the threat of the unbridled continuation of the violation and the resultant incalculable damage to the former employer’s business that constitutes the justification for equitable intervention.”

breach of an employment contract and an order enjoining Roth from violating the restrictive covenant contained in that contract. On the same date, PENT filed a Petition for a Temporary Restraining Order and Preliminary Injunction.

Lee M. Rowe (Rowe) is the President and sole shareholder of PENT. Rowe is an ear, nose and throat (ENT) specialist, and practices primarily at Northeastern Hospital (“Northeastern”). PENT has an office across the street from Northeastern, and rents clinic space in Northeastern.

On June 30, 1995, Roth entered into an Employment Agreement (Agreement) with PENT.⁷³ The Agreement contained a restrictive covenant which stated that Roth would not be able to practice at Pennsylvania Hospital, Northeastern, Wills Eye Hospital or Thomas Jefferson University Hospital for a period of two years following the termination of employment.

On November 20, 1995, the Board of Directors at PENT unanimously resolved to change Roth’s compensation from \$150,000 to \$80,000 plus fifty percent of the actual amount collected by PENT exceeding \$160,000 per contract year for professional services personally performed by Roth. This change was effective February 1, 1996. In addition to this modification to his compensation, Roth was also subjected to deductions for unemployment compensation taxes and worker’s compensation taxes (the “Tax Deductions”). For the period of February 1, 1996 to January 31, 1997, the Tax Deductions totaled \$10,784. The following year, in addition to the Tax Deductions, PENT further deducted the cost of Roth’s malpractice insurance premium (the “Insurance

⁷³ PENT was called Atkins-Keane-Rowe Otolaryngic Associates, Ltd. at the time Roth signed the Agreement, but will be called PENT for clarity.

Deductions” which, together with the Tax Deductions, are hereinafter referred to collectively as the “Deductions”), despite the Agreement expressly stating that PENT would be responsible for the premiums. The Deductions for this period totaled \$34,217. Roth testified that he contacted PENT’s accountant about the Deductions, and was told by the accountant that she could not remove the Deductions. For the period February 1, 1998 through January 31, 1999, the Deductions totaled \$43,535.

In the summer of 1999, Roth prepared to leave PENT and start his own practice. The preparations included setting up his own S-Corporation, hiring a billing service and looking for office space. On or about December 13, 1999, Roth informed Rowe that he was resigning from PENT. Roth later gave Rowe a resignation letter that stated that January 17, 2000 would be Roth’s last day.

In December 1999, U.S. Healthcare sent a reimbursement check directly to Roth’s new P.O. Box. The Court determined that there was no evidence to suggest that Roth had either attempted to divert funds rightfully owed to PENT, or cash the check. However, on December 21, 1999, Rowe confronted Roth about the check, and on January 7, 2000, Rowe hand-delivered a letter notifying Roth of his immediate termination.

Following his termination, Roth faxed a letter to area physicians who might provide referrals or consultations advising them of his new address and phone number. Roth and Rowe were the two primary ENT physicians who served the Northeastern area, and Rowe testified that, by continuing to practice in the Northeastern area, Roth had caused a schism in the staff at Northeastern.

PENT’s Petition asked the court for an injunction requiring Roth to resign his staff privileges at Northeastern and prohibiting him from practicing at Northeastern for

two years. In determining whether to grant the preliminary injunction, the Court first cited the five elements a plaintiff must sufficiently establish:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and;
- 5) that the plaintiff's right to relief is clear.⁷⁴

The Court first held that PENT had failed to establish immediate and irreparable harm that cannot be compensated by money damages. The Court held that Roth's breach of covenant (if assumed) alone, did not entitle PENT to preliminary injunctive relief. PENT had to show irreparable harm.⁷⁵ The Court held that the record failed to demonstrate that PENT would suffer irreparable injury as a result of Roth's practicing at Northeastern. Given that Rowe had a full workload, and, in fact, there were more patients than he could handle, together with his testimony that it was unlikely that he could hire another employee in the near future to share the workload, the Court held that no immediate harm would result from Roth treating patients that Rowe would not be able to treat in any event.

Second, the Court held that PENT did not establish that greater injury would result by refusing the injunction than by granting it. Preventing Roth from practicing at Northeastern would cause him to lose his primary source of income and decrease access to ENT treatment in the Northeastern area. In contrast, allowing Roth to practice at

⁷⁴ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

⁷⁵ New Castle Orthopedic Associates v. Burns, 481 Pa. 460, 465-66, 392 A.2d 1383, 1386 (Pa. 1978).

Northeastern would cause no immediate or irreparable harm to PENT. The Court rejected Rowe's testimony that the main issue was to get rid of the schism at Northeastern caused by Roth's competing practice based on the testimony of Dr. Guest, another physician at Northeastern, who testified that Roth's presence in fact helped the hospital.

Third, the Court held that an injunction barring Roth from working at Northeastern was not reasonably suited to abate the harm against which the restrictive covenant was meant to protect. The patient load had significantly increased since Roth had originally signed the Agreement, and had outgrown Rowe's ability to provide care to patients. Given that Roth's presence would not cause irreparable and immediate harm to PENT, the Court found that the requested injunction was not reasonably suited to abate the alleged wrong.

Fourth, the Court found that PENT had failed to establish a clear right to relief. Over the course of Roth's employment, PENT deducted in excess of \$75,000 from Roth's salary. Although Roth complained to the accountant about the Deductions, they continued. The Court did not decide whether the Deductions were improper under the Agreement and, if improper, whether the Deductions constituted a material breach. Rather, the Court concluded that whether PENT materially breached the Agreement was an issue for trial. Consequently, the Court held that PENT did not show that its right to enforce the Agreement against Roth was clear.

Thus, because PENT had failed to establish these four elements, the Court denied PENT's Petition for Preliminary Injunction.

In addition to addressing the five elements required for a preliminary injunction the Court refused to enforce Paragraph 10(b) of the Agreement which stated that, in the event there was a violation of the restrictive covenant, PENT would suffer irreparable harm and therefore be entitled to injunctive relief. The Court held that parties cannot contract to create a right to injunctive relief where an injunction would otherwise be inappropriate.⁷⁶

Reporting Services, Inc. v. Veritext L.L.C., June Term 2003, No. 489, 2003 WL 22183927, 2003 Phila. Ct. Com. Pl. LEXIS 66 (C.C.P. September 10, 2003) (Jones, J.) (The Court approved a Preliminary Injunction in part and denied it in part for an employee who wanted to be relieved from the restrictions imposed by a covenant not to compete entered into after the sale of his business). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/reporting-services-op.pdf>.

Plaintiff Lee Goldstein (“Goldstein”) was once the sole owner of Reporting Services Inc. (“RSA”). On April 17, 1998, Goldstein sold RSA to Veritext, L.L.C. (“Veritext”). As part of the sale, Goldstein and Veritext signed several agreements, including a Non-Competition Agreement. The Non-Competition Agreement stated that it was effective “[f]or a period of five years after the Closing, or for a period of five years after the termination of his employment with RSA or Veritext, whichever is longer. (“Non-Compete Agreement”).” As consideration for the Non-Compete Agreement, Goldstein received an additional \$100,000.00. Under the terms of the Non-Compete Agreement, Goldstein agreed that the provisions were fair, reasonable, and necessary to protect and preserve legitimate interests.

In addition to the Non-Compete Agreement, Goldstein signed an Employment Agreement wherein Veritext agreed to employ Goldstein for the period of April 17, 1998 to April 18, 2001 in consideration for an annual salary of \$100,000.00.

⁷⁶ See Dice v. Clinicop, Inc., 887 F. Supp. 803 (W.D. Pa. 1995).

In addition to these agreements, Goldstein signed a Subordinated Promissory Note (“Note”). This Note, as part of the original sale price, obliged Veritext to pay Goldstein the principal sum of \$1,714,498.00 with interest at eight and one half percent. Payment of the principal was subordinated to the payment of all other indebtedness of the company, as defined in the Note. In the event of indebtedness, Goldstein could not take any action to collect on the Note until the indebtedness was resolved, unless his rights of recovery were in jeopardy. Thus, Goldstein signed the Note knowing that there were some risks of non-payment under the terms of the Note.

On October 12, 2000, Veritext was required to stop making payments on all subordinated debts due to indebtedness to a senior note holder. After October 2000, Veritext suspended all payments on the Note. On April 17, 2001, Goldstein’s Employment Agreement expired, although he continued to remain employed by RSA. He was later terminated from employment on May 19, 2003.

On July 21, 2003, Goldstein and RSA filed an Amended Complaint asserting claims against Veritext for declaratory judgment, breach of contract, unjust enrichment, negligent misrepresentation, promissory estoppel and defamation. Additionally, Goldstein and RSA filed a Motion for a Temporary Restraining Order and Special Injunction seeking to have the Restrictive Covenant declared unenforceable.

Goldstein’s Petition for Preliminary Injunction asked the Court to relieve him of the restrictions set forth in the Non-Compete Agreement. He argued that the restrictive covenant was overly broad, unduly burdensome and unenforceable as a matter of law, and that Veritext had materially breached the Purchase Agreement by failing to make the

required payments under the Note, thereby rendering the restrictive covenant unenforceable.

In determining whether to grant the preliminary injunction, the Court first cited the five elements a plaintiff must establish to obtain injunctive relief:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- 5) that the plaintiff's right to relief is clear.⁷⁷

The elements “are cumulative, and if one element is lacking, relief may not be granted.”⁷⁸ Goldstein argued that he suffers irreparable harm every day he is not able to advertise and do business in the legal court reporting industry since he is not able to maintain his contacts because the covenant not to compete is overly broad. Before determining whether Goldstein had suffered irreparable harm, the Court first had to determine whether the covenant was enforceable.

The Court found that the restrictive covenant was enforceable since the Non-Compete Agreement was attached to the contract for the sale of the business, the geographic restriction was not unreasonable and \$100,000.00 was given to Goldstein as consideration for the Non-Compete Agreement. Addressing the duration of the Non-Compete Agreement, Goldstein argued that the five year period should end five years after the sale of RSA. Veritext, on the other hand, argued that the Court should interpret

⁷⁷ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

⁷⁸ Norristown Mun. Waste Authority v. West Norriton Tp. Mun. Authority, 705 A.2d 509, 512 (Pa. Commw. 1998).

the covenant to begin on May 19, 2003, the day on which Goldstein's employment was terminated. The Court found that imposing a five year non-compete restriction on Goldstein from the date of termination would impose on him a hardship which outweighed the harm that would be suffered by the defendants. Recognizing that Goldstein had neither been paid a salary since April 2001, when his Employment Agreement ended, nor been paid pursuant to the Note, the Court modified the covenant not to compete and limited the duration of the covenant to one year from the date of Goldstein's termination. In modifying the restrictive covenant, the Court further found that the modified restraint on Goldstein imposed a reasonable restraint and therefore Goldstein would not suffer irreparable harm if prohibited from working for a period of one year from his termination. Further, the Court concluded that a greater risk of harm would not result by refusing to grant the Preliminary Injunction, particularly in light of the modification.

The Court further held that granting the Preliminary Injunction would not restore the parties to the status quo. "The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy."⁷⁹ The Court found that the status quo would not be restored by granting the Preliminary Injunction. Further, the Court found that Goldstein failed to establish the fourth requirement for a Preliminary Injunction. The restrictive covenant did not prohibit him from earning a living, although it did prevent Goldstein from operating a business within certain identified states.

⁷⁹ Valley Forge Historical Soc. v. Washington Memorial Chapel, 493 Pa. 491, 426 A.2d 1023, 1129 (Pa. 1981).

In finding that Goldstein had bargained for and assented to the terms of the covenant not to compete, the Court rejected his argument that the Preliminary Injunction would be unreasonably suited to abate the wrong. The Court held that the modification of the covenant was the most reasonable abatement of the wrong. Lastly, the Court addressed the harm to the public interest in enforcing the covenant as modified. It determined that the public interest would not be harmed by enforcement of the restrictive covenant as modified.

For the foregoing reasons, the Court granted the Preliminary Injunction, in part, by modifying the terms of the restrictive covenant, but denied the request to find the covenant unenforceable.

On January 4, 2004, the Court addressed an Application for Injunction Pending Appeal filed by Veritext. Veritext was seeking an injunction pending the appeal of the September 10, 2003 decision. The Court found that, at the time of the appeal, because Goldstein was still restricted from competing, Veritext suffered no harm, and therefore no immediate and irreparable harm existed. Accordingly, the Court denied the Application for an Injunction Pending Appeal.⁸⁰

United Products Corp. v. Transtech Manufacturing, Inc., August Term 2000, No. 4051, 2000 WL 33711051, 2000 Phila. Ct. Com. Pl. LEXIS 91 (C.C.P. Phila. November 9, 2000) (Sheppard, J.) (The Court granted, in part, the Petition for Preliminary Injunction for a manufacturer seeking to enforce a restrictive covenant against its former employees). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/unitedff.pdf>.

United Products Corporation (“UPC”) supplies modules and parts for passenger railcar interiors. Two of its employees, Benjamin Amodei, Jr. and Mark Furry, resigned from UPC and started a new company, Transtech Manufacturing, Inc. (“TMI”), to supply

⁸⁰ This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/reporting-op.pdf>.

parts to passenger railroads, including parts for passenger railcar interiors. UPC filed a Petition for Preliminary Injunction to prohibit TMI from performing work for UPC's two biggest customers, Amtrak and the Southeastern Pennsylvania Transportation Authority ("SEPTA").

The interior of a passenger railcar contains thousands of parts manufactured by 70-80 vendors. In the past, these parts were bought directly from the vendors, and parts from different vendors were not fitted together to ensure that they fit properly. The result was continual delays in railcar assembly.

Egan, President and CEO of UPC, formed the company in the 1990s, and introduced the "kitting process" into the railcar interior supply industry to solve these delay problems. A "kit" is a group of two or more related parts tested to form fit their function before shipment to the railroad. This allows the railroad to deal solely with UPC.

UPC generally charged Amtrak by the hour, with the exception of the bag rack. The bag rack is a part that was designed and built by UPC. About twenty drawings comprise the bag rack design. In addition to the bag rack, UPC did most of the design engineering work for Amtrak's Priority Package Delivery (PPD) modules. UPC copyrights its drawings, and requires many of its employees and suppliers to sign non-competition, non-solicitation and confidentiality agreements. Amtrak did not pay for the bag rack drawings, but did pay for the PPD module drawings. At the end of the Capstone

project,⁸¹ a major refurbishing by UPC of 780 Amtrak passenger cars, the drawings for the PPD module became Amtrak's property.

UPC was also involved with the Silverliner project; a large refurbishing project by SEPTA. UPC supplied all interior parts except seats, windows, window trim, high ceiling lights and doors. UPC designed the interior based on specifications provided by SEPTA. It took eleven months for UPC to design the interior, and there were in excess of 400 drawings, 200 of which are copyrighted. Some of the drawings for the interior became SEPTA's property at the end of the project, and some remained UPC's property. In addition to these two projects, UPC supplied spare parts for both Amtrak and SEPTA. These spare parts were not part of either the Capstone or Silverliner projects, and there was no commitment to UPC that it would be the sole supplier of these parts.

Amodei was originally employed by UPC for a probationary period of 120 days at a salary of \$45,000. When the probationary period ended, Egan met with Amodei to discuss a raise. Amodei was told he was required to execute a restrictive covenant in exchange for the raise. Egan also told Amodei that the raise was for Amodei's good job performance. On November 12, 1998, Amodei signed an employment agreement that consisted of two parts. Both parts contained a general covenant not to compete and a non-solicitation agreement, both lasting for a period of two years from the date of termination. Additionally, Amodei signed a confidentiality agreement. Amodei was the main liaison for UPC on the Capstone project. His position gave him access to UPC's

⁸¹ At the time of the present case, the Capstone project was estimated to last for three more years.

kits and drawings. However, by January 2000, relations between Egan and Amodei had soured, and Amodei resigned from UPC on March 16, 2000.

Mark Furry began working for UPC as a part time consultant in March or April of 1995. He helped with UPC's bid for the Silverliner project, and was familiar with the Silverliner specifications. On May 30, 1996, Furry executed an agreement containing non-compete, non-solicitation and confidentiality agreements. On November 2, 1998, UPC hired Furry as a fulltime employee. Around this time, Furry signed the same employment and confidentiality agreement that Amodei signed.

Furry's position gave him access to all of UPC's records, including personnel files, drawings, bids, financial information, pricing, inventory, engineering and vendor records. In addition, after Amodei left, Furry assumed his duties on the Capstone project. However, relations soured between Egan and Furry, and on July 28, 2000, Furry tendered his resignation. His last day at UPC was August 2, 2000, when he met with Egan and signed an Exit Interview form, reaffirming his promises in the employment and confidentiality agreements.

Amodei and Furry founded TMI in April 2000.⁸² In May or June 2000, after Amodei quit UPC, Amodei visited Amtrak and was asked to submit a bid for bag racks. In or about July 2000, while Furry still worked at UPC, TMI gave Amtrak a quote for 100 bag racks. The prices for the TMI racks were 10% lower than UPC's prices, and Furry participated in the preparation of the bid. While Amtrak did not order any bag

⁸² TMI was not formally incorporated until July 13, 2000.

racks from TMI, in August 2000, after receiving a copy of TMI's quote, UPC lowered the price of their bag racks to about \$1000 per unit.⁸³

UPC asked the court to enjoin TMI from doing any business with Amtrak and SEPTA for two years. A Pennsylvania court may grant an injunction only if the moving party establishes five elements:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and the plaintiff's right to relief is clear; and
- 5) the injunction is reasonably suited to abate that wrong.⁸⁴

The Court first addressed whether UPC was entitled to relief under the non-competition, non-solicitation and confidentiality agreements. UPC alleged that its kitting process, products, customer and supplier information and other business information were trade secrets that merit protection. However, the Court found that UPC had failed to meet its burden of showing that trade secrets are at issue.⁸⁵ The Court held that a design is not a trade secret if it is in public view and susceptible to reverse engineering.⁸⁶ Further, the kitting process is known in the transit and automobile industries, and UPC offered no evidence to show that kitting, as applied by UPC, involved any secret nuances not used by other companies. Lastly, the identities of suppliers and customers are

⁸³ Earlier pricing for the bag rack was \$1275.

⁸⁴ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

⁸⁵ Pennsylvania courts have adopted the definition of a trade secret outlined in the Restatement (First) of Torts § 757.

⁸⁶ Van Products Co. v. General Welding & Fabricating Co., 419 Pa. 248, 266-67, 213 A.2d 769, 779-80 (Pa. 1965).

publicly available and therefore not trade secrets. Thus, the Court denied UPC's right to relief under the confidentiality agreements because UPC failed to establish the existence of trade secrets.

The Court next addressed the non-competition and non-solicitation agreements. In its Petition, UPC sought to bar TMI from any work with Amtrak or SEPTA. The Court found this requested relief overly broad, but held that if the agreements were enforceable, enforcement would be limited to prohibiting TMI from engaging in business with Amtrak and SEPTA involving passenger railcar interiors and the one non-interior item that UPC manufactures.

In determining whether the agreements were enforceable, the Court applied a three part test. The agreements were enforceable only if: (1) they are ancillary to an employment relation; (2) they are reasonably limited in duration and geographic scope; and (3) enforcement is necessary to protect a legitimate business interest of the employer without imposing an undue hardship on the employee.⁸⁷

To be enforceable, restrictive covenants must be ancillary to employment. Amodei signed his agreement months after first joining UPC. Furry signed his agreement years after first joining UPC as a consultant. When parties execute a restrictive covenant after an employee's service begins, a restrictive covenant is not ancillary unless it is accompanied by new consideration. Amodei received a \$10,000 raise, and a promotion from a probationary consultant to a fulltime employee. Furry also received a \$6,000 raise and promotion from a part time consultant to a fulltime employee. The Court held that

⁸⁷ John G. Bryant Co. v. Sling Testing and Repair, Inc., 71 Pa. 1, 8-9, 368 A.2d 1164, 1168 (Pa. 1977).

the raises and promotions constituted adequate consideration to support the finding that the restrictive covenants were ancillary.

Secondly, the Court held that the covenants were necessary to protect UPC's legitimate business interest in customer goodwill that Amodei and Furry created on behalf of UPC. The Court held that, while goodwill was the only business interest that needed protection, UPC had a right to protect the relationships with Amtrak and SEPTA through enforcement of the restrictive covenants.

Thirdly, the Court addressed the reasonableness of the duration and geographic scope of the restrictive covenants. TMI had the burden to show that both the time and geographic extent of the restrictive covenants were not reasonable.⁸⁸ Having already established that goodwill was the only business interest that Amodei and Furry had established on UPC's behalf, the Court held that the duration of the covenants is reasonable if the period restricted is no longer than necessary for UPC to put a new employee on the job and for the new employee to have a reasonable opportunity to demonstrate his effectiveness to UPC's customers. The record showed that Egan had already moved an employee into the position and that Egan himself had an established relationship with SEPTA and Amtrak. Additionally, given how regularly the position called for contact with SEPTA and Amtrak, the Court reasoned that a relationship could be established more quickly. For these reasons, the Court held that a one year period, beginning from Furry's last day at UPC, would be sufficient to protect UPC.

⁸⁸ Id. at 1169.

Additionally, since UPC was solely seeking to enjoin TMI from doing business with Amtrak and SEPTA, the Court held that the geographic scope set forth in the covenant was reasonable.

As part of their defense, Amodei and Furry claimed that UPC had constructively terminated their employment. They argued that an employer who constructively terminates his employees may not enforce a restrictive covenant against those employees. The Court refused to address whether it should extend the Insulation Corp. of America v. Brobston rule⁸⁹ to constructive termination because the record did not establish that working conditions at UPC were so intolerable that Amodei and Furry were forced to resign.

Having established that UPC had a clear right to enforcement of the non-competition and non-solicitation agreements for one year, the Court addressed whether UPC satisfied the remaining elements of the preliminary injunction test.

The Court held that knowing solicitation of a former employer's customers in violation of a restrictive covenant can be an "unwarranted interference with customer relationships that is unascertainable and not capable of being fully compensated by damages."⁹⁰ Additionally, the Court held that greater injury would occur from refusing to grant the preliminary injunction than from granting it. If the requested relief was not granted, Amodei and Furry would be free to exploit the goodwill relationships, which were UPC's assets, to UPC's detriment. If the Court granted the injunction, UPC would

⁸⁹ 446 Pa. Super. 520, 534-536, 667 A.2d 729, 735-37 (Pa. Super. 1995) (holding that an employer who terminated an employee for poor performance cannot enforce a restrictive covenant against that employee).

⁹⁰ John G. Bryant Co., 369 A.2d at 1167.

be able to freely re-establish relationships with Amtrak and SEPTA, while Amodei and Furry could still make a living selling anything but railcar interiors and uncoupling rods to Amtrak and SEPTA. In addition, there were no restrictions on selling products to other transit companies.

The Court further held that UPC had a clear right to partial enforcement of the non-competition and non-solicitation agreements because the agreements were enforceable to protect UPC's customer relationships.

Lastly, the Court held that a preliminary injunction prohibiting Amodei and Furry from engaging in business involving passenger railcar interior parts or uncoupling rods with Amtrak or SEPTA would restore the parties to the status quo that existed prior to TMI soliciting such work from those companies.

For the foregoing reasons, the Court granted, in part, the Petition for Preliminary Injunction and enjoined TMI from engaging in any business involving passenger railcar interior parts or uncoupling rods with Amtrak or SEPTA until August 3, 2001.

6. Failure to Financially Compensate or Provide Services

Fennell v. Van Cleef, May Term 2000, No. 2754, 2000 WL 33711077, 2000 Phila. Ct. Com. Pl. LEXIS 98 (C.C.P. Phila. May 31, 2000) (Herron, J.) (The Court denied the Petition for Preliminary Injunction for a consulting firm seeking compensation from a co-producer of a charity event). This Opinion is currently unavailable on the Commerce Court website.

On May 18, 2000, Arthur Fennell and Fennell Media Consulting (collectively, "Fennell") filed a Motion for Preliminary Injunction to prevent the release of certain funds from escrow received in connection with a charity event held the previous fall in Japan. In his complaint, Arthur Fennell alleged that on May 30, 1999, he entered into an agreement with Julian Van Cleef, acting on behalf of himself and Van Cleef and Company (collectively, "VCC"). Under the agreement, Fennell was to arrange a charity

event in Japan featuring Tiger Woods. Although the Plaintiffs did not produce any written agreement signed by Fennell, they alleged that VCC and Fennell agreed to share fees for organizing the event with Kazu Ito (“Ito”), the individual who had secured sponsorship of the event in Japan.

Fennell claimed that, in September 1999, the parties reached a final agreement under which Q’SAI Co., Ltd., the sponsor of the event, would pay \$1,215,000, of which VCC and Fennell would each receive \$80,000, Ito would receive \$50,000, and Merle Scott of International Management, Inc. (“IMI”) would receive \$15,000.

Fennell alleged that VCC promised Fennell, in writing, that they would receive their share of the funds on November 23, 1999, and that, based on this agreement, Fennell worked on setting up the event. Fennell claimed that VCC had not made any payments and that Fennell had been unable to contact VCC.

Under Pennsylvania law, a court will grant a preliminary injunction if:

- 1) The petitioner has a clear right to relief;
- 2) The preliminary injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages;
- 3) A greater injury will result by refusing to issue the injunction;
- 4) The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; and
- 5) The wrong is actionable and an injunction is reasonably suited to abate the wrong.⁹¹

The Court held that none of the writings or evidence presented by Fennell established any obligation on the part of VCC to make any payments to Fennell. Lacking this evidence, Fennell had not established a clear right to relief.

⁹¹ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

Secondly, the Court addressed whether the alleged harm to Fennell could be remedied by damages. Fennell argued that, while the harm contemplated could be remedied by damages, this case fell under an exception to the “no monetary damages” rule. Supporting this claim, Fennell cited Langston v. National Media Corp.,⁹² in which the parties had a written employment agreement that included a clause requiring the employer to set up an escrow account in the event of a dispute. The Langston court reasoned that a refusal to require the defendant to escrow the funds would render the escrow clause in the agreement a nullity and would contravene the parties’ intent that its establishment assured that the plaintiff would be compensated.⁹³ Fennell also directed the Court’s attention to Levin v. Barish,⁹⁴ wherein the Superior Court addressed whether a bond or other type of security from a temporary receiver was required under the Pennsylvania Rules of Civil Procedure.

The Court acknowledged that these two cases were “vaguely similar” to the present case, but held that neither case was controlling. In Langston, the court required the escrow pursuant to an executed, written agreement, while Levin focused almost exclusively on the bond issue and touched minimally on when a preliminary injunction is appropriate. The Court held that since Fennell was essentially seeking compensation in the form of money damages, Fennell had failed to establish the second element required to grant a preliminary injunction.

In finding that Fennell had failed to establish the first two elements required for a preliminary injunction, the Court found no need to address the third, fourth, or fifth

⁹² 420 Pa. Super. 611, 617 A.2d 354 (Pa. Super. 1992).

⁹³ Id. at 358.

⁹⁴ 505 Pa. 514, 481 A.2d 1183 (Pa. 1984).

prongs of the test.⁹⁵ For the foregoing reasons, the Court denied the Petition for Preliminary Injunction.

Kim v. Choi, July Term 2005, No. 3410, 2005 WL 1953037, 2005 Phila. Ct. Com. Pl. LEXIS 372 (C.C.P. Phila. August 9, 2005) (Abramson, J.) (The Court denied a Motion for Emergency Injunctive Relief because the breach of contract could be compensated by monetary damages and the misrepresented terms of the contract violated the public interest). This Opinion is available at <http://courts.phila.gov/pdf/cpcvcomprg/050703410.pdf>.

James I. Kim (“Kim”) was formerly the sole owner of JKYY Inc., which operated a delicatessen with a liquor license (“Deli Business”). Kim claimed that he had an oral agreement with Kijin Jay Choi (“Choi”) to purchase the Deli Business, including all inventory, equipment and licenses, for \$380,000, payable as follows:

- a. \$5,000 upon signing a written sales agreement;
- b. \$115,000 by note; and
- c. \$260,000 in cash at the closing.

Kim claimed that Choi conditioned the offer on Kim agreeing to memorialize the purchase as if it was for only \$120,000. The written agreement between the two parties provided for Choi to pay only \$120,000 for the Deli Business. Choi paid the \$5,000 down payment and executed a note for \$115,000. However, after signing the closing documents, Choi refused to pay the remaining \$260,000, despite taking possession of the Deli Business. As a result, Kim brought suit against Choi for damages for breach of contract, rescission based on fraud in the inducement of the contract, and unjust enrichment. Kim also requested injunctive relief imposing a “constructive trust” on the \$260,000 in cash that was purportedly brought to the closing but not paid to prevent

⁹⁵ See Norristown Mun. Waste Auth. v. West Norriton Twp. Mun. Auth., 705 A.2d 509, 512 (Pa. Commw. 1998)(holding “[t]he requisites of a preliminary injunction are cumulative, and if one element is lacking, relief may not be granted”).

“dissipation and waste.” Kim further filed a Motion for Emergency Injunction directing Choi to deposit with the court the \$260,000, to be held pending the resolution of the case.

Under Warehime v. Warehime,⁹⁶ the Court found six essential prerequisites that a party must establish prior to obtaining preliminary injunctive relief.

- 1) that the injunction is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by damages;
- 2) that greater injury would result from refusing an injunction than from granting it and, concomitantly, that issuance of an injunction will not substantially harm other interested parties in the proceedings;
- 3) that a preliminary injunction will properly restore the parties to their status as it existed immediately prior to the alleged wrongful conduct;
- 4) that the activity it seeks to restrain is actionable, that its right to relief is clear, and that the party seeking the injunction is likely to prevail on the merits;
- 5) that the injunction it seeks is reasonably suited to abate the offending activity; and
- 6) that a preliminary injunction will not adversely affect the public interest.

The Court denied the Motion for Emergency Injunctive Relief, finding that the Plaintiff’s claim failed to satisfy several of these requirements. First, it found that the breach of the oral contract could be adequately compensated with money damages. The Court further added that the mere risk that the defendant will prove to be judgment-proof does not warrant an injunction.

Second, the Court held that taking possession of the \$260,000 would not restore the parties to the position they were in prior to the defendant’s allegedly wrongful conduct. The alleged wrongful conduct was the taking possession of the Deli Business without paying all of the agreed upon purchase price. The Court held that to restore the

⁹⁶ 580 Pa. 201, 860 A.2d 41, 46-47 (Pa. 2004).

parties to their original position, the Deli Business would have to be returned to Kim and the \$120,000 paid would have to be returned to Choi. However, this relief was not requested in the Motion for Emergency Injunction.

Lastly, in addressing the effect on the public interest in granting the injunction, the Court noted that the transaction was structured to mislead third parties since it was drafted to appear “as if for only \$120,000.” The Court inferred that the parties’ intent was to commit fraud, and therefore the public’s interest would not be best served by granting an injunction.

Warehouse Tech., Inc. v. Lift, Inc., January Term 2006, No. 2827, 2006 WL 224271, 2006 Phila. Ct. Com. Pl. LEXIS 47 (C.C.P. Phila. Jan. 27, 2006) (Bernstein, J.) (The Court denied injunctive relief because future harm to a buyer who failed to receive goods from the seller was fully compensable by monetary damages). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/060102827.pdf>.

On November 30, 2005, Petitioner Warehouse Technology, Inc (“Petitioner”) entered into a written contract with Defendant Lift, Inc. (“Lift”) for the delivery of forty-two doors. The doors were manufactured by Defendant SPX Dock Products-TKO (“SPX”), and Lift was an authorized dealer of SPX’s product. Approximately five weeks later, Lift and SPX decided that they would not fulfill their contractual obligations to Petitioner, who was notified of this decision by email correspondence. Petitioner’s subsequent attempts to have the doors delivered by other SPX distributors were unavailing.

Petitioner sought a mandatory preliminary injunction against both Lift and SPX that would compel the delivery of the doors.⁹⁷ In order for the Court to have granted the injunction, Petitioner was required to establish the “six essential prerequisites” for such relief:

- 1) absent an injunction, the plaintiff will suffer an immediate and irreparable harm which cannot be adequately compensated by monetary damages;
- 2) that such harm to plaintiff is greater than any harm that any interested party will suffer if the injunction is granted;
- 3) that the injunction will return the parties to the status quo that existed before the occurrence of any wrongful conduct;
- 4) that the plaintiff is likely to succeed on the merits of the underlying claim;
- 5) that the injunction sought is reasonably suited to abate the offending activity; and
- 6) that the injunction will not adversely affect the public interest.⁹⁸

In denying Petitioner’s request for a mandatory preliminary injunction, the Court held that “[w]hile Petitioner will likely succeed on the merits of its claims all future injury is fully compensable by money damages.” Thus, Petitioner could not satisfy the first of the six prerequisites for injunctive relief.

The Court reasoned that if Petitioner was successful with its breach of contract claims against Lift and SPX, it could recover the difference between the contract price and the cost of purchasing substitute doors, the difference between the market price at the time when the buyer learned of the breach and the contract price and incidental and

⁹⁷ While the more typical preliminary injunction requires a party to refrain from certain conduct, a *mandatory* preliminary injunction orders a party to perform some positive act. See Josten Aluminum Products Co., Inc. v. Mount Carmel District Industrial Fund, 256 Pa.Super. 353, 389 A.2d 1160 (Pa.Super.1978).

⁹⁸ Deynzer v. Columbia Gas of Pa., Inc., 2005 PA Super 122, 875 A.2d 298 (Pa.Super.2005).

consequential damages. Moreover, the Court posited that Petitioner might also be entitled to pre and post judgment interest on the contract.

7. Insurance Related Disputes

Great American Alliance Ins., Co. v. Program JHE, Inc., April Term 2002, No. 2565, (Westlaw citation unavailable), 2002 Phila. Ct. Com. Pl. LEXIS 67 (C.C.P. Phila. November 21, 2002) (Cohen, J.) (The Court granted the preliminary injunction for an insurance company that sought an accounting of a financially troubled insured party and its obligee). This Opinion is available at <http://fjd.phila.gov/pdf/cpevcomprg/gramer1.pdf>.

Great American Alliance Insurance Co. (“Great American”), an issuer of surety bonds, issued performance and payment bonds (“Bonds”) in connection with a construction project for SEPTA. Program JHE, Inc. (“JHE”) was hired as general contractor to complete SEPTA’s 52nd and 63rd Streets renovations. The Bonds named JHE as principal, and SEPTA as obligee. The Bonds required Great American to cover JHE’s contractual obligations, in the event that JHE defaulted on its obligations.

Pursuant to the terms of an Indemnity Agreement between the JHE Defendants and Great American, if Great American made payments or incurred costs in connection with the Bonds, Great American could demand immediate repayment and/or collateral from the JHE Defendants. The Indemnity Agreement expressly assigned to Great American the contract balances from the bonded construction project. Additionally, the JHE Defendants agreed to hold in trust for Great American all funds received under the bonded construction contracts.

In November, 2001, JHE informed Great American that JHE was in severe financial distress and would not be able to complete the construction project. In return for Great American's financial assistance, JHE agreed to direct SEPTA to pay all remaining contract payments to Great American. On January 31, 2002, JHE sent SEPTA written

instructions directing SEPTA to make future contract payments to JHE. It is alleged that notwithstanding the instructions in the January 31st letter, SEPTA sent payments to JHE and that JHE, in violation of the terms of the Indemnity Agreement, converted the payments to pay Internal Revenue Service liens ("IRS liens") instead of forwarding the payments to Great American.

In response, Great American petitioned for a temporary restraining order and permanent injunction requiring JHE and SEPTA to provide an accounting for contract related sums paid or pending, and for JHE to account for all disbursements or distributions it made. Additionally, Great American sought an injunction requiring immediate turnover of all contract payments JHE possessed, as well as, all future payments received from SEPTA.

JHE filed a preliminary objection, stating that under Pennsylvania Rule of Civil Procedure 1509(c) the existence of a full and adequate remedy under law precluded Great American from seeking injunctive relief or from proceeding under the doctrine of equitable subrogation.

The Court first noted that a preliminary injunction may be appropriate “to preserve the status quo as it exists or as it existed before the acts complained of, thereby preventing irreparable injury or gross injustice.”⁹⁹

Great American asserted that JHE had assumed the role of trustee in control of funds received as payment for services rendered on the bonded construction project. Great American also asserted that it would be irreparably harmed by the continued

⁹⁹ American Express Travel Related Services, Co. v. Laughlin, 424 Pa. Super. 622, 627, 623 A.2d 854, 856 (Pa. Super. 1993).

dissipation of funds because JHE did not have sufficient assets to repay their debt obligations. As surety, Great American had made payments to satisfy the debts of JHE and to ensure completion of the SEPTA bonded construction project. The Court accepted all of these assertions as true, and therefore held that Great American was entitled to seek relief in the form of an injunction or under the doctrine of equitable subrogation.

Sigma Supplies Corp. v. Progressive Halcyon Ins., August Term 2003, No. 02968, 2004 WL 960011, 2004 Phila. Ct. Com. Pl. LEXIS 43 (C.C.P. Phila. April 23, 2004) (Sheppard, J.) (The Court held that injunctive relief is not available to eliminate a possible, remote future injury or invasion of rights and denied a request for injunctive relief). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/050603085.pdf>.

Sigma Supplies Corp. (“Sigma”) provides medical equipment to persons involved in automobile accidents. Progressive Halcyon Insurance (“Progressive”) was required to pay Sigma for the medical equipment under certain auto insurance policies issued by Progressive. Sigma alleged that they were not paid the full amount to which they were entitled under those policies and the provisions of the Pennsylvania Motor Vehicle Financial Responsibility Law (“MVFRL”).¹⁰⁰ Sigma filed a Petition for Injunctive Relief to enjoin Progressive from further violation of Section 1797 of the MVFRL in connection with Sigma’s present claims that Progressive violated the MVFRL and had breached its contract with Sigma.

In order to obtain a permanent injunction, plaintiffs must allege and show “an urgent necessity to avoid injury which cannot be compensated by damages.”¹⁰¹ The Court, citing Jamal v. Com. Dept. of Corrections¹⁰², found that “[t]here is no basis for injunctive relief where the purpose of such relief is solely to forestall potential future

¹⁰⁰ 75 Pa. C.S. § 1701 et seq.

¹⁰¹ Merchant v. Com.State Bd. of Medicine, 162 Pa. Commw. 332, 337, 638 A.2d 484, 487 (Pa. Commw. 1994).

¹⁰² 121 Pa. Commw. 42, 549 A.2d 1369 (Pa. Commw. 1988).

violations; injunctive relief is not available to eliminate a possible remote future injury or invasion of rights.” Additionally, Sigma was pursuing recovery for damages caused by Progressive’s alleged wrongful conduct. In finding that Sigma had a clear and adequate remedy at law which they were presently pursuing, the Court dismissed Sigma’s request for injunctive relief.

TJS Brokerage & Co. v. Hartford Insurance Co., December Term 1999, No. 2755, 2000 WL 1060645, 2000 Pa. Dist. & Cnty. Dec. LEXIS 313 (C.C.P. Phila. April 24, 2000) (Herron, J.) (The Court granted the preliminary injunction in part, and denied it in part for a brokerage firm seeking full coverage from its insurance company after its office was vandalized). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/tjspi3.pdf>.

In April 1999, TJS Brokerage and Co. (“TJS”) lost much of its office equipment when the brother of the TJS president vandalized the office. TJS submitted claims to its insurer, Hartford Casualty Insurance Co. (“Hartford”) for damaged property, damaged computers, valuable papers and lost business. Hartford paid some of the claims, but then ceased payments.

TJS filed a Petition for Preliminary Injunction requesting that the court order Hartford to continue to process the claims. TJS argued that if Hartford did not reimburse TJS for the damaged property and the lost business, TJS would go out of business. In its Answer, Hartford claimed that TJS did not submit enough information to allow Hartford to adjust the claims and further alleged that TJS’s claim had been fraudulent.¹⁰³

TJS filed several claims following the vandalism incident. The first was a Business Income Loss Claim. The insurance policy (“Policy”) provided that Hartford “will pay for the actual loss of Business Income you sustain due to the necessary suspension of your ‘operations’ during the ‘period of restoration.’” The Policy required

¹⁰³ The Court rejected the fraud claim, finding it unsupported by the record.

TJS to furnish evidence of business income loss. Hartford furnished two payments of \$50,000 for business income loss for the period April and May, 1999, but in June Hartford requested proof of business income loss. Young Adjustment, a public adjuster hired by TJS to prepare the business income loss claim, submitted its assessment to Hartford in August 1999. The information submitted to Hartford was incomplete and, as a result, Hartford ceased making payments.

Other claims submitted by TJS were for the damage to its business personal property and computer equipment. The Policy provided that Hartford pay the actual cost value of the loss. The Court addressed the balance of payments due for this equipment, finding that Hartford had not made full payment for all claims made by TJS. The evidence presented established that the damaged equipment was essential to TJS's business operations, and the vandalism incident resulted in the loss of income for the company. Furthermore, following the vandalism incident, TJS went from twenty employees to six. TJS was past due in paying its rent, its employee payroll, its telephone bills and its bills from other vendors.

After discussing the specific details of each insurance claim submitted by TJS, the Court turned to the request for a preliminary injunction. In determining whether to grant the preliminary injunction, the Court first cited the five elements a plaintiff must sufficiently establish:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and

5) that the plaintiff's right to relief is clear.¹⁰⁴

An injury is considered "irreparable" if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard.¹⁰⁵ However, a plaintiff can show irreparable harm even if the potential damages are readily calculable.¹⁰⁶ Furthermore, the Court held that the standard for granting a preliminary injunction required that the plaintiff not merely allege a loss of some business, but rather the loss must be great enough to "threaten the existence of the business."¹⁰⁷ Thus, the potential loss of a plaintiff's funds which are necessary to carry on the business can constitute irreparable injury.¹⁰⁸

In its brief, Hartford cited Vanderveen v. Erie Indem. Co.¹⁰⁹ to support its claim that a court may not enjoin an insurer's breach of an insurance agreement. In Vanderveen, the plaintiff was in a car accident and was subject to a claim for damages. He brought an action against the defendant, seeking specific performance of the defendant's duty to defend the claim. The trial court found that the threat of imminent, irreparable harm existed because of the potential for the loss of his license. The Pennsylvania Supreme Court reversed, stating the rule in Pennsylvania that in contract

¹⁰⁴ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

¹⁰⁵ Sovereign Bank v. Harper, 449 Pa. Super. 578, 592-93, 674 A.2d 1085, 1093 (Pa. Super. 1996).

¹⁰⁶ Id.

¹⁰⁷ Three County Services v. Philadelphia Inquirer, 337 Pa. Super. 241, 248, 486 A.2d 997, 1001 (Pa. Super. 1985).

¹⁰⁸ See East Hills TV & Sporting v. Dibert, 366 Pa. Super. 455, 459-460, 531 A.2d 507, 509 (Pa. Super. 1987)(concluding that a preliminary injunction should be granted where the irreparable harm consisted of a "potential loss of funds which are needed to carry on its business.").

¹⁰⁹ 417 Pa. 607, 208 A.2d 837 (Pa. 1965).

actions, including actions involving insurance contracts, the plaintiff generally has an adequate remedy at law.

The Court here distinguished Vanderveen, noting that Vanderveen did not hold that equitable relief is never available in insurance coverage actions. The Court further distinguished Vanderveen from the present case because the plaintiff there was not threatened with the loss of business. The Court held that it must balance the risk of harm to TJS against the risk of harm to Hartford. The risk to Hartford, should the injunction be granted, would be purely monetary. Given that Hartford only had one defense, fraud, to the bulk of TJS's claims, and the Court had already found the fraud claim to be unsupported by the record, the Court held that the risk to Hartford was minimal.

Conversely, the risk to TJS, should the injunction be denied, was great because TJS's business would be threatened. The demise of the business would cause incalculable harm not only to TJS, but also to TJS's employees. For this reason, the Court concluded that TJS had demonstrated that the risk of immediate and irreparable harm to TJS outweighed the risk to Hartford.

In assessing the status quo element, the Court held that the controversy at issue is Hartford's allegedly unlawful non-payment of the remainder of TJS's claims. Hartford made payments to TJS from April 19, 1999 to June 18, 1999, whereupon the payments ceased. The Court held, therefore, that the last actual, peaceable and lawful non-contested status quo was on or about June 18, 1999 when Hartford was still processing and paying the claims. For this reason, a preliminary injunction requiring the Hartford to process TJS's claims would restore the parties to this status.

The Court held that TJS had demonstrated that the alleged wrong was actionable and that an injunction was reasonably suited to abate that wrong.¹¹⁰ TJS had purchased an insurance contract to allow TJS to “weather catastrophic events that might otherwise put TJS out of business.” The Court found that the failure to honor this coverage threatened the destruction of TJS by events which TJS had insured itself against. For this reason, the Court held that an injunction requiring Hartford to honor the contract was reasonably suited to abate the harm from those events.

The Court then turned to the requirement that TJS show a clear right to relief. The Court evaluated each of TJS’s claims. First, the Court addressed the Business Income Loss Claim, and found that TJS had not demonstrated a clear right to relief. Finding that TJS had not clearly demonstrated its business loss, the Court held that it could not determine that TJS had a clear right to relief.

However, the Court held that TJS had demonstrated a clear right to relief on its Business Personal Property Claim. The Court held that the record clearly showed that Hartford had failed to fully reimburse TJS for this claim. Since the only defense offered by Hartford for its failure to pay was the unsupported fraud claim, the Court held that TJS had shown a clear right to relief for its business personal property claim.

In addition to the property claim, TJS filed a claim for coverage of its copier warranties. Hartford claimed that it was not required to cover the costs of recovering the copier warranties since they were not specifically included in the valuable papers

¹¹⁰ See e.g. Tonkovic v. State Farm Mutual Automobile Insurance Co., 513 Pa. 445, 521 A.2d 920 (Pa. 1987)(holding that an insurer’s breach of an insurer’s contract is actionable).

clause,¹¹¹ and, therefore, TJS had no clear right to relief for this claim. TJS argued that the valuable papers clause of the contract was ambiguous, and that Hartford was required to pay the costs of recovering the copier warranty documents. TJS's right to relief for this claim hinged on the Court's determination of whether the valuable papers clause was ambiguous.

The Court found that the term "valuable papers" was not ambiguous. However, the Court accepted TJS's argument that, in spite of the clear nature of this term, Hartford represented that the valuable papers coverage included the copier warranties. The record showed that TJS had sought coverage for the copier warranties, that TJS had been told that copier warranties were not usually covered, and that TJS had, as a result, purchased increased limits for the coverage of valuable papers by paying an increased premium. TJS argued that these facts created a reasonable expectation of coverage. The Court agreed, finding that the proper focus regarding issues of coverage under insurance contracts is the reasonable expectations of the insured.¹¹² In finding that TJS had specifically applied for and paid extra for copier warranty coverage, the Court accepted that TJS had a reasonable expectation of coverage. In so finding, the burden shifted to Hartford to make an affirmative showing that TJS was informed and understood that there was no coverage for the copier warranties. The Court held that the record did not establish that Hartford notified TJS that there was no coverage. Thus, under the Tonkovic reasonable expectations doctrine, the Court found that TJS showed a clear right to relief for the copier warranties.

¹¹¹ Hartford contracted to pay the costs to restore the information contained on valuable papers and records.

¹¹² Tonkovic, 521 A.2d at 926.

For the foregoing reasons, the Court granted the Petition for Preliminary Injunction regarding the business personal property and copier warranty claims, but denied the Petition regarding the business income claims.

8. Miscellaneous

Creative Print Group, Inc. v. Country Music Live, Inc. and Mark Michaels, May Term 2000, No. 0283, 2000 WL 33711090, 2000 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. June 13, 2000) (Sheppard, J.) (The Court denied the Petition for a Preliminary Injunction for a print agency that failed to demonstrate a clear right to relief because its services had been effectively terminated). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/creat-ff.pdf>.

On May 2, 2000, Creative Print Group, Inc. (“Creative”) filed a Petition for Preliminary Injunction against defendants Country Music Live (“CML”) and Mark Michaels (“Michaels”), the primary shareholder and officer of CML. Creative sought a mandatory injunction requiring CML to utilize Creative’s services in publishing future issues of CML’s magazines.

Creative alleged that CML had agreed to retain Creative as their exclusive print agency for at least one year, and to include Howard Friedman (“Friedman”), Creative’s president, as “production manager,” and Robert Snyder, an employee of Creative’s, as “art director,” on the masthead of the magazine for the same period of time. Creative alleged that CML terminated the plaintiff and removed the plaintiff and its employees from the masthead, despite being satisfied with the plaintiff’s services. Friedman testified that he and Michaels had verbally agreed that the relationship would last for at least one year, and that this long term relationship was intended because Creative would

never have agreed to the deal for the publication of only one issue in a start-up business for the relatively small amount of money agreed upon.¹¹³

Michaels admitted that there had been discussions regarding the use of Creative's services after the first issue, but disputed the claim that any actual agreement had been reached. There was no written agreement regarding the use of Creative's services.

In determining whether to grant the preliminary injunction, the Court first cited the five elements a plaintiff must sufficiently establish:

- 1) that relief is necessary to prevent immediate and irreparable harm that cannot be compensated by damages;
- 2) that greater injury will occur from refusing the injunction than by granting it;
- 3) that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
- 4) that the wrong is actionable and an injunction is reasonably suited to abate that wrong; and
- 5) that the plaintiff's right to relief is clear.¹¹⁴

Additionally, the Court noted that since Creative was seeking relief in the form of a mandatory injunction, Creative was required to make a very strong showing that its right to relief is clear. This is because a mandatory injunction compels a defendant to perform an act, rather than merely restraining the defendant from acting.¹¹⁵

The Court determined that the Petition turned on whether Creative had established that it had an agreement to be the exclusive print agency for CML for at least one year. In Pennsylvania, if the existence of an informal or oral agreement is alleged, "it is essential to the enforcement of such an informal contract that the minds of the parties

¹¹³ The parties agreed that the cost of providing services for the first issue of the magazine would not exceed \$50,000.

¹¹⁴ School District of Wilkinsburg v. Wilkinsburg Education Association, 542 Pa. 335, 337 n.2, 667 A. 2d 5, 6 at n. 2 (Pa. 1992).

¹¹⁵ Sovereign Bank v. Harper, 449 Pa. Super. 578, 591, 674 A.2d 1085, 1092 (Pa. Super. 1996).

should meet on all the terms as well as the subject matter.”¹¹⁶ A true and actual meeting of the minds is not necessary to form a contract, but determining the parties’ intent depends on their outward and objective manifestations of assent, rather than their undisclosed and subjective intentions.¹¹⁷

The Court found that the record failed to establish that the parties had entered into an enforceable agreement that Creative would be CML’s exclusive print agency for at least one year. It was undisputed that the parties had never entered into a written agreement. It was also undisputed that the essential terms as to price, the services needed, delivery dates or number of copies were never established with regard to using Creative’s services for subsequent issues. These terms had only been established for the first issue. Furthermore, while there was conflicting testimony as to whether CML was satisfied with Creative’s work, the Court found that the fact that CML had terminated Creative and used a different printer for three subsequent issues negated Creative’s contention.

Thus, the Court found that Creative had not established a clear right to injunctive relief since the record failed to demonstrate that there was either a mutual manifestation of assent to be bound or the existence of an enforceable oral agreement.

The Court further held that Creative had failed to show that it would suffer immediate and irreparable harm if injunctive relief was denied. Creative contended that it would lose the benefits that it was supposed to obtain as CML’s exclusive print agency,

¹¹⁶ GMH Assocs., 2000 WL 228918, at *7.

¹¹⁷ Ingrassia Constr. Co., Inc. v. Walsh, 337 Pa. Super. 58, 66-67, 486 A.2d 478, 483 (Pa. Super. 1984).

such as enhanced reputation, expansion to related products and customers, and future earnings and profits.

Although irreparable harm has been found in the commercial context where there is an impending loss of a business opportunity or market advantage,¹¹⁸ the Court found that the record did not demonstrate that Creative would suffer the requisite irreparable harm. Friedman testified that Creative had other projects besides the CML project, and that it continued to work on those projects after it was fired by CML. Friedman also testified that Creative's receivables had not been affected. Thus, contrary to Creative's allegations, the Court found that Creative neither established that its reputation would be damaged nor that it would lose a business opportunity to which it was entitled if the injunction were not granted.

Finally, the Court held that Creative had not established the other prerequisites for a preliminary injunction. The balance of harms did not, in the Court's opinion, weigh in favor of granting the injunction since the requested injunction could damage the business relationships that CML had with its other printer(s) that were used for subsequent issues. Further, it could be more harmful to force CML and Creative to stay in business together given that they "so obviously disagree on most issues." Lastly, the Court found that Creative had failed to demonstrate that the injunction would restore the status quo, or that the termination of Creative's services was an actionable wrong, since Creative had failed to establish that the parties had an agreement to exclusively use Creative's services for one year.

¹¹⁸ Sovereign Bank, 674 A.2d at 1093 (discussing John G. Bryant Co. v. Sling Testing and Repair, Inc., 71 Pa. 1, 7-9, 368 A.2d 1164, 1167-68 (Pa. 1977)).

For the foregoing reasons, the Court denied Creative's Petition for Preliminary Injunction.

DeStefano & Associates v. Cohen, June Term 2000, No. 2775, 2002 WL 1472340, 2002 Phila. Ct. Com. Pl. LEXIS 54 (C.C.P. Phila. May 23, 2002) (Herron, J.) (The Court granted a Motion for Summary Judgment for an attorney representing sellers in a business sale against buyer because buyer failed to meet burden of proof necessary to grant a permanent injunction). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/destef5.pdf>.

Richard DeStefano ("DeStefano") wanted to buy Bob Gendelman & Co., Inc. ("BGC"), an electrical contracting company, from its owner, Bob Gendelman. DeStefano, Gendelman and BGC hired Cohen, Seglias, Pallas & Greenhall P.C. ("Cohen") to represent both sides in the transaction. In February 1999, DeStefano hired independent counsel Kenneth Federman ("Federman") to represent him in the deal. DeStefano formed DeStefano & Associates, Inc. (DAI) to buy BGC's assets and on March 3, 1999, DeStefano, DAI, Gendelman and BGC signed an asset purchase agreement. In the agreement, Gendelman and BGC warranted that there were no pending disputes, no undisclosed liabilities and that BGC had accurately disclosed its financial condition.

When DeStefano took control of BGC's assets, he learned that BGC was not as financially stable as he had believed. He alleged that Gendelman, BGC and Cohen: (1) intentionally or negligently concealed information, including \$112,000 in labor cost overruns and a dispute between BGC and the general contractor Jeffrey M. Brown & Associates, and (2) intentionally or negligently misrepresented the percentage completion of and the anticipated profit on the Pennsylvania House project.

In September 1999, Cohen represented the plaintiffs in a dispute between DAI and a labor union. Plaintiffs alleged that Cohen and the local union business manager

had a close personal relationship that compromised Cohen's loyalty to DAI during the dispute. Plaintiffs further alleged that Cohen represented five other companies in debt collection disputes against DAI.

On November 9, 2000 DeStefano filed a complaint, alleging: (1) fraud against all defendants; (2) breach of fiduciary duty and negligence against Cohen; and (3) breach of contract and unjust enrichment against Gendelman and BGC. The complaint also sought an injunction against Cohen to prevent Cohen from representing the five companies against the plaintiffs.

On April 1, 2002, Cohen filed a motion for summary judgment.

In Count I of the Complaint, DeStefano asserted claims against Cohen for fraud/fraudulent inducement, negligent inducement and negligent misrepresentation. However, the Court found that while the Complaint alleged facts sufficient to withstand the defendant's preliminary objections, the allegations of the complaint could not survive the motion for summary judgment. DeStefano conducted no discovery, and submitted no evidence to support the claims. For this reason, the Court granted the Motion for Summary Judgment as to Count I of the Complaint.

Count II of the Complaint alleged claims of legal malpractice, breach of fiduciary duty, and negligence. Similarly to Count I, the Court held that there was insufficient evidence to support the plaintiffs' claims. DeStefano failed to present any evidence substantiating the claims of legal malpractice, breach of fiduciary duty or negligence.

The Court next addressed DeStefano's request to enjoin Cohen from representing other contractors who allegedly had debts owed to the plaintiffs. Citing Roman Cath.

Congregation of St. Elizabeth Church v. Wuerl,¹¹⁹ the Court stated that “[a] plaintiff seeking a permanent injunction must establish that he has a clear right to relief, and that irreparable harm will occur if relief is not granted.” Having granted the Motions for Summary Judgment as to Counts I and II of the Complaint, the Court concluded that DeStefano’s rights were not clear and free from doubt. There was no evidence in the record to support DeStefano’s causes of action and his right to relief. Further, there was no evidence to support DeStefano’s claim that Cohen’s representation of the alleged debtor contractors would cause irreparable harm. Since DeStefano failed to meet his burden of proof, the Court granted Cohen’s Motion for Summary Judgment and denied the permanent injunction.

Lewis v. Bayer Corp., August 2001 Term, No. 2353, 2002 WL 1472339, 2002 Phila. Ct. Com. Pl. LEXIS 87 (C.C.P. Phila. June 12, 2002) (Sheppard, J.) (The Court denied the Motion for Preliminary Injunction for a class of prescription drug consumers in a class action against the manufacturer, seeking to prevent the manufacturer from contacting physicians who prescribed the drugs). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/lewis.pdf>.

Jerry E. Lewis, et al. (“Lewis”) is a class representative and on behalf of the class filed a Motion for a Temporary Restraining Order and for a Preliminary Injunction. The Petition sought to enjoin Bayer AG and Bayer Corporation (collectively, “Bayer”) from directly contacting any individual residing in the United States who had ingested the drug Baycol during the course of his or her life.

Bayer is the manufacturer and distributor of Baycol. Baycol was approved for human use by the United States Food and Drug Administration (FDA) on June 26, 1996. Baycol was later withdrawn from the market in August 2001. Lewis alleged that Baycol

¹¹⁹ 22 Pa. D. & C. 4th 391, 396 (C.P. Wash 1994) *citing* Carringer v. Taylor, 402 Pa. Super. 197, 586 A.2d 928 (Pa. Commw. 1990).

caused a significantly higher percentage of patients to experience such side effects as muscle weakness and rhabdomyolysis, a potentially life-threatening condition. Lewis filed the Petition for Preliminary Injunction to enjoin Bayer from contacting putative class members for the purpose of obtaining adverse event reports. Lewis sought relief on two grounds:

1. That any such communication by Bayer violates Rule 4.2 of the Pennsylvania Rules of Professional Conduct (“Rule 4.2”); and
2. The Court, pursuant to Pa. R. C. P. 1713(a)(2),¹²⁰ has the authority to issue orders to protect the interests of the class.

A hearing was held on the Petition for Preliminary Injunction on March 13, 2002, during which Bayer admitted that complainants were mailed a blank authorization form that requested the name, address and telephone number of the prescribing physician, and authorized Bayer to contact the respective physician to collect further information about the adverse effects caused by the use of Baycol.

To obtain a preliminary injunction, the moving party has the burden of showing:

1. that relief is necessary to prevent immediate and irreparable harm which cannot be compensated by damages;
2. that greater injury will occur from refusing the injunction than from granting it;
3. that the injunction will restore the parties to the status quo as it existed immediately before the alleged wrongful conduct;
4. that the alleged wrong is manifest, and the injunction is reasonably suited to abate it; and
5. that the plaintiff’s right to relief is clear.¹²¹

¹²⁰ “In the conduct of actions to which this rule applies, the court may make appropriate orders requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice, other than notice under Rule 1712, be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate.”

¹²¹ Santoro v. Morse, 2001 PA Super 223, P17, 781 A.2d 1220, 1229 (Pa. Super. 2001).

The Petition for Preliminary Injunction requested that the Court order Bayer to refrain from transmitting medical authorizations, to maintain a file containing all original signed medical authorizations that it received, to present the file to the Plaintiff's counsel, and finally to destroy all copies of the medical authorizations. In order to determine whether Lewis met the criteria for an injunction, the Court analyzed the claims under both Rule 4.2 and Pennsylvania Rule of Civil Procedure 1713(a)(2). The Court addressed these two claims separately.

Claim under Rule 4.2

Lewis asserted that all members of the putative class are parties to the action whose "interests are represented by class counsel." Lewis argued that, under Rule 4.2, if Bayer is aware of a class action lawsuit, the letter requesting information should have been sent to the consumer's attorney instead of directly to the consumer.

In response, Bayer's counsel raised two defenses. First, Bayer responded that Rule 4.2 was inapplicable because there was no evidence that Bayer's counsel had sent the authorization forms and that the rule allows this type of communication because it was "authorized by law." The Court agreed that there was no evidence to indicate that there was any communication between Bayer's counsel and the putative class members. Further, there was no evidence to indicate that Bayer was consulting with counsel regarding its communications with the putative class members. The Court also found that there was no evidence to indicate that Bayer was misleading, coercing, or encouraging the putative class members in these communications.

Second, Bayer asserted that the communication was required by federal law since the FDA requires pharmaceutical companies to investigate "adverse drug experiences." The adverse event reports were collected by Bayer, catalogued into a database and

“submitted to the FDA for the purposes of reporting adverse events in accordance with Defendant’s obligations under federal law.”¹²² (emphasis added by the court).

The Court accepted both of these arguments, and rejected the claim under Rule 4.2 that Bayer should be enjoined from contacting putative class members.

Claim under Pa.R.C.P. 1713(a)(2)

Pa.R.C.P 1713(a)(2) provides a mechanism for the courts to protect against the potential for abuse inherent in class actions. Lacking relevant Pennsylvania precedent, Lewis relied upon cases from other jurisdictions that applied Federal Rule 23.¹²³ Lewis argued that Pa.R.C.P 1713(a)(2) can be issued as a notice and does not require a full evidentiary hearing of an injunction hearing.

Courts applying Federal Rule 23 have generally limited communications only upon the finding of abuse, and where there is no finding of potential abuse, courts have refused to impose restrictions on communications with putative class members. The Court held that Lewis failed to show the potential abuse of the communications.

However, the Court acknowledged that, if not carefully limited, such communications could be “tantamount to a discovery fishing operation.” For this reason, the Court sought a balance between Bayer’s reporting requirements to the FDA and Lewis’ concerns over the potential misuse of the information garnered with the medical authorization. The Court therefore ordered that Bayer modify its letter and release sent to consumers to indicate more clearly that the information sought only relates to adverse

¹²² To support this claim, Bayer invoked Rule 21 C.F.R. 314.80(c)(1)(ii) which describes reporting requirements for adverse drug experience information.

¹²³ The explanatory note to Pa.R.C.P 1713(a)(2) notes that this rule “copies Federal Rule 23(d) except that it omits the Federal provision for an order amending the proceedings.”

drug experiences. Additionally, Bayer counsel was restricted from accessing the medical records collected in the process.

In so ordering, the Court exercised its authority under Pa.R.C.P 1713(a)(2) and limited the scope of Bayer's communications. However, the Court assessed the five elements required in order to grant a preliminary injunction generally, and found that Lewis had not satisfied the five elements. Therefore, the Court denied Lewis' Motion for a Preliminary Injunction seeking to enjoin Bayer from communicating with putative members of the class.

Philadelphia Plaza-Phase II v. Bank of America National Trust & Savings Assoc., May Term 2002, No. 332, 2002 WL 1472338, 2002 Phila. Ct. Com. Pl. LEXIS 13 (C.C.P. Phila. May 30, 2002) (Herron, J.) (The Court denied injunctive relief for a loan borrower seeking to restrain the lender from soliciting buyers for the loan and revealing the borrower's confidential business information, two actions that were permitted by the express terms of the loan agreement). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/phil530.pdf>.

Plaintiff, Philadelphia Plaza-Phase II ("Plaza"), owned and operated a forty-one floor commercial office building ("the Property") in Center City Philadelphia. In 1990, Bank of America National Trust and Savings Association ("BOA") extended a multi-million dollar loan to Plaza to finance construction of the Property in a series of promissory notes ("the Notes"). As security for payments, Plaza executed a mortgage on the Property in favor of BOA. According to the terms of the agreement between Plaza and BOA, BOA had "the right to transfer the Loan" without consent from, or notice to, Plaza. BOA also retained the right to "disclose to any prospective purchaser of any securities issued by [BOA], and to any prospective or actual purchaser of any interest in the Loan or any other loans made by [BOA] to [Plaza], any financial or other information relating to [Plaza], the Loan or the Property."

In early 2002, Plaza learned that BOA was marketing the Notes to third parties. Specifically, Plaza claimed to have discovered that BOA entered into negotiations to sell the Notes to a mezzanine fund managed by Deutsche Bank. Plaza attempted to negotiate with Deutsche Bank regarding possible participation in the purchase of the Notes and other related issues. Feeling that any discussions between the two had the potential to disrupt negotiations with itself and Deutsche Bank, BOA entered into an agreement with Deutsche Bank to restrict communications between it and Plaza.

Plaza's main concern throughout was that mezzanine fund managers like Deutsche Bank typically seek to foreclose on properties mortgaged to them as a way of maximizing return on their investment. Plaza was also concerned by Deutsche Bank's apparent intent to bifurcate ownership of the Notes. Both conditions, Plaza argued, would complicate Plaza's ability to secure the various approvals required under its agreement with BOA and would create an intensely adversarial relationship with the Note holders. As such, Plaza sought a preliminary injunction that would do two things: 1) bar BOA from interfering with discussions between Plaza and Deutsche Bank; and 2) prohibit BOA from disseminating Plaza's confidential business information to Plaza's alleged competitors.

The Court denied Plaza's petition for a preliminary injunction because Plaza was unable to show that its right to relief was clear.¹²⁴ Plaza had attempted to premise a clear right to relief on four separate grounds: 1) an implied covenant of good faith and fair dealing; 2) trade secret misappropriation; 3) "lender liability"; and 4) BOA's alleged interference with Plaza's prospective contractual relations with Deutsche Bank.

The Court stated that under the agreement between Plaza and BOA, and "[g]iven Plaza's sophistication, it is proper to infer that Plaza contemplated the possibility, if not the probability, that a purchaser of the Notes would review information regarding the Property, including information that Plaza would consider confidential." Thus, BOA was at all times conducting itself in a manner consistent with the express terms of the agreement, and Plaza could not show a breach of the implied covenant of good faith and fair dealing.

Second, the Court found that it was "impossible to conclude" that BOA's disclosure of confidential information was a misappropriation of trade secrets because the agreement between BOA and Plaza "specifically authorizes the disclosure of information to prospective Note purchasers and allows such disclosure without Plaza's permission."

Third, the Court found that Plaza could not assert a claim under a "lender liability" theory

¹²⁴ In order for a petitioner to be entitled to a preliminary injunction, that petitioner must satisfy all prongs of a five part test: "1) The activity sought is actionable and the petitioner has a clear right to relief therefrom; 2) The injunction is necessary to prevent immediate and irreparable harm that cannot be compensated by monetary damages; 3) The injunction will restore the parties to the status quo as it existed prior to the wrongful conduct; 4) Greater injury will result from refusing to issue the injunction than from issuing it; and 5) The injunction is reasonably suited to abate the activity in question." School Dist. of Wilkinsburg v. Wilkinsburg Educ. Ass'n., 542 Pa. 335, 337 n.2, 667 A.2d 5, 6 n.2 (1995).

because there was no indication in the record that Deutsche Bank had a desire to communicate with Plaza. As the Court noted, the record revealed a contrary sentiment: “[i]ndeed, the fact that Deutsche Bank agreed to BOA’s request not to speak with Plaza may be interpreted as a lack of a substantial desire to communicate with Plaza.”

Finally, the Court found that Plaza was unable to satisfy two of the four factors necessary to establish intentional interference with prospective contractual relations.¹²⁵ First, the Court found that Plaza had failed to establish a reasonable probability that it would have reached an agreement with Deutsche Bank in the absence of BOA’s actions, and the existence of a contractual relationship between the two is a prerequisite for an intentional interference claim. Second, the Court found that “BOA’s conduct is privileged and therefore cannot constitute improper interference.”

Therefore, because the Court found each of Plaza’s arguments to be without merit, Plaza could not show a clear right to relief and its petition for a preliminary injunction was denied.

Solarz v. DaimlerChrysler Corp., No. 2033, 2002 WL 452218, 2002 Phila. Ct. Com. Pl. LEXIS 34 (C.C.P. Phila. March 13, 2002) (Herron, J.) (The Court denied injunctive relief where the relief requested by the class of minivan owners was within the primary jurisdiction of a governmental agency). This Opinion is available at <http://fjd.phila.gov/pdf/cpcvcomprg/solarz3.pdf>.

Between 1995 and 2000, Plaintiffs in this class action purchased minivans manufactured by Defendant DaimlerChrysler Corporation. Soon after purchasing these

¹²⁵ “A successful claim for intentional interference with contractual relations must satisfy four elements: 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.” Strickland v. Univ. of Scranton, 700 A.2d 979, 985, 121 Ed. Law Rep. 251 (Pa.Super.Ct.1997).

vehicles, Plaintiffs discovered that their minivans did not have a park-brake interlock (parking brake). Although such a feature was standard on other minivans manufactured by competitors, DaimlerChrysler did not offer this feature on the minivans purchased by Plaintiffs.

On August 1, 2000, the Dolans' (two of the Plaintiffs) parked minivan began to roll down the street after their one and a half year old daughter hit the minivan's transmission from "park" into "drive." After the Dolans' mechanic informed them that their minivan lacked a park-brake interlock, the Dolans' sought the help of their dealership. The dealership informed the Dolans that their minivan could not be modified to add the park-brake interlock, and DaimlerChrysler made no repairs to the minivan pursuant to the warranties provided to the Dolans. The other Plaintiffs in the class had problems similar to the Dolans. In addition to seeking an award of damages, Plaintiffs sought injunctive relief compelling DaimlerChrysler to install the park-brake interlock feature in their minivans.

The Court found that it was not empowered to grant Plaintiffs petition for injunctive relief. It agreed with DaimlerChrysler that Plaintiffs' request, which the Court described as "a 'retrofit' of the minivans by DaimlerChrysler, at no cost to the plaintiffs," amounted to a recall of certain vehicles. Next, the Court found that since the National Highway Traffic Safety Administration ("NHTSA") has primary jurisdiction in issuing recalls, the Court lacked the authority to grant the relief sought by Plaintiffs. The Court supported its reasoning by looking to the legislative intent behind the Motor Vehicle Safety Act, 49 U.S.C. §§ 30101, et seq., which indicated that that Department of Transportation (and by delegation the NHTSA) possesses primary jurisdiction in the

administration of automotive recalls. Thus, the Court was compelled to deny Plaintiffs' request for injunctive relief.