CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	))))))))))	06 CH 11607 (Transferred to Law Division)

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AS TO THE MEANING OF "ACTIVE PATIENT"

Pursuant to 735 ILCS 5/2-1005, Defendants move this Court for entry of summary judgment as to the meaning of "active patient," as that term of art is used in the parties' Agreement and in the dental profession. In support of their motion, Defendants state as follows:

INTRODUCTION AND STATEMENT OF FACTS[1]

First Dental, P.C. is the seller ("Seller") of a dental practice in Orland Park, Illinois ("Dental Practice"). Plaintiff ("Tujetsch"), a licensed dentist, is the buyer. Tujetsch bought the Dental Practice pursuant to an asset sale agreement executed June 27, 2004 ("Agreement"). Based on a concern first raised over 16 months after the sale, Tujetsch contends that the following Recital concerning "active patients" in the Agreement is false and fraudulent:

> Seller has represented that the Dental Practice has approximately 1,200 active patients, who have been treated within the previous twenty-four months according to First Pacific Corporation.[2]

As defined above and demonstrated hereinbelow, an "active patient" of a dental practice is a patient treated in the dental practice in the previous 24 months. As demonstrated in the January

[1] Defendants filed a motion for summary judgment on January 10, 2011 as to all counts of the complaint (the "January Motion"). The January Motion remains pending. Defendants incorporate by reference the Statement of Undisputed Facts set forth in the January Motion.

[2] First Pacific Corporation provided computerized third-party billing and information technology services to the Dental Practice. *See* January Motion at pp. 3, 4, 6, 8, 9, 11, 13, 14 and its Exh. I, *passim*.

Motion, there is no evidence that fewer than 1,200 patients were treated in the Dental Practice in the 24 months before its sale to Tujetsch. However, Tujetsch contends that the Recital is nonetheless false and fraudulent because even if 1,200 patients were treated in the Dental Practice in the 24 months prior to the sale, it was predictable -- based on a review of patient charts first undertaken years later -- that some of those 1,200 patients might not return to the Dental Practice for treatment after the sale.[3] Tujetsch's recently-formed opinions about whether a patient treated in the Dental Practice before the sale was likely to return thereafter cannot be the basis for a claim based on "active patients," because that term, properly understood, is exclusively historical and backward-looking.

"Active patient" is a term of art commonly used by persons skilled in the dental arts to provide a rough indication of one measure of the size of a dental practice based on past experience, *i.e.*, the number of patients treated in a specified number of previous months, usually 24. As such, "active patient" is based on historical fact, not speculation. The only variation in the generally accepted definition of "active patient" is the number of months in the lookback period. For example, some experts utilize a longer lookback for rural practices or practices that engage in cosmetic dentistry and a shorter lookback for practices that are located in urban settings or engaged in general dentistry. However, while the length of the lookback period may vary, there is no generally accepted definition of "active patient" that requires or includes any prediction as to future patient behavior.

Tujetsch construes the term "active patient" in the Recital as a subjective prediction of future patient conduct instead of an objective tally of past patient treatments. Tujetsch attempts

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[3] In fact, if this case goes to trial unrebutted evidence will show that patients of the Dental Practice returned in sufficient numbers to generate monthly income roughly equal to pre-sale levels for about six months after the sale, but stopped coming back thereafter, after they met Dr. Tujetsch and experienced price increases and late-fee policies implemented by her.

thereby to convert the Recital into a guarantee that 1,200 patients will present themselves for treatment after the sale, and will continue to return for treatment thereafter. By utilizing this idiosyncratic (and fundamentally unworkable) definition of "active patient," Tujetsch attempts to convert a backward-looking statement -- that approximately 1,200 patients had been treated in the 24 months before the sale -- into a forward-looking prediction that 1,200 patients will be treated, in some unspecified number of months, after the sale. Tujetsch's attempt to re-write the parties' 2004 Agreement by promoting a self-serving definition of "active patient" is meritless, as a matter of law.

STANDARD OF REVIEW

Summary judgment under 735 ILCS 5/2-1005 is a means of resolving litigation where no material fact is at issue. *See* Chubb Ins. Co. v. DeChambre, 349 Ill. App. 3d 56, 59 (1st Dist. 2004). In ruling on a motion to dismiss the Court considers the pleadings and proffered evidence to determine if any material factual dispute exists. If there is no dispute of material fact, the Court considers the facts and the law and determines whether, on the undisputed facts, the moving party is entitled to judgment. *See* Id., 349 Ill. App. 3d at 59.

ARGUMENT

There is no dispute of material fact regarding a prediction, in the Recital, as to the number of patients returning to the Dental Practice after the sale. That is because the Recital contains no such prediction. As demonstrated below, "active patient" has a well-established meaning among dental professionals, and has attained the status of a term of art in that profession. As such, Tujetsch, a dentist, is bound by that meaning and may not now substitute another meaning that is more to her liking.

A. **A "Term Of Art" Is A "Word Or Phrase Having A Specific, Precise Meaning In A Given Specialty, Apart From Its General Meaning In Ordinary Contexts.**

A "term of art" is a "word or phrase having a specific, precise meaning in a given specialty, apart from its general meaning in ordinary contexts." Black's Law Dictionary 1511 (8th ed. 2004). Authorities on the construction of contract language have uniformly stated that when words in a contract have attained, through wide usage in a particular profession or trade, the status of a term of art, the technical meaning of that term of art is preferred over the common or ordinary meaning. *See* Calamari and Perillo, Contracts § 3.13, at 155 [4th ed.] ("While words [in a contract] are generally assigned their ordinary meaning, where a word has attained the status of a term of art and is used in a technical context, the technical meaning is preferred over the common or ordinary meaning") (this principle is hereinafter referred to as the "Term of Art Rule"). Another authority, Corbin on Contracts, has expressed the Term of Art Rule as follows:

> In numberless well-considered cases, proof of local or trade usage, custom, and other circumstances has been allowed to establish a meaning that the written words of the contract would never have been given in the absence of such proof. It is not necessary that words should be unusual words or words that are "ambiguous on their face" in order to admit evidence of special usage. Such evidence often establishes a special and unusual meaning definitely in conflict with the more common and ordinary usages. . . . . The final interpretation of a word or phrase should not be adjudged without giving consideration to all relevant word usages, to the entire context and the whole contract, and to all relevant surrounding circumstances. . . . Seldom should the court hold that written words exclude evidence of the custom, since even what are often called "plain" meanings are shown to be incorrect when all the circumstances of the transaction are known; and usages and customs are a part of those circumstances by which the meaning of words is to be judged.

3 Arthur L. Corbin, Corbin on Contracts § 555 at 232-39 (1960).

The Restatement (Second) of Contracts provides that "[a]n agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage" (Restatement (Second) of Contracts

§ 220 Comment d (1981)), and that "[u]nless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement."). *See also* Id. at § 202(3)(b); § 221; at § 222 Comment b, § 223 Comment b (1981) ("there is no requirement that an agreement be ambiguous before evidence of a usage of trade [or course of dealing] can be shown, **nor is it required that the usage of trade [or course of dealing] be consistent with the meaning the agreement would have apart from the usage [or course of dealing]**."); Id., § 246 and comment on clause (a); 5 W. Jaeger, Williston on Contracts § 648, at 6-7 (3d ed. 1961); 12 R. Lord, Williston on Contracts §34:1, at 3-4 (4th ed. 1999) (contract language need not be ambiguous in order for usage to aid in interpretation); 17A Am. Jur. 2d Effect Of Usage, Custom, Or Course Of Dealing § 364 (1991) ("According to the prevailing view, where trade custom or usage attaches a special meaning to certain words or terms used in any particular trade or business, it is competent for the parties . . . to show the peculiar meaning of them in the business or trade to which the contract relates, not for the purpose of altering, adding to, or contradicting the contract, but for the purpose of elucidating the language used as a means of enabling the court to interpret the contract language according to the intentions of the parties.").

See also 5 Samuel Williston, Williston on Contracts § 648 at 6-7 (3d ed. 1961) ("It may be said broadly that any usage with knowledge of which both parties are chargeable is always admissible to show the meaning of the language employed. Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense."); Id. § 650 at 21 ("The correct rule with reference to the admissibility of evidence as to trade usage . . . is that while words in a contract are ordinarily

to be construed according to their plain, ordinary, popular or legal meaning, as the case may be, yet **if in reference to the subject matter of the contract, particular expressions have by trade usage acquired a different meaning, and both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage**. Parol evidence is admissible to establish the trade usage, and that is true even though the words are in their ordinary or legal meaning entirely unambiguous, inasmuch as by reason of the usage the words are used by the parties in a different sense.").

See also Grover C. Grismore, Law of Contracts § 106 at 165-66 (1947) ("Certain presumptions are habitually indulged in regard to the standards to be applied in the interpretation of language. . . . They are as follows: (1) The ordinary or popular sense of words as used throughout the country is preferred, in the absence of circumstances indicating a contrary understanding. (2) Technical terms and words of art are to be given their technical meaning, unless the circumstances indicate a contrary understanding. . . . . (4) The **usages of** a trade, or a locality, or **a profession**, etc., **will always supersede the ordinary or popular sense of words where the situation is such as to justify the assumption that these special usages would more nearly approximate the understanding of the parties**. **If the special usage relied upon is in fact the settled habit of expression of the group in question and not merely the expression of a few persons, and if the parties to the contract are members of the group, then the special usage will always prevail in the absence of competent affirmative evidence that the parties understood that some other meaning was to be attributed to the language in question**. But if one of the parties is not a member of the trade or other group, then the special usage of that group will not be adopted unless he had actual knowledge of it, or unless it

is so well known that it is fair to assume he must have had knowledge of it.").

See also II E. Allan Farnsworth, Farnsworth on Contracts § 7.13 at 283 ("Under the [Uniform Commercial] Code "any usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware" is said just like a course of dealing, to "give particular meaning to and supplement or qualify terms of an agreement."); 1 Greenleaf on Evidence, § 278 ("The terms of every written instrument are to be understood in their plain, ordinary and popular sense, **unless they have generally, in respect to the subject matter, as by the known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words**; or unless the context evidently points out that, in the particular instance, and in order to effectuate the immediate intention of the parties, it should be understood in some other and peculiar sense.").

See also Williston on Contracts (3d ed.) §§ 648, 650; Wigmore on Evidence (3d ed.) § 2463, pp. 203-4; McBain, *The Rule Against Disturbing Plain Meaning of Writings*, 31 Cal. L. Rev. 145 (1943); Patterson, *The Interpretation and Construction of Contracts*, 64 Col. L. Rev. 833, 839-44 (1964); 11 R. Lord, Williston on Contracts §31:9, at 340-41, §32:7 (4th ed. 1999); 12 R. Lord, Williston on Contracts §34:1 (4th ed. 1999); 5 W. Jaeger, Williston on Contracts § 648, at 6-7 (3d ed. 1961) ("Usage is an ordinary means of proving the local or technical meaning of language, and even language which is normally clear and unambiguous may be shown by usage to bear, under the circumstances of the case, a meaning different from its normal sense.").

B. Illinois Follows the Term Of Art Rule In Construing Contracts.

The Term of Art Rule has long been established in Illinois. *See, e.g.*, Reed v. Hobbs, 3 Ill. 297, 300-01 (1840); Cigler v. Keinath, 185 Ill. App. 353, 357 (1st Dist. 1914), *reversed on other grounds*, Cigler v. Keinath, 265 Ill. 144 (1914) ("[t]he rule of construction . . . is to . . .

collect the real intention of the parties from the terms used in the contract, taking them in their plain, ordinary and popular sense, **unless by the known usage of the trade they have acquired a peculiar sense** . . . .") (emphasis supplied). *See also* Steinke v. Novak, 109 Ill. App. 3d 1034, 1038 (3d Dist. 1982) ("Words used in a will are to be given their ordinary and natural meaning, but where technical terms are used, they are presumed to be used in their technical meaning.").

In Intersport, Inc. v. NCAA, 381 Ill. App. 3d 312 (1st Dist. 2008), Intersport was licensed to use a trademark to promote the sale of "media broadcasts." When Intersport announced that it intended to use the trademark to distribute content through cell phones, licensor argued that "media broadcasts" did not include distribution through cell phones, because the parties were bound by "media broadcast" as construed in accordance with the technical definition of "broadcast" in the Federal Communications Act; and that Act defined "broadcasting" only as distribution through television or radio -- not cell phones. The First District recited the controlling legal principles as follows:

> First, the court will examine the language of the contract alone, as the plain and ordinary meaning of the terms are the best indication of the parties' intent. . . . . Contract terms should also be interpreted in accordance with the custom and usage of those particular terms in the trade or industry of the parties. Quoting Judge Learned Hand, the Illinois Supreme Court has explained that "'[f]linch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words . . . .'" The court must also place itself in the position of the parties at the time they entered into the agreement. To that end, the language in the contract may be enlarged or limited by the attendant circumstances of the contract and its purpose. . . . . contract terms need not be found to be ambiguous before evidence of the custom and usage of the terms in the parties' trade or practice can be considered.

Id. at 319-20. Based on the foregoing, the court found that custom and usage in the parties' trade required the court to construe "broadcast" in conformity with the Federal Communications Act (and not according to its generic meaning), such that "media broadcast" did not include distribution of media content through cell phones.

Other Illinois cases uniformly uphold the Term of Art Rule. *See, e.g.,* Chicago Bridge & Iron Co. v. Reliance Insurance Co., 46 Ill. 2d 522, 531-32 (1970) ("If a usage exists in a particular trade of which both parties either had notice or should have had notice, it is only just and proper that their contract should be interpreted in view of the trade practice.") (*citing* Kunglig Jarnvagsstyrelsen v. Dexter & Carpenter, Inc., 299 F. 991 (S.D.N.Y. 1924) (Learned Hand, J.)) (attached hereto as Exhibit 1); *see also* United States Trust Co. v. Jones, 414 Ill. 265, 271 (1953). The presumption in interpreting a contract is that the meaning of a technical term is its technical meaning. Bandak v. Eli Lilly & Co. Ret. Plan, 587 F.3d 798, 800 (7th Cir. 2009) (citing Reed v. Hobbs, 3 Ill. 297 (1840); Minges Creek, LLC v. Royal Ins. Co., 442 F.3d 953, 956 (6th Cir. 2006); Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1013 (3d Cir. 1980); Superior Business Assistance Corp. v. United States, 461 F.2d 1036, 1039 (10th Cir. 1972)). (The foregoing cases are attached hereto as Group Exhibit 2.)

As the forgoing authorities indicate, if an Illinois contract utilizes a term of art, there is a presumption that that term of art is construed according to its accepted meaning, not a layperson's subjective interpretation of that term based on general principles. This especially true where, as here, the party to be charged with the technical meaning of a widely accepted term of art is a member of the profession that has adopted the term of art, claimed expertise in valuing and purchasing dental practices, and had, as of June 2004, previously purchased four dental practices. *See* January Motion, at pp. 1, 7, and at its Exh. E, ¶¶56-58.

C. "Active Patient Is A Term Of Art in Dentistry.

In 1991 the American Dental Association ("ADA") House of Delegates passed its Resolution 30H (Trans. 1991:621) in which it defined the term "active patient" as follows:

Active and Inactive Dental Patients of Record (1991:621)

Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:

Active Dental Patient of Record: An active dental patient of record is any individual in either of the following two categories: Category I—patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II—patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.

Inactive Dental Patient of Record: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

Since the ADA's passage of Resolution 30H, the foregoing definition of "active patient" has been repeatedly utilized *verbatim* in ADA publications. *See*, *e.g.*, *Valuing a Practice: A Guide for Dentist*, attached hereto as Exhibit 3, at p. 22; "*Dental Records,*" attached hereto as Exhibit 4, at p. 9; "*Guide to Closing a Dental Practice,*" attached hereto as Exhibit 5, at p. 47; "*Current Policies, Adopted 1954-2009*," attached hereto as Exhibit 6, at p. 91.

The ADA's definition of "active patient" has been all but universally accepted among persons skilled in the dental arts. In its "*2008 Survey of Dental Practice: Characteristics of Dentist in Private Practice and Their Patients,*" attached hereto as Exhibit 7, the ADA presents a statistical analysis of the dental profession in the United States. The ADA mailed a written questionnaire to a national, random sample of approximately 6,800 dentists in private practice.

The sample included general practitioners and specialists, as well as members and nonmembers of the ADA. Id. at p. 1. The ADA received responses from 2,416 dentists, representing an overall response rate of 35.5%. Among other things, respondents were asked how they defined "active patient." According to the *Survey*, 96.3% of independent dentists, 95.9% of solo dentists, and 97.2% of independent non solo dentists defined an active patient as a patient treated within the last 12 to 24 months. *See* Id. at pp. 52, 61, and 70, respectively.

The importance of the ADA as the authoritative source of terms of art for the dental profession has been recognized by the courts. In Wenzell v. Ingrim, 228 P.3d 103 (Alaska 2010) (attached hereto as Exhibit 8), Wenzell purchased a dental clinic from Ingrim. The purchase agreement included a covenant not to compete that prohibited Ingrim from the "practice of dentistry" within fifteen miles of his old clinic for two years. Id. at p. 106. One year after the sale, Ingrim was employed as a dentist at a not-for-profit clinic of the Alaska Native Medical Center ("ANMC") two miles away from his old clinic. When Wenzell sued Ingrim for breaching the covenant not to compete, the issue at bar was whether Ingrim's employment by a not-for-profit clinic constituted "practice of dentistry" for purposes of the covenant not to compete. Id.

Ingrim argued that "practice of dentistry" should be construed as practicing dentistry in a "private, competitive, fee-for-service practice," a construction that would exclude Ingrim's employment at the ANMC. Id. at p. 108. The Alaska Supreme Court rejected this argument because "practice of dentistry," as used in the purchase agreement, had to be construed according to the definition ascribed to that term in the dental industry. In order to determine the meaning of "practice of dentistry" in the dental industry, the court turned to the ADA, and found that "[t]he [ADA] defines 'dentistry' as 'the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral

cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body.'" Significantly, the court then "conclude[d] that this is the proper definition of 'practice of dentistry' as used in [the purchase agreement]," and applied that definition to resolve the parties' dispute. Id. at p. 108.

The same reasoning -- and result -- applies with equal force in this case. Here, as in Wenzell, the proper definition of a term of art in a contract between two dentists for the sale of a dental practice is the definition of that term promulgated by the ADA, the preeminent and authoritative voice of the dental profession. That definition binds the parties, to the exclusion of another definition that one of the parties might prefer. *See* Figueroa v. Pac. Dental Assocs., 2009 Cal. App. Unpub. LEXIS 5057 *4 (Cal. App. 1st Dist. June 23, 2009) (utilizing ADA definition of teeth cleaning ("prophylaxis")) (attached hereto as Exhibit 9); Kilgore v. Ohio State Dental Bd., 1995 Ohio App. LEXIS 2508 (Ohio Ct. App., Columbiana County June 14, 1995) (chiding parties for failing to introduce evidence of ADA definition of "oral maxillofacial practice" where meaning of that term was in dispute) (attached hereto as Exhibit 10).

D. "Active Patient" Has a Widely Accepted Meaning in The Dental Profession.

The widespread use and acceptance of "active patient" among dental professionals, as defined by the ADA, is apparent when that term is "Googled." *See*, *e.g.*, Henry Schein, "*The Most Important Number–The Active Patient Count*" ("The active patient count is defined as the number of different individuals seen in the practice during a prior specified time period. The ideal specified time period being the prior eighteen months; however, there is variation between different consultants as to what this period should be -- twelve, eighteen, or twenty-four months.")[4]; Mark Dilatush, "*What is an Active Patient Anyway?*" ("Over the history of dentistry,

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[4] *See* http://www.henryschein.com/us-en/images/dental/ActivePatientCount.pdf.

you were taught to measure active patients as those patients that have visited the office over the PAST 18 months.") (emphasis in original)[5]; Rick Willeford, MBA, CPA, CFP, "*The Buck Starts Here!*" ("You can roughly gauge your practice potential based on the number of active patients you have. The definition of an "active" patient ranges from one who has been in for treatment at least once in the last 18 months in an urban setting to one who has been seen within three years in a rural setting.")[6]; Dr. Gene Heller, "*Defining Successful Relationships*" ("The Active Patient Count is the number of different individuals seen in the office during the past eighteen months.")[7].

Dental regulations promulgated in various states -- including Indiana, where Tujetsch was licensed to practice dentistry in 2009 -- have utilized "active patient" in a manner consistent with the definition promulgated by the ADA. *See*, *e.g.*, Section 828 IAC 4-3-10(e) of the Indiana Administrative Code concerning "Mobile Dental Facilities And Portable Dental Operations," (providing that "[a]s used in this section, 'active patient' applies and refers to a person whom the mobile dental facility or portable dental operation has examined, treated, cared for, or otherwise consulted with during the two (2) year period prior to discontinuation of practice, or moving from or leaving the community").[8]

Finally, experts engaged in appraising and brokering dental practices are aware of the accepted technical meaning of "active patient." *See*, *e.g.*, Affidavit of Bruce Lowy attached hereto as Exhibit 11.

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[5] *See* at http://www.newpatientsinc.com/newsletters/092007.htm#LETTER.BLOCK7.

[6] *See* http://www.dentistryiq.com/index/display/article-display/151317/articles/dental-economics/volume-92/issue-8/features/the-buck-starts-here.html.

[7] *See* http://dentalentrepreneur.com/archives/fall08/practice_builders/index.html.

[8] *See* www.in.gov/legislative/iac/T08280/A00040.PDF.

E. A Party Is Presumed To Know A Trade Usage Embodied in a Term of Art And Is Therefore Bound By That Usage When (As Here) The Usage Is Well-Defined And Well-Recognized.

A member of a trade or profession is presumed to know a trade usage and hence be bound by it when (as here) the usage is established, well-defined, and well-recognized within the profession. Gholson, Byars & Holmes Constr. Co. v. United States, 173 Ct. Cl. 374, 395 (Ct. Cl. 1965) (*citing* Buffalo Merchandise Warehouses v. United States, 115 Ct. Cl. 568, 572, 88 F. Supp. 276, 277 (1950); United States v. Stanolind Crude Oil Purshasing Co., 113 F. 2d 194, 200 (10th Cir. 1940); Gelb v. Automobile Ins. Co. of Hartford, 168 F. 2d 774, 775 (2d Cir. 1948)). (The foregoing cases are attached hereto as Group Exhibit 12.) As a dentist licensed since 1989 and the buyer of four dental practices before 2004, Tujetsch is presumed to know the correct definition of "active patient."

F. "Active Patient" Is A Tally Of Past Events, Not A Prediction Of Future Events.

According to its widely accepted definition as a term of art, an "active patient" is "active" because he (she) has been treated in the past 24 months, not because he (she) is predicted to return for treatment in the future. A count of "active patients" is backward-looking and objective, a report of facts (patient treatments) that actually occurred, not a subjective prediction of future events based on unspecified considerations. A count of "active patients" is useful as a rough indicator of one measure of the size of a dental practice precisely because it has an accepted, objective definition that dental professionals agree on, and that is based on historical fact, not an amorphous, subjective, and potentially self-serving attempt to foretell the future. *See* Id. at ¶¶45-46. This makes intuitive sense. Patients are human beings, not chattels that can be bought and sold as assets owned by a dental practice, and the behavior of patients is subject to myriad factors -- too many factors to be readily predictable.

Defendants represented that practice management software of the Dental Practice reported that the Dental Practice had approximately 1,200 "active patients" around June 2004 -- meaning that the Dental Practice had treated approximately 1,200 patients in the previous 24 months. There is no evidence that that did not occur. The statement that a patient was treated in the Dental Practice in the 24 months before June 2004 is not a prediction that such patient will be treated in the future, nor is it a representation that after being treated the patient has not died, moved to a new home; declined to schedule further treatment; or suggested that he or she might see a different dentist.

G. Tujetsch' Definition Of "Active Patient" As A Prediction Of The Future Is Fundamentally Unworkable.

Tujetsch' claim premised on "active patients" cannot stand because it is based on an idiosyncratic, self-serving, and incorrect definition of a precisely defined term of art. Tujetsch suggests, *sub silentio*, that an "active" patient is "active" because he or she is predicted to return for treatment at some unspecified time. That is not true. Where a term has acquired a technical meaning as a term of art, the technical construction of the term is preferred over the common meaning. Courts will not substitute an ill-defined, self-serving, and ambiguous general meaning for a clear term of art. "Active patient" cannot be construed as a prediction of future events because the term-of-art definition of "active patient" is set forth in the Recital, the only sentence that mentions "active patients" in the Agreement, because there is no established non-technical meaning of "active patient," and because both parties to the Agreement are dentists.

CONCLUSION

For the foregoing reasons, Defendants move this Court to enter summary judgment that the term "active patient," as used in the Agreement, connotes a patient treated in the Dental Practice during the previous 24 months, and is not a prediction as to the number of patients who

will return to the Dental Practice to seek treatment in the future; and providing for such other and further relief as the Court deems just and appropriate.

Dated: February 14, 2010

Respectful submitted,
TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C.,

By:_____
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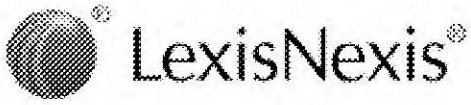
EXHIBIT 1



LEXSEE 299 F. 991

KUNGLIG JARNVAGSSTYRELSEN v. DEXTER & CARPENTER, Inc., et al.

District Court, S.D. New York

299 F. 991; 1924 U.S. Dist. LEXIS 1599

May 21, 1924

OPINION BY: [**1] HAND

OPINION

[*991] LEARNED HAND, District Judge. The declaration is for breach of a contract for the sale of coal. It alleges, stripped of irrelevant matter, that the defendant sold and the plaintiff bought a cargo of coal at $31.90 per ton, "said price including cost, insurance and freight upon said coal prepaid to the port of Malmo," the price "to be paid against delivery in the city of New York of shipping documents, including insurance policies, bills of lading, and invoice"; that the plaintiff established a letter of credit with a New York bank, which it instructed to pay the price on receipt of the invoice, shipping documents, and "policy or policies of insurance"; that the bank, contrary to instructions, paid the purchase price without demanding policies of insurance, and received in lieu thereof only a "certificate of insurance," declaring under the hand of the defendant's insurance broker that insurance had been underwritten in London for account of the defendant; that under the law of England such a certificate was not a policy of insurance within the meaning of such a contract of sale; that the coal was lost at sea and that the plaintiff has paid the bank; that the [**2] insurance broker had not taken out any insurance when the certificate of insurance was delivered to the bank.

The plea makes profert of the contract, which was parol, and which provided for the sale of 150,000 tons of coal at various prices for various points of delivery, in all cases "c.i.f." (the letters being so written), of which 30,000 were to be delivered at Malmo. It alleged that the cargo in question was shipped under the contract; that it was a universal custom in the United States, in cases of "c.i.f." sales, for the seller to have the option of New York or London insurance; that in case of London insurance the seller might procure it through an American broker, who would in turn through a London broker secure the actual policy, who cabled back when he had fixed it; that on receipt [*992] of such a cable the New York broker would issue such a certificate of insurance as the plea made profert of; that this custom was followed in the case at bar, the defendant paid the New York broker, indorsed the certificate, and the bank accepted the papers on tender. The certificate of insurance in question recited that insurance of necessary amount had been issued by "London underwriters" [**3] for the account of the defendant on the shipment in question; that policies of London underwriters would be exchanged on demand for the certificate as soon as practicable; that the insurance was placed subject in all respects to English laws and customs governing marine and war risk insurance. Various conditions applicable specifically to coal cargoes were contained in an annexed rider.

The purpose of the demurrer is to secure a ruling consonant with those recent English cases under which such a certificate would not be a valid tender of insurance, and under which apparently, even after acceptance, substantial damages may be recovered. Under the declaration at bar it may well be argued that only nominal damages can in any aspect be recovered, without some allegation that the plaintiff has been unable to collect from the London underwriters under the certificate of insurance. That is quite another question from whether the tender could have been refused and damages recovered for the breach. However, since the tender, if bad, was a breach, I suppose that nominal damages, at least, were recoverable, and, if so, the declaration is not demurrable. Hence the demurrer raises the validity [**4] of the plea.

Before reaching this question, there is one preliminary matter, to wit, whether the acceptance by the bank of the certificate without reservation still left it within the

power of the plaintiff to treat it as an insufficient tender. The bank was the plaintiff's agent for that purpose, and it is a matter of no moment to the defendant if it disobeyed its instructions. That question I mention only to pass, assuming merely for argument that, though acceptance would bar the right to reject, it did not prevent an action for damages on breach of the promise to deliver insurance.

Thus I am brought squarely to the question whether, if there be a uniform usage in this country to treat such certificates as performance of a contract "c.i.f.," the tender was good. I must start by observing that the plea varies from the declaration, the latter alleging that the contract stipulated for "policies of insurance," while the contract contained only the words:

"We offer * * * the quantity indicated herein at the following prices: * * * $31.50 per gross ton c.i.f. Malmo."

On demurrer the plea controls, and the case is at once distinguished from the only case in the English Court [**5] of Appeal, and that last decided in order of time, Donald H. Scott & Co. v. Barclay's Bank, [1923] 2 K.B. 1. There action was brought on by the seller on a letter of credit, upon the bank's refusal to accept the tender of a certificate of insurance completer in detail than that at bar, but still referring to the policy for part of the contract. The letter of credit had prescribed among the necessary documents an "approved insurance policy." Bankes, Scrutton, and Atkin, L. JJ., held that, as the buyer must look [*993] to another policy to ascertain all the terms of insurance, the tender was bad. There was no proof of usage, and the certificate did not declare that a specific policy had been taken out on the cargo in suit, but it was merely a coverage slip on a floating policy. However it specifically provided against any broker's lien for premiums paid.

In Diamond, etc., Co. v. Fl. Bourgeois, [1921] 3 K.B. 443, the next most recent case, McCardie, J., had before him an action on the refusal by the buyer to accept under a contract of sale "c.i.f." A certificate of insurance was tendered similar to that in Scott v. Barclay's Bank, supra, which the learned judge held insufficient. [**6] His reasons were three: First, the same as that later adopted by the Court of Appeal; second, that the certificate was not a classifiable legal document at all; and, third, that it was very doubtful whether such a certificate would support an action under the British statute. McCardie, J., expressed a faint doubt whether a uniform usage might not have made good such a tender.

In Wilson, etc., Co. v. Belgian, etc., Co., [1920] 2 K.B. 1, Bailhache, J., also had a case of suit upon the buyer's refusal under a usual "c.i.f." contract. There the tender had been of a broker's coverage note. This was not identical in form with the certificate of insurance in the two later cases, but so far as I can see was the same in substance, except for the absence of a provision relating to the broker's lien for premiums, a circumstance on which Bailhache, J., in part relied in his judgment. There was some proof of custom, but the witnesses could recall no instance where such a note had been forced upon an unwilling buyer, a defect that, with deference, it seems to me was scarcely or moment, if none had never been refused. Bailhache, J., in declaring that the certificate was not a good tender [**7] of insurance, said that he did not mean to include in his decision American certificates of insurance, a reservation which, however, the two cases already cited declined to accept. The custom he thought insufficiently proved for the reason given. How far a custom might have controlled does not definitely appear.

The first case was also a judgment of McCardie, J., in Manbre Sacharine Co. v. Corn Prod. Co. Ld., [1919] 1 K.B. 188. The suit was by the buyer, who had accepted the documents under a "c.i.f." contract, one of which was a letter of the seller stating that the goods were insured by it under a general policy covering these and more, and in substance that the policy was pro tanto for the benefit of the buyer. Having paid, the buyer sued for breach of contract as in the case at bar. McCardie, J., thought that custom might have made such a tender good, but found none such. It did not appear whether the buyer's efforts, if any, to collect on the insurance, had proved vain, but damages in full were allowed on the theory that only a separate policy of insurance, uncomplicated by sharing with other goods, was a proper tender.

Such is the law at present in England, so far [**8] as I have found, and it is clear that no case is like that at bar. The contract did not here prescribe a policy of insurance, but left the obligations to be determined from the letters "c.i.f." There was a specific London policy underwritten on this cargo alone; the usage in New York was universal to [*994] accept such certificates as performance; the policy as underwritten is valid under the laws of England, where it was made. Candidly, it seems to me probable that a tender even under all these circumstances would at present be held bad in England, but any conclusion is as yet doubtful, and the results so far has been reluctantly reached. However that may be, and much as I should hesitate to diverge from the settled law of so great a commercial country, it seems to me, in the language of a great English judge:

"It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind." Humfrey v. Dale, 7 E. & B. 266, 278.

When a usage of this kind has become uniform in an actively commercial community, that should be warrant

enough for supposing that it answers the needs of those who are dealing upon the faith of it. [**9] I cannot see why judges should not hold men to understanding which are the tacit presupposition on which they deal. From Lord Holt's time on they have generally in one way or the other been forced in the end to yield to the more flexible practices of commercial usage. So far as I know, the results have been generally acceptable to every one, once they were settled.

The objections to this specific usage are that it is unreasonable, and that it contradicts the contract. The first objection may be divided into two parts: First, that it compels the buyer to take insurace the full terms of which he has no opportunity to see; and, second, that it exposes him to a broker's lien. As to the first, it would be formidable if the contract prescribed the terms of the policy to be delivered, but it does not. Any policy would do which was adequate marine protection within tolerable limits. The certificate at bar contains some of the terms of the policy actually underwritten, and for the balance refers to "English law and customs." Now it is quite true that such a reference leaves much uncertain, but can any one say that it is less certain than the permissible latitude in the provisions of [**10] a policy which the seller might tender and the buyer must accept? That law is a standard of reference as definite as the contract prescribed, and I can see no ground for declaring a usage unreasonable which substituted one for the other. Certainly the situation is toto coelo different from such a tender under a contract which stipulated for the delivery of an approved policy of insurance.

The other supposed unreasonable feature of the usage is that there might be a broker's lien upon the policy for premiums. The New York broker could have none, because the lien is possessory (*Spring v. So. Car. Ins. Co., 8 Wheat. 268, 285, 5 L. Ed. 614*; *Rose v. Shinasi, 168 App. Div. 93, 153 N.Y. Supp. 734*), and he has given up the certificate. The London broker might indeed have a lien for the premium paid by him, even though the seller paid the New York broker (Fisher v. Smith, L.R. 4 App. Cas. 1), but he would have no general lien (Manss v. Henderson, 1 East, 335), because he knew that the policy was for a third person. Therefore the objection comes to this: Though the seller pays the premium to the New York broker, a usage is unreasonable which exposes the buyer to the possibility of a lien [**11] for that premium in [*995] favor of the London broker, whom the New York broker does not pay. In the first place, is it altogether clear that the London broker could hold his lien, if he knew that the certificate was to pass to a third person and would represent the policy which he retained? Assuming that he could, and that the usage leaves the buyer exposed to such a risk, it does not on that account appear to me to be beyond reasonable limits because of that possible injustice. Usages are never of importance, unless they modify rights which would otherwise result. The fact that the usage imposes a risk upon the buyer, which he would not incur if a policy were delivered, is not, I think, so vital to the substance of the contract that it may not be interpolated into the contract by implication.

This raises the general question of how far the usage contradicts the language of the contract. "Insurance" certainly does not literally mean a "policy of insurance." When the buyer has a policy of insurance awaiting his demand and covering the loss, and that alone, why should the situation be thought to contradict a contract giving him only "insurance"? Is it less insurance because, [**12] though he has received symbolic delivery of the policy and actual delivery of the document whih controls its production, he has not the policy itself? I must own that I cannot see why.

But the conventional statement of the rule is really not susceptible of consistent application anyway, and has been recognized not to be by the best writers. Words mean what the parties who use them want them to mean, and it makes no difference how widely their meaning in a special case varies from their common meaning. It is true that, in deciding how far any specific usage can be supposed to vary that normal meaning, the extent to which that meaning is set awry ought to be an important consideration, but that is all. At least that, I am glad to say, is the authoritative rule in this court. *Eames v. Claflin (C.C.A. 2) 239 Fed. 631*, 152 C.C.A. 465; *Nicoll v. Pittsvein Coal Co. (C.C.A. 2) 269 Fed. 968.*

There appear to be no American cases on the point here at bar, but *Vietor v. National City Bank, 200 App. Div. 557, 193 N.Y. Supp. 868, 206 App. Div. 664, 199 N.Y.S. 955*, and *237 N.Y. 538, 143 N.E. 733*, is not far away. There the New York courts went much further in allowing a usage to wrest common [**13] terms from their common meaning. The issue was whether a receipt for water carriage, signed by a transportation company, could by usage fulfill the definition of a bill of lading. The seller, presenting such a document, was held to make a good tender.

The demurrer is overruled.

EXHIBIT 2

LEXSEE 587 F.3D 798

STEPHEN I. BANDAK, Plaintiff-Appellee, v. ELI LILLY AND COMPANY RETIREMENT PLAN, et al., Defendants-Appellants.

Nos. 09-1620, 09-2271

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

587 F.3d 798*; *2009 U.S. App. LEXIS 25369*; *48 Employee Benefits Cas. (BNA) 1001

October 9, 2009, Argued
November 18, 2009, Decided

PRIOR HISTORY: [**1]
Appeals from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 1:06-CV-01622-LJM-JMS--Larry J. McKinney, Judge. *Bandak v. Eli Lilly & Co. Ret. Plan, 2009 U.S. Dist. LEXIS 10885 (S.D. Ind., Feb. 10, 2009)*

DISPOSITION: AFFIRMED.

COUNSEL: For STEPHEN I. BANDAK, Plaintiff - Appellee: Andrew W. Hull, Attorney, HOOVER HULL LLP, Indianapolis, IN.

For ELI LILLY PHARMACEUTICAL COMPANY, EMPLOYEE BENEFITS COMMITTEE OF THE ELI LILLY AND COMPANY RETIREMENT PLAN, Defendants - Appellants: Jon B. Laramore, Attorney, BAKER & DANIELS, Indianapolis, IN.

JUDGES: Before POSNER, ROVNER, and WILLIAMS, Circuit Judges.

OPINION BY: POSNER

OPINION

[*799] POSNER, *Circuit Judge*. Bandak, a retired employee of Eli Lilly, sued the company's retirement plan under ERISA and received a judgment for $ 100,222.86 in damages and an injunction against the plan's offsetting any of his future benefits by amounts paid to him under a plan in which he was enrolled when he worked in the United Kingdom. The district court also awarded him attorneys' fees and costs, amounting to $ 89,612, on the ground that Lilly's position in the litigation had not been substantially justified.

Bandak, who is English, began work for the Lilly group of companies in 1978 in England, and was enrolled in the pension plan of the English member of the group. [**2] In 1995, he was shifted to the United States. Lilly informed him in writing that he was now enrolled in the U.S. affiliate's retirement plan and that his benefits under the plan would be based on his years of service retroactive to his initial employment by the Lilly group, which is to say back to 1978. Thus he would be treated as if he had worked for U.S. Lilly from 1978 to 1995 rather than for the English affiliate. He retired in 2004.

[*800] The plan in effect in 1995 said that an employee's retirement benefits "shall be reduced by the Actuarial Equivalent of any benefit payable to such a person under a *qualified defined benefit plan* maintained by" a Lilly employer (emphasis added). On the basis of this provision, the plan administrator decided that Bandak was not entitled to benefits under the English affiliate's retirement plan because it was a "qualified defined benefit plan" and thus within the exclusion. If this is correct, Bandak's pension entitlement would fall from $ 18,000 a month to $ 14,000.

The term "qualified defined benefit plan" is an American legal term that means a plan approved by the Internal Revenue Service for favorable federal tax treatment. See, e.g., *26 U.S.C. §§ 401(a)(5)(D)(i)*, [**3] *1060(e)(2)(A)(ii)* ("a defined benefit plan . . . which qualifies"); *26 C.F.R. § 1.401-4(c)(7)(ii)*; *Powell v. Commissioner, 129 F.3d 321, 323 (4th Cir. 1997)*; *Arnold v. Arrow Transportation Co., 926 F.2d 782, 783 (9th Cir. 1991)*; *Wilson v. Bluefield Supply Co., 819 F.2d*

457, 464 (4th Cir. 1987); Jesse D. Taran & Pamela C. Scott, "Qualified Defined Benefit Plans: The Essentials," 875 *PLI/Tax* 149, 155 (2009). It has no reference to foreign taxation. The presumption in interpreting a contract is that the meaning of a technical term is its technical meaning, *Reed v. Hobbs, 3 Ill. 297 (1840)*; *Minges Creek, LLC v. Royal Ins. Co., 442 F.3d 953, 956 (6th Cir. 2006)*; *Mellon Bank, N.A. v. Aetna Business Credit, Inc., 619 F.2d 1001, 1013 (3d Cir. 1980)*; *Superior Business Assistance Corp. v. United States, 461 F.2d 1036, 1039 (10th Cir. 1972)*; *Restatement (Second) of Contracts § 202(3)(b)* (1981), and thus, if it is a technical legal term, its technical legal meaning. *Sunstar, Inc. v. Alberto-Culver Co., No. 07-3288, 586 F.3d 487, 2009 U.S. App. LEXIS 23759, 2009 WL 3447450, at *3 (7th Cir. Oct. 28, 2009)*; *Mellon Bank, N.A. v. Aetna Business Credit, Inc., supra*; *Superior Business Assistance Corp. v. United States, supra.* Elsewhere in the [**4] plan document, moreover, "qualified" plan unmistakably means a U.S. plan because it makes specific references to the Internal Revenue Code.

Lilly argues that it would be "unfair" for Bandak to get greater benefits than if he had begun work for Lilly's U.S. affiliate rather than its English affiliate in 1978. Whether and in what sense it is "unfair" would require a deeper investigation than attempted by the plan administrator --would require for example investigating whether it really is "unfair" to give an employee relocated to a foreign country (remember that Bandak is English, not American) a 30 percent increase in retirement benefits ($ 4,000/$ 14,000). Lilly is a sophisticated enterprise, the plan document was undoubtedly drafted by lawyers specializing in ERISA, and those lawyers would, unless it were otherwise stated in the document, use technical legal terms in their technical legal senses.

While conceding that "qualified defined benefit plan" is not an English legal term, Lilly says that the plan in which Bandak was enrolled when he worked in England was a "broad-based retirement plan" entitled to favorable tax treatment under English law. The district judge rejected the argument [**5] on the grounds that the administrative record contains no English plan document and that Lilly cites no English law. Lilly thus laid no foundation for comparing the English plan to a U.S. "qualified defined benefit plan."

The U.S. plan does state that "in no event shall an Employee receive credit more than once for the same period of Service." But the plan restricts "Employees" to citizens or residents of the U.S., and Bandak was neither when he was working for the English affiliate.

[*801] Two years after he was relocated to the United States the retirement plan of the U.S. affiliate was amended to provide that the plan benefits "of an individual who becomes an Employee on or after April 1, 1997" would be reduced by the amount of benefits to which he was entitled "by a plan or program maintained by a non-United States [Lilly company] . . . that provides retirement-type benefits," or by the retirement plan of a foreign government. The amendment did not apply to Bandak, whose employment by the domestic affiliate had begun before 1997; its only significance in the litigation is in undermining Lilly's position.

Rather than trying to define a "qualified" retirement plan, the amendment eliminated [**6] double counting for anyone who had received "retirement-type benefits" under a plan maintained by a foreign Lilly affiliate for whom the employee had worked. Lilly argues that the amendment does not apply to foreign retirement plans that are "like" a U.S. qualified defined benefit plan; those plans, it argues, had always been usable to reduce benefits. On this interpretation the plan administrator when dealing with a benefits claim by someone like Bandak who is not subject to the amendment has to decide how much "like" a "qualified defined benefit plan" in its U.S. sense the foreign affiliate's plan had been. The administrator would have to familiarize himself with the retirement laws of the 52 other countries in which one or more of Lilly's 142 affiliates operate. He would have to decide whether the Chinese affiliate, for example, has a retirement plan that is sufficiently "like" a qualified defined benefit plan under U.S. law to satisfy the plan administrator's understanding of "qualified defined benefit plan."

Notice the strangeness of an interpretation that allows an employee to get double service credit (as Lilly's lawyer acknowledged at argument) if the foreign affiliate's retirement [**7] plan is not given favorable tax treatment by the foreign government.

It seems the amendment was intended to close what Lilly belatedly had decided was a loophole through which Bandak has sailed. This interpretation is supported by the minutes of the Lilly board meeting at which the amendment was adopted. The chairman of the board explained that the "amendment is necessary to prevent the Company from paying benefits for years of service that are already being paid or credited by another affiliate or foreign country." That describes Bandak's case to a T.

The contention in Lilly's brief that the reference in the minutes to years of service "credited by another affiliate" is a reference to defined contribution plans, not defined benefit plans, makes no sense. Though Lilly does offer a defined contribution plan, benefits generated by such plans are based on the contributions to the employee's retirement account rather than on his years of service. E.g., *Evans v. Akers, 534 F.3d 65, 71 n. 5 (1st Cir. 2008)*; *Hawkeye National Life Ins. Co. v. AVIS Industrial Corp., 122 F.3d 490, 500 n. 6 (8th Cir. 1997)*;

Andrew L. Gaines & Steven M. Margolis, "An Introduction to Defined Contribution Plans," [**8] 875 *PLI/Tax* 183, 189 (2009). Nor were defined contribution plans common prior to 1997. See Gregory N. Filosa, "International Pension Reform: Lessons for the United States," *19 Temp. Int'l & Comp. L.J. 133, 137 (2005)*; Marti Dinerstein, "Social Security 'Totalization': Examining a Lopsided Agreement with Mexico," Center for Immigration Studies (Sept. 2004), available at www.cis.org/articles/2004/back904.pdf (visited Oct. 11, 2009); Noriyuki Takayama, "Pension Reform in Japan at the Turn of the Century," 26 *Geneva Papers on Risk and Insurance* 565 [*802] (2001); Lothar Schruff, "Pensions and Post-Retirement Benefits by Employers in Germany," 64 *Brooklyn L. Rev.* 795, 800 (1998).

The implication that the 1997 amendment was based on a belief that without it persons in Bandak's situation would have a double dip is further strengthened by Lilly's inability to name even one person whose benefits under a foreign retirement plan had been reduced *before* the amendment (which remember is not applicable to Bandak) went into effect, even though Lilly is a global enterprise and many of its high-level scientific employees, like Bandak, must at times during their career with Lilly reside in different countries, [**9] working for different affiliates each with its own defined benefit plan.

A document in Bandak's employee file states that "until 1997 [the reference is to the 1997 amendment], the offset [for foreign plans] was not specifically written into the plan, but was followed as a common practice." Provisions of an ERISA plan must be in writing. *29 U.S.C. § 1102(a)(1)*; *Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 83-84, 115 S. Ct. 1223, 131 L. Ed. 2d 94 (1995)*. They cannot be modified by "common practice." E.g., *Orth v. Wisconsin State Employees Union Counsel 24, 546 F.3d 868, 872 (7th Cir. 2008)*; *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 58 F.3d 896, 905-06 (3d Cir. 1995)*.

Lilly reminds us that a plan administrator's judgment is entitled to deference when as in this case (as in almost every case) the plan document vests the administrator with discretion in interpreting and applying the plan. But the entitlement is diminished by indications that the conflict of interest inherent when benefits determinations are made by a plan funded by the employer has infected the administrator's consideration of the application for benefits. As we explained in *Marrs v. Motorola, Inc., 577 F.3d 783, 789 (7th Cir. 2009)*, [**10] elaborating on the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Glenn, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008)*, "If the circumstances indicate that probably the decision denying benefits was decisively influenced by the plan administrator's conflict of interest, it must be set aside . . . . The *likelihood* that the conflict of interest influenced the decision is therefore the decisive consideration, as seems implicit in the majority opinion's [in *Glenn*] reference to indications of 'procedural unreasonableness' in the plan administrator's handling of the claim in issue, *id. at 2352* (emphasis in original), and its suggestion that efforts by the plan administrator to minimize a conflict of interest would weigh in favor of upholding his decision. *Id. at 2351*."

We know that the chairman of Lilly's board of directors was concerned about the cost of its retirement plan. And the disingenuousness of Lilly's arguments suggests that the conflict of interest was indeed gnawing at the administrator. Consider the administrator's failure to identify *anyone* in Bandak's position hired before the 1997 amendment who had been denied service credit for his time with a foreign affiliate, and consider the implausible [**11] suggestion that the reference to private plans in the 1997 amendment is just to defined contribution plans. Consider also the barrenness of the record concerning the English plan and English tax law, which makes one wonder how the plan administrator even knew that the English plan was a "qualified defined benefit plan," and which suggests the administrator was covertly applying the 1997 amendment, while conceding its inapplicability to Bandak.

So not only was the district court's decision correct; Lilly's rejection of [*803] Bandak's claim was not substantially justified, and therefore the district judge committed no error in awarding Bandak his reasonable attorneys' fees and costs. *Sullivan v. William A. Randolph, Inc., 504 F.3d 665, 670-72 (7th Cir. 2007)*; see *29 U.S.C. § 1132(g)*. Bandak has asked for fees for defending the appeal, and he is entitled to them too. As we explained in *Sullivan*, "affirmance entitles an appellee who has properly been awarded an attorney's fee in the district court to an attorney's fee for successfully defending the district court's judgment in the court of appeals. Otherwise the purpose of the initial award--to shift the cost of litigation to the losing party--would [**12] be imperfectly achieved." *Sullivan v. William A. Randolph, Inc., supra, 504 F.3d at 672* (citations omitted). Bandak is directed to submit within 10 days an itemized statement of the attorneys' fees that he incurred in defending the appeal, and Lilly will have 10 days to respond.

AFFIRMED.

LEXSEE 442 F.3D 953

MINGES CREEK, L.L.C., Plaintiff-Appellee, v. ROYAL INSURANCE COMPANY OF AMERICA, Defendant-Appellant.

No. 05-1313

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

06a0126p.06; ***442 F.3d 953*****;** ***2006 U.S. App. LEXIS 8302*****;** ***2006 FED App. 0126P (6th Cir.)***

March 16, 2006, Argued
April 6, 2006, Decided
April 6, 2006, Filed

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 03-72763-Julian A. Cook, Jr., District Judge.

COUNSEL: ARGUED: James N. McNally, SOMMERS, SCHWARTZ, Southfield, Michigan, for Appellant. Rick J. Patterson, POTTER, DeAGOSTINO, O'DEA & PATTERSON, Auburn Hills, Michigan, for Appellee.

ON BRIEF: James N. McNally, Leonard B. Schwartz, SOMMERS, SCHWARTZ, Southfield, Michigan, for Appellant. Rick J. Patterson, Steven M. Potter, POTTER, DeAGOSTINO, O'DEA & PATTERSON, Auburn Hills, Michigan, for Appellee.

JUDGES: Before: DAUGHTREY and GILMAN, Circuit Judges; RUSSELL, District Judge. *

* The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

OPINION BY: RONALD LEE GILMAN

OPINION

[***1] [*954] RONALD LEE GILMAN, Circuit Judge. A customer slipped and fell on an icy sidewalk upon exiting a card store in the Minges Brook Mall, a shopping center owned by Minges Creek, L.L.C. Chubb Insurance Company, the insurer of the mall's common areas, paid the settlement cost and the associated litigation expenses resulting from the customer's lawsuit. Minges Creek then sued Royal Insurance Company of America, [**2] the insurer of the card store, for indemnification on the basis that Minges Creek was named as an additional insured under the card store's liability policy with Royal. Summary judgment was granted in favor of Minges Creek. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions for the district court to dismiss the complaint with prejudice.

[***2] **I. BACKGROUND**

Minges Creek is the owner of the Minges Brook Mall located in Battle Creek, Michigan. In December of 1989, Minges Creek leased a portion of its property to the "1/2 Off Card Shop" (Card Shop). The "leased premises" were defined in the lease as the 6,796 square feet shown on the site plan, which clearly indicated that the leased premises were limited to the interior of the store and did not include the exterior walls, the roof, or the surrounding land. (Lease § 1.01) Common areas, including the parking lots, roadways, and pedestrian sidewalks, were provided by Minges Creek "for the convenience and use of the tenants of the Shopping Center, and their respective subtenants, agents, employees, customers, invitees, and any other licensees of Landlord. [**3] " (Lease § 7.03)

The lease also set forth the Card Shop's insurance obligations as a tenant:

> Tenant shall, during the entire term hereof, keep in full force and effect a policy of public liability and property damage insurance *with respect to the leased premises, and the business operated by Tenant* and any subtenants of Tenant in the leased premises . . . . The policy shall name Landlord, any other parties in interest designated by Landlord, and Tenant as insured . . . .

(Lease § 10.01) (Emphasis added.)

Pursuant to the Card Shop's lease obligation, Royal issued a general liability policy to the Card Shop to cover its Minges Brook Mall store and several other Card Shop locations. An addendum to Royal's policy with the Card Shop defined additional insureds as follows:

> The following is added to **SECTION II- WHO IS AN INSURED**:
>
> 5. a. Any person or organization you are required by a written contract, agreement or permit to name as an insured is an insured but only with respect to liability arising out of:
>
> . . .
>
> 2. Premises owned or used by you.

[*955] (Royal Ins. Policy "Enhancement Endorsement" § 12).

The Card Shop, along with all of the other [**4] tenants of the Minges Brook Mall, was also required by the lease to pay a proportionate share of Minges Creek's cost of maintaining and insuring the common areas of the mall. Minges Creek's insurance policy covering the common areas was issued by Chubb.

The underlying accident that gave rise to the insurance dispute in this case occurred in March of 1999 when Peggy Lampert, a customer of the Card Shop, slipped and fell on ice while walking to her car from the store. Lampert sued Minges Creek, the Card Shop, and a snow removal contractor in Michigan state court. Her complaint alleged as follows:

> The accident occurred when Plaintiff Peggy Lampert, as a customer of the 1/2 Off Card Shop, Inc., began walking toward her car which was located in Defendant Minges Creek LLC's parking lot, and while in the process of leaving the store, slipped and fell on ice, causing her to sustain very serious personal injuries and damages.

[***3] The state trial court dismissed the Card Shop from Lampert's suit because the Card Shop did not "legally possess[] the sidewalk area where the fall occurred." Minges Creek was found to have "exclusive dominion and control over maintaining the [**5] entire parking area including the sidewalks in front of the 1/2 Off Card Shop." Following the Card Shop's dismissal, Minges Creek settled the lawsuit with Lampert for $ 210,000. Chubb, as Minges Creek's insurer, covered this cost as well as the expense of defending against Lampert's claim.

Minges Creek then filed suit against Royal, the Card Shop's insurer. The suit was removed to federal court based on diversity of citizenship. Alleging that it was an additional insured under the Card Shop's policy, Minges Creek sought reimbursement for the $ 210,000 settlement cost and approximately $ 26,700 in expenses that were incurred in defending against Lampert's claims. Royal's insurance contract promised to pay all insureds "those sums that the insured becomes legally obligated to pay . . . [and] defend the insured against any 'suit' seeking [bodily injury or property] damages."

After both parties moved for summary judgment, the district court granted judgment in favor of Minges Creek. It held that Minges Creek was an additional insured under the Card Shop's insurance policy issued by Royal and that the accident occurred on premises used by the Card Shop. Thus, even though the Card [**6] Shop did not control the common area where the accident occurred, and even though it was dismissed from Lampert's lawsuit, the Card Shop's insurance policy was deemed to cover the claim. According to the district court, this obligated Royal to defend and indemnify Minges Creek. The district court therefore ordered Royal to reimburse Minges Creek for the settlement cost and the litigation expenses for the underlying litigation with Lampert. Royal now appeals.

A. Standard of review

II. ANALYSIS

The district court's grant of summary judgment is reviewed de novo. *Int'l Union v. Cummins, Inc., 434 F.3d 478, 483 (6th Cir. 2006)*. Summary judgment is proper where there exists no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*. In considering a motion for summary judgment, the district court must construe the evidence and draw all reasonable inferences

in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S.* [*956] *574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986).* The central issue is "whether the evidence presents a [**7] sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251-52, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).*

B. Applicable law

Both parties agree that because Michigan is the forum state and the place where Royal's insurance policy was written, Michigan law governs the interpretation of the insurance policy. *See Himmel v. Ford Motor Co., 342 F.3d 593, 598 (6th Cir. 2003)* (applying the law of the forum state in diversity cases). The interpretation of an insurance policy is a question of law that is reviewed de novo. *Schmalfeldt v. N. Pointe Ins. Co., 469 Mich. 422, 670 N.W.2d 651, 653 (Mich. 2003).*

An insurance policy is interpreted in accordance with its terms. *Twichel v. MIC Gen. Ins. Corp., 469 Mich. 524, 676 N.W.2d 616, 622 (Mich. 2004)* (holding that, based on the clear language of the policy at issue, a driver was not covered by his grandfather's insurance). Moreover, a party's "reasonable expectations cannot supercede the clear language of a contract." *Wilkie v. Auto-Owners Ins. Co., 469 Mich. 41, 664 N.W.2d 776, 786 (Mich. 2003)* [**8] (quotation marks omitted).

[***4] Insurance policies must be read as a whole, giving meaning to all of their terms. *Auto-Owners Ins. Co. v. Harrington, 455 Mich. 377, 565 N.W.2d 839, 841 (Mich. 1997).* If a term is not defined in an insurance policy, the term is "accorded its commonly understood meaning." *Twichel, 676 N.W.2d at 622.* The Michigan Supreme Court employs dictionary definitions to interpret nontechnical terms, but uses specialized dictionaries and caselaw to interpret legal terms of art. *See id.* (referencing dictionary definitions to interpret the term "owner"); *Henderson v. State Farm Fire & Cas. Co., 460 Mich. 348, 596 N.W.2d 190, 194 (Mich. 1999)* (distinguishing between legal terms of art, like "equitable remedy," which should be interpreted in accordance with their common law understandings, and colloquialisms, which should be given their ordinary meaning). If language in an insurance policy can reasonably be interpreted in more than one way, the policy will be interpreted against the insurer. *Wilkie, 664 N.W.2d at 786-87.* Courts, however, should not "create ambiguity in an insurance policy [**9] where the terms of the contract are clear and precise." *Henderson, 596 N.W.2d at 193.* Unambiguous terms "must be enforced as written," and insurers are not liable for risks that they do not assume. *Id.*

In the present case, the district court held Royal liable for both the expense of litigating Lampert's suit and the ultimate settlement cost. It thus held that Royal had both a duty to defend and a duty to indemnify Minges Creek, a named insured under Royal's policy with the Card Shop. According to the Michigan Supreme Court, "the duty to defend is broader than the duty to indemnify and is properly invoked when claims are even arguably within coverage." *Polkow v. Citizens Ins. Co., 438 Mich. 174, 476 N.W.2d 382, 384 (Mich. 1991)* (quotation marks omitted). Although all doubts regarding whether the duty to defend applies are resolved in favor of the insured, *id.*, "if coverage is not possible, then the insurer is not obliged to provide a defense." *Marlo Beauty Supply, Inc. v. Farmers Ins. Group of Cos., 227 Mich. App. 309, 575 N.W.2d 324, 327 (Mich. 1998)* (construing an ambiguous policy against the insurer). We must therefore first determine [**10] whether Lampert's suit against Minges Creek was covered by Royal's insurance policy.

[*957] **C. The insurance contract**

1. Was Minges Creek a named insured?

Because the lease agreement between Minges Creek and the Card Shop required the Card Shop to name Minges Creek as an additional insured, the district court held that Royal was obligated to defend and indemnify Minges Creek. Royal contends, however, that Minges Creek was an additional insured under the Card Shop's policy only with respect to incidents occurring inside of the Card Shop. This is because the "written contract, agreement or permit" requiring the Card Shop to name Minges Creek as an additional insured, as stated in Royal's Insurance Policy "Enhancement Endorsement" § 12, obligated the Card Shop to insure only the "leased premises." (Lease § 10.01)

Royal issued a certificate of liability insurance to Minges Creek, stating that "the certificate holder is listed as an additional insured-Landlord with respect to the property located at [Minges Brook Mall]." Minges Creek therefore qualified as an additional insured under Royal's policy. The scope of Royal's liability to Minges Creek as a named insured, [**11] however, must be determined by the "premises owned or used" language in Royal's policy.

2. Did the accident occur on premises "owned or used by" the Card Shop?

In order for Royal to be obligated to defend and indemnify Minges Creek, Lampert's accident had to have occurred on "premises owned or used by" the Card Shop. The parties dispute the proper definitions of both the term "premises" and the term "used." Royal first argues that the term premises refers only to the inside of the

Card Shop, whereas Minges Creek asserts that the term premises means the Card Shop plus the common areas surrounding the store.

[***5] The district court, in following Michigan precedent that instructs courts to generally apply the commonly understood meaning of terms, *see Twichel, 676 N.W.2d at 622*, referenced the dictionary definition of the term premises. Premises is defined by *Merriam Webster's Collegiate Dictionary* 920 (10th ed. 1997), as "a tract of land with the buildings thereon." If the term premises is more appropriately classified as a "term of art," however, reference to a specialized dictionary is appropriate. *Black's Law Dictionary* 1180-81 (6th ed. 1997), [**12] is such a specialized dictionary, and it defines premises as follows:

> Land with its appurtenances and structures thereon. Premises is an elastic and inclusive term, and it does not have one definite and fixed meaning; its meaning is to be determined by its context and is dependent upon circumstances in which used, and may mean a room, shop, building, or any definite area.

Black's Law Dictionary thus recognizes that the term premises has an elastic and context-specific definition. The district court focused on the first sentence of the definition and concluded that *Black's* supports Minges Creek's claim that the accident is covered by Royal's policy. But the court failed to consider the definition beyond the first sentence, specifically the part stating that the meaning of the term premises "is to be determined by its context and is dependent upon circumstances in which used . . . ." *Id.*

Royal persuasively argues that, throughout the insurance policy, "an intent is clearly shown to rely on the written contract [i.e. the lease] to define the obligation to add the landlord as a named insured, and to define the scope of the obligation owed to that party." [**13] It contends that the term premises in the insurance policy is *un*ambiguous because the lease's definition [*958] of the term "leased premises" should be deemed to control the meaning of the term premises as used in the policy. A term in a contract is unambiguous if there is only one way to reasonably interpret the term. *See Wilkie, 664 N.W.2d at 786-87* (defining an ambiguous term in a contract as one where there is more than one reasonable interpretation). Royal argues that because its policy specifically refers to the "written contract, agreement or permit" in its "additional insured" section, the only reasonable interpretation of the term premises is one based on the lease.

We agree that the lease and Royal's policy are inextricably intertwined and should be interpreted in context with each other. Although Minges Creek argues against referring to the lease in order to define the term premises in the policy, Minges Creek's conclusion that the Card Shop *used* the area where Lampert fell is based on the provision of the lease (Lease § 7.03) designating the common areas for use by all of the tenants of the shopping center. Minges Creek cannot have it both ways. The [**14] plain language of Royal's policy links it to the lease, and therefore the only reasonable interpretation of "premises owned or used by" the Card Shop is one that is informed by the lease.

Given the lease's provision obligating the Card Shop to insure only the inside of its store, we conclude that the only reasonable interpretation of the term premises comports with the lease's definition of the term "leased premises." The lease defines the leased premises as the 6,796 square feet inside the Card Shop, and does not include the sidewalk where Lampert fell. And the lease obligated the Card Shop to name Minges Creek as an insured only with respect to the "leased premises." Defining the term premises in the insurance policy to include the common areas that the Card Shop was not required to insure strikes us as unreasonable.

The case of *Zurich Insurance Co. v. CCR & Co., 226 Mich. App. 599, 576 N.W.2d 392 (Mich. 1997)*, supports the proposition that terms that might be ambiguous in some contexts can have highly specific and unambiguous meanings in others. *Zurich* posits an example where A contracts with B to pay for eagles. *Id. at 397 n.4*. Depending on the context, [**15] eagles can unambiguously mean coins if the parties are numismatists, birds if the parties are animal dealers, or scores in an athletic competition [***6] if the parties are golfers. *Id.* In the present case, the context that defines the otherwise ambiguous term premises is not extrinsic evidence, but the plain language of the lease, which is specifically referenced in Royal's insurance policy. This context requires that the definition of premises in the policy be coextensive with the Card Shop's obligation to name Minges Creek as an additional insured.

Because we conclude that the term premises is restricted to the inside of the Card Shop, Lampert's accident outside of the Card Shop is not covered by Royal's policy. We therefore do not have to analyze the definition of the term "used," but wish to reiterate that even Minges Creek looked to the lease to define that term. Moreover, we note that an absurd result would occur if the terms "premises" and "used" were both interpreted according to Minges Creek's definition of premises (the Card Shop and the sidewalk around it) and its expansive definition of used (in which all tenants use the common areas). Under its interpretation, [**16] Minges Creek

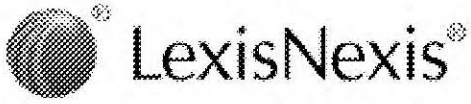
could seek indemnity under Royal's policy even if a patron of another store fell on the common sidewalk. In fact, it could presumably seek coverage as the named insured from every tenant in the shopping center whose policy contained language similar to Royal's. This interpretation is all the more unreasonable in light of Minges Creek having procured a separate insurance [*959] policy through Chubb that explicitly covered the common areas. Minges Creek has clearly not advanced a reasonable interpretation of "premises owned or used" by the Card Shop.

For the reasons stated above, we also hold that Royal had no duty to defend against Lampert's claims. Even accepting all of Lampert's allegations as true, Royal's policy does not cover her accident. Royal therefore was not required to defend Minges Creek against the lawsuit by Lampert. *See Marlo Beauty Supply, 575 N.W.2d 324 at 327* (holding that "if coverage is not possible, then the insurer is not obliged to provide a defense").

At bottom, this case appears to involve an effort by one insurance company (Chubb, the insurer of the common areas) to obtain reimbursement from another insurance company (Royal, the insurer [**17] of the Card Shop's leased premises). The only reasonable reading of the documents controlling the relationship between the parties, however, convinces us that Chubb was the proper insurance company to defend and indemnify Minges Creek for Lampert's accident that occurred in the common areas.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to dismiss the complaint with prejudice.



LEXSEE 619 F.2D 1001

MELLON BANK, N.A., v. AETNA BUSINESS CREDIT, INC., Appellant

No. 79-1092

UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

619 F.2d 1001; *1980 U.S. App. LEXIS 19061*

October 9, 1979, Argued
March 31, 1980, Decided

PRIOR HISTORY: [**1] APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA (D.C. Civil No. 75-1156)

COUNSEL: Thomas McGanney (argued), White & Case, New York City, William C. O'Neil, David G. Ries, Thorp, Reed & Armstrong, Pittsburgh, Pa., for appellant.

Thomas R. Johnson (argued), Kirkpatrick, Lockhart, Johnson & Hutchison, Pittsburgh, Pa., for appellee.

JUDGES: Before ALDISERT and HUNTER, Circuit Judges and CAHN, * District Judge.

* Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION BY: CAHN

OPINION

[*1005] OPINION OF THE COURT

This diversity case, tried under Pennsylvania law, [1] involves a contractual dispute between Mellon Bank, N.A., of Pittsburgh, Pennsylvania (Mellon), and Aetna Business Credit, Inc., of East Hartford, Connecticut (Aetna). Both parties are commercial lending institutions. In the context of this case, Mellon is the construction lender and Aetna is the permanent or "take out" lender. [2] Mellon sued Aetna averring that Aetna breached a written contract by refusing to purchase the [**2] construction loan held by Mellon. In a nonjury proceeding the district court found Aetna in breach and awarded Mellon damages in the amount of $ 1,165,731, representing Mellon's loss following foreclosure on the construction loan. Aetna has appealed to this court from the final judgment entered below. The facts, in greater detail, are as follows.

1 In this diversity action we are bound by the law of Pennsylvania, including its conflict of law rules. *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc., 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)*. The district court made no specific finding in regard to choice of law. However, the district court applied Pennsylvania law.

All parties have proceeded at the trial and appellate level as if Pennsylvania law applied to the interpretation of this contract. No objection was raised below or on appeal. At this time we will consider the parties to have waived any objection to the application of Pennsylvania law. See *Bilancia v. G.M.C., 538 F.2d 621 (4th Cir. 1976)*.

2 In *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association of Norristown, 610 F.2d 164 (3d Cir. 1979)*, Judge Adams outlined the usual method of financing a real estate development as follows:

As with most real estate developments, the financing here was to take place in two stages: a short-term construction loan and a long-term permanent loan. The construction loan was to finance the actual construction of the project and the permanent loan, or mortgage loan, was designed to replace or "take out' any short-term borrowings. A permanent loan is generally obtained from a savings institution or insurance company,

> while a construction lender usually is a commercial bank. A standby commitment obligates the permanent lender to refinance the construction loan if called upon to do so by the developer, but in addition generally provides the borrower with the option to search for an alternative lender with more advantageous terms. The premium paid for this option is a nonrefundable fee, and the commitment enables a developer to seek short term construction financing.
>
> *610 F.2d at 167* (footnote omitted).

[**3] I. FACTS

Messrs. Opp, Elgin and Wise (the borrowers) were joint venturers in the development and construction of an office complex in the suburbs of Atlanta, Georgia. The project, known as Kensington Square, was to consist of six two-story office buildings. The estimated total cost of the project was $ 2,500,000.

In May of 1974 Aetna extended to the borrowers a permanent loan commitment in the amount of $ 2,500,000. The borrowers paid a $ 50,000 fee to Aetna to bind the commitment which was to remain in force until August 1, 1975. Under the terms of the commitment the borrowers could obtain a six month extension for an additional fee of $ 25,000.

In June of 1974 Mellon issued a construction loan commitment to the borrowers. In July of 1974 the borrowers, Mellon, and Aetna executed a tripartite Buy-Sell Agreement and related instruments. Upon completion of the project, the Buy-Sell Agreement obligated Aetna, subject to certain conditions, to purchase the construction loan from Mellon. By August 1, 1975, the borrowers' contractor had substantially completed the project and Mellon had advanced $ 2,241,489 under the construction loan. The work which remained unfinished involved the [**4] completion of individual suites to the specifications of prospective tenants. However, earlier in 1975 there had been a precipitous decline in the Atlanta real estate market and the project was only seven percent leased, which placed its economic feasibility in jeopardy.

On August 1, 1975, a Mellon representative met with Aetna's special counsel in Atlanta and delivered closing documents to him. In a letter to Mellon dated August 15, [*1006] 1975, Aetna stated that upon Aetna's receipt of sworn statements from the borrowers, representing that they are solvent, "we (Aetna) shall be in a position to fund this loan." On August 27, 1975, Aetna received the executed affidavits of solvency. Two days later Aetna gave notice to Mellon that it would not purchase the construction loan.

The borrowers defaulted on their obligation on September 1, 1975. On October 3, 1975, Mellon declared the construction loan in default. On November 3, 1975, Kensington Square was sold at a foreclosure sale for $ 1,150,000. Thereafter, Mellon obtained an order from the Superior Court, DeKalb County, Georgia, confirming that the property was sold for its true market value.

Mellon brought suit against Aetna [**5] on November 12, 1975, in the United States District Court for the Western District of Pennsylvania. In its complaint Mellon alleged that Aetna had breached the Buy-Sell Agreement by refusing to purchase the construction loan. Mellon claimed damages measured by the difference between the $ 2,241,489 advanced to the borrowers under the construction loan and the confirmed foreclosure sale price of $ 1,150,000 plus prejudgment interest and costs.

Aetna's answer denied that all conditions precedent to its take-out commitment had occurred or been performed. Aetna alleged that as a condition precedent to its obligation to purchase the construction loan it was required that the borrowers be solvent. The Buy-Sell Agreement in Section 4 provided that:

> (In) the event of bankruptcy or insolvency of Borrower the provisions of paragraph 3 of the Permanent Commitment relating thereto shall be applicable.

Aetna drafted paragraph 3 of the Permanent Commitment, insisted that it be incorporated by reference in the Buy-Sell Agreement, and rejected Mellon's attempt to negotiate its deletion. Paragraph 3 stated:

> We (Aetna) shall have no obligation to acquire the construction loan from the [**6] construction lender in the event of bankruptcy or insolvency of the Borrower.

Aetna contended that the borrowers were not solvent at the time it was to purchase the construction loan from Mellon. Also Aetna alleged that there had been material adverse change in the borrowers' condition which negated Aetna's duty to fund the loan. The Permanent Commitment stated:

> (The borrowers) will furnish evidence satisfactory to you (Aetna) at the date of funding that there has been no material adverse change in our financial or other condition . . . from that presented to you (Aetna) for the purpose of considering the loan. [3]

3 Section 8 of the Buy-Sell Agreement provided that "the Permanent Commitment shall remain in full force and effect."

Mellon maintained that the borrowers were not insolvent and that there was no material adverse change in the borrowers' financial condition. Further, Mellon urged that Aetna was not only in breach of the Buy-Sell Agreement, but in breach of a promise contained in the letter of August 15, 1975. That letter stated:

> (W)e agreed to purchase the captioned loan from you upon compliance with all terms and conditions of our commitment. One such [**7] condition states that we shall have no obligation to purchase in the event of bankruptcy or insolvency of the borrower. Our funding is, therefore, conditioned upon your submission of sworn statements (in form attached hereto) of each borrower, that each is presently in a solvent condition. Upon receipt of these statements, we shall be in a position to fund this loan.

Record at 336a. The letter was signed by John J. Gillies, an attorney for Aetna. The executed affidavits represented that the borrowers were "presently in a solvent financial condition. My liabilities do not exceed the fair market value of my assets and I am able to pay my debts as they mature." Record at 341a-344a. However, a cover letter from the borrowers' attorneys returned with the affidavits stated:

> [*1007] This will further confirm conversation held in your office on August 8, 1975, wherein Mr. Opp advised members of your organization that the current cash flow from his other endeavors would not carry the payments on the Kensington operation until the same is leased. He further advised that the other individuals in the joint venture do not have sufficient cash flow to carry the amount of the loan [**8] payments until tenants are acquired.

Record at 339a. The letter also noted that Mr. Opp faced certain contingent liabilities from litigation then pending against him.

The district court, after a bench trial, first found that:

> Aetna's defense in reality boils down to a very thin thread, that is, the issue of whether on August 1, 1975, the borrowers were insolvent. That was an affirmative defense, which Aetna was required to prove by a fair preponderance and has failed to do so.

Record at 75a. Second, the district court concluded that in determining whether or not the borrowers were insolvent the assets and liabilities of the Kensington Square project should be disregarded. Record at 78a. Third, the district court decided that Aetna's failure to purchase the construction loan was in breach of a promise set forth in its letter of August 15, 1975. Finally, the district court held that the act of the borrowers' furnishing evidence to Aetna of no material adverse financial change on their part was not a condition precedent to Aetna's obligation to purchase the construction loan, but merely a promise of the borrower, and that in any event the promise or condition had [**9] been fulfilled. The district court entered judgment for Mellon against Aetna in the sum of $ 1,165,731, which included prejudgment interest.

We determine that the district court incorrectly placed the burden of proof on Aetna to establish the insolvency of the borrowers. Also, the district court should have considered the assets and liabilities of the Kensington Square project in calculating whether or not the borrowers were insolvent. The district court erred in interpreting Aetna's August 15 letter and the return of the borrowers' affidavits either as a separate contractual obligation to purchase the construction loan or as a waiver of the condition that the borrowers not be insolvent. The district court correctly construed the clause in the Permanent Commitment requiring the borrowers to furnish evidence of "no material adverse change in our financial or other condition" to be a promise of the borrowers and not a condition precedent to Aetna's obligation. The case will be remanded for further proceedings in accordance with this opinion.

II. BURDEN OF PROOF

The generally accepted rule is that the burden of proof in regard to a condition precedent is on the party alleging the breach [**10] of the conditional promise. [4] *Standard Alliance Industries v. Black Clawson Co., 587 F.2d 813, 823 (6th Cir. 1978)*, cert. denied, *441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396 (1979)*; *Ziman v. Employers Fire Insurance Co., 493 F.2d 196, 199 (2d Cir. 1974)*; *Aetna Casualty and Surety Co. v. Harris, 218 Va. 571, 239 S.E.2d 84, 88 (1977)*; *Allis Chalmers Manufac-*

turing Co. v. Malan Construction Corp., 30 N.Y.2d 225, [*1008] *331 N.Y.S.2d 636, 282 N.E.2d 600, 602 n.5 (1972)*; *Israel W. Berthiaume's Case, 328 Mass. 186, 102 N.E.2d 412, 414 (1951)*; 3A Corbin, Contracts §§ 749-751; 5 Williston, Contracts § 674. The few Pennsylvania cases dealing with the burden of proving a condition precedent also suggest that the burden of proof to establish the condition is on the party alleging the breach. *Dauphin Deposit Trust Co. v. World Mutual Health and Accident Insurance Co., 206 Pa.Super. 406, 213 A.2d 116 (1965)*; [5] *Jennison v. Aacher, 201 Pa.Super. 583, 193 A.2d 769, 772 (1963)*; Bossler v. Poroner, 29 Pa.Dist. 421, 12 Berks 39 (C.P. Berks County 1919).

4 The only general exception to this rule is reflected by the strained reasoning courts utilize to place the burden on an insurance company where the company raises a "condition" in a policy as a defense. See e. g., *Fortress Re, Inc. v. Jefferson Insurance Co., 465 F. Supp. 333 (E.D.N.C.1978)*; *Stortenbecker v. Pottawattamie Mutual Insurance Association, 191 N.W.2d 709 (S. Ct.Iowa 1971)*; *Allen v. Ross, 38 Wis.2d 209, 156 N.W.2d 434 (1968)*.

All parties and the district court have characterized the insolvency condition as a condition precedent. See Mellon Bank v. Aetna, No. 75-1156 at 7 (W.D.Pa.1978); Brief of Appellee at 21; Brief for Appellant at 6. This is clearly a correct characterization solvency was a condition which had to exist or occur before a duty of immediate performance of Aetna's promise would arise. See Restatement of Contracts § 250; 3A Corbin, Contracts §§ 739-747; 5 Williston, Contracts §§ 666-668. We need not delve into the elusive distinctions between conditions precedent and subsequent. There has been no contention presented that the insolvency clause was or became a condition subsequent.

[**11]

5 This opinion is reported in Atlantic Second under the name of Peters v. World Mutual Health and Accident Insurance Co. The difference in names between the official and the West's reporter is unexplained.

Therefore, the district court was in error when it placed on Aetna the burden of proving the insolvency of the borrowers as a defense to the action. [6] Mellon had the burden of showing that the borrowers were solvent as a condition precedent to recovery for breach of Aetna's promise. [7]

6 It should be noted that the appellant Aetna was partly responsible for this misapplication of the burden. Mellon correctly pleaded the occurrence of all conditions precedent in its complaint. Record at 5a; see *Fed.R.Civ.P. 9(c)*. Aetna properly made a specific denial of the solvency condition. Record at 63a; see *Fed.R.Civ.P. 9(c)*. However, Aetna misled the court by incorrectly pleading the nonoccurrence of the condition precedent as an "Affirmative Defense." Record at 64a.

7 We do not accept Mellon's argument, made in a supplementary letter brief, that the condition precedent is really a proviso subject to proof by Aetna. See 5 Williston, Contracts § 667, pp. 182-183 (1961). Mellon cites no authority for this proposition other than Williston, whose own analysis would probably preclude the application of the proviso doctrine to this situation. See 5 Williston, Contracts § 667. There is no Pennsylvania case law in support of Mellon's analysis and all other case law which has been brought to our attention is contrary thereto. See *Kadner v. Shields, 20 Cal.App.3d 251, 97 Cal.Rptr. 742 (1971)*.

[**12]

III. INTERPRETATION OF "INSOLVENCY"

Aetna took the position in their briefs and at oral argument that they are entitled to judgment on the record as a matter of law. The basis for Aetna's position is the wording of the insolvency clause which states that Aetna "shall have no obligation to acquire the construction loan . . . in the event . . . of insolvency of the Borrower." Aetna contends that the test of insolvency is well established in law and as a commercial standard a party is insolvent when their liabilities exceed their assets or they are unable to pay their debts as they come due. See e. g. *Larrimer v. Feeney, 411 Pa. 604, 192 A.2d 351 (1963)*; *11 U.S.C. § 101(26) (1978)*; Uniform Commercial Code, 12A Pa.Con.Stat.Ann. § 1-201(23) (Purdons). Aetna contends that documentary evidence establishes the borrowers were insolvent under either of these tests, and therefore, Aetna had no obligation to purchase the construction loan.

Mellon takes the position that the insolvency test must be applied without reference to the liabilities or assets of the borrowers which accrue from the Kensington Square project. Mellon alleges that only this construction of the insolvency clause properly [**13] reflects the intent of the parties and is required for a rational interpretation of the Buy-Sell Agreement. Aetna responds to Mellon's position by contending that Mellon's interpretation of the insolvency clause is an impermissible rewriting of the words of the contract.

The district court heard oral testimony, received documentary evidence and concluded that the term in-

solvency in the context of the Buy-Sell Agreement should be interpreted to exclude reference to assets or liabilities related to the Kensington Square project. The district court held this interpretation was "required by the clear allocation of lending risks between Mellon Bank and Aetna." No. 75-1156, slip. op. at 8. The basis for this holding was not the words of the contract, but evidence extrinsic to it. The district court found that Aetna's loan officer recognized Aetna's principal risk to [*1009] be whether the office park could reach and maintain a ninety percent occupancy level. The district court found that Aetna in analyzing the security for its permanent loan did not consider the borrowers' cash flow, did not condition its obligation upon any occupancy level, and therefore concluded "Aetna recognized [**14] that the financial transaction in question was not a basis for finding insolvency." The district court cited no basis in the contract document or wording of the insolvency clause for its conclusion. Our task is to decide if the district court permissibly used extrinsic evidence to interpret the contract and, if so, whether it drew the proper legal conclusions therefrom.

In this case we confront several familiar, but not necessarily consistent, precepts of contract interpretation. We start from the premise that commercial parties are free to contract as they desire. *Brokers Title Co., Inc. v. St. Paul Fire and Marine Insurance Co., 610 F.2d 1174 (3d Cir. 1979)*. Absent illegality, unconscionableness, fraud, duress, or mistake the parties are bound by the terms of their contract. [8] *Peter J. Mascaro Co. v. Milonas, 401 Pa. 632, 166 A.2d 15 (1960)*; *National Cash Register Co. v. Modern Transfer Co., 224 Pa.Super. 138, 302 A.2d 486 (1973)*.

8 Illegality, unconscionableness, fraud, duress or mistake are not alleged here. It should be noted that both parties to the Buy-Sell Agreement are commercial entities of great experience and expertise and were represented by counsel in negotiations. Therefore, what we rule in this case is not based on overriding policy concerns that courts sometimes apply to restrict freedom of contract. In the future commercial parties creating loan commitments and buy-sell agreements will negotiate with knowledge of this opinion and will take greater care in expressing their intent. If in the instant case the parties had, with greater clarity, excluded or included the liabilities associated with the Kensington Square project, that would not present public policy difficulties. In this case the court sits with one purpose to interpret through the use of objective indicia the intent of the contracting parties.

Additionally, it should be noted that we are not dealing with a proceeding in equity. For example, in *First National State Bank of New Jersey v. Commonwealth Federal Savings and Loan Association of Norristown, 610 F.2d 164 (3d Cir. 1979)*, we considered a situation where a breach of a take out loan commitment had occurred, and the construction lender sought specific performance of the take-out commitment. The consideration of factors such as the allocation of risk between the parties was important in deciding if the court should exercise its discretion to grant equitable remedies.

[**15]

"In construing a contract, a court's paramount consideration is the intent of the parties." *O'Farrell v. Steel City Piping Co., 266 Pa.Super. 219, 403 A.2d 1319, 1324 (1979)*. It would be helpful if judges were psychics who could delve into the parties' minds to ascertain their original intent. However, courts neither claim nor possess psychic power. Therefore, in order to interpret contracts with some consistency, and in order to provide contracting parties with a legal framework which provides a measure of predictability, the courts must eschew the ideal of ascertaining the parties' subjective intent and instead bind parties by the objective manifestations of their intent. As Justice Holmes observed:

> (T)he making of a contract depends not on the agreement of two minds, in one intention, but on the agreement of two sets of external signs not on the parties' having meant the same thing but on their having said the same thing.

Holmes, The Path of the Law, in Collected Legal Papers 178, as quoted by *Judge Friendly in Frigaliment Importing Co. v. B. N. S. International Sales Corp., 190 F. Supp. 116, 117 (S.D.N.Y.1960)* (emphasis in original). See also Gilmore, The Death of [**16] Contract (1974).

The strongest external sign of agreement between contracting parties is the words they use in their written contract. Thus, the sanctity of the written words of the contract is embedded in the law of contract interpretation. As it has been variously put:

> (A) court will make no inference or give any construction to the terms of a written contract that may be in conflict with the clearly expressed language of the written agreement.

National Cash Register Co. v. Modern Transfer Co., Inc., 224 Pa.Super. 138, 142, 302 A.2d 486, 488 (1973).

> [*1010] A court is not authorized to construe a contract in such a way as to modify the plain meaning of its words, under the guise of interpretation.

Best v. Realty Management Corp., 174 Pa.Super. 326, 329-330, 101 A.2d 438, 440 (1953).

> When a written contract is clear and unequivocal, its meaning must be determined by its contents alone.

East Crossroads Center, Inc. v. Mellon-Stuart Co., 416 Pa. 229, 230, 205 A.2d 865, 866 (1965).

> The rule enunciated in *Gianni v. Russell & Co., Inc., (281 Pa. 320, 126 A. 791)* supra, is firmly embedded in the law of Pennsylvania and from that rule we will [**17] not permit a deviation for it is essential that the integrity of written contracts be maintained. . . . "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement: (citing cases). All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract * * * and unless fraud, accident or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor subtracted from by parol evidence: (citing cases).'

United Refining Co. v. Jenkins, 410 Pa. 126, 134, 189 A.2d 574, 578 (1963) (emphasis and citations omitted). [9]

> 9 Though the concept of the Parole Evidence Rule is relevant here, the issue in this case really concerns an exception to that rule. In the instant case one party introduced extrinsic evidence to "interpret" the contract. The other party argues that this extrinsic evidence seeks to vary or add to the contract and is therefore not admissible. If the written contract is unambiguous, the Parol Evidence Rule and the doctrines cited above bar the use of extrinsic evidence for interpretation. If the written contract is ambiguous the Parole Evidence Rule does not prevent the use of extrinsic evidence to interpret the writing.
>
> This issue of ambiguity must be carefully distinguished from the issue of "integration" which arises when evidence is introduced to vary or add to the unambiguous written terms of a contract on the ground that the evidence is admissible because the written contract is not fully integrated. The issue becomes whether the proffered evidence is extrinsic to the integrated written contract, and thus inadmissible, or whether the proffered evidence is part and parcel of the entire contract of which the written document is only a part.
>
> Though it may be asserted that Pennsylvania courts employ a strict "four corners" approach to issues of integration, we do not believe this approach is required by Pennsylvania decisions in regard to the issue of ambiguity. See *Universal Film Exchanges, Inc. v. Viking Theatre Corp., 400 Pa. 27, 161 A.2d 610 (1960)*; cf. In *Re Estate of Breyer, 475 Pa. 108, 379 A.2d 1305 (1977)*; *United Refining Co. v Jenkins, 410 Pa. 126, 138, 189 A.2d 574 (1963)*. In the case at bar there is no contention that the contract is not fully integrated.

[**18]

In a world where semantics is a science instead of an art we might be able to read a contract and understand it without question. However, English is often a difficult and elusive language, and certainly not uniform among all who use it. External indicia of the parties' intent other than written words are useful, and probably indispensable, in interpreting contract terms. If each judge simply applied his own linguistic background and experience to the words of a contract, contracting parties would live in a most uncertain environment. Therefore, under Pennsylvania law we are instructed that:

> A court must be careful not to "retire into that lawyers Paradise where all words have a fixed, precisely ascertained meaning; where men may express their purposes, not only with accuracy, but with fullness; and where, if the writer has been careful, a lawyer, having a document referred to him, may sit in his chair inspect the text, and answer all questions without raising his eyes.

In *Re Estate of Breyer, 475 Pa. 108, 379 A.2d 1305, 1309 n.5 (1977)* (citations omitted), quoting Thayer, Pre-

liminary Treatise on Evidence 428, as quoted in 3 Corbin, Contracts § 535 n.16 (1960);

> In [**19] the construction of any contract, certain principles must guide us: (a) if there is any doubt as to the meaning of a [*1011] term of a contract, such term should "receive a reasonable construction and one that will accord with the intention of the parties; and, in order to ascertain their intention, the court must look at the circumstances under which the (contract) was made'; (b) in construing a contract we seek to ascertain what the parties intended and, in so doing, we consider the circumstances, the situation of the parties, the objects they have in mind and the nature of the subject matter of the contract; (c) "However broad may be the apparent terms of the agreement, it extends only to those things concerning which the parties intended to contract, and the subject-matter of their negotiations may affect the meaning of the words they employ, especially if, in connection with that subject-matter, the conventional interpretation would give an unreasonable or absurd result.'

United Refining Co. v. Jenkins, 410 Pa. 126, 137-38, 189 A.2d 574, 580 (1963) (citations omitted) (emphasis deleted).

Courts are left with the difficult issue of determining as a matter of law which [**20] category written contract terms fall into clear or ambiguous. *United Refining Co. v. Jenkins, supra*; *O'Farrell v. Steel City Piping Co., 266 Pa.Super. 219, 403 A.2d 1319 (1979).* [10] There is a point at which interpretation becomes alteration of the written contract. We must determine if the trial judge went beyond that point. [11]

> 10 Under Pennsylvania law, ambiguous writings are interpreted by the fact finder and unambiguous writings are interpreted by the court as a question of law. *Brokers Title Insurance Co., Inc., v. St. Paul Fire and Marine Insurance Co., 610 F.2d 1174 (1979).* In the instant case the judge sitting without a jury made findings of fact and reached conclusions of law.
>
> 11 We could declare our holding in this case, quote the appropriate doctrine, and not explain the approach we feel a court should take on the issue of ambiguity. However, we believe that guidance and standards are necessary in this most difficult area.

A.

Ambiguity is defined as:

> Intellectual uncertainty; . . [**21] . the condition of admitting of two or more meanings, of being understood in more than one way, or referring to two or more things at the same time . . .

Webster's Third New International Dictionary (unabr.1971).

A court must have a reference point to determine if words may reasonably admit of different meanings. Under a "four corners" approach a judge sits in chambers and determines from his point of view whether the written words before him are ambiguous. An alternative approach is for the judge to hear the proffer of the parties and determine if there is objective indicia that, from the linguistic reference point of the parties, the terms of the contract are susceptible of differing meanings. We believe the latter to be the correct approach.

It is the role of the judge to consider the words of the contract, the alternative meaning suggested by counsel, and the nature of the objective evidence to be offered in support of that meaning. The trial judge must then determine if a full evidentiary hearing is warranted. If a reasonable alternative interpretation is suggested, even though it may be alien to the judge's linguistic experience, objective evidence in support of that [**22] interpretation should be considered by the fact finder. [12] See Corbin, Contracts § 542.

> 12 It is only by this approach that courts can achieve consistency in contract interpretation.
>
> The strict "four-corners" doctrine allows a court to sit in an isolated position and decide if words are "clear" or "ambiguous." Judges today come from a variety of backgrounds private law practice, government service, business, academia and their fields of experience represent an even wider variance. The parties who appear before the court in these times of complex commercial transactions come from a variety of specialized worlds of trade. It is the parties' linguistic reference that is relevant, not the judges'. The judge is in his or her linguistic field of expertise only when viewing words which lawyers have developed as terms of legal art. Even when the judge faces the need to interpret legal terms of art, extrinsic evidence and legal briefing are useful.

For example, a contract might provide for a party to pay "$ 10,000 for 100 ounces of platinum." A judge might state that the quoted words are so clear and unambiguous that parol evidence is not admissible to vary their meaning. That judge might never learn that the parties have a consistent past practice of dealing only in Canadian dollars and follow a standard trade practice of measuring platinum in troy ounces (12 to the pound instead of 16). This is because that judge's linguistic frame of reference includes the dollars and the ounces he or she encounters in daily life. That is not the linguistic frame of reference of the commercial parties.

There are many other examples which demonstrate the necessity of the approach we outline. A "pound" of caviar is always 14 ounces. One can readily see the difficulty counsel might have convincing a judge who never has eaten caviar that a "pound" can be 14 ounces. The case could also come before a judge who was a lifelong gourmet and consumer of caviar. To the gourmet judge it might be "clear and unambiguous" that a pound of caviar is 14 ounces. Similarly, in the lumber business a "two by four" is never really two inches by four inches, but somewhat smaller. The background of some judges might make them aware of this, the background of others might not. Following the approach we outline in this opinion a consistent result could be reached in each case the parties would be bound to the same meaning of the external signs of their intent. When the judge who knows only common usage is told that a specialized usage can be shown which is common to both parties, he will realize an ambiguity can exist and will admit evidence to determine the meaning by which the parties should be bound. Under a "four-corners" approach to the question of ambiguity, the result would depend on which judge heard the case.

[**23]

[*1012] An analysis of Pennsylvania cases demonstrates that this approach is in accord with practice in the Pennsylvania courts. [13] Accordingly we conclude that it [*1013] was proper for the court here to consider extrinsic evidence.

13 Confusion is often caused by the use of the term "ambiguous on its face." See *Merriam v. Cedarbrook Realty, Inc., 266 Pa.Super. 252, 404 A.2d 398, 401 (1978)*. A requirement of "facial ambiguity" might mean that a court should look exclusively at the "face" of a contract to determine if words are ambiguous. However, we are not aware of any cases where Pennsylvania courts have construed a writing, declared it unambiguous, and ruled that any consideration of an argument for ambiguity must be disregarded. Much to the contrary, many cases which hold words unambiguous do so only after an examination of circumstances and facts demonstrate that any variation of the words would be an impermissible rewriting of the contract. See e. g. *United Refining Co. v. Jenkins, supra*; *Merriam v. Cedarbrook Realty, Inc., 266 Pa.Super. 252, 404 A.2d 398, 401-402 (1978)*; *Best v. Realty Management Corp., 174 Pa.Super. 326, 101 A.2d 438 (1953)*. Even given this approach, there will be cases where a claim of ambiguity is virtually impossible, and a failure to proffer an argument for ambiguity in the answer to pleadings or motions might be sufficient to allow a judge to declare terms unambiguous. There is no reason for a court to consider seriously a complaint or argument which seeks to mischaracterize an agreement. See e. g. *East Crossroads Center, Inc. v. Mellon-Stuart Company, 416 Pa. 229, 205 A.2d 865 (1965)*. However, the court must entertain the argument before it can be rejected. The judge should not abandon his legal expertise or knowledge of the English language. We only assert that the judge's own semantic expertise does not stand sacrosanct against a reasonable alternative semantic reference presented by the parties. If no "reasonable" alternative meanings are put forth, then the writing will be enforced as the judge reads it on its "face." See International Systems, Inc. v. Personnel Data Systems, slip. op. (Pa.Supreme Ct. Jan. 18, 1980).

An illuminating example of the approach of the Pennsylvania courts is the case of *United Refining Co. v. Jenkins, 410 Pa. 126, 189 A.2d 574 (1963)*. This case was divided into two parts, a suit on a note (United v. Jenkins) and a counterclaim on an oil sale contract (Jenkins v. United). The basis of the claim in United v. Jenkins was a note which provided:

December 31, 1957 after date I promise to pay the order of United Refining Company Ten Thousand Dollars . . . with interest at 5 per cent per annum.

The trial court had admitted extrinsic evidence on behalf of Jenkins to show that the sole source of payment of the note was to be proceeds from property involved in another agreement between United and Jenkins. Jenkins contended that the note was part and parcel of the oil sale agreement between United and Jenkins and that

therefore the proffered interpretation was a permissible interpretation of the note. The Pennsylvania Supreme Court ruled that this note was clear and unequivocal and could not be varied by parol evidence. "The contract is absolute and complete on its face and sufficiently comprehensive to embody the aim and object of the parties." *410 Pa. at 134, 189 A.2d at 578*, quoting *Speier v. Michelson, 303 Pa. 66, 70-71, 154 A. 127 (1931)*. Judgment was entered for United.

The basis of the counterclaim was the same oil purchase agreement which Jenkins had claimed was integrated with the note in United v. Jenkins, under this purchase agreement United agreed to purchase and Jenkins agreed to sell all the crude oil produced by Jenkins. The agreement provided that it was to continue in force "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United)." Jenkins argued that the clause meant what it said that as long as a debt was outstanding, the agreement was in force. United argued that it would be irrational to construe the words in such a way that the obligation remained in effect even if the debts Jenkins owed United were in default. The Pennsylvania Supreme Court agreed with United and the counterclaim was dismissed. This cause was held to be ambiguous and was interpreted rationally in accord with all the circumstances and negotiations of the parties.

It is beyond argument that the clause in issue in the counterclaim by Jenkins was not ambiguous on its face. The words "so long as" have a clear meaning. The words "there remains unpaid" have no facial ambiguity. The meaning of the words "any indebtedness and interest thereon" were not in dispute. They referred to the note Jenkins owed United. It was this very note which the court ruled in United v. Jenkins was not "part and parcel" of the oil purchase plan, but a separate integrated contract. There were no facially inconsistent words in the contract. Why then did the court allow United to add the condition that made the clause which was written "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United)" read "so long as there remains unpaid any indebtedness and interest thereon of (Jenkins) to (United) which is not in default "? The reasons are clear from an examination of external signs and objective indicia this was the only rational interpretation of the parties intent. The court had made detailed examination of the evidence offered on the claim and the counterclaim. The evidence on the counterclaim was so compelling that the inference was permissible. However, there was no similar evidence of a compelling nature presented by Jenkins in the action on the note. Interpretation of the note as written was not irrational.

[**24]

B.

But our approach does not authorize a trial judge to demote the written word to a reduced status in contract interpretation. Although extrinsic evidence may be considered under proper circumstances, the parties remain bound by the appropriate objective definition of the words they use to express their intent. Generally parties will be held to definitions given to words in specialized commercial and trade areas in which they deal. Similarly, certain words attain binding definition as legal terms of art. See e. g. Brockett v. Carnes, slip. op. (Pa.Super.Ct.Dec. 19, 1979). Dates, numbers and the like generally cannot be varied. See e. g. *O'Farrell v. Steel Piping Co., supra.* [14] For example, extrinsic evidence may be used to show that "Ten Dollars paid on January 5, 1980," meant ten Canadian dollars, but it would not be allowed to show the parties meant twenty dollars. Trade terms, legal terms of art, numbers, common words of accepted usage and terms of a similar nature should be interpreted in accord with their specialized or accepted usage unless such an interpretation would produce irrational results or the contract documents are internally inconsistent. [15]

14 But see the "two by four" example given at note 12, supra.

[**25]

15 There could still be proof of fraud, duress, mistake or subsequent oral modification to vary the term used. See F. D. I. C. v. Barness, No. 78-100, slip op. at 20-21 (Pa.Super.Ct.Jan. 31, 1980). See note 9, supra.

We have concluded that the district court here exceeded the permissible boundary of interpretation. We believe its interpretation of insolvency was improperly restrictive. Commercial parties entered a Buy-Sell Agreement using a well defined commercial term and legal term of art "insolvent." The court rejected the test which we believe an attorney or commercial creditor would use to determine if the borrowers were insolvent in any other context, and instead substituted a test for insolvency which excluded certain liabilities of the borrowers. This variation of the written words used in the contract was not justified by the evidence received. When the district judge received Mellon's evidence it should have rejected it as insufficient to vary the meaning of a commercial term as well established as "insolvent." In this case the district court added a term which

made the condition [**26] a nullity. It ruled that, although the solvency of the borrowers was a condition [*1014] in the written contract, the fact that the borrowers' solvency was not significantly considered by Aetna in evaluating the take-out loan minimized or nullified this clause of the contract.

The condition that the borrowers not be insolvent was added by Aetna and retained in the contract over Mellon's protests. The fact that the insolvency of the borrowers was not significantly considered by Aetna in evaluating the take-out loan is immaterial given the expression of that concern in the written words of the contract. The fact that Aetna thought it bore some risk of default if the occupancy rate of the project fell too low was not sufficient to vary the normal commercial meaning of the word "insolvent." Of course Aetna bore some risk of default Aetna's funding obligation extended over a ten year period. There was no substantial evidence for Mellon's interpretation of the contract other than evidence tending to show that Aetna was not significantly concerned with the borrowers' solvency until they desired an "out" to excuse their obligation to purchase a loan which had become unsound. Fortunately [**27] for Aetna it retained that "out" in the Buy-Sell Agreement despite specific objections from Mellon. See Testimony of DeLuca, Record at 515a-518a. At best, Mellon's officers admitted that they knew the insolvency clause was adverse to Mellon's interests, but they didn't "really" know what it meant. Testimony of DeLuca, Record at 518a. Mellon's evidence was simply insufficient to vary the clear meaning of the commercial term "insolvent."

C.

Our holding the parties to a generally accepted commercial interpretation of the word "insolvency" in no way produces an irrational result. Aetna was to undertake the risk of a decline in the real estate market for ten years after it purchased the construction loan. Mellon was at risk of construction not being completed on time and within cost. The issue is who bore the risk that the borrowers' financial reserves could not carry the project from the date of the Buy-Sell Agreement to the closing on the permanent financing i. e. who bore the risk of a decline in the Atlanta real estate market from July of 1974 to August of 1975. It is not irrational to place that risk on Mellon, nor is it irrational to place it on Aetna. [16] Aetna inserted the insolvency [**28] clause in the commitment. Mellon demanded that the clause be excluded from the Buy-Sell Agreement. Aetna refused. When Mellon signed the agreement notwithstanding the inclusion of the clause, it became bound by the usual meaning of insolvency. This result is not irrational and therefore does not compel the alternative meaning of insolvency suggested by Mellon. Mellon cannot now insert an exception to the solvency condition. "Where one of two innocent persons must sustain a loss, the law will place that burden on the party that has agreed to sustain it." *F. J. Busse, Inc. v. Department of General Services, 47 Pa.Cmwlth. 539, 408 A.2d 578, 580 (1979).* See International Systems, Inc. v. Personnel Data Systems, slip. op. (Pa. Superior Ct., Jan. 18, 1980).

16 Mellon cannot deny that such a decline in real estate value was a risk it at least partially bore Mellon took a mortgage on the Kensington property as security for its construction loan.

Accordingly, we conclude that in determining the insolvency of the [**29] borrowers the district court must include all the assets and liabilities of the borrowers in applying both generally accepted commercial tests for insolvency. The notion of insolvency is measured both by a balance sheet showing all assets and liabilities and the test of whether one can meet current debts as persons engaged in a trade normally do. [17]

17 The issue is if the borrowers were solvent on the day the duty to fund would otherwise arise August 1, 1975. A determination of solvency requires a factual review of the borrowers' financial condition and the application of complex and sometimes conflicting accounting practices and valuation theories. Although the definition of solvency on the surface appears simple, the factual finding of its existence may present difficulties which should be resolved by the trial court.

[*1015] IV. THE LETTER OF AUGUST 15, 1975

We find it necessary to respond to Mellon's alternative argument that notwithstanding the presence of the insolvency clause in the contract, [**30] Aetna waived any defense based on this clause by its letter of August 15, 1975. We believe that the letter of August 15, 1975, and the borrowers' affidavits of solvency submitted in response to that letter do not establish a separate contract obligating Aetna to purchase the construction loan nor do they constitute a waiver of the condition that the borrowers not be insolvent at the time Aetna would otherwise become obligated to purchase the loan. We are unable to perceive how this letter could be construed as an offer by Aetna to waive any of Aetna's contractual rights under the insolvency clause. This very letter reasserted Aetna's rights under that clause, reminded the borrowers that their solvency was a required condition precedent to funding the permanent loan, and asked for "sworn statements" to assure Aetna that the condition was fulfilled. The letter never unequivocally stated that Aetna would fund the loan upon submission of the statements, but only that Aetna would "be in a position" to fund the loan. In the context of complex commercial dealings courts must be careful not to take single acts or isolated corre-

spondence out of the context of the entire situation and construe [**31] them as separate contracts or waivers of important contract rights unless such an intent is explicitly and clearly expressed.

When Aetna requested affidavits they were asking for sworn truthful statements of the borrowers' solvency. [18] If the borrowers were insolvent when they signed affidavits swearing that they were solvent, then the return of those affidavits did not consummate a contract since the act of acceptance was not in conformity with the offer. If the affidavits were signed truthfully, then the letter and affidavits merely evidence that the condition of solvency was satisfied. [19] In reality, the letter of August 15 was an attempt by Aetna to determine if the insolvency condition was fulfilled.

18 As a matter of judicial integrity and public policy the court would not enforce a contract requiring submission of perjured affidavits. In any event, it could not be argued here that Aetna, when requesting "sworn" affidavits, wanted anything less than truthful statements.

19 We need not determine what the effect might be if the borrowers signed the affidavits truthfully but were unaware of their own insolvency. The cover letter returned with the letters makes clear that all parties were aware that the major borrower, Mr. Opp, could not meet his obligations in connection with the Kensington Square project.

[**32]

In addition, the cover letter which was returned with the affidavits and signed by the borrowers' attorney can be said to have derogated the contents of the affidavits. An acceptance must be unequivocal to be valid. In *Re ABC-Federal Oil and Burner Co., 182 F. Supp. 928 (E.D.Pa.1960)*, aff'd *290 F.2d 886 (3d Cir. 1961)*; *Hedden v. Lupinsky, 405 Pa. 609, 176 A.2d 406 (1962)*.

V. MATERIAL ADVERSE CHANGE

The district court determined that the material adverse change clause was not a condition precedent to Aetna's obligation to buy the construction loan. First, the district court noted that paragraph four of the Buy-Sell Agreement contained an extensive list of conditions precedent to Aetna's obligations. The material adverse change clause was not in that paragraph. Normally this might be probative evidence that the material adverse change clause was not a condition precedent. However, the material adverse change clause was in a totally different document, which preceded the Buy-Sell Agreement. The material adverse change clause was contained in the Loan Application, which in turn became part of the Permanent Commitment, which as previously noted, became part of the Buy-Sell Agreement [**33] by incorporation. Therefore, the fact that such a clause was not in paragraph four of the Buy-Sell Agreement does not by itself support the district court's conclusion that the material adverse change clause was not a condition precedent to Aetna's obligation. The insolvency [*1016] condition also was not in paragraph four, but in the Permanent Loan Commitment.

The district court also held that the insolvency clause was not a condition precedent to Aetna's obligation based on the language of the clause. The clause stated:

> If the application is approved, we (the borrowers) agree to the following: . . . we (the borrowers) will furnish evidence satisfactory to you (Aetna) at the date of funding that there has been no material adverse change in our financial or other condition. . . .

Record at 29a.

The rule in Pennsylvania is that a condition precedent to an obligation must be expressed by clear language or it will be construed as a promise or covenant. Language not clearly written as a condition precedent is presumed not to be, unless the contrary clearly appears to be the intention of the parties. *Britex Waste Co. v. Nathan Schwab and Sons, 139 Pa.Super. 474, 12 A.2d* [**34] *473 (1940)*; Potts Mfg. Co. v. Loffredo, 96 Dauph. 413 (Ct. of Common Pleas), aff'd, *235 Pa.Super. 294, 340 A.2d 468 (1974)*; Sharp v. McKelvey, 57 Lanc.Rev. 377, exceptions dismissed, 57 Lanc.Rev. 391, aff'd *196 Pa.Super. 138, 172 A.2d 580 (1961)*. We hold that it was not error for the district court to construe the material adverse change clause as a promise of the borrowers, and as consideration for Aetna's promise and not a condition precedent to Aetna's obligation. It was also not error for the district judge to hold that this clause was fulfilled. Aetna required no more information than they received, and expressed no dissatisfaction with this information. Aetna added the insolvency/bankruptcy condition in the acceptance of the application which already contained the material adverse change clause. It is a rational interpretation to view the insolvency clause as addressing Aetna's concerns about the borrowers' financial condition because it viewed the material adverse change clause as insufficient to cover the same potential problems. The material adverse change clause was the procedural way Aetna was to receive information about the financial status of the borrowers. Unless the [**35] borrowers and Mellon were in substantial noncompliance with their obligations under the Buy-Sell Agreement/Permanent Loan Commitment, Aetna was limited

to the insolvency condition as a ground for refusing to purchase the construction loan.

VI. CONCLUSION

On remand the district court should place the burden of proof on Mellon to establish the condition precedent that the borrowers were not insolvent as of August 1, 1975. The district court should include the liabilities of the Kensington Square project in deciding whether or not the borrowers were then insolvent. Aetna's letter of August 15, 1975, and the response thereto do not constitute a valid waiver of the condition precedent nor do they create a separate contract obliging Aetna to purchase the construction loan. [20]

20 We need not reach the issue of Mellon's entitlement to prejudgment interest.

The judgment of the district court will be vacated and the cause remanded for proceedings consistent with the foregoing.

LEXSEE 461 F.2D 1036

SUPERIOR BUSINESS ASSISTANCE CORPORATION, Defendant-Appellant, v. UNITED STATES of America, Defendant-Appellee

No. 71-1671

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

461 F.2d 1036; 1972 U.S. App. LEXIS 8922; 72-2 U.S. Tax Cas. (CCH) P9617; 29 A.F.T.R.2d (RIA) 1428

June 19, 1972

DISPOSITION: [**1] Reversed.

JUDGES: Lewis, Chief Judge, and Kilkenny * and Doyle, Circuit Judges.

* Senior Circuit Judge, United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION BY: KILKENNY

OPINION

[*1037] KILKENNY, Circuit Judge:

This is an appeal from a summary judgment granted in a suit to quiet title to certain real property and in an ancillary proceeding to determine whether the United States or appellant, Superior Business Assistance Corporation, has the first right to the sum of $3,000.13, now being held by the plaintiff [1] in the suit to quiet title. The proceeding originated [**2] in the Oklahoma state court and was removed to the district [*1038] court for the Western District of Oklahoma, pursuant to *28 U.S.C. § 1444*. The district court held that the United States was entitled to the fund. We reverse.

1 Central Management, Inc.

FACTS

Appellant obtained a judgment against Victor Wickersham in the district court of Oklahoma County, Oklahoma on July 26, 1967. The judgment was properly filed and docketed in the district court of Cleveland County, Oklahoma, on October 4, 1967. The United States filed its notice of tax lien with the County Clerk of Cleveland County on March 28, 1968.

Previously, on February 24, 1966, Wickersham and others entered into what was designated a "Joint Venture Agreement" with reference to the purchase and sale of a parcel of real property in Cleveland County. Under the terms of this agreement, Wickersham was to receive 10% of the profit upon the sale of the land. Plaintiff acquired title to the real property owned by the [**3] joint venture on February 2, 1970, and commenced this suit to resolve the dispute between appellant and appellee. The total net profit of the venture was $30,001.34. Consequently, Wickersham's share would be $3,000.13.

ISSUE

Although a place was provided on the last page of the Joint Venture Agreement for Wickersham's signature, the copy of the instrument before us was not signed by him. However, it is clear from the terms of the agreement and the parties agree, that he had some type of an interest, the issue being whether the interest was in the real property or a mere chose in action to collect his percentage of the fund. The appellant contends that the interest was in real property and subject to its judgment lien, while the United States argues that appellant's interest was nothing more than a chose in action.

CONCLUSIONS

While federal law determines the priority of competing liens on property to which a tax lien [2] has attached, state law determines the extent of the taxpayer's property rights to which the lien can attach. *Aquilino v. United*

States, 363 U.S. 509, 80 S. Ct. 1277, 4 L. Ed. 2d 1365 (1960). [**4]

2 *26 U.S.C. § 6321, 26 U.S.C. § 6323(a), (f)* 1.

Under Title *12, Oklahoma Statutes Annotated, § 706*, a judgment becomes a lien upon real property of the judgment debtor in the county where the judgment was rendered and in any other county where the judgment was filed and docketed of record. There is no judgment lien on personal property, such as a chose in action, until such time as the judgment creditor succeeds in levying execution upon specific property. See *Burchfield v. Bevans, 242 F.2d 239 (10th Cir. 1957).*

The Wickersham interest, here under scrutiny, is clearly outlined in Paragraph VII of the Joint Venture Agreement. [3]

3 * * *

"VII

It is further agreed by and between the joint venturers that for and in consideration of services previously rendered and other good and valuable consideration received, *Victor Wickersham shall be entitled to and receive a percentage of the net profits of this joint venture operation so that therefore the joint venturers shall share in the net profits of the joint venture in accordance with the following 'percentage of net profits participation schedule'*:

Victor Wickersham	10%
W. F. Parrish, Jr.	15%
James F. Freeman	22 1/2%
Floyd J. Freeman	30%
Freeman Enterprises, Inc.	22 1/2%"

* * *

"That all gains, profits and increases from or by reason of the said joint venture shall be divided in accordance with the 'percentage of net profits participation schedule' set forth hereinabove. . . ."

* * *

"This agreement shall be construed with the laws of the State of Oklahoma and Uniform Partnership Act contained in the laws of the State of Oklahoma." (Emphasis supplied.)

* * *

[**5] [*1039] That the parties intended to give Wickersham an equitable interest in the real property is demonstrated beyond question by Paragraph II of the agreement. [4]

4 * * *

"II

That for the convenience and expendiency of the business of this joint venture, Floyd J. Freeman holds title to the property owned by this joint venture in his name solely, but that *each joint venturer hereto does have an equitable interest in said property in accordance with the 'percentage of net profits participation schedule' hereinafter set forth*, and that Floyd J. Freeman holds title to the subject property as trustee and for the benefit of the joint venturers hereto in accordance with said 'percentage of net profits participation schedule' . . .." (Emphasis supplied.)

* * *

Of particular significance is the fact that the agreement in defining Wickersham's interest used the technical words "equitable interest". In the [**6] absence of explicit language showing a contrary intent, technical words must be given their usual technical meaning. *Barber v. Gonzales, 347 U.S. 637, 74 S. Ct. 822, 98 L. Ed. 1009 (1954).* The laws of Oklahoma subsisting at the time and place of making of the agreement, entered into and formed a part of it as if they were expressly referred to or incorporated in its terms. *Wood v. Lovett, 313 U.S. 362, 61 S. Ct. 983, 85 L. Ed. 1404 (1941); Meyer v. City of Eufaula, 154 F.2d 943 (10th Cir. 1946).* Words used in a writing, which had at the time a well known meaning in the law, are to be employed in that sense unless the context clearly requires a contrary result. *Keck v. United States, 172 U.S. 434, 19 S. Ct. 254, 43 L. Ed. 505 (1899).* In other words, it is our duty to construe the contract so as to effectuate the manifest intention of the parties and to give life and vitality to the language the parties have

used to express their agreement. [**7] *Tenneco Oil Co. v. Gaffney, 369 F.2d 306 (10th Cir. 1966)*; *United States v. Continental Oil Co., 237 F. Supp. 294 (W.D.Okla.1964)*, aff'd. *364 F.2d 516 (10th Cir. 1966)*.

An equitable interest in real property has long been recognized by the Oklahoma courts. *Guaranty State Bank v. Pratt, 72 Okl. 244, 180 P. 376 (1919)*; *Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947)*, and *Youngs v. Case, 341 P.2d 572 (Okl.1959)*.

Youngs v. Case, supra, is of particular significance. The case was decided many years prior to the execution of the joint venture contract now before us. There, an attorney rendered legal services to another in connection with the purchase of eighty acres of land located in the state of Oklahoma. The attorney agreed to render his client additional legal services as might be required until the land was disposed of by the seller and, as compensation for his services rendered and to be rendered, the parties agreed that the attorney should receive one-half of the net income from the [**8] land until disposed of and one-half of the profit made thereon when sold. The court held that this transaction constituted a joint venture and that an equitable interest was created in the attorney, permitting him to prosecute an action to quiet title under Title *12, Oklahoma Statutes Annotated, § 131*. Additionally, the court there held that an agreement, express or implied, to share losses is not essential to the validity of a joint venture in cases where one party furnishes the money and the other party service. *341 P.2d at 576*.

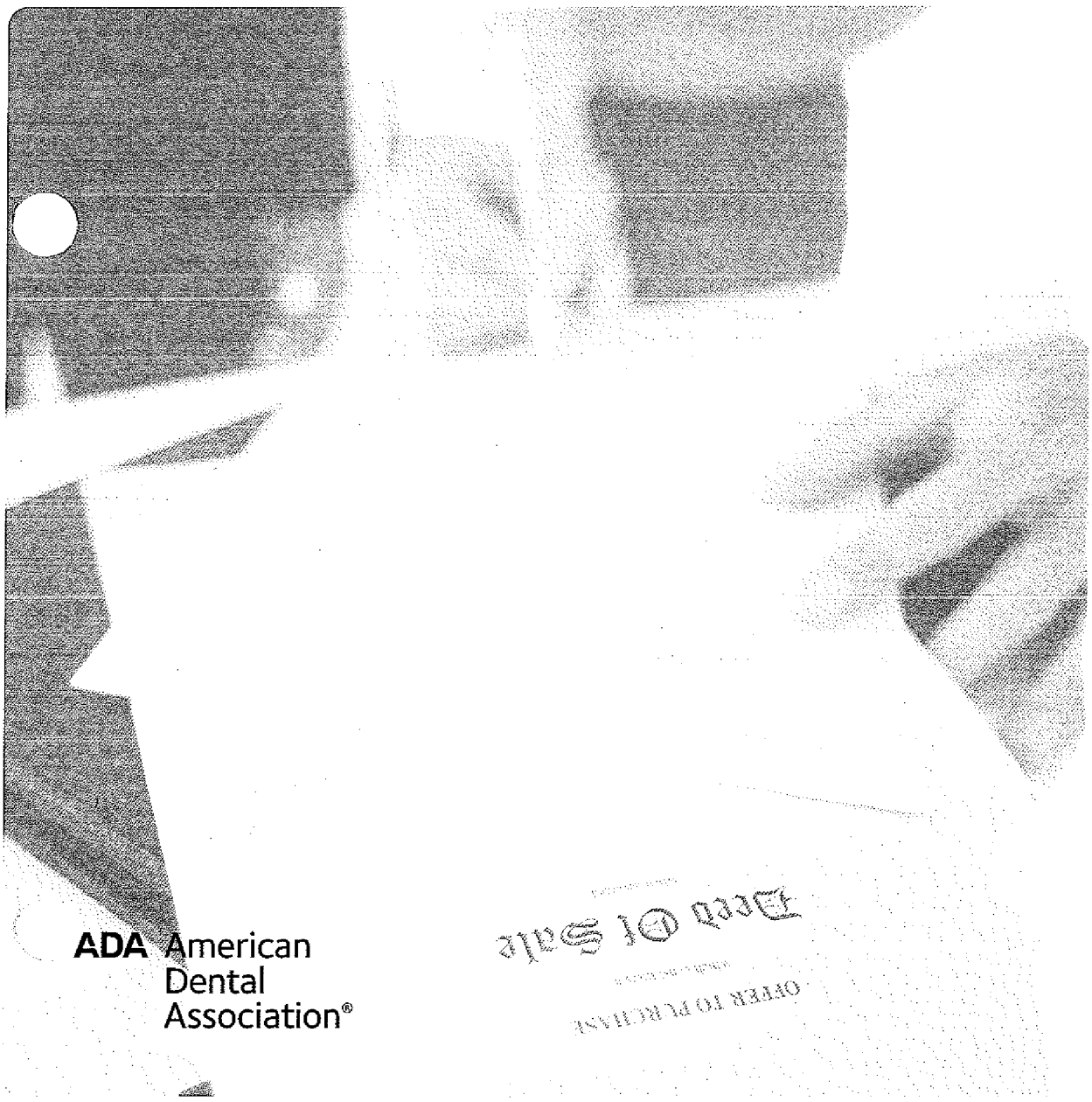
In the light of the language of the agreement and of the law of the state of Oklahoma as expressed in the foregoing cases, we have no alternative but to hold that Wickersham had an equitable interest in the real property of the joint venture at the time of the filing and docketing of the judgment in Cleveland County and that appellant had [*1040] a valid judgment lien against such interest long prior to the filing of the appellee's tax lien on March 28, 1968. Accordingly, we reverse the judgment of the lower court and direct that the fund [**9] here in dispute be paid to the appellant, rather than to the appellee.

Reversed.

EXHIBIT 3

VALUING A PRACTICE:

A GUIDE FOR DENTISTS



- Critical Valuation Issues
- Buying a Practice vs. Starting a Practice
- Legal and Tax Issues

ADA American Dental Association®

Be sure the valuator can differentiate between practice or personal-related items. For example, insurance expense may have included premiums for health insurance covering the dentist and his or her family as well as premiums that cover the staff

11 If the valuation relates to only a portion of a practice and the buyer is to enter a partnership or expense-sharing arrangement with the seller, a copy of this arrangement or a description of the specific details of this arrangement should be provided. It is extremely difficult, if not impossible, to determine the fair market value for a portion of a practice unless the post buy-in structure and financial arrangements are known

PATIENT AND SERVICE INFORMATION

1. Total number of active patients and a breakdown as to whether these patients are assigned to specific dentists who will remain after the sale As defined by the 1991 House of Delegates in Resolution 30H (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II - patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty-four (24) months It should be noted, however, that many dental practice appraisers consider an active patient as someone who has been seen in the past 12-18 months and, to the dentist's knowledge, is still living in the area. They do not consider individuals who were seen for one-time emergency treatment as active patients. Typically, practice appraisers concentrate on this definition of an active patient in their valuation.

2. Number of new patients per month in each of the past three years and year-to-date for present year A new patient is one who has become a patient of record. A patient of record is someone who has been examined by a dentist, has had a medical and dental history completed and evaluated by a dentist and has had his or her oral condition diagnosed and a treatment plan developed by a dentist.

3. Number of monthly patient visits for the practice and for each dentist and hygienist for the past three years and year-to-date for the present year.

4. A demographic profile of active patients (i.e., age, percentage with dental insurance)

5. A description of any special contractual relationships with patient groups, employers or insurance companies, including PPOs, IPAs or capitation programs and dates when these contracts expire.

6. Percentage distribution of the types of services or procedures that have been provided in the practice for the past three years.

EXHIBIT 4

Dental Records

American Dental Association
www.ada.org

Council on Dental Practice
Division of Legal Affairs

Seven out of ten dentists are members of the ADA.

2007

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Color Coding
Many dental offices use a color-coded filing system for patient record files. Color-coded labels—usually the first two letters of the patient's last name and active date of treatment—are placed on the patient's file. This can help make record retrieval fast and easy.

Active and Inactive
Most offices have two categories of patient records files: 1) Active and 2) Inactive.

Active files hold the records of patients currently having their dental care provided by the practice. Inactive patients are considered to be those who have not returned for 24 months. Keep files of active patients on-site. These records should be conveniently located in the office.

Inactive files hold the records of patients who have been treated in the office in the past but are not currently under care in the office. These files are generally located in the office, but in a remote area.

As defined by policy of the American Dental Association, (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months.

The above definition is typically used in practice appraisals and may not be the same definition of an active patient used in a dental office in records maintenance.

A system should be established in your office to identify a change from active to inactive status on a timely basis. All records, active and inactive, should be maintained carefully to be certain that they are not destroyed or lost.

Content of the Dental Record

The information in the dental record should primarily be clinical in nature. The record includes a patient's registration form with all the basic personal information.

The dental team should be very meticulous and thorough in the dental office recordkeeping tasks. All information in the dental record should be clearly written, and the person responsible for entering new information should sign and date the entry. The information should not be ambiguous or contain many abbreviations. In practices with more than one dental practitioner, the identity of the practitioner rendering the treatment should be clearly noted in the record.

All entries in the patient record should be dated, initialed and handwritten in ink and/or computer printed. While no specific color of ink is required, any copy of the record should be easy to read. Handwritten entries should be legible. If a mistake is made, do not correct it with "white-out." A single line should be drawn through the incorrect info, the new corrected info added, and again, the entry should be signed and dated.

The following are examples of what is typically included in the dental record:

- database information, such as name, birth date, address, and contact information
- place of employment and telephone numbers (home, work, mobile)
- medical and dental histories, notes and updates
- progress and treatment notes
- conversations about the nature of any proposed treatment, the potential benefits and risks associated with that treatment, any alternatives to the treatment proposed, and the potential risks and benefits of alternative treatment, including no treatment,
- diagnostic records, including charts and study models
- medication prescriptions, including types, dose, amount, directions for use and number of refills
- radiographs
- treatment plan notes
- patient complaints and resolutions

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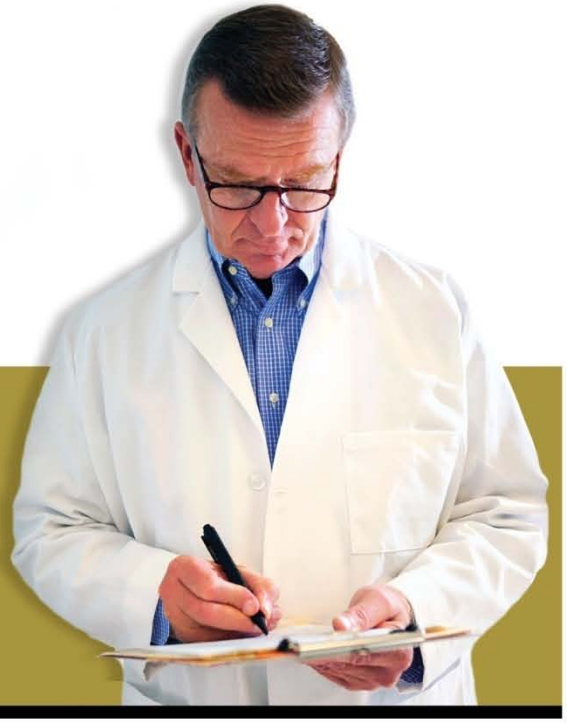
EXHIBIT 5

Guide to Closing a Dental Practice



Contains sample letters and tips to close a dental practice at retirement or in the event of a dentist's long-term illness or death

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Endnotes

[i] Publication 538 "Starting a business and keeping records," Internal Revenue Service, Jan 2007.
[ii] McGill, John, MBA, JD, CPA, How long should you keep your business records, Journal of Clinical Orthodontics, May 2003.
[iii] Paoloski, Susana, DDS, "When is it safe to pitch office papers," Journal of the Greater Houston Dental Society, Sept 2002.
[iv] Presavento & Pesavento, LTD, CPAs, "Records retention schedule," Collier, Sarner and Assoc Newsletter, Berwyn, IL, May 15, 2005.
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[viii] Practitioner's Manual, An Informational Outline of the Controlled Substance Act, United States Department of Justice, Drug Enforcement Administration, Office of Diversion Control, 2006 Edition.
[ix] Wikipedia, http://en.wikipedia.org/wiki/Hospice#Concept, accessed August 26, 2008.
[x] Wikipedia, http://en.wikipedia.org/wiki/Durable_power_of_attorney, accessed August 26, 2008.
[xi] ADA Policy, (Trans. 1991:621),; As defined by policy of the American Dental Association, (Trans. 1991:621), an active dental patient of record is any individual in either of the following two categories: Category I - patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty four (24) months, but not within the past twelve (12) months. An inactive patient is any individual who has become a patient of record and has not received any dental services(s) by the dentists in the past twenty four (24) months.

The above definition is typically used in practice appraisals and may not be the same definition of an active patient used in a dental office in records maintenance.

[xii] American Dental Association, "Tips For Evaluating Information On The Internet," http://www.ada.org/sections/newsAndEvents/pdfs/tips.pdf, accessed August 29, 2008.

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EXHIBIT 6

ADA American Dental Association®

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Current Policies

Adopted
1954-2009

side, and following that arch to the terminus of the lower jaw, the lower right third molar (32).

Supernumerary teeth are identified by the numbers 51 through 82, beginning with the area of the upper right third molar, following around the upper arch and continuing on the lower arch to the area of the lower right third molar (e.g., supernumerary #51 is adjacent to the upper right molar #1; supernumerary #82 is adjacent to the lower right third molar #32).

Primary Dentition

Consecutive upper case letters (A-T), in the same order as described for permanent dentition should be used to identify the primary dentition.

Supernumerary teeth are identified by the placement of the letter “S” following the letter identifying the adjacent primary tooth (e.g., supernumerary “AS” is adjacent to “A”; supernumerary “TS” is adjacent to “T”).

International Standards Organization (ISO) TC 106 Designation System for Teeth and Areas of the Oral Cavity

Designation of Areas of the Oral Cavity

The oral cavity is designated by a two-digit number where at least one of the two digits is zero, as follows:

00 designates the whole of the oral cavity
01 designates the maxillary area
02 designates the mandibular area
10 designates the upper right quadrant
20 designates the upper left quadrant
30 designates the lower left quadrant
40 designates the lower right quadrant
03 designates the upper right sextant
04 designates the upper anterior sextant
05 designates the upper left sextant
06 designates the lower left sextant
07 designates the lower anterior sextant
08 designates the lower right sextant

Designation of Teeth

Teeth are designated by using a two-digit code. The first digit of the code indicates the quadrant and the second indicates the tooth in this quadrant:

a. First digit (quadrant)

Digits 1-4 are used for quadrants in the permanent dentition and digits 5-8 for those in the deciduous dentition, clockwise from the upper right quadrant.

b. Second digit (tooth)

Teeth in the same quadrant are designated by the second digit 1-8 (1-5 in the deciduous dentition); this designation is from the median line in a distal direction.

Active and Inactive Dental Patients of Record (1991:621)

Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms “active” and “inactive” dental patients of record apply:

Active Dental Patient of Record: An active dental patient of record is any individual in either of the following two categories: Category I—patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II—patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.

Inactive Dental Patient of Record: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

Individual Practice Association (1990:540)

Resolved, that the following definition of Individual Practice Association be adopted:

A legal entity organized and governed by individual participating dentists for the primary purpose of collectively entering into contracts to provide dental services to enrolled populations.

Medically Necessary Care (1990:537)

Resolved, that the following definition of “medically necessary care” be adopted:

Medically necessary care means the reasonable and appropriate diagnosis, treatment, and follow-up care (including supplies, appliances and devices) as determined and prescribed by qualified, appropriate health care providers in treating any condition, illness, disease, injury or birth developmental malformations. Care is medically necessary for the purpose of: controlling or eliminating infection, pain and disease;

EXHIBIT 7

ADA American Dental Association®

2008 Survey of Dental Practice

Characteristics of Dentists in Private Practice and Their Patients

Dental Practice

Personal and professional characteristics of dentists in private practice, including employment status, practice hours and size, and number of operatories, along with patient characteristics such as visits per hour, per week, and per year, plus length of appointments and scheduling.

September 2009

ADA Survey Center

Dentists were asked for the number of active patients currently on record in their primary practice. (Most independent dentists, 96.3%, defined active patients as those treated within the last 12 to 24 months.) General practitioners' practices had an average of 2,354.5 patients while specialists' practices had an average of 2,090.5. (See Table 56 and Figure 35.)

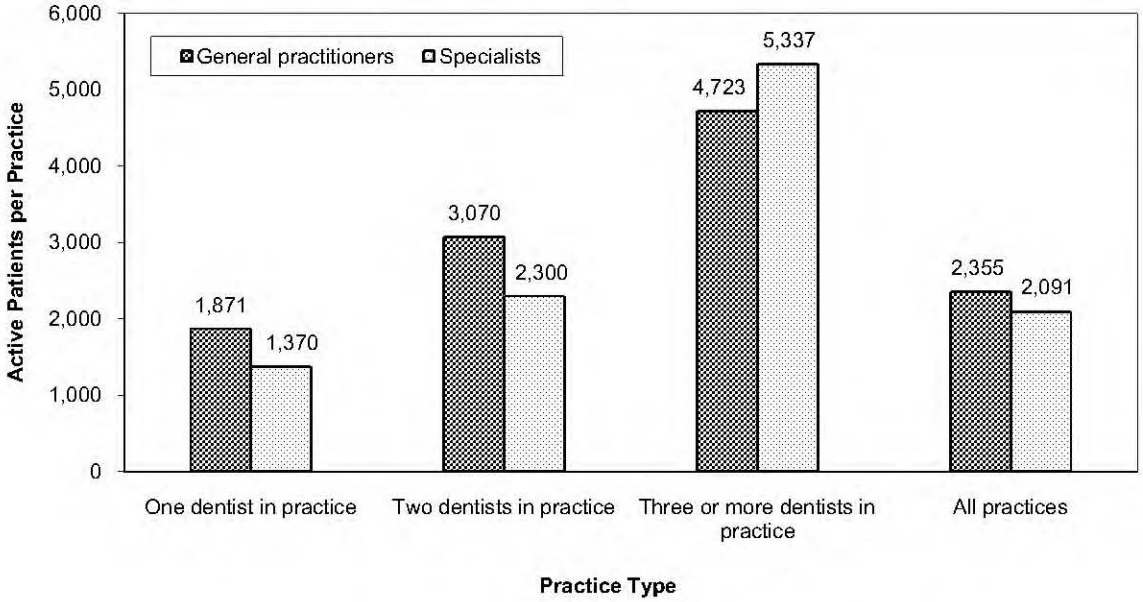
Among all independent dentists' primary practices, the average number of patients varied with the number of dentists in the practice. Practices with one dentist averaged 1,798.3 active patients on record, practices with two dentists averaged 2,951.6 patients, and practices with three or more dentists averaged 4,861.9 patients.

Table 56: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners						
One dentist in practice	1,871	1,100	1,700	2,500	1,030	587
Two dentists in practice	3,070	1,800	2,500	4,000	2,028	168
Three or more dentists in practice	4,723	2,550	4,000	5,300	3,686	69
All Independent	2,355	1,200	2,000	3,000	1,858	824
Specialists						
One dentist in practice	1,370	400	900	2,000	1,338	262
Two dentists in practice	2,300	748	1,500	3,226	1,958	80
Three or more dentists in practice	5,337	2,000	4,500	7,000	4,909	53
All Independent	2,091	500	1,200	2,900	2,628	395
All Independent (Weighted)						
One dentist in practice	1,798	1,000	1,500	2,400	1,123	849
Two dentists in practice	2,952	1,500	2,500	4,000	2,077	248
Three or more dentists in practice	4,862	2,460	4,000	5,637	3,893	122
All Independent	2,314	1,140	2,000	3,000	2,039	1,219

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

Figure 35: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Dentists, 2007



Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

Dentists were asked for the number of active patients currently on record in their primary practice. (Most solo dentists, 95.9%, defined active patients as those treated within the last 12 to 24 months.) Solo general practitioners' practices had an average of 1,871.4 patients while solo specialists' practices had an average of 1,369.8. (See Table 65.)

Table 65: Number of Active Patients per Practice, Solo Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners	1,871	1,100	1,700	2,500	1,030	587
Specialists	1,370	400	900	2,000	1,338	262
All Solo (Weighted)	1,798	1,000	1,500	2,400	1,123	849

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

In 2007, the average length of a patient's appointment with a solo dentist was 49.0 minutes. The average length of an appointment was longer among solo general practitioners than solo specialists, 50.6 minutes compared to 41.8 minutes. A typical patient visited a solo dentist, on average, 3.7 times per year. Patients of solo specialists averaged 5.4 visits annually, while solo general practitioners' patients averaged 3.3 visits per year. (See Table 66.)

Table 66: Appointment Length and Annual Number of Visits among Solo Dentists, 2007

	General Practitioners			*Specialists*			*All Solo (Weighted)*		
	Mean	*S.D.*	*N*	*Mean*	*S.D.*	*N*	*Mean*	*S.D.*	*N*
Appointment length in minutes	50.6	14.8	719	41.8	22.6	418	49.0	16.8	1,137
Annual number of visits	3.3	1.2	689	5.4	4.0	403	3.7	2.2	1,092

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

Dentists were asked for the number of active patients currently on record in their primary practice. (Most independent nonsolo dentists, 97.2%, defined active patients as those treated within the last 12 to 24 months.) General practitioners' practices had an average of 3,551.1 patients while specialists' practices had an average of 3,510.2. (See Table 74 and Figure 48.)

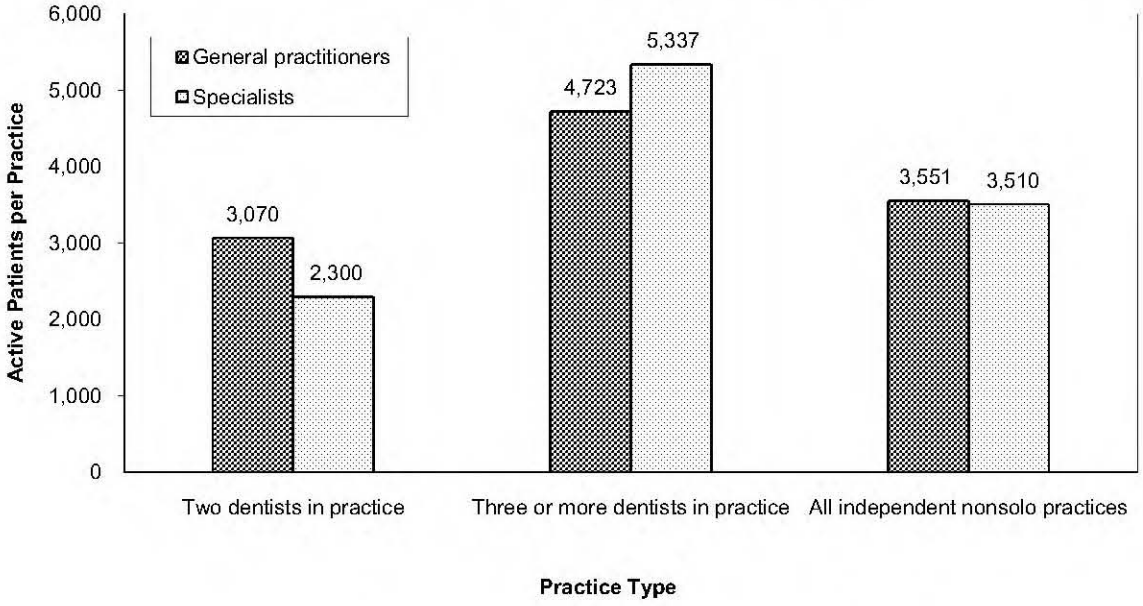
Among all independent nonsolo dentists' primary practices, the average number of patients varied with the number of dentists in the practice. Practices with two dentists averaged 2,951.6 patients, and practices with three or more dentists averaged 4,861.9 patients.

Table 74: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Nonsolo Dentists, 2007

Type of Practice	*Mean*	*1st Q*	*Median*	*3rd Q*	*S.D.*	*N*
General Practitioners						
Two dentists in practice	3,070	1,800	2,500	4,000	2,028	168
Three or more dentists in practice	4,723	2,550	4,000	5,300	3,686	69
All independent nonsolo	3,551	2,000	3,000	4,500	2,719	237
Specialists						
Two dentists in practice	2,300	748	1,500	3,226	1,958	80
Three or more dentists in practice	5,337	2,000	4,500	7,000	4,909	53
All independent nonsolo	3,510	1,000	2,800	4,600	3,744	133
All Independent Nonsolo (Weighted)						
Two dentists in practice	2,952	1,500	2,500	4,000	2,077	248
Three or more dentists in practice	4,862	2,460	4,000	5,637	3,893	122
All independent nonsolo	3,544	1,800	2,900	4,500	2,941	370

Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

Figure 48: Number of Active Patients per Practice Grouped by Number of Dentists per Primary Practice, Independent Nonsolo Dentists, 2007



Source: American Dental Association, Survey Center, 2008 *Survey of Dental Practice*.

EXHIBIT 8

Cited
As of: Feb 01, 2011

DOMINIC WENZELL, D.M.D. P.C., Appellant, v. GUY INGRIM, D.M.D., Appellee.

Supreme Court No. S-13347, No. 6469

SUPREME COURT OF ALASKA

228 P.3d 103; *2010 Alas. LEXIS 39*

April 9, 2010, Decided

PRIOR HISTORY: [**1]
Appeal from the Superior Court of the State of Alaska, Third Judicial District, Anchorage, Sharon Gleason, Judge. Superior Court No. 3AN-07-9282 CI.

LexisNexis(R) Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review
Civil Procedure > Summary Judgment > Standards > Genuine Disputes
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A grant of summary judgment based upon contract interpretation is subject to de novo review. Drawing all reasonable inferences in favor of the nonmoving party, the Alaska Supreme Court will uphold summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Summary judgment is improper when the evidence before the superior court establishes a factual dispute as to the intent of the contracting parties.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN2] Covenants are construed to effectuate the parties' intent. Clear and unambiguous language should be accorded its plain meaning. Where language is ambiguous, extrinsic evidence of surrounding circumstances and usage may be admitted to aid in determining the intent of the parties and resolve the ambiguity. A restrictive covenant ancillary to the sale of a business is construed liberally not to favor either party.

Contracts Law > Contract Interpretation > General Overview
Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN3] The general rule of law is that a contract may be interpreted by the general and accepted usage of the trade or business involved. Thus, the term "practice of dentistry" should be given its common industry definition. The American Dental Association defines "dentistry" as the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and their impact on the human body.

Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN4] Alaska law provides that one engages in the "practice of dentistry" who evaluates, diagnoses, treats,

or performs preventative procedures related to diseases, disorders, or conditions of the oral cavity, maxillofacial area, or adjacent and associated structures, *Alaska Stat. § 08.36.360.*

Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN5] *Alaska Stat. § 08.36.350(a)* provides that the statutory chapter on dentistry applies to a person who practices dentistry in the state except a dentist in the employ of the Alaska Native Service.

Healthcare Law > Business Administration & Organization > Licenses > General Overview
[HN6] The statutory provision of *Alaska Stat. § 08.36.350(a)* does not suggest that a dentist at the Alaska Native Medical Center is not engaging in the "practice of dentistry"; instead, it exempts an Alaska Native Service dentist from all provisions of the chapter on dentistry, including licensing requirements, disciplinary actions, and statutory definitions. It is precisely because a dentist in the employ of the Alaska Native Service is practicing dentistry that it is necessary to exempt him or her from the otherwise applicable statutory provisions.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN7] In the typical case, where a party seeks to enforce a covenant not to compete against a person who opens a for-profit practice or accepts private employment, a court need not inquire into the presence of competition; it can be presumed. A plaintiff can prove a breach of the covenant by showing that the challenged conduct falls within the category of prohibited activity and occurred within the geographic scope and duration of the covenant. In the rare instance where a party is attempting to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization that provides free or low-cost health care services, competition will not be presumed and must be proven.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN8] The enforceability of a covenant not to compete is a question of law to be decided by the court after a factual inquiry into the relevant factors.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN9] Non-competition agreements are disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood. Such agreements may be ancillary to an employer-employee agreement or, as in this case, to the sale of a business. The enforceability of a non-competition agreement ancillary to the sale of a business is an issue of first impression in Alaska. Unlike covenants not to compete ancillary to employment contracts, which are scrutinized with particular care because they are often the product of unequal bargaining power, this level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN10] According to the *Restatement (Second) of Contracts §§ 186, 188*, a covenant not to compete is unenforceable on grounds of public policy if it unreasonably restrains trade, either because: (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. In the context of covenants not to compete ancillary to the sale of a business, the Restatement describes the "promisee's legitimate interest" as the "value of the good will that he has acquired" in the purchase of the business. When determining the enforceability of a covenant not to compete ancillary to the sale of a business, a court must therefore consider whether the restriction bargained for is no greater than is needed to protect the goodwill the purchaser has acquired in the business and, if so, whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely injury to the public. A similar test has been adopted in numerous jurisdictions, and the Alaska Supreme Court adopts it in Alaska.

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements
[HN11] Although a court should generally examine whether a covenant not to compete is enforceable only after determining that it was breached, it is within the

superior court's discretion on remand to assume a breach and address the enforceability of the covenant first.

Contracts Law > Remedies > Liquidated Damages
[HN12] The validity of a liquidated damages clause is to be decided by the court, which will consider whether the facts of the case satisfy the liquidated damages test.

COUNSEL: David A. Devine and Sarah A. Badten, Groh Eggers, LLC, Anchorage, for Appellant.

Susan D. Mack and Blake H. Call, Call, Hanson & Kell, P.C., Anchorage, for Appellee.

JUDGES: Before: Carpeneti, Chief Justice, Fabe, Winfree, and Christen, Justices. [Eastaugh, Justice, not participating.].

OPINION BY: FABE

OPINION

[*104] FABE, Justice.

I. INTRODUCTION

Dominic Wenzell purchased a private dental clinic in Anchorage from Guy Ingrim. [*105] The purchase agreement included a "Covenant Not to Compete" prohibiting Ingrim from the "practice of dentistry" within fifteen miles of his old clinic for two years and within ten miles for an additional three years. One year after the sale, Ingrim began employment as a dentist at the Alaska Native Medical Center (ANMC), two miles away from the clinic. Wenzell sued in superior court for breach of the covenant not to compete. The superior court found as a matter of law that Ingrim's employment at ANMC did not constitute the "practice of dentistry" and granted summary judgment in Ingrim's favor, dismissing the lawsuit. Although we conclude that Ingrim's employment [**2] at ANMC does constitute the "practice of dentistry" and vacate the superior court's grant of summary judgment, we remand the case to the superior court to determine whether Ingrim's employment at ANMC violates the covenant not to compete.

II. FACTS AND PROCEEDINGS

A. Facts

Wenzell and Ingrim are both professional dentists licensed to practice dentistry in Alaska. In 2005 Ingrim retained a broker to assist him in the sale of his Anchorage dental practice, Turnagain Dental Clinic. He began negotiations with Wenzell, who signed a Letter of Intent/Pre-Agreement in February 2006 to purchase Ingrim's practice. Wenzell offered $ 500,000 and proposed a "Restrictive Covenant" that would "restrict Dr. Guy Ingrim from practicing dentistry within a 30 mile radius [from Turnagain Dental Clinic] for a period of five years." After further negotiations, this restriction was reduced to fifteen miles for the first two years and ten miles for the next three years. The sale was consummated in May 2006. The $ 500,000 purchase price was broken down as follows: $ 400,000 for "Patient Charts & Goodwill," $ 10,000 for the "Restrictive Covenant Not to Compete," and the remaining $ 90,000 for dental equipment and [**3] supplies.

Section 13(a) of the Purchase and Sale Agreement, entitled "Seller's Covenant Not to Compete and/or Solicit," provides:

> In connection with the sale to Buyer of the goodwill of the practice . . . , Seller[] shall not carry on or engage in the practice of dentistry, either directly or indirectly, as an owner, operator, or employee, within a fifteen (15) air mile radius of the Buyer's practice . . . for a period of two (2) years from the closing date and then for the ensuing three (3) years for a radius of ten (10) air miles, without the prior written permission of the Buyer.

Section 13 also includes the following liquidated damages provision:

> The covenant not to compete and/or solicit is of material significance to Buyer. Because the damage Buyer will sustain will be difficult if not impossible to ascertain, if the covenant not to compete and/or solicit is breached for whatever reason, Seller shall pay Buyer Two Hundred Fifty Thousand Dollars ($ 250,000) as liquidated damages. Furthermore, Seller agrees that should he choose to treat any former patients of the practice other than his family members and first tier relations, that in addition to the liquidated damages set forth herein, [**4] he will pay the Buyer the sum of Three Hundred Dollars ($ 300) per patient.

According to Wenzell, this provision was of critical importance to him and he would not have purchased Ingrim's dental practice without it. Wenzell claims that prior to the signing of the agreement, he reminded Ingrim of his obligations under Section 13.

Following the sale, Ingrim moved with his family to Mexico, where he intended to stay for the duration of the restrictive covenant. Due to marital difficulties, however, he returned to Anchorage roughly a year later.

Upon his return, Ingrim began employment at the Alaska Native Medical Center (ANMC), in his own words "practicing dentistry." ANMC is located within fifteen miles of Turnagain Dental Clinic and provides free dental services to Alaska Natives, other Native Americans, and their children. At ANMC, Ingrim performs dental examinations, reviews x-rays, drills and fills cavities, and occasionally pulls teeth.

Upon learning that Ingrim was working at ANMC, Wenzell, through his attorney, sent a letter demanding that Ingrim cease practicing [*106] dentistry within fifteen miles of Turnagain Dental Clinic and pay Wenzell $ 250,000 within nine days or face litigation. [**5] Ingrim came to Wenzell's office the next day, requesting that Wenzell not bring a lawsuit. According to Ingrim, his employment at ANMC does not violate Section 13(a) because he does not compete with Turnagain Dental Clinic. Wenzell suggested that Ingrim take a position outside of the geographic scope of Section 13(a), but Ingrim refused. Wenzell filed suit on August 16, 2007.

The parties dispute whether Ingrim's employment at ANMC competes with Wenzell's business. Wenzell testified that his current and potential Alaska Native patients might instead seek treatment with Ingrim at ANMC, and then would not refer additional patients to his practice. Ingrim presented expert testimony that his employment at ANMC "is in no way unfair or actually competitive [with Turnagain Dental Clinic]. He's not in private practice, he doesn't have an office, he doesn't see private patients. He doesn't market his practice. He doesn't have a private phone number. There's no way that he's in competition with any dentist in the community." Ingrim's broker also suggested that employment at ANMC does not pose a competitive threat to Turnagain Dental Clinic and that the impact on the business is likely to be minimal. [**6] Ingrim testified that he has not solicited any former patients and in fact would be unable to solicit patients because ANMC patients do not select their dentist.

B. Proceedings

The parties filed cross-motions for summary judgment: Ingrim sought a judgment that there was no breach of Section 13(a), while Wenzell sought $ 250,000 in damages for the breach of Section 13(a). After oral argument on February 26, 2008, the superior court ruled on the record that Ingrim had breached Section 13(a) as a matter of law and directed the parties to file supplemental briefing related to the validity of the liquidated damages provision and alternative remedies.

After reviewing the supplemental briefing, the superior court vacated its prior judgment on April 21, 2008, and instead determined that a jury should decide whether Ingrim breached Section 13(a). Relying on *Aviation Associates v. Temsco Helicopters, Inc.* ("*Temsco*"), [1] the superior court concluded that there should be an evidentiary hearing to determine the proper interpretation of Section 13(a) and to formulate an appropriate jury instruction concerning the covenant.

1 *881 P.2d 1127 (Alaska 1994).*

The superior court held an evidentiary hearing on [**7] August 15 and August 25, 2008 in an attempt to frame an appropriate jury instruction. The court heard testimony by Wenzell; Ingrim; Joseph Consani, Ingrim's broker for the sale of his dental practice and now Wenzell's witness; and Stanley Pollock, Ingrim's expert witness on the sale of dental practices and what constitutes the practice of dentistry. At the end of the hearing, the court held as a matter of law that the "practice of dentistry" as used in Section 13(a) does not include employment at ANMC, and therefore granted Ingrim's motion for summary judgment that he did not breach Section 13(a). The court then held that there was a question of fact as to whether Ingrim solicited dental patients of Turnagain Dental Clinic. Wenzell informed the court that he was not pursuing a claim that Ingrim solicited patients and requested that it enter final judgment so that he could appeal the ruling. The court entered final judgment in favor of Ingrim on October 24, 2008, and Wenzell now appeals.

III. STANDARD OF REVIEW

[HN1] A grant of summary judgment based upon contract interpretation is subject to de novo review. [2] "Drawing all reasonable inferences in favor of the nonmoving party, we will uphold [**8] summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a [*107] matter of law." [3] "[S]ummary judgment is improper when the evidence before the superior court establishes a factual dispute as to the intent of the contracting parties." [4]

2 *K & K Recycling, Inc. v. Alaska Gold Co., 80 P.3d 702, 711-12 (Alaska 2003)* (citing *Am. Computer Inst. v. State, 995 P.2d 647, 651 (Alaska 2000)).*

3 *Nichols v. State Farm Fire & Cas. Co., 6 P.3d 300, 303 (Alaska 2000).*

4 *K & K Recycling, Inc., 80 P.3d at 712* (citing *Sykes v. Melba Creek Mining, Inc., 952 P.2d 1164, 1167 (Alaska 1998)).*

IV. DISCUSSION

A. The Proper Interpretation of Section 13(a)

1. Section 13(a) prohibits the practice of dentistry in competition with Turnagain Dental Clinic.

We must first interpret Section 13(a) before examining whether it was breached by Ingrim's employment at ANMC. As we have previously held, [HN2] "[c]ovenants are construed to effectuate the parties' intent. Clear and unambiguous language should be accorded its plain meaning." [5] Where language is ambiguous, "extrinsic evidence of surrounding circumstances and usage may be admitted to aid in determining the intent of the parties and [**9] resolve the ambiguity." [6] A restrictive covenant ancillary to the sale of a business, like the one in this case, is construed liberally not to favor either party. [7]

5 *Gordon v. Brown, 836 P.2d 354, 357 (Alaska 1992)* (quoting *Lamoreux v. Langlotz, 757 P.2d 584, 587 (Alaska 1988))*.

6 *Nat'l Bank of Alaska v. J. B. L. & K. of Alaska, Inc., 546 P.2d 579, 582 (Alaska 1976)*; *see also Neal & Co., Inc. v. Ass'n of Vill. Council Presidents Reg'l Hous. Auth., 895 P.2d 497, 502 (Alaska 1995)* ("extrinsic evidence [] includ[es] the parties' conduct, goals sought to be accomplished, and surrounding circumstances at the time the contract was negotiated" (citing *Peterson v. Wirum, 625 P.2d 866, 870 & n.7 (Alaska 1981)))*.

7 *See Aviation Assocs., Ltd. v. Temsco Helicopters, Inc., 881 P.2d 1127, 1130 n.5 (Alaska 1994)* ("Under such circumstances, the parties presumably bargain from positions of equal bargaining power." (quoting *Centorr-Vacuum Indus., Inc. v. Lavoie, 135 N.H. 651, 609 A.2d 1213, 1215 (N.H. 1992)))*. In contrast, restrictive covenants ancillary to employment agreements are strictly construed against the employer. *Id.*

Section 13(a) of the Purchase and Sale Agreement provides that Ingrim "shall not carry on or [**10] engage in the practice of dentistry, either directly or indirectly, as an owner, operator, or employee" for five years within certain geographic boundaries. Wenzell argues that the words of Section 13(a) are "simple, straightforward, and mean what they say" -- they prohibit "any practice of dentistry" regardless of whether the practice is in competition with Turnagain Dental Clinic.

Ingrim argues that the parties instead intended Section 13(a) to be a "restriction against competition -- not a restriction against all dentistry." In support of this interpretation, Ingrim notes the various references to Section 13(a) in the Purchase and Sale Agreement as a "Covenant Not to Compete." For example, the heading of Section 13(a) is "Seller's Covenant Not to Compete and/or Solicit"; the liquidated damages provision states that "[t]he covenant not to compete and/or solicit is of material significance to Buyer"; the "Restrictive Covenant Not to Compete" is listed as an asset being sold, with a value of $ 10,000; and Exhibit F lists "a covenant not to compete" as among the assets being sold.

The superior court found that "the primary intent of the parties was to address Dr. Wenzell's stated concern [**11] of not wanting to have another dental practice in competition with him down the street or within the mileage that was specified in the agreement." In addition to the references to Section 13(a) as a covenant not to compete, the superior court believed the $ 250,000 liquidated damages provision to be "indicative of a intent for there to be compensation in the event of actual competition between the buyer and the seller . . . as opposed to dentistry that would not be in direct competition with Dr. Wenzell's practice."

We agree, and conclude as a matter of law that the parties intended to prohibit Ingrim from practicing dentistry in competition with Turnagain Dental Clinic. As made clear by the numerous references in the agreement, [*108] Section 13(a) is a covenant not to compete. [8] The purpose of a covenant not to compete, as suggested by its name, is to prevent the covenantor from competing with the covenantee and, in the case of the sale of a business, to protect the goodwill associated with the purchased company. [9] Wenzell himself describes the purpose of Section 13(a) as protecting the "continued success of his dental practice," not barring Ingrim from practicing his trade in any capacity. [**12] Moreover, the magnitude of the liquidated damages provision, almost half of the total cost of the business, suggests an intent that the restrictive covenant only prevent the practice of dentistry that competes with Turnagain Dental Clinic. Therefore, Section 13(a) is properly interpreted as prohibiting only the practice of dentistry in competition with Turnagain Dental Clinic.

8 The Purchase and Sale Agreement states that "descriptive headings . . . are for convenience only and shall not be deemed to affect the meaning or construction of any provisions herein." Even ignoring the heading of Section 13(a), there are three other references to the provision as a covenant not to compete.

9 *See RESTATEMENT (SECOND) OF CONTRACTS § 188 cmt. f* (explaining that covenants not to compete ancillary to the sale of a business protect the covenantee's "legitimate interest" in

the "value of the good will that he has acquired"); BLACK'S LAW DICTIONARY 392 (8th ed. 2004) ("Noncompetition covenants are valid to protect business goodwill in the sale of a company."). "Goodwill" is defined as a "business's reputation, patronage, and other intangible assets that are considered when appraising the business, esp. [**13] for purchase; the ability to earn income in excess of the income that would be expected from the business viewed as a mere collection of assets." BLACK'S LAW DICTIONARY 715 (8th ed. 2004).

2. The term "practice of dentistry" should be given its common industry definition.

Ingrim argues that the "practice of dentistry" should be interpreted as "private, competitive, fee-for-service practice," which would exclude his employment at ANMC. The superior court agreed, holding as a matter of law that "practice of dentistry," as used in Section 13(a), does not include employment at ANMC and thus Ingrim's employment at ANMC does not violate Section 13(a). This holding was in error.

We have stated[HN3] "the general rule of law" that "a contract may be interpreted by the general and accepted usage of the trade or business involved." [10] Thus, the term "practice of dentistry" should be given its common industry definition. The American Dental Association defines "dentistry" as "the evaluation, diagnosis, prevention and/or treatment (nonsurgical, surgical or related procedures) of diseases, disorders and/or conditions of the oral cavity, maxillofacial area and/or the adjacent and associated structures and [**14] their impact on the human body." We conclude that this is the proper definition of "practice of dentistry" as used in Section 13(a). [11]

10 *Stock & Grove, Inc. v. City of Juneau, 403 P.2d 171, 176 (Alaska 1965)*; *see also AS 45.01.303(d)* ("usage of trade in the vocation or trade in which [the parties] are engaged or of which they are or should be aware is relevant in ascertaining the meaning of the parties' agreement [and] may give particular meaning to specific terms of the agreement").

11 Similarly, [HN4] Alaska law provides that one engages in the "practice of dentistry" who "evaluates, diagnoses, treats, or performs preventative procedures related to diseases, disorders, or conditions of the oral cavity, maxillofacial area, or adjacent and associated structures." *AS 08.36.360*.

The superior court relied on *AS 08.36.350* in finding, as does Ingrim in arguing, that the "practice of dentistry" excludes employment at ANMC. [HN5] *Alaska Statute 08.36.350(a)* provides that the statutory chapter on dentistry "applies to a person who practices . . . dentistry in the state except . . . a dentist in the employ . . . of the Alaska Native Service." As an initial matter, this statutory provision was not explicitly [**15] or implicitly incorporated into the parties' Purchase and Sale Agreement. There is no evidence in the record that Ingrim and Wenzell's understanding of the meaning of "practice of dentistry" was influenced by this statute, or even that they were familiar with the statute at the time of contracting.

In any event, we interpret *AS 08.36.350(a)* differently than Ingrim and the superior court.[HN6] The statutory provision does not suggest that a dentist at ANMC is not engaging in the "practice of dentistry"; instead, it [*109] exempts an Alaska Native Service dentist from all provisions of the chapter on dentistry, including licensing requirements, disciplinary actions, and statutory definitions. It is precisely because "a dentist in the employ of the . . . Alaska Native Service" is practicing dentistry that it is necessary to exempt him or her from the otherwise applicable statutory provisions. [12]

12 Although exempt from the dentistry chapter, such a dentist is still "held to the same standard of care" as one to whom the dentistry chapter is applicable. *AS 08.36.350(b)*.

Relying on the expert testimony of Dr. Pollock, Ingrim also argues that the "private practice of dentistry" excludes employment at ANMC [**16] because such employment instead constitutes " 'community' dental services." Even assuming this to be true, it is not relevant here -- Section 13(a) prohibits the "practice of dentistry," not the "private practice of dentistry." Dr. Pollock did not clearly testify that the "practice of dentistry" excludes community dentistry. [13]

13 Dr. Pollock did provide testimony that "a community dentist is not really practicing dentistry . . . ." The American Dental Association, in contrast, refers to "public health" dentistry (used interchangeably with "community" dentistry by Dr. Pollock) as "that form of *dental practice* which serves the community as a patient rather than the individual." (Emphasis added.) But even crediting Dr. Pollock's testimony, Ingrim sees *individual* patients at ANMC and does not serve communities by, for example, helping organize the fluoridation of village water treatment plants, attending village dental health fairs, or lecturing Alaska Native communities about the importance of dental health. Thus, he is not exclusively a community dentist.

B. Whether Ingrim Breached Section 13(a) Is a Question of Fact.

Ingrim's employment at ANMC clearly constitutes the "practice of dentistry" [**17] as that term is defined above. Ingrim sees numerous individual patients, performing their dental examinations, reviewing their x-rays, drilling and filling their cavities, and pulling teeth "on occasion." Moreover, Ingrim has admitted during this litigation that he is practicing dentistry at ANMC. In his affidavit submitted in support of his motion for summary judgment, Ingrim stated: "I admit that I am practicing dentistry and I admit the Alaska Native Medical Center is located within a fifteen air mile radius of the Turnagain Dental Office." Similarly, in his answer, Ingrim admitted that he "began working at the Alaska Native Medical Center engaging in the practice of dentistry." [14] Thus, Ingrim's employment falls within the category of activity prohibited by the covenant not to compete.

14 *See Darnall Kemna & Co., Inc. v. Heppinstall, 851 P.2d 73, 76 (Alaska 1993)* ("The general rule provides that admissions made in the pleadings are conclusively established.").

But this does not resolve the question before us: whether Ingrim's employment violates Section 13(a). As we discussed earlier, Section 13(a) is properly interpreted as prohibiting the practice of dentistry in competition with [**18] Turnagain Dental Clinic, thereby protecting Wenzell's legitimate interest in the goodwill he acquired. [HN7] In the typical case, where a party seeks to enforce a covenant not to compete against a person who opens a for-profit practice or accepts private employment, a court need not inquire into the presence of competition; it can be presumed. A plaintiff can prove a breach of the covenant by showing that the challenged conduct falls within the category of prohibited activity and occurred within the geographic scope and duration of the covenant. This case, however, presents a rare instance where a party is attempting to enforce a covenant not to compete against a person employed by a federally-funded non-profit organization that provides free or low-cost health care services. In such a case, competition will not be presumed and must be proven.

We therefore remand this case to the superior court to consider whether Ingrim's practice of dentistry at ANMC is in competition with Turnagain Dental Clinic and thus violates Section 13(a). This question cannot be answered based on the record before us, and may need to be presented to a jury to resolve factual disputes. [15] In considering whether [*110] there [**19] is competition, the superior court should examine whether Ingrim's employment at ANMC has the realistic potential to draw business away from Turnagain Dental Clinic, reduce the number of referrals it receives, or otherwise harm Turnagain Dental Clinic and the goodwill Wenzell purchased.

15 The superior court suggested that there was a disputed factual issue concerning competition when it ruled that the parties would go to trial on the claim that Ingrim solicited patients in violation of the Purchase and Sale Agreement, although Wenzell chose not to proceed to trial on that claim.

C. The Superior Court Must Consider Whether Section 13(a) Is Enforceable as Applied to Ingrim's Employment at ANMC.

Ingrim argues that, to the extent his employment at ANMC is found to violate Section 13(a), that provision is overbroad and unenforceable. Although raised below, the superior court did not reach this issue because it found that Ingrim's employment at ANMC did not constitute the practice of dentistry and therefore did not violate Section 13(a). If on remand the superior court or a jury determines that Section 13(a) was breached, the superior court must consider its enforceability. [16]

16 [HN8] The enforceability [**20] of a covenant not to compete is a question of law to be decided by the court after a factual inquiry into the relevant factors. *See* Ferdinand S. Tinio, Annotation, *Validity and Construction of Contractual Restrictions on Right of Medical Practitioner To Practice, Incident to Sale of Practice,* 62 A.L.R.3d 918 (1975) ("[W]hat is a reasonable restraint on competition is a question of law for the determination of the court, and not one of fact for the jury."); 6 RICHARD A. LORD, WILLISTON ON CONTRACTS § 13:4 (4th ed. 2009) ("The question of reasonableness is ordinarily for the court, not the jury.").

[HN9] "[N]on-competition agreements are disfavored in the law as restraints upon trade and because they impose hardships upon individuals seeking to earn a livelihood." [17] Such agreements may be ancillary to an employer-employee agreement or, as in this case, to the sale of a business. [18] The enforceability of a non-competition agreement ancillary to the sale of a business is an issue of first impression in Alaska. [19] Unlike covenants not to compete ancillary to employment contracts, which "are scrutinized with particular care because they are often the product of unequal bargaining power," [20] this [**21] level of scrutiny is not applied to covenants ancillary to the sale of a business because the contracting parties are more likely to be of equal bargaining power. [21]

17 *DeCristofaro v. Sec. Nat'l Bank, 664 P.2d 167, 168-69 (Alaska 1983).*
18 *See RESTATEMENT (SECOND) OF CONTRACTS § 188(2)* (1981).
19 We have, however, discussed the enforceability of a covenant not to compete ancillary to an employment contract. In *Data Management, Inc. v. Greene,* this court held that if an overbroad covenant not to compete ancillary to an employment contract can be reasonably altered to render it enforceable, a court shall do so unless it finds that the covenant was not drafted in good faith. *757 P.2d 62, 64 (Alaska 1988).*
20 *RESTATEMENT (SECOND) OF CONTRACTS § 188.*
21 *Aviation Assocs., Ltd. v. Temsco Helicopters, Inc., 881 P.2d 1127, 1130 n.5 (Alaska 1994); see also Dalrymple v. Hagood, 246 Ga. 235, 271 S.E.2d 149, 150 (Ga. 1980)* ("In determining the reasonableness of a covenant not to compete greater latitude is allowed in those covenants relating to the sale of a business than in those covenants ancillary to an employment contract."); *Century Bus. Servs., Inc. v. Urban, 179 Ohio App. 3d 111, 2008 Ohio 5744, 900 N.E.2d 1048, 1054 (Ohio App. 2008)* ("restrictive [**22] covenants entered into ancillary to the sale of a business should be afforded less scrutiny than ones entered into by employees as consideration for employment").

[HN10] According to the Restatement (Second) of Contracts, a covenant not to compete is unenforceable on grounds of public policy if it unreasonably restrains trade, either because:

> (a) the restraint is greater than is needed to protect the promisee's legitimate interest, or
>
> (b) the promisee's need is outweighed by the hardship to the promisor and the likely injury to the public. [22]

In the context of covenants not to compete ancillary to the sale of a business, the Restatement describes the "promisee's legitimate interest" as the "value of the good will that he has acquired" in the purchase of the business. [23] When determining the enforceability [*111] of a covenant not to compete ancillary to the sale of a business, a court must therefore consider whether the restriction bargained for is no greater than is needed to protect the goodwill the purchaser has acquired in the business and, if so, whether the purchaser's need to protect that goodwill outweighs the hardship to the seller and likely injury to the public. A similar test has been adopted [**23] in numerous jurisdictions, [24] and we adopt it in Alaska.

22 *RESTATEMENT (SECOND) OF CONTRACTS §§ 186, 188.*
23 *Id. § 188 cmt. f; see also* 15 GRACE MCLANE GIESEL, CORBIN ON CONTRACTS § 80:8 (Rev. Ed. 2003) ("[C]ourts readily recognize the interest of buyers in protecting the good will purchased and frequently enforce covenants not to compete accompanying the sale of a business.").
24 *See* Tinio, *supra* note 16 (listing jurisdictions in which, to be enforceable, "contractual restrictions on the right of medical practitioners to practice, made as an incident to the sale of a medical practice . . . must not extend beyond what is necessary to protect the interests of the buyer, must not be unnecessarily injurious to the seller, and must not unduly interfere with the public interest."); *see also* 6 WILLISTON ON CONTRACTS, *supra* note 16, § 13:4 ("In considering what is reasonable, courts pay regard to: (1) the question of whether the promise is broader than is necessary for the protection of some legitimate interest of the covenantee; (2) the effect of the promise or agreement on the covenantor, and (3) the effect of the promise or agreement upon the public welfare or common good." (internal citations [**24] omitted)).

Under the first prong of the analysis, the superior court must decide whether Section 13(a), as applied to Ingrim's employment at ANMC, is more restrictive than necessary to protect Wenzell's legitimate interest in the goodwill he acquired in purchasing Turnagain Dental Clinic. If the superior court or a jury determines that Ingrim's employment at ANMC is in competition with Turnagain Dental Clinic and thus violates Section 13(a), it will have already resolved the first prong -- the covenant is no broader than is necessary to protect the goodwill Wenzell purchased. Under the second prong, the superior court must balance Wenzell's need to protect the goodwill he purchased with the hardship to Ingrim from enforcing the covenant and the likely injury to the public. It appears from the record that Ingrim is employed by an organization providing an important, low-cost service to a population in need of such care. In a case that implicates such considerations, it is appropriate for a court to closely scrutinize the covenant not to compete to determine whether it is void for public policy reasons. [25]

25 *See* 6 WILLISTON ON CONTRACTS, *supra* note 16, § 13:6 ("[T]he concern of the courts [**25] for the public welfare typically results in

closer judicial scrutiny of restraints on . . . dentists . . . because of the . . . value of their services to the community.").

[HN11] Although a court should generally examine whether a covenant not to compete is enforceable only after determining that it was breached, it is within the superior court's discretion on remand to assume a breach and address the enforceability of the covenant first. If the superior court can decide the enforceability of the covenant as applied to Ingrim's employment at ANMC on the current record or with an additional evidentiary hearing, but prior to a full trial, it may do so in the interest of judicial economy. [26]

26 If the superior court rules that Section 13(a) is unenforceable, either before or after trial, it should modify the provision to make it enforceable if it can reasonably do so provided that the agreement was drafted in good faith, which Ingrim has conceded. *See Data Mgmt., Inc. v. Greene, 757 P.2d 62, 64 (Alaska 1988).*

D. The Validity of the Liquidated Damages Provision

If Ingrim is found to have breached Section 13(a) and the superior court holds that this provision is enforceable, the superior court must [**26] evaluate the validity of the liquidated damages provision under *Carr-Gottstein Properties, Ltd. Partnership v. Benedict.* [27] Although we do not decide this issue today, we note our concern that the amount of stipulated damages is the same regardless of the nature of the breach of Section 13(a), which suggests that the parties made no [*112] attempt to forecast actual damages. [28] Indeed, Wenzell stated that the $ 250,000 figure was selected because it represents half of the purchase price, essentially conceding that it was not a forecast of actual damages.

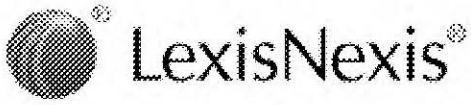
27 *72 P.3d 308, 311 (Alaska 2003)* ("Liquidated damages clauses are proper . . . where it would be difficult to ascertain actual damages, and where the liquidated amount [is] a reasonable forecast of the damages likely to occur in the event of breach." (internal quotation marks omitted)). We thus agree with the superior court that [HN12] the validity of a liquidated damages clause is to be decided by the court, which will consider whether the facts of the case satisfy the liquidated damages test. *Id. at 310-11.*

28 *See Kalenka v. Taylor, 896 P.2d 222, 229 (Alaska 1995)* (finding a liquidated damages provision to be flawed because it assigned the same high [**27] penalty "for a total or partial breach, or for breach of minor or major contract provisions" (internal quotation marks omitted)).

V. CONCLUSION

For the foregoing reasons, we VACATE the superior court's grant of Ingrim's motion for summary judgment dismissing the lawsuit and REMAND the case to the superior court to conduct proceedings consistent with this opinion.

EXHIBIT 9



LEXSEE 2009 CAL. APP. UNPUB. LEXIS 5057

LORETTA FIGUEROA, Plaintiff and Appellant, v. PACIFIC DENTAL ASSOCIATES, Defendant and Respondent.

A121610

COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION ONE

2009 Cal. App. Unpub. LEXIS 5057

June 23, 2009, Filed

NOTICE: NOT TO BE PUBLISHED IN OFFICIAL REPORTS. CALIFORNIA RULES OF COURT, RULE 8.1115(a), PROHIBITS COURTS AND PARTIES FROM CITING OR RELYING ON OPINIONS NOT CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED, EXCEPT AS SPECIFIED BY RULE 8.1115(b). THIS OPINION HAS NOT BEEN CERTIFIED FOR PUBLICATION OR ORDERED PUBLISHED FOR THE PURPOSES OF RULE 8.1115.

PRIOR HISTORY: [*1]
San Francisco City & County Super. Ct. No. CGC-07-459319.

JUDGES: Margulies, J.; Marchiano, P.J., Graham, J. * concurred.

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

OPINION BY: Margulies

OPINION

Plaintiff Loretta Figueroa was employed as a dental hygienist by defendant Pacific Dental Associates (Pacific Dental). In 2004, Pacific Dental decided to reduce the time allotted to hygienists' routine teeth-cleaning sessions from 60 minutes to 50 minutes to enhance profitability. Believing that the reduction would reduce the quality of patient care, Figueroa resisted the change and was eventually fired. She filed an action against Pacific Dental, alleging that she was terminated because of her opposition to the change and that such a termination violated public policy. The trial court granted summary judgment against her claims, reasoning that the Business and Professions Code provisions relied on by Figueroa did not protect her conduct. We affirm.

I. BACKGROUND

Figueroa filed a complaint in June 2007, alleging a single cause of action for termination from employment in violation of public policy. The complaint alleged [*2] that Figueroa had worked for Pacific Dental, a San Francisco dental office, as a registered dental hygienist, beginning in 1991. In March 2004, Pacific Dental decided to increase the number of patients seen by its hygienists each day by reducing the time spent with patients from an hour to 50 minutes. Figueroa "pointed out that this would not be enough time for some patients, but her concerns were ignored." There followed a debate about the new level of treatment and its disclosure to patients. As a result of her reluctance to go along with the policy, and her conduct in expressing that reluctance, Figueroa was fired. Figueroa alleged that Pacific Dental's conduct violated, "among other statutes, *Business and Professions Code § 1680(q)*, which specifically forbids the discharge of an employee primarily based on the employee's attempt to comply or to aid in compliance with sound dental practices."

Pacific Dental moved for summary judgment in August 2007, arguing that the record demonstrated that Figueroa had not attempted to enforce compliance with dental disciplinary rules, as required by the *Business and Professions Code* [1] *section 1680, subdivision (q)*, and that she was terminated for [*3] business reasons. In a decla-

ration submitted in support of the motion, Pacific Dental's periodontist, Garry Rayant, stated that there had never been a professional disciplinary complaint or claim of malpractice against Pacific Dental during his tenure, which began in 1989. [2] Rayant said he had always found Figueroa's "attitude difficult and at times unacceptable." She questioned his diagnoses and treatments in a manner he believed to be inappropriate and made " 'editorial' " comments in patient charts. He complained about her conduct in writing in 1999. When no action was taken, he continued to work with her for several years without further formal complaint, although he saw little improvement in her deficiencies.

1 All statutory references are to the Business and Professions Code.

2 This claim was not entirely true. One of the practice's dentists admitted in deposition that he had settled a malpractice claim approximately five years earlier.

Rayant explained that by 2004, Pacific Dental's practice was booming, with a three-month waiting list, but unprofitable. The practice hired a consultant who proposed, in March 2004, "a restructured program [that would] run more efficiently which would [*4] reduce waiting times for patients, yet leave ample time for excellent patient care. One of the most critical changes required to increase efficiency was the shortening of routine cleaning appointments from 60 minutes to 50 minutes. Patients' *[sic]* whose conditions required more than 50 minutes were either scheduled for 60 minute appointments or two 50 minute appointments (based on the best judgment of the dentist)." According to the consultant, "most dental offices in San Francisco had already switched to 50 minute appointments for most cleanings and had little trouble completing cleanings (called 'prophylaxis') according to the definition provided by the American Dental Association ('ADA')."

Rayant stated that Figueroa made clear she would not cooperate in the implementation of the program, in part because she believed routine prophylaxis should include an additional procedure, cleaning below the gum line, that was not included in the ADA definition. It was, however, included as an element of "prophylaxis" as defined by the insurer Delta Dental. Thereafter, Figueroa made notations in patient charts reflecting her dissent, but she never contended that the change was illegal or grounds [*5] for a disciplinary proceeding against Pacific Dental. By the time the change to 50-minute cleanings was implemented in November 2004, Figueroa had been given oral and written warnings about her conduct. The decision to terminate her was made in December 2004.

A declaration submitted by Pacific Dental's consultant confirmed his retention and the content of his recommendations, adding that "my understanding is that 50 minute appointments for regular cleanings are permitted by law when deemed appropriate by the treating dentist. If I believed there was even a remote possibility that 50 minute appointments were inconsistent with law, neither myself nor my firm would have suggested that any dental office have 50 minute appointments for regular cleanings." Declarations by other dentists in the Pacific Dental practice supported Rayant's contentions, declaring that Figueroa was fired because of her difficult attitude rather than her advocacy of better patient care.

In a declaration submitted in opposition, Figueroa stated that while she was criticized for her attitude early in her career with Pacific Dental, she had taken the comments to heart and changed her behavior. She had worked closely [*6] with several Pacific Dental dentists "without serious complaints" for the four years between 1999 and 2003. She confirmed the difference between the ADA and Delta Dental definitions of "prophylaxis." In deposition excerpts, Figueroa testified that in November 2004, she began to write "ADA prophylaxis" in patient charts to distinguish the treatment she was providing in a 50-minute appointment, which did not include cleaning below the gum line, from the Delta Dental definition. Figueroa stated that in her view it was not the change, per se, that was improper but the failure expressly to inform patients, who would continue to assume they were getting a 60-minute cleaning. She had been forbidden by the Pacific Dental dentists from informing patients of the change. Figueroa believed the "sole reason" she was terminated was that she "advocated for better dental care for patients."

Figueroa also submitted the declaration of an expert in dental practice with experience in reviewing the treatment records of California dentists, Dr. Kevin Sheets. Sheets contended that the examples of allegedly improper patient file notations by Figueroa cited by Pacific Dental were not, in fact, improper. He [*7] did not address the controversy regarding the length of cleaning appointments or otherwise opine on the quality of the dentistry practiced at Pacific Dental.

The trial court granted Pacific Dental's motion for summary judgment. In its order, the trial court held that Figueroa "has not, and it appears to this Court that Plaintiff cannot, produce any admissible evidence that establishes that she ever engaged in any 'protected activity' that would trigger the duty not to retaliate contained in Business & Professions code *section 1680(q)*. While plaintiff produced evidence that she expressed objections to the switch to 50 minute appointments for ordinary cleanings . . . , she produced no evidence that she ever told [Pacific Dental] that she believed the change was

illegal . . . . Further the undisputed facts . . . show that she never told [Pacific Dental] she contended that the new policy would result in 'negligent or incompetent treatment' nor that it would 'discourage necessary treatment'."

II. DISCUSSION

Figueroa contends that the trial court erred in granting summary judgment because her disagreement with Pacific Dental with respect to the regular prophylaxis treatments was " 'protected [*8] activity' " under the Business and Professions Code.

"Because plaintiff appealed from the trial court's order granting defendant summary judgment, we independently examine the record in order to determine whether triable issues of fact exist to reinstate the action. [Citation.] In this action, therefore, we must determine whether defendant has shown that plaintiff has not established a prima facie case . . . , 'a showing that would forecast the inevitability of a nonsuit' in defendant's favor. [Citation.] 'If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.' [Citation.] In performing our de novo review, we view the evidence in the light most favorable to plaintiff as the losing party. [Citation.] In this case, we liberally construe plaintiff's evidentiary submissions and strictly scrutinize defendant's own evidence, in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." *(Johnson v. American Standard, Inc. (2008) 43 Cal.4th 56, 64.)*

The cause of action for termination of employment in violation of public policy originated with *Tameny v. Atlantic Richfield Co.* (1980) *27 Cal.3d 167 (Tameny).* [*9] The claim recognizes that "while an at-will employee may be terminated for no reason, or for an arbitrary or irrational reason, there can be no right to terminate for an unlawful reason or a purpose that contravenes fundamental public policy." *(Gantt v. Sentry Insurance (1992) 1 Cal.4th 1083, 1094*, overruled on other grounds in *Green v. Ralee Engineering Co. (1998) 19 Cal.4th 66, 80, fn. 6.)* "[D]espite its broad acceptance, the principle underlying the public policy exception is more easily stated than applied. The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee." *(Id. at p. 1090.)* In drawing this line, the Supreme Court has held that the public policy "must be based on policies 'carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions . . . .' " *(Silo v. CHW Medical Foundation (2002) 27 Cal.4th 1097, 1104.)*

"To support such a *[Tameny]* cause of action, the [public] policy in question must satisfy four requirements: 'First, the policy must be supported by either constitutional [*10] or statutory provisions. Second, the policy must be "public" in the sense that it "inures to the benefit of the public" rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be "fundamental" and "substantial." ' " *(Ross v. Raging Wire Telecommunications, Inc. (2008) 42 Cal.4th 920, 932.)* "Th[ese] limitation[s] recognize[] an employer's general discretion to discharge an at-will employee without cause under *[Labor Code] section 2922*, and best serve[] the Legislature's goal to give law-abiding employers broad discretion in making managerial decisions." *(Green v. Ralee Engineering Co., supra, 19 Cal.4th at pp. 79-80.)*

Figueroa contends, and Pacific Dental does not dispute, that a fundamental public policy enforceable through a *Tameny* claim is contained in the Business and Profession Code sections defining "unprofessional conduct" by a dentist. [3] Under section 1670, a dentist who engages in "unprofessional conduct" is subject to disciplinary measures, including license revocation, reprimand, and probation. *Section 1680* lists a wide variety of conduct that constitutes unprofessional dentistry, [*11] including "[t]he aiding or abetting of a licensed dentist, . . . or registered dental hygienist . . . to practice dentistry in a negligent or incompetent manner" *(id.,* subd. (y)) and "the discharge of an employee primarily based on the employee's attempt to comply with the provisions of this chapter or to aid in the compliance" *(id.,* subd. (q)). Section 1685 states, "In addition to other acts constituting unprofessional conduct under this chapter, it is unprofessional conduct for a person licensed under this chapter to require, either directly or through an office policy, or knowingly permit the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community."

> 3 Because Pacific Dental does not dispute Figueroa's reliance on these statutes, we assume without deciding that they express the type of fundamental public policy adequate to support a *Tameny* claim under the standards set out in *Ross v. Raging Wire Telecommunications, Inc., supra, 42 Cal.4th at p. 932.*

In order to claim the protection [*12] of *section 1680, subdivision (q)*, which precludes the discipline of an employee as a result of his or her attempt to comply with the statutes governing dental practice, Figueroa

must locate a provision of the Business and Professions Code whose violation was threatened by the change to 50-minute cleaning appointments. Figueroa has not pointed us to any state statutes or regulations specifically governing the timing or components of dental prophylaxis. Rather, the only provisions she has called to our attention are those quoted above, which preclude generally the "practice [of] dentistry in a negligent or incompetent manner" (*§ 1680, subd. (y)*) and "the delivery of dental care that discourages necessary treatment or permits clearly excessive treatment, incompetent treatment, grossly negligent treatment, repeated negligent acts, or unnecessary treatment, as determined by the standard of practice in the community." (§ 1685.) It is these statutes we will use to measure the public policy at issue in this action.

We agree with the trial court's conclusion that Pacific Dental successfully demonstrated Figueroa could not make a prima facie case that the controversy regarding cleaning time concerned [*13] negligent or incompetent treatment, as required to violate these statutory provisions. The testimony of Pacific Dental's witnesses established that an adequate cleaning for most patients could be performed in 50 minutes and that a 50-minute cleaning was the norm in the majority of dental offices in San Francisco. The fact that the ADA does not require cleaning below the gum line as a regular feature of prophylaxis provides fairly conclusive evidence that Pacific Dental's new practice, whatever its merits, did not constitute negligent or incompetent treatment. Further, Figueroa implicitly acknowledged that prophylaxis as defined by the ADA could be performed in 50 minutes, since she labeled her 50-minute appointments an "ADA prophylaxis." For patients requiring more extensive cleaning, Pacific Dental dentists reserved the option of scheduling a 60-minute treatment or a second 50-minute treatment.

Figueroa believed either that patients routinely should be given the Delta Dental version of prophylaxis, including cleaning below the gum line, or that, at a minimum, they should be informed that their treatment did not include this cleaning. [4] While this difference of opinion between Figueroa [*14] and the dentists clearly concerned the nature of dental care provided at Pacific Dental, Figueroa provided no evidence suggesting it was a dispute over the provision of reasonable versus "negligent or incompetent" care. Rather, it was a good faith dispute about the appropriate components of routine preventative care and patient communication, with both sides inside the bounds of reasonable care. [5]

4 Although there were references in Figueroa's deposition to impropriety in billing Delta Dental for prophylaxis when only an ADA cleaning was performed, we find insufficient evidence on this issue to create a triable issue that Pacific Dental was engaged in any type of improper billing practice. In any event, Figueroa denied that she believed Pacific Dental was "defrauding" Delta Dental by following the ADA definition.

5 Figueroa contends a claim of malpractice is supported by her written employment warning, in which one of the office's dentists characterized her conduct as writing "incriminating" notes in the patient files. In his declaration, the dentist called that a poor choice of words. Regardless, it is clear from the record that Figueroa never contended or believed the office was committing [*15] malpractice. The mere use of the word "incriminating" to refer to her notations does not constitute substantial evidence to the contrary.

Figueroa acknowledges she must "prove that she attempted to comply or aid in the compliance with the provisions of [the Business and Professions Code] and that she was discharged because of that." In making her arguments, however, she ignores the specific language of the Code, contending that "by statute, California specifically protects its [dental hygienists] who support better patient treatment." Such a broad construction of the *Tameny* cause of action in these circumstances is unwarranted, either by the language of the Business and Professions Code or the policies underlying a *Tameny* claim. The Business and Professions Code does not require dentists to provide a particular level or type of care, other than to avoid negligent and incompetent care. It leaves to the discretion of individual dental health professionals to select among the range of reasonable treatment options. As this case illustrates, for example, the ADA believes cleaning below the gum line is not a necessary component of routine cleaning, while Delta Dental takes, or at least took, [*16] a different position. [6] Because the statutes refer only to conduct falling below the level of competent, there is no basis in the Business and Professions Code for protecting employee advocacy of "better patient treatment" that is not concerned with avoiding malpractice.

6 In deposition, Pacific Dental's counsel suggested that Delta Dental has revised its view and adopted the position of the ADA. While Delta Dental's current position is immaterial to resolution of this appeal, its past position clearly illustrates the range of professional opinion.

Nor would it serve the purposes of *Tameny* to create such a right. A *Tameny* claim is not intended to restrict employers' "broad discretion in making managerial decisions" *(Green v. Ralee Engineering Co., supra, 19 Cal.4th at pp. 79-80)* or to turn "ordinary disputes between employer and employee" into lawsuits *(Gantt v.*

Sentry Insurance, supra, 1 Cal.4th at p. 1090). For that reason, we are required to confine the cause of action to the public policy concern actually articulated by the Legislature: the avoidance of dental malpractice. So long as it is within the range of the standard of practice in the community, the precise level of care provided [*17] by a particular dental office is of no statutory concern. As a result, disputes between the proprietors of the office and their staff concerning this topic do not constitute protected activity, and the proprietors may lawfully terminate at-will employees on the basis of their resistance to an office's chosen standard of practice. As this case illustrates, any other rule would undermine dentists' control over their practices by permitting their employees to select their own methods and level of treatment.

Figueroa also argues that her "good faith belief in her actions qualifies her for protection." (See, e.g., *Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1043* [employee is protected when refusing to engage in conduct reasonably believed to violate Fair Employment and Housing Act, even if the conduct is ultimately found lawful].) There is no dispute Figueroa sincerely believed that Pacific Dental should have continued to provide 60-minute prophylaxis treatments and/or informed its patients of the change. Under *Yanowitz,* however, what was required was not merely a good faith belief in her position, but a good faith belief that the conduct she resisted violated public policy. As [*18] discussed above, there is no evidence Figueroa believed Pacific Dental would be providing care that violated the Business and Professions Code--that is, negligent or incompetent care--if it did not adopt her position. Accordingly, her good faith advocacy of a higher standard did not constitute protected activity.

Finally, Figueroa argues that her conduct was protected because she believed she would not be able to complete the prescribed procedures in 50 minutes. Pacific Dental, however, provided uncontradicted evidence that other dental offices in San Francisco regularly provided 50-minute prophylaxis. In light of this standard of practice in the community, Figueroa was not entitled to protection under *Tameny* merely because she was unable or unwilling to comply with standard procedures.

Because we conclude that Figueroa failed to create a triable issue of fact regarding the protected nature of her conduct, we do not consider the other issues raised by the parties.

III. DISPOSITION

The judgment of the trial court is affirmed.

Margulies, J.

We concur:

Marchiano, P.J.

Graham, J. *

* Retired judge of the Superior Court of Marin County assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution.*

EXHIBIT 10

LEXSEE 1995 OHIO APP. LEXIS 2508

DAVID S. KILGORE, DDS, APPELLANT, - VS - OHIO STATE DENTAL BOARD, APPELLEE.

CASE NO. 94-C-63

COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT, COLUMBIANA COUNTY

1995 Ohio App. LEXIS 2508

June 14, 1995, Decided

PRIOR HISTORY: [*1] CHARACTER OF PROCEEDINGS: Civil Appeal from Columbiana County Common Pleas Court. Case No. 94 CIV 274.

DISPOSITION: JUDGMENT: Affirmed.

COUNSEL: For Appellant: Stuart A. Strasfeld, Youngstown, Ohio.

For Appellee: Betty Montgomery, Attorney General, Julia M. Graver, Asst. Attorney General, Health & Human Services Section, Columbus, Ohio.

JUDGES: Hon. Joseph E. O'Neill, Hon. Gene Donofrio, Hon. Edward A. Cox. Donofrio, J., concurs. Cox, J., concurs.

OPINION BY: Joseph E. O'Neill

OPINION

OPINION

O'NEILL, P.J.

This appeal arises out of the trial court's judgment entry, dated September 7, 1994, affirming the decision of the Ohio State Dental Board which issued an adjudication order, on May 3, 1994, finding that the appellant had violated *R.C. 4715.30(A)(9)* and Sec. 4715-5-04(B)(2) of the Ohio Administrative Code by practicing outside of his specialty field.

The appellant is a licensed dentist who limits his practice to oral and maxillofacial surgery (Tr. 27). A friend of appellant's, Mr. Coffee, approached him in September 1991 telling him that his wife was experiencing acute pain in [*2] the lower left side of her jaw. Upon examination, Dr. Kilgore determined that Mrs. Coffee was suffering from an abscessed tooth which he alleviated by doing an extirpation and doing a root canal. Dr. Kilgore also extracted two teeth, performed routine diagnostic procedures, placed a gold on-lay on a tooth, and followed up with endodontic treatment and bridge work (Tr. 12).

Originally the agreement had been that, in return for Dr. Kilgore performing these services, Mr. Coffee would install air conditioning in a home being constructed by Dr. Kilgore. Subsequently, a dispute arose between the parties relative to Dr. Kilgore's billing. A complaint was filed by the Coffees to the State Dental Board. The billing dispute was settled and withdrawn but the board, upon reviewing the billing complaint, noticed that Dr. Kilgore was not limiting his practice to oral and maxillofacial surgery. Dr. Kilgore was notified that the board intended to proceed on a charge that he had practiced outside of his specialty and, upon his request, an administrative hearing was scheduled and conducted.

Dr. Robert L. Schroeder, a licensed dentist, investigated the complaint and testified at the administrative [*3] hearing. Dr. Kilgore also testified at the administrative hearing. Following the hearing, the board issued an adjudication order finding that the appellant had violated *R.C. 4715.30(A)(9)* and *Ohio Administrative Code Sec. 4715-5-04(B)(2)*. In this order, the dental board suspended the appellant's license for ninety (90) days and he was placed on probation for five (5) years. The appellant

appealed this order to the Court of Common Pleas which affirmed the decision of the board.

Section 4715-5-04 of the Administrative Code read, in pertinent part, as follows:

> "(A) A licensed dentist who limits his practice to a specialty(s) recognized by the 'American Dental Association' for limited practice may use the designation 'Practice limited to', or 'Specialist in' in announcements, cards, letterheads, office signs, referral slips, directory listings or otherwise, provided the requirements of this rule are met.
>
> "(B) The licensed dentist must comply with the following standards before announcing or otherwise designating himself to be in a limited specialty practice:
>
> "(1) The indicated specialty(s) of dentistry must be those for which there are certifying boards recognized by [*4] the 'American Dental Association'; and
>
> "(2) The practice of the licensed dentist seeking specialty designation must be limited exclusively to the indicated specialty area(s); * * *"

R.C. 4715.30(A)(9) provides, in pertinent part, as follows:

> "(A) The holder of a certificate or license issued under this chapter is subject to disciplinary action by the state dental board for any of the following reasons:
>
> "* * *
>
> "(9) Violation of any provision of this chapter or any rule adopted thereunder;"

Very specifically, following the hearing, the board concluded and ruled that Dr. Kilgore, as the result of his services rendered to Mrs. Coffee, had not limited his practice exclusively to his indicated specialty area of oral and maxillofacial surgery.

The first assignment of error complains that the decision of the dental board is not supported by reliable, probative and substantial evidence.

Appellant takes issue with the fact that Dr. Schroeder, who was the investigator, was not qualified as an expert in the field of oral and maxillofacial surgery. In this contention, the appellant is correct. Dr. Schroeder rendered an opinion that:

> "An oral maxillofacial [*5] surgeon deals with the diagnosis and treatment of all problems in and around the head and the neck region of a person encompassing everything with the exception of what we consider routine restorative treatment that does not require the expertise of an oral maxillofacial surgeon."

At best, this can only be classed as a general description of the specialty of an oral maxillofacial surgeon, but certainly not a definition of that specialty. Most certainly, somewhere within the American Dental Association or the Ohio State Dental Board, there should be a very specific description and definition of an oral maxillofacial practice. If we could stop at this point, it would be our conclusion that there was a complete failure of evidence on the part of the Ohio State Dental Board. However, Dr. Kilgore, during direct examination, admitted that some of the services that he had performed for Mrs. Coffee was beyond his specialty. "I told him at the time I was an oral maxillofacial surgeon and I cannot do it but I would do it as a favor. But it's not what I normally do." This testimony was sufficient evidence to support a conclusion that Dr. Kilgore had not limited his practice exclusively to [*6] his indicated specialty area.

Under this assignment of error, the appellant also argues the absence of Mrs. Coffee during the administrative hearing. Appellant contends it was plain error for the dental board to proceed when there was no longer a complaint before it. There is a requirement that there be a complainant before the board. *R.C. 4715.03*, which provides for the organization, the adoption of rules, the conduct of investigation and the classification of qualified personnel, the state dental board, paragraph (D) provides, in pertinent part:

> "The board shall administer and enforce the provisions of this chapter. The board shall investigate evidence which appears to show that any person has violated any provision of this chapter. * * *."

It is correct that the complaint against Dr. Kilgore originated as a fee dispute. However, upon initial investigation of that fee dispute, the board became aware that there was evidence which appeared to show that Dr. Kilgore had violated a provision of Chapter 4715.

This first assignment of error is found to be without merit.

The second assignment of error contends that the trial court abused its discretion in upholding the order [*7] of the Ohio State Dental Board suspending the appellant's dental license for a period of ninety (90) days.

Basically, the appellant argues that there was nothing in the record to reflect that the Ohio State Dental Board exercised discretion in suspending the dental license of the appellant for a period of ninety (90) days and placing him on probation for a period of five (5) years. Sanctions for a violation of any provision of *Chapter 4715. of the Revised Code* or of any administrative rule adopted by the dental board are set forth in paragraph (C) of *R.C. 4715.30*, which reads as follows:

> "Subject to *Chapter 119 of the Revised Code*, the board may take one or more of the following disciplinary actions if one or more of the grounds for discipline listed in divisions (A) and (B) of this section exist:
>
> "(1) Censure the license or certificate holder;
>
> "(2) Place the license or certificate on probationary status for such period of time the board determines necessary and require the holder to:
>
> > "(a) Report regularly to the board upon the matters which are the basis of probation;
> >
> > "(b) Limit practice to those areas specified by the board;
> >
> > "(c) Continue or renew [*8] professional education until a satisfactory degree of knowledge or clinical competency has been attained in specified areas.
>
> "(3) Suspend the certificate or license;
>
> "(4) Revoke the certificate or license."

It is insisted by the appellant that, in its adjudicatory order, the board must demonstrate that it considered all of the various statutory sanctions hereinbefore set forth and that its findings are consistent with the evidence presented to it. Appellant insists that this demonstration of a consideration of the various statutory sanctions is set forth in *Brost v. Ohio State Medical Board (1991), 62 Ohio St.3d 218, 581 N.E.2d 515*, and, in fact, sets forth an alleged quotation from that case. We have reviewed the *Brost, supra,* case completely and cannot find that the Supreme Court has set forth a requirement that the board must demonstrate that it considered all of the various statutory sanctions. Rather, we find the Supreme Court in *Brost, supra,* stating at page 221:

> "As noted, the General Assembly has granted the board a broad spectrum of sanctions from which to choose. Naturally, the General Assembly intended that the sanction selected by the [*9] board be proportionate to the prohibited act or acts committed by the doctor. * * *"

This was not the first time that Dr. Kilgore had been before the board on a disciplinary matter. On October 31, 1989, Dr. Kilgore was sent an order by the Ohio State Dental Board finding that he had been practicing outside the scope of his specialty. His license was suspended for a period of thirty (30) days, he was placed on probation and ordered to take continuing education. That order also required that he notify the board whether he was limiting his practice to oral and maxillofacial surgery or practicing general dentistry. On November 28, 1989, he notified the board that he would limit his practice to oral and maxillofacial surgery.

Based upon this previous adjudication and based upon the evidence which was placed before the board, most certainly the sanctions selected by the board was proportionate to the prohibited act or acts committed by Dr. Kilgore.

This second assignment of error is found to be without merit.

The third assignment of error complains that the Court of Common Pleas confined its review of the case to the transcript as filed by the Ohio State Dental Board and did not set [*10] the matter for hearing as requested by the appellant.

On August 30, 1994, counsel for the appellant, by way of a letter, requested that the trial judge set the appeal pending before him for a hearing. This request was obviously denied. In support of this contention, the appellant refers us to a portion of *R.C. 119.12* which sets

forth various provisions controlling appeals from administrative bodies. Very specifically, one paragraph of that code section reads as follows:

> "'The court shall conduct a hearing on such appeal and shall give preference to all proceedings under *sections 119.01 to 119.13 of the Revised Code*, over all other civil cases, irrespective of the position of the proceedings on the calendar of the court. An appeal from an order of the state medical board issued pursuant to division (D) of *section 4731.22 of the Revised Code* or the chiropractic examining board issued pursuant to *section 4734.101 of the Revised Code* shall be set down for hearing at the earliest possible time and takes precedence over all other actions. The hearing in the court of common pleas shall proceed as in the trial of a civil action, and the court shall determine the rights of the parties [*11] in accordance with the laws applicable to such action. At such hearing, counsel may be heard on oral argument, briefs may be submitted, and evidence introduced if the court has granted a request for the presentation of additional evidence."

Relative to a "hearing", the Ohio Supreme Court has had the following to say:

> " *R.C. 119.12* requires only a hearing. The hearing may be limited to a review of the record, or, at the judge's discretion, the hearing may involve the acceptance of briefs, oral argument/or newly discovered evidence." *Ohio Motor Vehicle Dealers Board v. Central Cadillac Co. (1984), 14 Ohio St.3d 64, 471 N.E.2d 488.*

In the instant case, the trial judge allowed the filing of briefs and determined the case based upon the briefs and a review of the record. There is no indication that this action, by the judge, was an abuse of discretion. Relative to the presentation of addition evidence, the trial judge, in his final judgment, had the following to say:

> "The Court also notes that the Notice of Hearing issued by The Ohio State Dental Board clearly contained what the investigation and violations were. The appellant had opportunity to be present, testify, [*12] be represented by counsel, and present evidence as he so chose at the adjudicatory hearing.
>
> "None of the evidence offered in the affidavit is evidence that could not have been presented before the adjudicatory board, nor has the request to take additional evidence indicated that new evidence has arisen since the time of the hearing, or that he was denied an opportunity by any means to present evidence at the adjudicatory hearing.
>
> "For these reasons the affidavit, and any additional evidence are not warranted, and the Court confines its review of this matter to the Transcript as filed by The Ohio State Dental Board."

We affirm the judgment of the trial court.

Donofrio, J., concurs.

Cox, J., concurs.

APPROVED:

Joseph E. O'Neill

PRESIDING JUDGE

EXHIBIT 11

CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, LAW DIVISION

MARY A. TUJETSCH, Plaintiff, v. TODD C. PUSATERI, FIRST DENTAL, P.C. and FIRST DENTAL OF ORLAND PARK, P.C., Defendants.	)	06 CH 11607 (Transferred to Law Division)

AFFIDAVIT OF BRUCE J. LOWY

I, Bruce J. Lowy, being of the age of majority, and first being placed under oath, depose and state as follows:

1. I am authorized to furnish this Affidavit and competent to testify to the matters set forth in this Affidavit.

2. The facts set forth in this affidavit are within my personal knowledge.

3. If called upon as a witness, I would and could competently testify to all of the facts stated in this Affidavit.

4. I received an undergraduate degree in Industrial Psychology from Kent State University.

5. Thereafter, I attended John Carroll University's graduate program in Educational Psychology and studied Business Administration at Keller Graduate School of Management.

6. I am a nationally recognized expert in the fields of Dental Practice Management and Dental Practice Valuation.

7. I have been a management consultant and valuation specialist to the Dental Profession Since 1976.

8. In 1976, I was a National Consultant for Sycom, a leading dental practice

management consulting firm.

9. As such, I traveled throughout the United States and Canada providing analysis, training, and system design for dental practices.

10. In 1977, I established my own consulting firm, Progressive Management & Associates (hereinafter "PM&A").

11. PM&A has a website with URL http://www.brucelowy.com.

12. PM&A provides comprehensive consulting, marketing, valuation, and brokerage services to the dental industry.

13. PM&A has two offices, one located at 8840 Karlov Avenue, in Skokie, Illinois, and another at 2256 West End Court, Lehigh Acres, Florida.

14. For over twenty-five years, PM&A has been engaged in providing various specialized practice-management valuation services to dentists and dental practices throughout the United States.

15. I am certified with the Secretary of State of the State of Illinois as a Certified Business Broker and an active member of the Practice Valuation Study Group, a national organization of business valuation experts.

16. Clients generally call upon my valuation expertise when there is a need to value a health care practice incident to a purchase, sale, legal dispute, or because of estate and financial planning.

17. I am also the cofounder of Dental Staff Placement, Inc., a Chicago-based employment agency specializing in permanent and temporary placement of dental personnel.

18. I have been a guest lecturer on dental practice administration and principles of dental practice valuation at the School of Dentistry of the University of Illinois.

19. I lecture regularly at the Chicago Dental Society's Mid-Winter Meeting, and have conducted numerous leadership conferences for the Academy Of General Dentistry and the Illinois State Dental Society.

20. I regularly speak and lecture dentists and dental professionals on a comprehensive list of dental practice and business management topics including: practice valuations; practice sales/acquisitions; associate and partnership planning; partnership formation and planning; practice analysis and strategy; planning marketing professional services; personnel management; financial controls (financial arrangements, collections and insurance); new patient examination and case presentation procedures; trends in the economics of dentistry and the basics of the "Business of Dentistry."

21. Since I began to offer professional practice valuation services, I have personally participated in the valuation of over 350 dental practices.

22. In order to meet the standard of care applicable to professional valuation and consulting services in respect of dental practices, I stay abreast of developments in the field of dentistry, including the meaning of terms of art that are utilized and accepted in that profession.

23. One widely accepted term of art in the dental profession is "active patient."

24. The preeminent, authoritative voice of the dental profession in the United States on matters of professional standards and accepted usages and terminology is the American Dental Association.

25. In 1991, the House of Delegates of the American Dental Association adopted its Resolution 30H (Trans. 1991:621).

26. Resolution 30H defines an active dental patient as follows:

Active and Inactive Dental Patients of Record (1991:621)

> Resolved, that only for the purpose of evaluating or appraising the assets of a dental practice do the following definitions of the terms "active" and "inactive" dental patients of record apply:
>
> **Active Dental Patient of Record:** An active dental patient of record is any individual in either of the following two categories: Category I -- patients of record who have had dental service(s) provided by the dentist in the past twelve (12) months; Category II patients of record who have had dental service(s) provided by the dentist in the past twenty-four (24) months, but not within the past twelve (12) months. Each of these categories of active patients of record can be further divided into: (1) new or regular patients who have had a complete examination done by the dentist and, (2) emergency patients who have only had a limited examination done by the dentist.
>
> **Inactive Dental Patient of Record**: An inactive dental patient of record is any individual who has become a patient of record and has not received any dental service(s) by the dentist in the past twenty-four (24) months.

27. The ADA recently performed a statistical analysis of the dental profession in the United States and issued a monograph entitled "*2008 Survey of Dental Practice: Characteristics of Dentists in Private Practice and Their Patients*." *See* Exhibit A.

28. According to that study, over 95% of dentists who responded to the survey indicated that they defined an "active patient" as a patient treated within the last 12 to 24 months. *See* Id. at pp. 52, 61, and 70, respectively.

29. The definition of active patient is important to persons buying or selling dental practices because a count of "active patients" can be used to provide a rough indication of one measure of the size of a dental practice, based on past experience.

30. However, care must be taken correctly to interpret the limited meaning of "active patient" as it has been defined as a term of art in dentistry, for at least two reasons.

31. First, the number of patients treated in the past says nothing about the amount of net cash flow generated by the dental practice in respect of those treatments.

32. Most appraisers of dental practices appraise the value of a dental practice as a function of the net cash flow that the practice generates, not the number of patients that it has treated in the past -- or is expected to treat in the future.

33. That is because the historical number of patients that a dental practice has treated in a given historical timeframe does not indicate that the practice generated net cash flow when it treated those patients, nor does it provide a reliable prediction that a dental practice will generate net cash flow in the future.

34. Indeed, two dental practices with the same historic number of "active patients" can have substantially different net cash flow -- and appraised values -- for many reasons, such as where one practice is expected to perform more specialized (and expensive) dental procedures than another.

35. Because of the centrality of net cash flow to the appraisal of dental practices, some buyers and seller of dental practices use gross revenues as a proxy for net cash flow and negotiate the sale price of a dental practice as a percentage of gross revenues in a previous period.

36. For example, one popular "rule of thumb" in the dental industry is that dental practices should sell for approximately 50% to 67% of their revenue in the previous year.

37. Second, the term "active patient" cannot be construed as a prediction that any patient will be "active" in the future.

38. While a layperson might naively interpret the term "active patient" as a statement that a patient is "active" because he or she is predicted to return for treatment in the future, that is not the case.

39. The generally accepted definition of "active patient" as a term of art in dentistry is based on objective, historical fact, not an expectation of future events.

40. The number of "active patients" includes only those patients who have actually been treated in a dental practice during some defined period of time, usually 24 months.

41. As such, a count of "active patients" is not a subjective prediction that a specified number of patients will return and request treatment in the future.

42. The only inquiry that is required to generate a count of active patients is a count of the number of unique patients who have been treated in a given dental practice during a specified lookback period -- usually 12 or 24 months.

43. Properly understood, a count of active patients does not require or imply that a manual review of patient charts has been conducted to predict how many of the patients actually treated during the specified lookback period will return.

44. Because it is a limited and exclusively backward-looking measure, an active patient count does not require that a dentist attempt to predict how many of the patients treated during the lookback period will return based on their present state of health, or indications that they might have moved to a new home, or expressed an intention to change dentists.

45. The utility of the term "active patient" is derived largely from the fact that it is, as defined, objective and based on empirically verifiable facts (discrete treatment events) that are generally not subject to conjecture, manipulation, subjectivity, or speculation.

46. In my expert opinion, the term "active patient" would have little if any utility if it were based on unspecified factors used to generate a subjective prediction about the number of patients who might return to a practice for treatment, because there are a potentially infinite number of factors that determine whether a patient returns.

47. For example, if a count of active patients were influenced by a patient moving his or her residence, this would require a consideration of how far the new home might be from the dental practice in question as a function of distance, and perhaps also actual commuting times.

48. A patient moving across the street might generate a different count of active patients than one moving across the county.

49. The potentially limitless number of considerations that could be said to bear upon "active patient" -- if it were a prediction, as distinct from a historical measure -- coupled with the subjective and complex nature of attempting to predict human behavior generally explain, in my view, why that "active patient" is universally understood not to include any predictive content.

50. With or without a count of active patients, patient abandonment after the sale of a dental practice is an unavoidable risk.

51. The practice of dentistry is highly competitive, and there is no shortage of dentists to choose from.

52. Patients cannot be compelled to the return to a dental practice after it is sold, and may choose not to return based on purely subjective, personal preferences.

53. If the existing patients of a dental practice do not feel a personal affinity with a new owner, or dislike changes in office procedures and costs, they cannot be compelled to return.

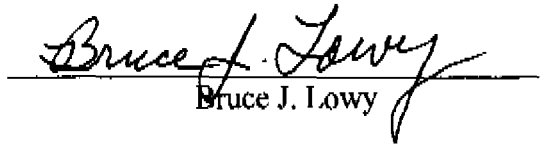
54. I counsel my clients who are buying dental practices to view an active patient count as merely the starting point for an analysis of potential future patient traffic, because the fact that a patient has been treated in the past does not perforce imply that such patient will be treated in the future.

55. Rather than value a dental practice by attempting to predict how individual patients may behave in the future, I counsel my clients to focus on the cash flow generated by a

practice, and assume that no dental practice can remain viable without being sensitive to issues that may affect the ability to retain existing patients and attract new ones.

FURTHER AFFIANT SAYETH NAUGHT.

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure (735 ILCS 5/109), the undersigned certifies that the statements set forth in this instrument are true and correct.



Bruce J. Lowy