A CELEBRATION OF LIBERTY AND JUSTICE FOR ALL: THE BICENTENNIAL OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Panelists:

The Honorable D. Brooks Smith
Chief United States Circuit Judge (3d Cir.)

The Honorable Thomas M. Hardiman
United States Circuit Judge (3d Cir.)

The Honorable Donetta W. Ambrose
United States District Judge

The Honorable Robert C. Mitchell
United States Magistrate Judge

Mr. Robert V. Barth, Jr.
Formerly Clerk of the United States District Court

Moderator:

The Honorable Maureen P. Kelly
Chief United States Magistrate Judge

BIOGRAPHIES

The Honorable D. Brooks Smith

D. Brooks Smith is the Chief Judge of the U.S. Court of Appeals for the Third Circuit. He is the only judge in the history of that Circuit to have served as both a chief district judge and as chief of the circuit. (Only five judges in the history of the federal judiciary have served in both capacities).

Judge Smith began his legal career as an associate with the Altoona, PA law firm of Jubelirer, Carothers, Krier and Halpern. He eventually became managing partner of that firm. He also served as an assistant district attorney in Blair County, PA, and as a special prosecutor helping to lead a two-year grand jury investigation which eventually brought down a Central Pennsylvania criminal organization affiliated with the La Rocca crime family. Smith was appointed Blair County District Attorney in 1983 by the Court of Common Pleas of Blair County, and was appointed by Governor Dick Thornburgh the following year to that county's bench. In 1985, he was elected to a full term as a Common Pleas Court judge after receiving the nominations of both major political parties.

In 1988, President Ronald Reagan appointed Judge Smith to the U.S. District Court for the Western District of Pennsylvania. In 2002, then – Chief District Judge Smith was appointed to the Third Circuit by President George W. Bush after receiving a unanimous Well-Qualified rating from the American Bar Association.

During his years as a federal judge, Smith has served on two committees of the Judicial Conference of the United States. He was a member of the Advisory Committee on Criminal Rules by appointment of Chief Justice William Rehnquist, and was a member, and eventually chair, of the Committee on Space and Facilities, having been named to those posts by Chief Justice John Roberts. He currently serves as a member of the Judicial Conference, the governing body of the Federal judiciary.

Judge Smith is a graduate of Franklin and Marshall College and the Dickinson School of Law (now Penn State Law). He was named an Alumni Fellow of Penn State University in 2011, and received the law school's first Leadership Award in 2016. He is chair of the Penn State Law Board of Advisors. In 2017, Judge Smith was named a Distinguished Alumnus of the University. He is an adjunct professor at Penn State Law where he teaches a seminar in class actions. Mount Aloysius College conferred on him an honorary Doctor of Humane Letters degree in 2012.

Judge Smith has taught and lectured in rule of law programs in Albania, Azerbaijan, Brazil, Bosnia, Bulgaria, China, Kosovo, Latvia, Macedonia, Moldova, Panama, Russia, Turkey, Ukraine, and the United Kingdom.

The Honorable Thomas M. Hardiman

The Honorable Thomas M. Hardiman was nominated by President George W. Bush to the United States Court of Appeals for the Third Circuit on January 9, 2007 and was confirmed by the Senate (95-0) on March 15, 2007. Prior to becoming an appellate judge, he served as a trial judge on the United States District Court for the Western District of Pennsylvania as of November 1, 2003. Before entering judicial service, Judge Hardiman handled a wide variety of litigation matters in state and federal trial and appellate courts as a partner at Reed Smith LLP (1999-2003), a partner at Titus & McConomy LLP (1996-1999), and as an associate with its predecessor firm, Cindrich & Titus (1992-1996). A graduate of the University of Notre Dame (1987) and Georgetown University Law Center (1990), Judge Hardiman began his legal career as an associate in the Washington D.C. office of Skadden, Arps, Slate, Meagher & Flom (1990-1992).

In addition to his service on the Third Circuit Court of Appeals, Judge Hardiman is an Adjunct Professor at Duquesne University School of Law where he teaches Advanced Constitutional Law.

The Honorable Donetta W. Ambrose

The Honorable Donetta W. Ambrose was born in New Kensington, Pennsylvania on November 5, 1945. She graduated as valedictorian from Arnold High School in 1963, Duquesne University with the degree of Bachelor of Arts in 1967, and was awarded a J.D. cum laude from Duquesne University School of Law in 1970. She has been admitted to practice before the Supreme Court of Pennsylvania, various federal courts and the U.S. Supreme Court.

She was a law clerk to the late Pennsylvania Supreme Court Justice Louis L. Manderino from 1970-72., an Assistant Attorney General for the Commonwealth of Pennsylvania from 1972-74, an Assistant District Attorney for Westmoreland County from 1977-82, and engaged in the private practice of law from 1974-1982. She was the first woman elected as Judge of the Court of Common Pleas of Westmoreland County in November of 1981 on which she served until her appointment to the United States District Court for the Western District of Pennsylvania on November 23, 1981. Judge Ambrose was the first female Chief Judge for the Western District of Pennsylvania. She served as Chief Judge from 2002-2009. By appointment of Chief Justice William Renquist, she served as a member of the Judicial Conference Committee on Criminal Law from 1999-2006. She assumed Senior Status on the Western District court on November 5, 2010.

Judge Ambrose is the recipient of many awards and honors, including the Anne X. Alpern Award from the Pennsylvania Bar Association Commission on Women in the Profession, the Susan B. Anthony Award from the Womens Bar Association, the Carol Los Mansmann Helping Hand Award from the Allegheny Bar Association Women in the Law Division, a Special Recognition Award from the ADR Committee of the Pennsylvania Bar Association, and the Carol Los Mansmann Award for Distinguished Public Service on the occasion of the 100th anniversary of the Duquesne University School of Law.

The Honorable Robert C. Mitchell

Magistrate Judge Robert C. Mitchell was born in New York City on August 4, 1940. He graduated with an A.B. Degree from Dartmouth College in 1962, and received an M.B.A. from the University of Pittsburgh in 1964 and a J.D. Degree from the University of Pittsburgh in 1967.

He served as a law clerk to the Honorable Louis Rosenberg from 1968 through 1972, was appointed as a United States Magistrate in 1972, and reappointed several times and has been serving as a recalled retired Magistrate Judge since 2005. He is a member of the American Bar Association, the American Judicature Society, the Allegheny County Bar Association and the National Council of United States Magistrates.

He is married to Leslie T. Mitchell and the father of a son, Barrett, and a daughter, Allison.

Robert V. Barth, Jr.

Robert V. Barth, Jr. was the Clerk of Court for the United States District Court for the Western District of Pennsylvania from 2002 until 2017. Bob started his career with the clerk's office in 1978 as a temporary in the file room and was promoted through the office culminating in his appointment as Clerk of Court in February of 2002. He graduated magna cum laude from the part-time degree program at Point Park University with a Bachelor of Science in Public Administration. He worked in various areas of the clerk's office, including as the courtroom deputy clerk to District Judge Glenn Mencer, and as the Chief Deputy Clerk prior to his appointment as Clerk. He retired on July 31, 2017.

The Honorable Maureen P. Kelly

Chief Magistrate Judge Maureen P. Kelly was born in Youngstown, Ohio, the oldest of six children in a household influenced by strong Irish-Catholic roots. She is a graduate of the University of Notre Dame and Duquesne University School of Law.

Following law school, Magistrate Judge Kelly worked as an associate and then partner at Thorp, Reed & Armstrong, where she specialized in commercial and employment litigation. In 1999, she joined Babst, Calland, Clements & Zomnir as a shareholder, chairing the Employment and Labor Services Group. Her practice primarily concentrated on the litigation of issues related to Title VII of the Civil Rights Act of 1964, the American Disabilities Act, the Age Discrimination in Employment Act, as well as restrictive covenants, employment contracts and FLSA collective actions.

As a trial lawyer, Magistrate Judge Kelly received the national honors of induction into the American College of Trial Lawyers in 2007 and the Litigation Council of America in 2008. She was elected to the Academy of Trial Lawyers of Allegheny County in 1996 and is a Fellow in the Academy of Trial Advocacy. She was listed in the Labor and Employment Section of The Best

Lawyers in America® from 2008 to 2011. She was recognized as a Pennsylvania Super Lawyer from 2005 to 2011 and was listed as one of Pittsburgh's Top 50 Lawyers and one of Pennsylvania's Top 50 Women Lawyers. She has served in leadership roles as a member of the Pennsylvania State Committee of the American College of Trial Lawyers and the Board of Governors of the Academy of Trial Lawyers of Allegheny County.

Judge Kelly has served the courts in a variety of roles. She was appointed by the Pennsylvania Supreme Court to serve as Chair of the Interest on Lawyers Trust Account Board and served as Chair for five years. She has also served as an appointed member of the Lawyers Advisory Committee to the United States Court of Appeals for the Third Circuit as well as Chair of the Merit Selection Panel for the Selection and Appointment of Magistrate Judge for the Western District of Pennsylvania.

Judge Kelly currently serves as co-chair of the Allegheny County Bar Association ("ACBA") Gender Equality Committee. She has served as chair of the ACBA's Civil Litigation Section Council as well as an elected member of the Judiciary Committee. On a statewide level, Judge Kelly served as co-chair of the Pennsylvania Bar Association Task Force on Student Loan Forgiveness and as an appointed member on the Task Force on the Delivery of Legal Services to the Poor. She recently completed a three year term on the nine-member American Bar Association Commission on the Interest on Lawyers Trust Accounts.

Judge Kelly has always been dedicated to the delivery of civil legal aid to those in need. She served as President of Neighborhood Legal Services Association and chaired the annual Equal Justice Under Law Campaign for many years. She was a member of the board of directors of Pennsylvania Legal Services from 1996 to 2003.

In addition, Judge Kelly has been active in civic and charitable organizations. She recently completed a term on the board of the Carnegie Museum of Natural History. She served on the Advisory Board of the Center for Social Concerns at the University of Notre Dame. She has also served on the boards of other non-profit programs in Western Pennsylvania.

Judge Kelly has been the recipient of awards recognizing her professional accomplishments. In September 2016, she was honored with induction as a member of the Duquesne University Century Club in recognition of her exemplary record of professional achievement and service to the community. In February 2008, The Penn State Dickinson School of Law awarded her the Sylvia H. Rambo Award in recognition of her distinguished legal career and her efforts on behalf of women in the profession. In March 2007, the Pennsylvania Legal Aid Network presented Judge Kelly with the Outstanding Leadership in Support of Legal Services award. This award recognizes commitment to the delivery of legal services to the poor in Pennsylvania. She was presented with the Susan B. Anthony Award in February 2007 by the Women's Bar Association. This award honors an outstanding member of the legal community who demonstrates dedication to encouraging and promoting women in the law and maintaining the highest professional standards in the courts and legal profession. In June 2006, Judge Kelly was presented with the Dorothy Ann Richardson Award by the Neighborhood Legal Services Association, in recognition of service and advocacy for equal justice for all. Judge Kelly also was named Woman of the Year in May 2004 by the Women's Law Association of Duquesne University

School of Law. She was presented with the 1999 Duquesne University School of Law Outstanding Alumni Achievement Award for her achievements in the legal profession and service to the community.

Since her appointment to the Court in 2011, Judge Kelly has served as one of the judges overseeing the Re-integration into Society Effort ("RISE") Court. She was also appointed by the United States Court of Appeals for the Third Circuit to serve as co-chair of the newly established Re-entry Committee of the Circuit.

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I. CHIEF CIRCUIT JUDGE D. BROOKS SMITH

Additional Reading:

Dan Packel, Smith Replaces McKee as 3rd Circ. Chief Judge, Law 360, Oct. 3, 2016.

II. JUDGE THOMAS HARDIMAN

III. JUDGE DONETTA AMBROSE

VII. ANDREW WILLIAM MELLON

See, Andrew William Mellon (1855-1937), National Park Service, taken from David Cannadine, Mellon: An American Life, (New York: Vintage Books, 2008), from the brief David Cannadine biography of Andrew Mellon found on the Mellon Foundation website, and briefly, from Martha Frick Symington Sanger, Henry Clay Frick: An Imitate Portrait (New York: Abbeville Press, 1998).

REFLECTIONS ON THE WESTERN DISTRICT OF PENNSYLVANIA

Select materials on Chief Circuit Judge D. Brooks Smith

compensation tort immunity. It did not, however, analyze whether New York's formulation of the dual capacity doctrine comported with the New Jersey Workers' Compensation Act as interpreted by the New Jersey courts.[16]

In light of the New Jersey courts' emphasis on corporate structure at the time of the injury, on the economic reality of whether the party answerable for tort damages is in fact the same corporate entity as the employer and on preserving the statutory equilibrium embodied in the exclusivity provisions, I find *Petrocco* and its application of the dual capacity doctrine inconsistent with established principles of New Jersey workers' compensation law. I therefore conclude that McNeil–PPC is entitled to summary judgment on the grounds that as plaintiff's employer at the time of the injury it is entitled to workers' compensation tort immunity.[17]

ORDER

AND NOW this 9 day of September, 1996 upon consideration of the pleadings and record herein and the Report and Recommendation of the Magistrate Judge it is hereby ORDERED that defendant's renewed motion for summary judgment is GRANTED and judgment is entered for defendant and against plaintiff.

16. Where as here the state supreme court has not decided the precise issue at hand "a federal tribunal should be careful to avoid the danger of giving a state court decision a more binding effect than would a court of that state.... Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends they evince." *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657, 662–63 (3d Cir.), *cert. denied*, 449 U.S. 976, 101 S.Ct. 387, 66 L.Ed.2d 237 (1980). State trial court decisions are "not controlling," *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 68 S.Ct. 488, 92 L.Ed. 608 (1948), and need not be followed when their reasoning contradicts statutory intent and would not be followed by the state supreme court. *McGeshick v. Choucair*, 9 F.3d 1229, 1234 (7th Cir.1993), *cert. denied*, —— U.S. ——, 116 S.Ct. 1834, 134 L.Ed.2d 937 (1996). In ascertaining how the state Supreme Court would rule state appellate decisions on matters "closely related but not identical ... [are] more helpful than more closely related opinions by lower state courts." *Gruber v. Owens–Illinois Inc.*, 899 F.2d 1366, 1370 n. 5 (3d Cir.1990).

17. As to plaintiff's breach of warranty and strict liability claims defendant is entitled to summary judgment on the additional grounds that defendant was not a merchant with respect to the type of goods that injured plaintiff and did not place such products in the stream of commerce.

SANI–DAIRY, A DIVISION OF PENN TRAFFIC CO., INC.; John P. Strittmatter, d/b/a Strittmatters Dairy; Delbert and Ed Thomas; Lowell Friedlin; Arthur Bloom; and James L. Harris, Plaintiffs,

v.

Mike ESPY, Secretary of Agriculture, United States Department of Agriculture; and Commissioner of Agriculture and Markets, State of New York, Defendants.

MILK MARKETING, INC., Plaintiffs,

v.

Mike ESPY, Secretary of Agriculture, Defendant.

Civil Action Nos. 90–222J, 90–236J.

United States District Court,
W.D. Pennsylvania.

Dec. 30, 1993.

Dairy farmers and dairy cooperative filed action challenging validity of Secretary of Agriculture's regulations governing marketing of fluid milk in particular marketing area. The District Court, D. Brooks Smith, J., held that regulations constituted economic trade barrier in violation of Agricultural Marketing Agreement Act.

Ordered accordingly.

Affirmed, 91 F.3d 15.

Food ⇐1.9(3)

Secretary of Agriculture's regulations governing marketing of fluid milk in particular marketing area constituted economic trade barrier in violation of Agricultural Marketing Agreement Act, by requiring partially regulated handler to pay milk producers less per gallon than it otherwise would in very competitive market and thereby impermissibly limited marketing of dairy products in area for benefit of those doing business in area; federal regulatory scheme levied charge on partially regulated handler, regardless of minimum price it was required to pay producers under state law, and forced nonpool milk to subsidize pool milk from competitive impact caused by entry of outside milk. Agricultural Adjustment Act, § 8c(5)(G), as amended, 7 U.S.C.A. § 608c(5)(G).

Marvin Beshore, Milspaw & Beshore, Harrisburg, PA, for plaintiffs.

Glen W. Wagner, Port Clinton, OH, John J. Valkovci, AUSA, Johnstown, PA, Donald Tracy, Office of General Counsel, U.S. Department of Agriculture, Washington, DC, for defendants.

FINDINGS OF FACT and CONCLUSIONS OF LAW

D. BROOKS SMITH, District Judge.

I. *Introduction*

Several Pennsylvania dairy farmers and a dairy cooperative [1] challenge the validity of the Secretary of Agriculture's regulations governing the marketing of fluid milk in the New York–New Jersey milk marketing area.[2] Plaintiffs allege that the Secretary's regulations, promulgated pursuant to the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 601 *et seq.* ("the Act"), violate 7 U.S.C. § 608c(5)(G), which states:

> No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

I held an evidentiary hearing on January 28, 1993 to determine whether the Secretary's regulation, as applied to the plaintiffs, constitutes a prohibited economic trade barrier, *see Lehigh Valley Cooperative Farmers, Inc. v. United States*, 370 U.S. 76, 91–98, 82 S.Ct. 1168, 1175–80, 8 L.Ed.2d 345 (1962), to milk producers and sellers outside the New York–New Jersey milk marketing area. The parties have filed proposed findings of fact and conclusions of law (Docket Nos. 42 and 44). I now enter the following findings of fact and conclusions of law:

II. *Background*

A. *Regulation of Milk Products Under the Federal Order System and Order 2*

Raw milk has two principal end uses: fresh fluid milk or for use in manufactured products such as yogurt, butter and cheese. Milk that is sold for fluid use brings a higher price than milk sold for use in manufactured products; accordingly, in the absence of regulation, competition among farmers for fluid milk sales can be intense. During the Great Depression, the demand for fluid milk fell, exacerbating the price-depressing effects of fierce competition and seasonal milk surplus, and causing unrest among milk producers. *See* Richard A. Ippolito and Robert T. Masson, *The Social Cost of Government Regulation of Milk*, 21 J. Law & Econ. 33, 36 (1978).

Congress responded by enacting the Agricultural Marketing Agreement Act, which authorizes the Secretary to promulgate milk marketing orders. The milk marketing or-

1. By Memorandum Order dated October 29, 1991 (Docket No. 22), the Secretary's motion to dismiss the complaint filed by plaintiff Sani-Dairy was granted because Sani-Dairy, a milk processor, or "handler" as that term is defined by 7 C.F.R. § 1002.7, failed to exhaust its administrative remedies before seeking judicial review. The claims of the individual plaintiffs, all dairy farmers, or "producers" as that term is defined by 7 C.F.R. § 1002.6, and of Milk Marketing, Inc. ("MMI"), a dairy farmer cooperative, were not dismissed.

2. The marketing area is defined in 7 C.F.R. § 1002.3.

ders divide milk into different classes, depending upon the ultimate use to which the milk will be put, and require all handlers in the marketing area to pay a higher minimum price for milk that will be sold as fluid milk ("Class I milk") than for milk that will be used in manufactured products such as yogurt and cottage cheese ("Class II milk"), or as butter and cheese ("Class III milk"). Producers, who sell their milk in fluid form, receive the same price for their milk, whether it is sold for fluid consumption or used in manufactured products.

Reconciliation of the uniform price received by producers with the varying prices paid by handlers is accomplished by operation of the producer settlement fund ("the Fund"). Each month, the Market Administrator establishes the minimum price for each class of milk, and then ascertains the total volume of milk, by class, used in the market. By multiplying the volume of each class of milk by the applicable class price, and dividing the product by the aggregate volume of all milk, the Administrator arrives at the uniform "blend price" which handlers must pay to all producers regardless of the ultimate utilization of their milk. 7 C.F.R. § 1002.61. Handlers pay into the Fund the amount by which their purchased milk multiplied by the respective minimum class prices, is greater than their purchased milk multiplied by the blend price. Handlers receive from the Fund the amount that the handlers' purchased milk multiplied by minimum class prices, is less than their purchased milk multiplied by the blend price. *See United States v. Rock Royal Co-Operative,* 307 U.S. 533, 555, 59 S.Ct. 993, 1004, 83 L.Ed. 1446 (1939).

The Secretary regulates milk sales in the New York–New Jersey milk marketing area through marketing Order No. 2 ("Order 2"), 7 C.F.R. § 1002, *et seq.,* issued pursuant to 7 U.S.C. § 608c(1). These consolidated actions focus on certain of the Secretary's regulations in Order 2 requiring what are commonly known as "partially regulated handlers" located outside the marketing area to make payments to the Order 2 producer settlement fund.

Generally, under Order 2, a handler shall be a fully regulated handler, and its facilities designated a "pool plant," each month that it classifies at least twenty five percent of its milk as Class I–A for distribution in the New York–New Jersey marketing area. 7 C.F.R. § 1002.28(a). Handlers that classify less than the minimum percentage of their milk as Class I–A for distribution in the marketing area are informally called "partially regulated handlers," and their facilities are designated "partial pool plants." 7 C.F.R. § 1002.29. Unlike fully regulated handlers, partially regulated handlers are subject to regulation only on their sales of Class I milk in the marketing area.

Sani–Dairy, the handler to whom the individual plaintiffs sell their milk, is a partially regulated handler under Order 2, and is required to account to the Order 2 Fund in the same manner as fully regulated Order 2 handlers: it must pay the Fund the difference between the Class I minimum price and the blend price of milk on all the milk it sells in the marketing area each month. 7 C.F.R. §§ 1002.50–1002.77. Order 2 permits a partially regulated handler to meet its obligation to the Fund in one of three ways: (1) purchase from fully regulated handlers sufficient quantities of milk to meet its distribution requirements; (2) become fully regulated itself[3]; or (3) establish a "bulk tank unit" pursuant to 7 C.F.R. § 1002.25. Tr. 148. Handlers who are partially regulated under Order 2 by dint of their milk sales in that marketing area, but fully regulated by another federal milk marketing Order, have no obligations whatsoever to the Order 2 producer settlement fund. Tr. 165–66.

B. *Sani–Dairy's Operation Under Order 2*

Sani–Dairy is a Johnstown, Pennsylvania based handler that distributes milk and dairy products in four federal milk order marketing areas.[4] Its maximum distribution radius

3. A partially regulated handler may only become fully regulated if its Class I utilization is at least as high as that of handlers who are already fully regulated under Order 2. Tr. 178.

4. In addition to the Order 2 marketing area, Sani–Dairy distributes its products in Order 33 (central Ohio), Order 36 (western Pennsylvania

has increased from fifty miles in 1960 to about two hundred miles today, largely attributable to greater transportation efficiencies. Tr. 33–35. Sani–Dairy has marketed milk products in New York state since 1989, and currently distributes its products in Chemung, Tioga and Cortland counties only through retail outlets of its own subsidiary companies. Tr. 32. Sani–Dairy purchases its milk from 165 individual dairy farmers, including plaintiffs, and from the MMI cooperative. Tr. 30.

Sani–Dairy meets its obligations to the Order 2 producer settlement fund by pooling some of the milk it purchases on a "bulk tank unit," which in practice is nothing more than an accounting mechanism. Sani–Dairy "pools" milk on its bulk tank unit by identifying and designating raw milk that it purchases from eleven producers, including the individual plaintiffs, as Class I milk that will be resold in Order 2, and accounting for that milk accordingly. Tr. 59. Pursuant to the Order 2 pricing regulations described above, Sani–Dairy must make "compensatory payments" to the Order 2 producer settlement fund for all milk pooled on its bulk tank unit for Class I resale in the Order 2 marketing area. It is undisputed that for approximately eighteen months, Sani–Dairy has pooled an amount of milk on its bulk tank unit ranging from 250,000 to 500,000 pounds greater than the amount required to satisfy its obligation under Order 2.[5] Tr. 152.

Although Sani–Dairy is not fully regulated by any federal marketing Order, it is subject to the regulations of the Pennsylvania Milk Marketing Board (PMMB). Tr. 38. Like Order 2, the PMMB establishes minimum prices that handlers must pay producers for each class of milk. As a result of these PMMB regulations, Sani–Dairy has paid the producers from whom it purchases milk a minimum Class I price averaging $0.49 per hundredweight greater than Order 2's minimum Class I price since it began selling milk in the Order 2 marketing area.[6] Nevertheless, Order 2 levies the same producer settlement fund obligations on Sani–Dairy as it does on fully regulated handlers within the marketing area. Tr. 153–55.

From December 1989 through December 1992, Sani–Dairy's average compensatory payment to the Order 2 Fund for milk it pooled on its bulk tank unit for Class I distribution was $1.77 per hundredweight. Plaintiffs' Exhibit 5. The total dollar amount paid by Sani–Dairy to the Order 2 Fund during that same period was $563,590.51.

The PMMB permits Sani–Dairy to deduct these compensatory payments from its entire producer payroll. Tr. 73. As a result, the cost of the payments Sani–Dairy makes to the Order 2 Fund is borne by all of its producers, including those not designated as bulk tank unit producers. Tr. 57, 73. The bottom line for each of Sani–Dairy's producers, then, is that Sani–Dairy pays them fifteen and one quarter cents ($0.1525) per gallon of milk less than it otherwise would, which amount is directly attributable to the Order 2 compensatory payment. Tr. 55.

III. *Discussion*

The issue in this case is whether the Order 2 regulatory scheme acts to "prohibit" or "limit" the marketing of nonpool milk in the Order 2 marketing area, in violation of 7 U.S.C. § 608c(5)(G). As the *Lehigh Valley* court stated, "the word 'prohibit' refers not merely to absolute or quota physical restrictions, but also encompasses economic trade barriers...." *Lehigh Valley*, 370 U.S. at 97, 82 S.Ct. at 1180.

Plaintiffs have demonstrated by a preponderance of the evidence that the producer-handler market is competitive and that a

and eastern Ohio) and Order 4 (southeastern Pennsylvania and northeastern Maryland).

5. Sani–Dairy is required to pool an amount of milk on its bulk tank unit equivalent to the amount of fluid milk it regularly distributes in the Order 2 marketing area. Tr. 152.

6. From December 1989 through December 1992, the PMMB minimum blend price that handlers were required to pay to producers averaged $14.90. During the same period, the Order 2 minimum blend price averaged $14.41. Plaintiffs' Ex. 4. The difference between the PMMB minimum blend price and the Order 2 minimum blend price may actually be greater than $0.49 because Sani–Dairy's Johnstown plant is located farther than 200 miles from New York City, a factor which would lower the minimum blend price required by Order 2. Tr. 44–45.

handler's bid for producers' milk often turns on one or two cents per gallon: "Sometimes ... in rough situations it can be even less, half a cent." Tr. 55. Under those conditions, Order 2's imposition of an additional fifteen cents per gallon charge on such producers would be an economic barrier of the sort contemplated by § 608c(5)(G).

The Order 2 charge applies to all milk pooled on the bulk tank unit, not the amount of milk actually distributed in the Order 2 marketing area. To the extent Sani–Dairy pools excess milk on its bulk tank unit, it pays more money than necessary to the Order 2 Fund. Order 2 requires only that partially regulated handlers pool enough milk on their bulk tank units to cover their monthly average distribution in the marketing area. 7 C.F.R. § 1002.25; Tr. 149–150. Admittedly, identifying that figure precisely is probably impossible, and handlers may prefer to err on the side of over-pooling. But the Secretary demonstrated that Sani–Dairy regularly pools substantially more milk in its bulk tank unit than necessary. Sani–Dairy's excess, ranging from 25 percent to 50 percent over its monthly average distribution of Class I milk into Order 2, is objectively high. Defendant is not under any duty to inform Sani–Dairy that it is pooling too much milk on its bulk tank unit, and that it could save money for itself and for plaintiff producers by pooling an amount that more closely approximates that amount it actually distributes.

The Secretary calculates the cost of Sani–Dairy's obligations to Order 2, based upon the amount of milk Sani–Dairy was *obligated* to pool (not the greater amount of milk it actually did pool) at $463,556.79, or $1.48 per hundredweight, Defendant's Exhibit 1. A charge of $1.48 per hundredweight translates into a per gallon charge of 12.7 cents, compared to 15.5 cents per gallon by Sani–Dairy's calculations.

Using either set of figures, the compensatory payment scheme places a regulatory disadvantage on the plaintiff producers that New York producers are not burdened with, and in a market where bids turn on one or two, or even five or ten cents per gallon, Tr. 87–88, it is a disadvantage substantial enough to violate § 608c(5)(G).

The crux of the problem is that Order 2 levies its charge on Sani–Dairy regardless of what Sani–Dairy paid its producers pursuant to PMMB regulations. Under the federal milk marketing scheme,[7] Order 2 may properly protect its producers from underpriced milk dumped into the marketing area by outside handlers. *Lehigh Valley,* 370 U.S. at 99, 82 S.Ct. at 1180. Even before the Order 2 charge, however, Sani–Dairy already pays plaintiff producers 3.5 percent more per hundredweight than Order 2 handlers pay their producers under the Order 2 blend price. Accordingly, the "compensatory" payment does not level the playing field between partially regulated handlers such as Sani–Dairy and Order 2 handlers; rather, it places Sani–Dairy at a substantial disadvantage by piling an extra charge on top of the already-higher PMMB minimum blend price Sani–Dairy must pay to its producers.

The Supreme Court found, in *Lehigh Valley,* that a previous incarnation of Order 2 protected the blend price received by Order 2 pool producers from the competitive impact of nonpool milk, as though all such milk were physically excluded and they alone supplied the Order 2 marketing area. *Lehigh Valley,* 370 U.S. at 89–90, 82 S.Ct. at 1175. Although not as egregiously as in *Lehigh Valley,* the Secretary has protected Order 2 producers from *all* nonpool milk, not merely from *underpriced* nonpool milk. Order 2 thereby forces "nonpool milk ... to subsidize the pool milk and insulate the pool milk from the competitive impact caused by the entry of outside milk," *id.* at 91, 82 S.Ct. at 1175. This creates a price protection scheme broader than the Secretary has been authorized to promulgate.

7. Edward Gallagher, Chief of Market Analysis for the Office of Market Administrator in Order 2 testified that "the purpose of ... the Federal Milk Marketing Orders is to assure that handlers competing in a specific area have an equal raw product cost for their class of milk in that area." Tr. 198. Cf. *Lehigh Valley,* 370 U.S. at 84, 82 S.Ct. at 1173 (compensatory payments "put[] pool and nonpool milk on substantially similar competitive positions at source") (citation omitted).

In *Lehigh Valley*, the Supreme Court struck down a compensatory payment scheme requiring the plaintiff, a partially regulated handler, to make payments to the Order 2 Fund of equalling 43 percent of the PMMB minimum Class I price the handler already paid to its producers. *Id.* at 86, 82 S.Ct. at 1174. The Court also noted that the Secretary could, and under other milk marketing orders did, consider "the actual price of nonpool milk" when calculating compensatory payments owed by nonpool handlers. *Id.* at 87 n. 13, 82 S.Ct. at 1174 n. 13. The Order 2 Administrator currently does not consider the effect of the PMMB regulations when determining the obligation of partially regulated handlers.[8]

The Court in *Lehigh Valley* "did not strike down all compensatory payments," *Lewes Dairy, Inc. v. Freeman*, 401 F.2d 308, 314 (3d Cir.1968), but only those charges that "[bear] no relation to the actual cost of the milk," *id.* at 313, or to the nonpool "handler's competitive advantage." *Fairmont Foods Co. v. Hardin*, 442 F.2d 762, 771 (D.C.Cir. 1971). Sani-Dairy makes payments of 10–12 percent more than the PMMB minimum Class I price, depending upon whether one accepts plaintiffs' or defendant's calculation of the average payment per hundredweight. Given the competitiveness of the market, the effect of the Secretary's regulations is not distinguishable from those struck down in *Lehigh Valley*.

Footnote 13 to *Lehigh Valley* does not compel a different conclusion. In that footnote, the Court addressed the Secretary's concern that nonpool handlers could acquire a competitive advantage by paying their nonpool producers a premium over the Order 2 blend price. After considering alternative regulatory schemes, including the one currently used by the Order 2 Market Administrator, Justice Harlan opined that the Secretary "might be able to justify a compensatory payment equal to the difference between the nonpool milk's 'use value' and the 'blend price,' though we do not decide the question." *Id.* at 87 n. 13, 82 S.Ct. at 1174 n. 13.

The Secretary contends that because Sani-Dairy "is paying the same as its competitors, and its producers receive no less than any other similarly situated Order 2 producer," Order 2 as currently administered complies with the regulatory scheme Justice Harlan approved in dictum. However, plaintiff producers are not "similarly situated" with any Order 2 producer, because their competitive environment is dictated by PMMB regulations and prices, which do not mirror Order 2 regulations and prices. Unlike the plaintiff in *Lehigh Valley*, Sani-Dairy cannot be treated *as if* it operated on terms similar to those faced by Order 2 handlers, for Sani-Dairy does not *choose* to pay its producers more than the Order 2 minimum Class I price for milk purchased. Therefore, the Court's suggestion in footnote 13 that "the exaction of a Class I-blend price payment would effectively discourage [nonpool handlers'] purchases in excess of the [Order 2] blend price" is inapposite to the instant case. Sani-Dairy obtains no competitive advantage over Order 2 producers by paying plaintiff producers more than the Order 2 minimum Class I price, and cannot be discouraged from paying its producers more than Order 2 minimum prices in any event, for the price it pays for raw milk is determined by PMMB regulations.

The conclusion I reach is supported by *County Line Cheese Co. v. Lyng*, 823 F.2d 1127 (7th Cir.1987), the most recent reported case addressing the compensatory payment scheme *sub judice* in light of 7 U.S.C. § 608c(5)(G). In *County Line*, one of the plaintiffs was a handler who purchased milk from another pool handler. When the selling handler's plant from which the purchasing

8. Edward Gallagher testified on direct examination:

> [B]ecause we don't have any control over how these States set their regulations it is impossible for us to really take them into consideration in setting our regulations. Because after we make a change and if—if we start recognizing these prices and went through the expensive and time-consuming process of having a hearing and changing a marketing order to recognize this the next or soon thereafter the State could end up doing something—changing their regulations and things would be out of whack again. So it would become a virtual impossibility because the Secretary cannot control what the States are doing.

Tr. 200.

handler bought its pool milk was "depooled" for several months, the purchasing handler had to make compensatory payments into the producer settlement fund on each gallon of "nonpool" milk it had purchased during those months. The purchasing handler's obligation for those months was the same as Sani-Dairy's obligation since it began distributing milk in the Order 2 marketing area: the difference between the blend price and the Class I price. *Id.* at 1129–30.

The court in *County Line* rejected the plaintiff handlers' § 608c(5)(G) challenge to the compensatory payment scheme in light of *Lehigh Valley.* In so doing, the court considered three situations to which the compensatory payment scheme might apply. First, a handler might purchase nonpool milk at a price less than the pool's blend price. In that case, requiring the handler to pay a compensatory payment of the difference between the Class I and the blend price clearly compensates the pool producers without putting the nonpool milk at a disadvantage, for nonpool Class I milk could still enter the pool at a total cost less than pool Class I milk.

Second, the fact pattern actually faced by the plaintiff in *County Line,* a handler might purchase nonpool milk at a price that falls somewhere between the blend price and the Class I price. In that case, the compensatory payment would put nonpool milk at a slight disadvantage, "because the handler's total cost after adding the compensatory payment would then be more than the Class I price." However, it is appropriate to demand the payment from purchasers of nonpool milk for the sake of consistency, because handlers who buy pool milk at more than blend price have to pay the difference between blend and Class I too. *Id.* at 1134; *Lehigh Valley,* 370 U.S. at 87 n. 13, 82 S.Ct. at 1174 n. 13.

Finally, it is possible that a handler would purchase nonpool milk at a price that is higher than the Class I price. In that case, the "nonpool milk's price ... would already cost more than pool milk," *County Line,* 823 F.2d at 1134, and the purchasing handler should not be subject to a compensatory payment. Any compensatory payment is inappropriate under this scenario for two reasons. First, no price advantage can possibly redound to the handler who buys nonpool milk at a price greater than Class I. Second, no purchaser of pool milk would ever be subject to the payment obligation because, assuming economic rationality in the Milk Marketing Order regulatory system of milk pricing, it is inconceivable that the over-blend premium pool producers sometimes enjoy would ever be so high as to raise the price they receive over the minimum Class I price.

In sum, where a nonpool handler already pays its producers 3.5 percent more for raw milk than handlers in the protected marketing area, imposing an extra 10–12 percent charge on the nonpool handler neither wholly nor partially "compensates" entities regulated under the order, that is, does not "put[ ] pool and nonpool milk on substantially similar competitive positions at source," *Lehigh Valley,* 370 U.S. at 84, 82 S.Ct. at 1173. Rather, in that situation the charge is a sheer penalty, *see Kass v. Brannan,* 196 F.2d 791, 795 (2d Cir.1952), that, plaintiffs have shown by adequate evidence, *see United States v. Ott,* 214 F.Supp. 616, 618 n. 4 (D.Del.1963), constitutes an economic trade barrier making nonpool milk more expensive, impermissibly limiting the marketing of dairy products in the Order 2 marketing area for the benefit of "those doing business in [that area], at the expense of those outsiders seeking to enter the market," *Lewes Dairy,* 401 F.2d at 315, in violation of 7 U.S.C. § 608c(5)(G).

An appropriate order follows.

ORDER

AND NOW, this 30th day of December, 1993, consistent with the foregoing Findings of Fact and Conclusions of Law, judgment is hereby entered in favor of plaintiffs John P. Strittmatter, d/b/a Strittmatters Dairy, Delbert and Ed Thomas, Lowell Friedlin, Arthur Bloom, James L. Harris, and Milk Marketing, Inc. Defendant's Motion For Summary Judgment (Docket No. 44) is hereby DENIED.

It is further ORDERED, that defendant's Motion To Admit Defendant's Exhibit 1–a (Docket No. 37) and Motion To Strike Por-

tions of Plaintiffs' Exhibit 1 (Docket No. 38) are denied as moot.

In the event that the parties are unable to agree within thirty (30) days of this Order on the appropriate measure of damages due to plaintiffs, they shall apply to the Court for a determination of damages.

UNITED STATES of America

v.

James John NESSER, III.

Criminal No. 95-36.

United States District Court,
W.D. Pennsylvania.

Aug. 6, 1996.

Following conviction for conspiracy to distribute drugs, conspiracy to launder money, money laundering, and engaging in illegal monetary transactions, defendant moved, inter alia, for judgment of acquittal or for new trial. The District Court, Cindrich, J., held that: (1) willful blindness instruction did not open door to conviction for negligent behavior; (2) willful blindness instruction did not place burden on defendant to offer proof that he lacked guilty knowledge, contrary to Fifth Amendment; (3) willful blindness instruction was supported by evidence; (4) there was sufficient evidence for jury to convict on drug conspiracy charge; and (5) conspiracy convictions did not result in defendant's being convicted twice for same conduct.

Motion denied.

1. **Conspiracy** ⇐48.2(2)
Criminal Law ⇐772(5)
United States ⇐34

Willful blindness instruction did not open door to conviction for negligent, as opposed to knowing, behavior in prosecution for conspiracy to launder money and distribute drugs and for money laundering; instruction explicitly stated, and repeated, that jury could not convict for stupidity, negligence, or recklessness, and that criminal knowledge was based on subjective knowledge, or its equivalent, narrowly defined.

2. **Criminal Law** ⇐772(5)

Willful blindness instruction did not place burden on defendant to offer proof that he lacked guilty knowledge, contrary to Fifth Amendment, despite claim that language in charge, that one aspect of willful blindness was defendant's deliberate failure to investigate suspicious circumstances, created burden for defendant at trial to explain to jury why he did not investigate sources of money he handled; defendant's claim confused conduct which was part of willful blindness at time of alleged crimes with his obligations at trial. U.S.C.A. Const.Amend. 5.

3. **Conspiracy** ⇐48.2(2)
Criminal Law ⇐772(5)
United States ⇐34

Evidence supported giving of willful blindness charge in prosecution of attorney for conspiracy to distribute drugs, conspiracy to launder money, money laundering, and engaging in illegal monetary transactions; case was based on attorney's years of association with client and sometimes social acquaintance, attorney handled property transactions for client and represented drug dealers who were part of client's organization, and there was abundant evidence of attorney's detailed knowledge of client's financial affairs, and sufficient evidence to inform attorney that those affairs were funded by drug money.

4. **Conspiracy** ⇐48.2(1)
Criminal Law ⇐772(5)

Willful blindness charge was not improper on conspiracy charge, as opposed to substantive offense.

5. **Criminal Law** ⇐1134(8)

In deciding motion for judgment of acquittal based on sufficiency of evidence, court determines whether, after viewing evidence in light most favorable to prosecution, any

case does not fit within any of the three types. We agree. We have before us a Motion to Dismiss for Lack of Jurisdiction under Fed.R.Civ.P. 12(b)(1) and the strong pronouncements of *McNary* dictate that we not hear matters such as this when state courts provide a plain, adequate and complete remedy. Accordingly, we should not abstain, but should grant defendants' motion and dismiss.

An appropriate Order follows.

ORDER

AND NOW, this 19th day of October, 1990, upon consideration of the defendants' motion to dismiss for lack of jurisdiction, pursuant to Fed.R.Civ.P. 12(b)(1), and upon consideration of the plaintiffs' response thereto, it is ORDERED that the plaintiffs' request for injunctive relief is hereby DISMISSED by stipulation of counsel made in open court and that the plaintiffs' complaint is hereby DISMISSED with prejudice.

MELLON BANK CORPORATION and Mellon Bank, N.A., Plaintiffs,

v.

FIRST UNION REAL ESTATE EQUITY AND MORTGAGE INVESTMENTS, Defendant.

Civ. A. No. 88-0775.

United States District Court, W.D. Pennsylvania.

Sept. 28, 1990.

Mortgagee brought action against mortgagor following mortgagor's prepayment of mortgage, alleging breach of contract and fraud premised on mortgagor's alleged oral agreement not to prepay or to protect mortgagee if prepayment was made. On mortgagor's motion for summary judgment, the District Court, D. Brooks Smith, J., held that: (1) alleged oral agreement did not concern collateral matter and was not supported by independent consideration, precluding admission of agreement under collateral agreement exception to parol evidence rule; (2) mortgagee failed to show that mortgagor misrepresented his intent at beginning of transaction, so as to allow admission of agreement under fraud exception to parol evidence rule; (3) mortgagee's failure to produce evidence that mortgagor misstated his present intent at beginning of transaction precluded recovery on ground of fraud; and (4) mortgagor's reliance on alleged oral promise was not justified, precluding recovery in fraud.

Motion granted.

1. Evidence ⇐397(2)

Pennsylvania courts adhere to parol evidence rule which forbids introduction of parol evidence of antecedent or contemporaneous agreements, negotiations and understandings of contracting parties for purpose of varying or contradicting terms of contract which both parties intended to represent definite and complete statement of their agreement.

2. Contracts ⇐176(1)
Evidence ⇐397(2)

Under Pennsylvania law, whether writing is complete statement of agreement is to be determined by examining writing it-

their jurisdiction in order to prevent needless friction between the federal and state governments. *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1062-1063, 3 L.Ed.2d 1163 (1959). There are three general types of abstention. First, there is *Younger* abstention under which a federal court will abstain from hearing a case when there is a pending state court action. *Younger*, 401 U.S. 37, 91 S.Ct. 746. Second, there is *Pullman* abstention under which a federal court will abstain when there is an unsettled question of state law, the disposition of which may obviate the need to reach a federal constitutional question. *Pullman*, 312 U.S. 496, 61 S.Ct. 643. Third, there is *Burford* abstention under which a federal court may abstain in order to avoid deciding an issue which would interfere with a state's attempt to establish or maintain a coherent state policy with respect to a matter of important state concern. *Burford*, 319 U.S. 315, 63 S.Ct. 1098.

self, and if it is couched in such terms as import complete legal obligation without any uncertainty as to object or extent of engagement, it is conclusively presumed that whole engagement of parties, and extent and manner of their undertaking, were reduced to writing; thus, question of integration is one for court to decide by reference to four corners of agreement.

3. Evidence ⇐395(1)

Mortgage agreement allowing for prepayment of mortgages was reduced to three separate, formal agreements which identified property involved, purchase price and terms of repayment and, thus, writings were integrated and parol evidence rule was applicable under Pennsylvania law to bar evidence of alleged oral agreement by mortgagor that mortgages would not be prepaid or that, if prepaid, mortgagee would not be hurt.

4. Evidence ⇐443(1, 3)

Under Pennsylvania law, while parol evidence rule does not bar evidence of oral agreements that are separate from written agreements, oral agreement is not considered separate agreement unless it concerns separate subject and is supported by independent consideration.

5. Evidence ⇐441(5)

Alleged oral agreement that mortgagor would not prepay mortgage or that, if it did, mortgagee would not be hurt, concerned material term expressly provided for in written agreement between parties and, moreover, was not supported by independent consideration and, thus, was not admissible under Pennsylvania's collateral agreement exception to parol evidence rule; mortgagee stated that, but for oral agreement, it would not have entered transaction.

6. Evidence ⇐434(8)

Under Pennsylvania law, parol evidence rule does not bar evidence that contract was obtained through fraud.

7. Evidence ⇐434(7)

Mortgagee failed to show that mortgagor, prior to time mortgages closed, intended to prepay mortgages and intended to refuse to make alternative arrangements to "protect" mortgagee, as required under Pennsylvania law for mortgagee to avail itself of fraud exception to parol evidence rule to introduce evidence of alleged oral agreement by mortgagor not to prepay mortgages or to protect mortgagee in event of prepayment.

8. Fraud ⇐12

Mortgagee failed to establish that mortgagor misstated its present intent, as required to show fraud under Pennsylvania law, when mortgagor allegedly agreed that it would not prepay mortgage or that, if it did prepay, it would protect mortgagee; evidence of mortgagor's intent and actions after transaction was undertaken was not sufficient to show misrepresentation of mortgagor's state of mind at beginning of transaction.

9. Fraud ⇐20

Mortgagee's reliance on mortgagor's alleged oral promise not to prepay mortgages or, if prepayment was made, "not to hurt" mortgagee was unjustified, precluding mortgagee's recovery for fraud under Pennsylvania law following mortgagor's prepayment; both parties were sophisticated commercial entities and transaction was complicated, involving $48 million.

Paul A. Manion, Pittsburgh, Pa., for plaintiffs.

Kenneth S. Mroz, Pittsburgh, Pa., and James T. Crowley, Cleveland, Ohio, for defendant.

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge.

This case arises out of a series of transactions between First Union Real Estate Equity and Mortgage Investments (hereinafter First Union), an Ohio real estate trust, and Mellon Bank (hereinafter Mellon). In the fall of 1981, Mellon was badly in need of space for expanded office facilities, and approached First Union to explore the possibility of acquiring from it One

Oliver Plaza, a building in downtown Pittsburgh.

The parties began negotiating for a mutually agreeable sale price, and these efforts continued for several months. The greatest obstacle was not, however, the sale price. Instead, the parties had difficulty agreeing on the structuring of Mellon's payment for the building. Mellon preferred to purchase the property with cash, thereby avoiding the payment of interest on a loan. Barnes Deposition at 21. First Union, on the other hand, would not consent to a cash sale because of the tax ramifications to it. Schofield Deposition at 70. Indeed, Donald Schofield, the President of First Union, insisted that the transaction be structured to be tax free for First Union. Accordingly, he proposed that Mellon purchase the property through an installment sale. Mellon hesitated because of the attendant interest charges. Schofield then offered to give Mellon mortgages on two of its mall properties to offset the cost of the interest of the installment sale of One Oliver Plaza. Mellon accepted this arrangement and the parties began to draft the appropriate documents.

The transaction was further complicated by Schofield's insistence that the transactions, the sale of One Oliver Plaza and the mall mortgages, appear independent of each other. According to Mellon, Schofield insisted on the appearance of independence to lessen the likelihood of I.R.S. scrutiny. *See* Knight Deposition at 25–26; Montgomery Deposition at 37–38. To facilitate the appearance of independence, the parties agreed that the mall mortgages and the One Oliver Plaza deal would close in different years. The loan documents also contained different provisions regarding the parties' right to prepay the loans. The mall mortgages specifically provided for prepayment, whereas the One Oliver Plaza note expressly prohibited prepayment. Mellon claims that, notwithstanding the contractual language to the contrary, Schofield promised that he would not prepay the mall mortgages, or if he did exercise his right to prepay, he "would not hurt [Mellon]." *See* Knight Deposition at 32.

The mall mortgages closed on March 2, 1982, and the mortgage on One Oliver Plaza closed on May 13, 1983. On August 31, 1983, Schofield informed Mellon that First Union would exercise its right to prepay the mall mortgages as provided in the loan documents.

Mellon protested First Union's decision to prepay and reminded First Union of the alleged oral agreement. *See* Montgomery Deposition at 96; Schofield Deposition at 300–301. First Union denied making any such agreement and prepaid the mall mortgages in accordance with the written agreements. Mellon took no further action until September of 1986, when it approached First Union with a proposal to prepay the One Oliver Plaza note. First Union refused to accept prepayment and refused to make alternative arrangements to buffer Mellon's loss on the interest payments.

As a result, Mellon filed this suit against First Union alleging six breach of contract counts and one count of fraudulent misrepresentation. The case is now before us on First Union's motion for summary judgment. First Union claims it is entitled to summary judgment on the contract counts because the parol evidence rule bars the introduction of evidence concerning the alleged oral agreement. First Union further claims that it is entitled to summary judgment on the fraud count simply because Mellon cannot produce any evidence of fraud sufficient to overcome this motion for summary judgment.[1] We agree, and for the reasons set forth below, grant First Union's motion.

Rule 56 allows a party to move for summary judgment upon a showing that there is no genuine issue of material fact or that it is entitled to judgment as a matter of

1. First Union alleged several other grounds for summary judgment in its brief to this Court. Specifically, First Union claimed that Mellon lacked standing to prosecute this suit, that Mellon failed to file this suit in a timely fashion, and that Mellon failed to join a necessary and indispensable party, One Oliver Plaza Associates, pursuant to Fed.R.Civ.P. 19. None of these contentions warrant discussion.

law. Although we view the evidence in the light most favorable to the non-moving party, *Lang v. New York Life Ins. Co.*, 721 F.2d 118, 119 (3d Cir.1983), the nonmoving party has the burden of showing that there is a genuine dispute regarding an issue of material fact. The nonmoving party must produce more than a mere scintilla of evidence to avoid summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 262, 106 S.Ct. 2505, 2517, 91 L.Ed.2d 202 (1986). Indeed, the nonmoving party must produce evidence upon which the jury could reasonably find for the plaintiff. *Id.* Mellon cannot meet this burden.

I. THE CONTRACT CLAIMS

[1] The Pennsylvania courts steadfastly adhere to the parol evidence rule which forbids "the introduction of parol evidence of antecedent or contemporaneous agreements, negotiations and understandings of the contracting parties for the purpose of varying or contradicting the terms of a contract which both parties intended to represent the definite and complete statement of their agreement." *American Bank & Trust Co. of Pennsylvania v. Lied*, 487 Pa. 333, 409 A.2d 377, 381 (1979). *See also McWilliams v. McCabe*, 406 Pa. 644, 179 A.2d 222, 228 (1962). *In re Furjanick's Estate*, 375 Pa. 484, 100 A.2d 85, 89 (1953).

[2, 3] Whether a writing is the complete statement of the agreement is to be determined by examining the writing itself, and if "it is couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking were reduced to writing." *Gianni v. Russell & Co.*, 281 Pa. 320, 126 A. 791, 792 (1924). Thus, the question of integration is one for the court to decide by reference to the four corners of the agreement. *Federal Deposit Ins. Co. v. Barness*, 484 F.Supp. 1134, 1146 (W.D.Pa.1980). *See also Mellon Bank, N.A. v. Aetna Business Credit*, 619 F.2d 1001, 1010 n. 9 (3d Cir.1980). The agreement in the instant case was reduced to three separate, formal agreements which identified the property involved, the purchase price and the terms of repayment. Accordingly, we find that the writings were integrated and that therefore, the parol evidence rule is applicable.

Mellon attempts to avoid the consequences of the parol evidence rule by arguing that the instant case falls within two well recognized exceptions to that rule. Mellon first claims that the oral agreement was somehow separate and distinct from the written agreement, thereby making the parol evidence rule inapplicable. Next, Mellon contends that it was induced to agree to the written provisions of the note by Schofield's fraudulent misrepresentations regarding his intent to honor the prepayment provisions of the mortgage notes. Both of these contentions are without merit.

A. *The Separate Agreement Theory*

[4, 5] It is well recognized that the parol evidence rule does not bar evidence of oral agreements that are separate from the written agreement. *See Wood v. R.R. Donnelley & Sons*, 888 F.2d 313 (3d Cir. 1989). An oral agreement, however, is not considered a separate agreement unless it concerns a separate subject and is supported by independent consideration. *See Wood v. R.R. Donnelley & Sons*, 888 F.2d at 317–18; *Cohn v. McGurk*, 330 Pa.Super. 333, 479 A.2d 578 (1984), *Kravitz v. Mudry*, 200 Pa.Super. 240, 189 A.2d 311 (1963). The facts of the instant case preclude Mellon from availing itself of this exception. The oral agreement in the instant case concerned a material term of the contract that was expressly provided for in the writing. Thus, the oral agreement did not concern a collateral matter, but went to the heart of the transaction governed by the writing. Moreover, there was absolutely no independent consideration for the oral agreement. Both the facts of this case and counsel's statement at oral argument belie any attempt to characterize the oral agreement as separate from the writing. Indeed, at oral argument, counsel for Mellon stated that, but for the oral agreement that Schofield would "protect" Mellon, Mellon would

not have entered into the transaction. Thus, it is impossible to find that the oral agreement was in any manner independent from the writings.

Moreover, the cases upon which Mellon relies for support of its theory of a separate agreement are easily distinguished from the matter at hand. Indeed, a brief review of these cases will demonstrate the weakness of Mellon's position.

Cohn v. McGurk, supra, is similar to the instant case in that it involved a dispute over an obligation on a mortgage. That, however, is where the similarities end. In *Cohn,* the McGurks were named guardians of the children of Margaret Grekowicz. In her will, Grekowicz directed that her estate provide the McGurks with enough money to purchase a home for her children. When the mortgage on the new house was closed, Cohn, the personal representative of Grekowicz's estate, told the McGurks that they would have to sign a mortgage on the new house in favor of the estate or the money required to purchase the house would not be forthcoming. Thus, the McGurks had a choice between signing the mortgage in favor of the estate or losing the $20,000.00 they had already deposited as a down payment. The McGurks chose to sign the mortgage. However, prior to the closing, Cohn had given McGurk assurances that the estate would provide funds sufficient for purchasing the house. The court found that the oral agreement was entirely separate from the written mortgage. 479 A.2d at 582. The oral agreement was supported by independent consideration in the form of the McGurk's agreement to care for the decedent's children. *Id.* Moreover, the court further found that the parol evidence would be admissible regarding the mortgage to the estate because the McGurks signed the mortgage under duress. *Id.* at 583. The court found the prospect of losing the $20,000.00 down payment sufficient duress to overcome the strictures of the parol evidence rule. Clearly, *Cohn* is inapposite.

Wood v. R.R. Donnelley & Sons, supra, is similarly distinguishable. That case involved several separate agreements, only one of which was reduced to writing. Wood had directed his bank, which was not a party to the lawsuit, to issue an irrevocable letter of credit on his behalf to Donnelley. This letter of credit was, of course, in writing. Wood and Donnelley, however, had a separate oral understanding concerning the conditions precedent which would allow Donnelley to demand performance on the letter of credit. Donnelley claimed that the letter of credit was a writing within the meaning of the parol evidence rule which prevented Wood from introducing any evidence regarding their oral agreement. Our Court of Appeals disagreed, finding that the letter of credit governed only the obligations between the bank and Wood. The court further found that the letter of credit did not concern the conditions precedent which would allow Donnelley to demand payment through the letter of credit. Accordingly, the Court found that the oral agreement was a totally separate contract on an independent subject, supported by independent consideration. *Id.* at 318.

Unlike the plaintiffs in *Wood* and *Cohn,* Mellon cannot show that its oral agreement concerned a subject separate from the written contract. Nor can Mellon show that the oral agreement was supported by independent consideration. Therefore, the collateral agreement exception to the parol evidence rule is inapplicable in the instant case.

B. *The Fraud Exception*

[6] Mellon next claims that the parol evidence rule should not be applied in this case because the contract was obtained through fraud. Although it is true that the parol evidence rule does not bar evidence that a contract was obtained through fraud, Mellon cannot avail itself of this exception to the rule.

[7] The Pennsylvania courts have repeatedly held that a mere breach of good faith or a broken promise to do or refrain from doing something *in the future* is not the kind of "fraud that will admit parol testimony to vary the terms of a written contract." *Sokoloff v. Strick,* 404 Pa. 343, 172 A.2d 302, 305 (1961); *Wood v. R.R. Donnelley & Sons Co.,* 888 F.2d at 318–19.

Thus, to defeat First Union's motion for summary judgment, Mellon would have to produce evidence from which a jury could reasonably find that Schofield *intended* to prepay the mall mortgages at the time they were closed in March of 1982. Even when the evidence is viewed in the light most favorable to Mellon, it is apparent that Mellon has failed to meet this burden.

In *Betz Laboratories, Inc. v. Hines*, 647 F.2d 402 (3d Cir.1981), Judge Weis, writing for the court, discussed at length the relationship between the parol evidence rule and allegations of fraud. He declared that "[i]t is arguably incorrect to say that fraud is an exception to the parol evidence rule ..." because such fraud establishes that there is no contract, which in turn obviates any need to respect the written contract. *Id.* at 406. Thus, an allegation of fraud allows the introduction of parol evidence, not to vary the terms of the contract, but to vitiate the contract entirely.

To avail itself of the fraud exception to the parol evidence rule, Mellon would need to produce some evidence that Schofield had misrepresented his intent at the beginning of the transaction. Thus, Mellon would need to show that Schofield (1) intended to prepay the mortgages and (2) intended to refuse to make alternative arrangements to "protect" Mellon before any of the mortgages closed. This would demonstrate Schofield possessed the intent to deceive Mellon and fraudulently induce it to enter the agreement from the very beginning of the transaction. If Mellon, for example, could produce notes or statements made by Schofield before any mortgages closed from which it could be inferred that he planned to prepay the mall mortgages without making "protective" arrangements for Mellon, then Mellon might be able to avail itself of the fraud exception to the parol evidence rule. The record, however, is utterly devoid of such evidence. Instead, the record and the evidence upon which Mellon must rely, demonstrates that Schofield did not decide to prepay the mall notes until well after the transaction was under way.

To meet its burden, Mellon relies solely upon the deposition testimony and notes of Donald Schofield. Although Schofield admits (and his notes corroborate) that he was considering prepayment in February of 1983, that is almost a full year after the first part of the transaction was closed. *See* Schofield deposition at 267–69; Plaintiff's Exhibit D at p. 8. Moreover, the reason Schofield gives for his eventual decision to prepay—namely a decline in interest rates—refutes Mellon's claim that Schofield misrepresented his intentions at the beginning of the transaction.

Mellon's argument is, however, dealt a fatal blow by the vague nature of the alleged oral promise. According to Mellon, Schofield's alleged oral promise was alternative in nature: either he would not prepay, or if he did he would not "hurt" Mellon. *See* Knight Deposition at 36–37. To avoid a potential statute of limitations problem, Mellon identifies the time of breach not at the moment of prepayment, but when Schofield refused to make alternative arrangements to prevent Mellon from losing money on the interest charges on One Oliver Plaza. If this was the moment of breach, as Mellon claims, it did not occur until 1986, more than four years after the mall mortgages closed and three years after the Oliver Plaza deal closed. Thus, even if Mellon could show, which it cannot, that Schofield intended to prepay before entering the transaction, its claim would still fail because Mellon has identified Schofield's refusal to "protect" Mellon as the time of the breach, and yet has introduced absolutely no evidence regarding when Schofield made the decision to refuse Mellon's attempt to prepay the note. It is therefore impossible for Mellon to produce any evidence that Schofield intended not to "protect" Mellon at the beginning of the transaction. Thus, Mellon cannot rely on the fraud exception to the parol evidence rule.

II. THE FRAUD COUNT

[8] The parol evidence rule does not impact Mellon's final count which is based on a tort theory of fraudulent misrepresentation. However, even without this ob-

stacle Mellon has failed to produce evidence sufficient to create a genuine issue of material fact. Accordingly, First Union is entitled to summary judgment on the fraud count as well.

The elements of fraud, according to Pennsylvania law, are "(1) a misrepresentation; (2) a fraudulent utterance thereof; (3) an intention by the maker that the recipient will thereby be induced to act, (4) justifiable reliance by the recipient upon the misrepresentation, and (5) damage to the recipient as a proximate result." *Delahanty v. First Pennsylvania Bank, N.A.*, 318 Pa. Super. 90, 464 A.2d 1243, 1252 (1983) quoting *Scaife Co. v. Rockwell-Standard Corp.*, 446 Pa. 280, 285, 285 A.2d 451, 454, *cert. denied*, 407 U.S. 920, 92 S.Ct. 2459, 32 L.Ed.2d 806 (1971). Moreover, each element must be proved by "evidence that is clear, precise, and convincing." *Delahanty*, 464 A.2d at 1252. (citations omitted). Indeed, a "judge must decide as a matter of law before he submits a case to a jury whether the plaintiff's evidence attempting to prove fraud is sufficiently clear, precise and convincing to make out a prima facie case." *Beardshall v. Minuteman Press International, Inc.*, 664 F.2d 23, 26 (3d Cir.1981). Thus, "whether the evidence is true is a question of fact . . . but whether it meets the required standard which justifies submission to the jury is always a question of law." *Id.* (citations omitted).

Mellon simply cannot make this showing. First, Mellon is once again plagued by its inability to prove that Schofield acted fraudulently when he made the alleged promise "not to hurt Mellon." Mellon relies on a lengthy passage in the *Delahanty* case in which (now President) Judge Cirillo gives an exhaustive definition of what actions may constitute fraud under Pennsylvania law. Mellon correctly argues that the definition is extremely broad. The breadth of this definition, however, does not contradict other cases which very clearly hold that a broken promise to do or refrain from doing something in the future is not fraud. *See First Pennsylvania Banking & Trust Co. v. McNally*, 200 Pa. Super. 196, 188 A.2d 851 (1963); *Com. v. Kelinson*, 199 Pa.Super. 135, 184 A.2d 374 (1962); *M. Leff Radio Parts, Inc. v. Mattel, Inc.*, 706 F.Supp. 387 (W.D.Pa.1988) (Video game distributor could not prevail on a claim of fraud where manufacturer sent correspondence stating that rumors regarding manufacturer's intent to abandon the business were false three months before abandoning business, where distributor failed to demonstrate the decision was made prior to the correspondence); *Proie Bros., Inc. v. Proie*, 301 F.Supp. 680, *aff'd* 414 F.2d 1365 (3d. Cir.1968).

It is just as clear, however, that "a statement of present intention which is false when uttered may constitute a fraudulent misrepresentation of fact." *DuSesoi v. United Refining Co.*, 540 F.Supp. 1260, 1273 (W.D.Pa.1982) quoting *Brentwater Homes, Inc. v. Weibly*, 471 Pa. 17, 369 A.2d 1172, 1175 (1977). Thus, if Mellon could show that Schofield misrepresented his present state of mind when he entered into the transaction, this would constitute one element of actionable fraud. However, as discussed above, Mellon has not produced a scintilla of evidence to demonstrate that Schofield misstated his present intent at the beginning of the transaction. Instead, Mellon relies upon evidence of Schofield's intent and of his actions *after* the transaction was undertaken. This evidence, however, is not sufficient to show that Schofield misrepresented his state of mind at the beginning of the transaction. Mellon's inability to prove that Schofield did not intend to "protect" Mellon from the beginning of the transaction is as fatal to the fraud count as it was to the contract counts.

[9] This, however, is not the only flaw in Mellon's argument. To avoid summary judgment, Mellon must produce sufficient evidence from which a reasonable jury could find that Mellon's reliance on Schofield's alleged oral promise was justified. *See Delahanty v. First Pennsylvania Bank, N.A.*, 464 A.2d at 1252. *DuSesoi v. United Refining Co.*, 540 F.Supp. 1260 (W.D.Pa.1982). This Mellon cannot do.

Mellon claims that it entered into a 48 million dollar transaction in reliance on

Schofield's alleged oral promise "not to hurt Mellon." Mellon claims that this meant First Union would either refrain from prepaying the mall mortgages or allow Mellon to prepay its mortgage on One Oliver Plaza, or provide Mellon with some other security notwithstanding the written contractual provisions to the contrary.[2] Mellon's reliance on this vague oral promise is wholly unjustified.

First, Mellon Bank is a very large commercial entity. Its officers are individuals with considerable business sophistication. As such, Mellon's officers, who consulted with legal counsel at various critical stages in this transaction, should have been fully aware of the binding impact of a writing. The writing itself expressly allowed First Union to prepay the mall mortgages and expressly prohibited Mellon from prepaying its own mortgage on Oliver Plaza. Thus, the parties' rights were clearly delineated in the writing. Mellon, however, claims that it relied on Schofield's vague promise "not to hurt" Mellon. In other words, Mellon relied upon a vague and casual oral promise to alter the express and unequivocal terms of subsequent writings. Moreover, Mellon knew that Schofield himself was a very sophisticated businessman, also aware of the impact of a writing. Given the sophistication of the parties, the complicated nature of the transaction, and the considerable amount of money involved, Mellon would have been wholly unjustified in relying on such a vague oral promise by Schofield to alter the terms of the written agreements. *See generally, Josephs v. Pizza Hut*, 733 F.Supp. 222, 227 (W.D.Pa.1989) *aff'd mem.* 899 F.2d 1217 (3d Cir.1990) (It is not reasonable for experienced business people to make business decisions based on oral representations in contravention of written statements).

Moreover, according to Edward Montgomery, Jr., who was the head of Mellon's real estate department at the time of the transaction, Schofield told Mellon at the outset that he might want to prepay the mall mortgages. Montgomery Deposition at 38, 43–45. Thus, assuming *arguendo*, that a promise was made, it was unreasonable for Mellon to expect such a promise to be kept in light of the writing to the contrary and Schofield's open discussion of the possibility that he might avail himself of the right to prepay.

Therefore, we find that Mellon has utterly failed to produce evidence sufficient to establish two of the elements of a prima facie case of fraud. Mellon cannot demonstrate that Schofield possessed a fraudulent intent at the beginning of the transaction. Nor can it show that its reliance on the alleged oral promise was reasonable. First Union is therefore entitled to summary judgment on the fraud count.

An appropriate order will be entered.

Charles T. ROWE, Administrator of the Estate of Mildred Glick Friedman, deceased, and Charles T. Rowe, Administrator of the Estate of Mildred Glick Friedman, Trustee Ad Litem, Plaintiff,

v.

Dorothy MARDER, Defendant.

Civ. A. No. 90–162 Erie.

United States District Court, W.D. Pennsylvania.

Nov. 15, 1990.

Administrator of suicide victim's estate brought state court action against victim's sister to recover for intentional infliction of

2. The only evidence of what Schofield's promise "not to hurt Mellon" entailed is speculation by Mellon's officers. The record contains no evidence of what Schofield actually meant, if in fact these words were uttered. Instead, Mellon's only evidence regarding the content of the promise is the interpretation ascribed to the words by Mellon's own employees and the various proposals that Mellon would find satisfactory in the event of prepayment. Montgomery Deposition at 46–48. Knight Deposition at 34–35.

Park "to preserve and commemorate for the people of the United States the area associated with the heroic suffering, hardship, and determination and resolve of General George Washington's Continental Army during the winter of 1777–1778 at Valley Forge". 16 U.S.C.A § 410aa (1992).

As Magistrate Judge Smith mentioned to appellants at the hearing, the National Park Service expends significant public funds in its efforts to attract visitors, including countless children, to national parks. N.T. at 7. Those visitors explore wherever they please in this Park, and should be able to do so without concern of happening upon an open sex act. As demonstrated by their behavior, these appellants clearly knew that the public would accept Congress's invitation to wander about the Park, but proceeded nevertheless.

This case is therefore more compelling than *United States v. Lanen*, 716 F.Supp. 208 (D.Md.1989), where the appellant was convicted of disorderly conduct after he was seen masturbating in the stall of a restroom in a park, where arguably one might expect considerably more privacy. We thus respectfully part company with the view of our colleague, Judge Ditter, that when people engage in sexual activities outdoors in a public park, "the public [i]s not involved at all." *Malone*, 822 F.Supp. at 1188. While we agree with our colleague that some places in the Park are less visible or open than others, this distinction cannot change the legal and practical reality that every square inch of the Park's grounds is public, and thus Park grounds cannot supply a venue for sex akin to the privacy of a room.

III. *Conclusion*

Because we find that appellants engaged in an obscene act that recklessly created a risk of public alarm, we shall affirm their convictions for disorderly conduct. We shall also reverse the appellants' convictions for open lewdness in light of the Government's concession as to this charge.

UNITED STATES of America, Plaintiff,

v.

COMMONWEALTH OF PENNSYLVANIA, Robert Casey, Governor of the Commonwealth of Pennsylvania, Karen F. Snyder, Acting Secretary Department of Public Welfare, Steven M. Eidelman, Deputy Secretary of Mental Retardation Office of Mental Retardation, Alan M. Bellomo, Director Ebensburg Center, Defendants.

Civ. A. No. 92–33J.

United States District Court,
W.D. Pennsylvania.

July 27, 1995.

United States sued Commonwealth of Pennsylvania and state officials claiming institution violated retarded persons' constitutional rights and brought suit pursuant to Civil Rights of Institutionalized Persons Act (CRIPA) and moved for injunctive relief. The District Court, D. Brooks Smith, J., held that: (1) CRIPA is standing statute; (2) institution had duty to provide adequate food, shelter, clothing, medical care, safety and freedom from bodily restraint and related training, and minimally adequate training; (3) professional judgment standard was to be used; (4) court could not specify which of several professional choices should have been made; (5) isolated examples of problems did not establish constitutional violations; (6) residents had right to avoid being viewed unclothed; (7) United States failed to show that lapses in basic care rose to level of constitutional violation or that state's official policy or custom played any role in alleged deprivation of care; (8) institution failed to exercise professional judgment concerning monitoring blood levels of medication and deviated from acceptable professional standards; but (9) injunctive relief was not warranted; and (10) professional judgment was exercised in provision of care to residents.

Judgment for defendants.

1. Civil Rights ⇐202

Plain language of Civil Rights of Institutionalized Persons Act (CRIPA) confers standing on Attorney General and provides authority for United States to initiate lawsuit on behalf of mentally retarded persons and others who reside at or are confined in institution. Civil Rights of Institutionalized Persons Act, § 3(a), 42 U.S.C.A. § 1997a(a).

2. Civil Rights ⇐202

Elements in Civil Rights of Institutionalized Persons Act (CRIPA) apply to Attorney General's "reasonable cause" determination which must be made before Attorney General may properly institute CRIPA action. Civil Rights of Institutionalized Persons Act, § 3(a), 42 U.S.C.A. § 1997a(a).

3. Statutes ⇐217.4

When text of statute is clear, it is inappropriate to resort to legislative history for purposes of interpreting statute.

4. Civil Rights ⇐191

Civil Rights of Institutionalized Persons Act (CRIPA) is legislation pertaining to specific class of federal civil rights actions. Civil Rights of Institutionalized Persons Act, § 2 et seq., 42 U.S.C.A. § 1997 et seq.

5. Civil Rights ⇐192

Federal civil rights statute did not create any new rights, but was enacted to give remedy to parties deprived of constitutional rights, privileges and immunities by official's abuse of position. 42 U.S.C.A. § 1983.

6. Civil Rights ⇐192, 196.1

As Civil Rights of Institutionalized Persons Act (CRIPA) was enacted to provide standing for Attorney General to initiate civil rights actions on behalf of institutionalized persons; essential elements that must be proven are, whether conduct complained of was committed by person acting under color of state law and whether that conduct deprived person of rights, privileges, or immunities secured by Constitution or laws of United States. Civil Rights of Institutionalized Persons Act, § 2 et seq., 42 U.S.C.A. § 1997 et seq.

7. States ⇐191.10

Suing state officials in their official capacities generally represents another way of pleading action against entity of which officer is agent, is suit against official's office, and as such is no different from suit against State itself.

8. Federal Courts ⇐265, 269

Eleventh Amendment typically bars actions for damages in federal court against States and state officials sued in their official capacities. U.S.C.A. Const.Amend. 11.

9. Federal Courts ⇐272

Eleventh Amendment poses no bar to actions for prospective injunctive relief against state officials sued in their official capacities, and in such circumstances, state officials are considered persons for purposes of civil rights claims, but court still considers action as addressing State's official policy or custom. U.S.C.A. Const.Amend. 11; 42 U.S.C.A. § 1983.

10. Federal Courts ⇐265

Eleventh Amendment does not apply to suits by United States against State. U.S.C.A. Const.Amend. 11.

11. Civil Rights ⇐206(3)

In federal civil rights official capacity suit, governmental entity is liable only when entity itself is moving force behind deprivation, thus, entity's policy or custom must play part in violation of federal law. 42 U.S.C.A. § 1983.

12. Constitutional Law ⇐255(5)

Fact that mentally retarded person has been involuntarily committed to state institution under proper procedures does not deprive him of all substantive liberty interests under Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

13. Mental Health ⇐51.5

State has duty to provide adequate food, shelter, clothing, and medical care to mentally retarded persons who are committed.

14. Mental Health ⇐51.1, 51.10

Involuntary commitment proceedings do not extinguish right to safe conditions and freedom from bodily restraint.

15. Constitutional Law ⇐255(5)
Mental Health ⇐51.5

There is right to minimally adequate training for involuntarily committed mentally retarded persons; "minimally adequate training" is that which is reasonable in light of identifiable liberty interests and circumstances of case.

See publication Words and Phrases for other judicial constructions and definitions.

16. Constitutional Law ⇐82(5)

Federal court must identify constitutional predicate for imposition of any affirmative duty on state.

17. Constitutional Law ⇐255(5)
Mental Health ⇐51.10, 52.1

Standard for determining whether state violated institutionalized individual's rights is whether extent or nature of restraint or lack of absolute safety violates due process; determination must be made by balancing individual's liberty interests against relevant state interests, that balancing cannot be left to judge or jury, and courts must make certain that professional judgment was exercised and courts cannot specify which of several professional choices should have been made. U.S.C.A. Const.Amend. 14.

18. Mental Health ⇐51.20

In applying professional judgment standard to determine involuntarily committed mentally retarded person's claim for minimally adequate training, deference is given to judgment exercised by qualified professional and decision made by professional is presumptively valid; liability may be imposed only when decision by professional is such substantial departure from accepted professional judgement practice as to demonstrate decision was not actually based on such judgment.

19. Mental Health ⇐51.5, 51.10, 52.1

Court must apply professional judgment standard to all failure to protect, excessive restraint, and failure to habilitate claims brought by mentally retarded persons who are institutionalized, whether claims are brought independently or in tandem.

20. Constitutional Law ⇐255(5)

Mere negligence cannot trigger due process protection under professional judgment standard in determining whether institutionalized individual's rights have been violated.

21. Mental Health ⇐51.1

Application of professional judgment standard to determine whether institutionalized individual's rights were violated requires that state actor exercise professional judgment in choosing appropriate course of action and falls somewhere between simple negligence and intentional misconduct standards.

22. Mental Health ⇐51.1

Professional judgment standard, in determining whether institutionalized individuals rights were violated, is less onerous standard than negligence or medical malpractice and optimal courses of treatment as determined by expert do not establish minimal constitutional standard, instead, factfinder must determine whether decision made by professional comports with minimally accepted professional standards.

23. Evidence ⇐512

In determining professional judgment standard to find whether institutionalized individuals' rights were violated, expert testimony is relevant not because of expert's own opinions but because testimony may shed light on what constitutes minimally accepted standards across profession, and court should not use expert testimony to choose from among several professionally acceptable remedies.

24. Constitutional Law ⇐255(5)

In determining whether institutionalized individuals' liberty interests were violated, District Court had to evaluate nature of liberty interests of residents at issue and defendants' corresponding duty to protect those rights, and whether defendants' official customs and policies as implemented at institution so substantially departed from accepted professional judgment, practice, or standards as to demonstrate that defendants actually did not base their decisions on professional judgement.

25. Mental Health ⇐52.1

Two isolated instances related to insects on residents, without more, were insufficient to demonstrate that institution provided constitutionally inadequate basic care by tolerating insect infestations where incidents were promptly reported by staff and professional judgment was exercised, situations were addressed, and problems did not recur.

26. Constitutional Law ⇐255(5)
Mental Health ⇐51.5

Isolated examples of problems, inadequate care, or malpractice at institution do not establish constitutional violations and right to protection is not activated by isolated mishap.

27. Mental Health ⇐51.1

One instance of vomitus on institutionalized resident's face and clothing, without more, was not indicative of failure by institution to provide adequate clothing for residents or to promptly respond to situations requiring care and attention.

28. Mental Health ⇐51.1

Institution was not constitutionally deficient in providing adequate clothing to residents based on presence of stains on clothing where evidence showed that institution routinely changed clothing of residents who needed it and that each resident had clean, presentable, and properly-fitting clothes.

29. Mental Health ⇐51.1

Single discovery of problem with changing residents' diapers by medical assistance survey team did not prove prevalent condition at institution.

30. Evidence ⇐317(9)

Testimony about anonymous complaint at union meeting about bathing institutionalized residents was not competent and was hearsay when it was offered to prove residents were not bathed properly where identity of declarant was not known and declarant was not subject to cross-examination.

31. Evidence ⇐571(3)

State failed to show institution's bathing practices did not meet minimum professional standards or that institution failed to exercise professional judgment where expert testimony did not establish inadequate bathing process, did not assert residents were dirty after being bathed or that they smelled or that they were not bathed frequently enough, even though expert testified that bathing was done very quickly.

32. Constitutional Law ⇐82(7)

There exists correlative right to privacy for institutionalized mentally retarded individuals to avoid being viewed unclothed.

33. Constitutional Law ⇐82(7)

Institutionalized residents' right to privacy was not violated, and professional judgment that was exercised did not substantially depart from accepted professional standards, where institution responded to breaches of privacy by instituting more training, privacy issues were not ignored, and plan of correction that was implemented comported with accepted professional standards.

34. Constitutional Law ⇐82(7)

Finding violation of institutionalized residents' right to privacy was not compelled by fact that training after privacy breaches did not stop all incidents where improvements were made and where there was no testimony that institution's action in responding to privacy breaches constituted substantial deviation from acceptable professional standards.

35. Mental Health ⇐51.1

Basic care provided by institution did not violate constitution, did not constitute substantial deviation from professional standards, and no official policy or custom played any role in alleged deprivation of care where institution responded to problems with corrective measures pursuant to exercise of professional judgment, even though institution's lapses in care may have been negligent.

36. Constitutional Law ⇐255(5)

Institutionalized mentally retarded person has right to receive adequate medical care and substantive liberty interest is protected by Fourteenth Amendment. U.S.C.A. Const.Amend. 14.

37. Mental Health ⇐51.15

Institution's administration of anticonvulsants intramuscularly for treatment of status epilepticus before 1993 did not violate constitutional minimum standards where decision was made pursuant to exercise of professional judgment that had some basis in accepted professional practice among general practitioners at that time; however, intramuscular administration of Valium (diazepam) for treatment of status epilepticus in future may constitute departure from professional judgment.

38. Mental Health ⇐51.5

Institution's administration of multiple anticonvulsants to some residents did not constitute violation of residents' right to adequate neurological care where in each case of polypharmacy, decision to use additional anticonvulsant was result of exercise of professional judgment that was consistent with acceptable professional standards.

39. Mental Health ⇐51.5

Professional judgment was not exercised in monitoring and responding to sedation caused by Dilantin (phenytoin) where there was no indication that institution's physicians made any conscious decision whatsoever regarding that aspect of treatment; however, injunctive relief was not warranted because United States did not attempt to establish that lapse in institution's neurological care was result of state's policy or custom as implemented at institution and constitutional challenge to neurological care in official capacity action failed as matter of law.

40. Mental Health ⇐51.5

Deciding whether to perform particular diagnostic study is matter of professional judgment.

41. Mental Health ⇐51.20

Adherence by professional to older of two widely-accepted schools of thought did not establish failure to exercise acceptable professional judgment and finding that institution exercised professional judgment in determining if activity was seizure-related was supported by physician's testimony.

42. Mental Health ⇐52.1

Professional judgment was exercised where resident's falls and injuries were addressed by interdisciplinary team and protective gear was obtained and fact injuries continued after securing helmet for resident did not in and of itself indicate that professional judgment had not been exercised.

43. Mental Health ⇐51.5

Professional judgment was exercised where it manifested assessment of situation and decision to incorporate suggestion into plan of care.

44. Mental Health ⇐51.10, 52.1

Institutionalized resident's right to be protected from harm due to seizure activity requires protection as may be reasonable in light of liberty interest in freedom from unreasonable restraints; protective helmets are restrictive measure and constitute infringement of resident's liberty interests.

45. Mental Health ⇐51.10, 52.1

Institution's neurologic care of residents was not deficient where protective helmet was not approved, or not approved quickly, where final decisionmaker with regard to using helmet was human rights committee which was independent body that conducted evaluation and either approved or rejected proposed restrictive device.

46. Mental Health ⇐52.1

Frequency and severity of injuries sustained by institutionalized residents who have seizure disorders did not constitute sufficient evidence to establish lack of professional judgment regarding use of protective helmets; failure to exercise professional judgment was not established where there was mere quantification of injuries and expert testimony did not discuss nature of injuries or why institution's care for those residents failed to meet minimum professional standards.

47. Mental Health ⇐51.5

Right of institutionalized mentally retarded persons to receive adequate medical care includes provision for psychiatric care where needed.

48. Mental Health ⇐51.5

Accepted professional practice for psychiatric assessments included use of assessments completed by interdisciplinary team and collecting both objective and subjective data and institution's psychiatric assessments that were consistent with accepted professional practice evidenced exercise of professional judgment and did not violate Constitution.

49. Mental Health ⇐51.5

Specific cases of allegedly flawed differential diagnoses were at worst indicative of erroneous psychiatric evaluations of institutionalized residents and were not constitutional violations.

50. Mental Health ⇐51.5

Constitutional standard of psychiatric care for institutionalized residents is concerned with care provided to residents, not conformity of nomenclature to latest revisions to Diagnostic and Statistical Manual.

51. Mental Health ⇐51.5

In determining of institutionalized resident's right to psychiatric care, it was acceptable professional practice for complete differential diagnosis to be constructed from documentation found throughout resident's chart, and treatment may have to be geared to symptoms presented as opposed to treatment of diagnosis consistent with Diagnostic and Statistical Manual.

52. Mental Health ⇐51.5

In determining institutionalized resident's right to psychiatric care, documentation alone could not establish constitutional deficiency, and focus was whether professional judgment was exercised, that is whether practitioner considered options and made differential psychiatric diagnosis for resident that was in keeping with minimal professional standards; problem with documentation does not prohibit exercise of professional judgment.

53. Mental Health ⇐51.5

Exercise of professional judgment in selection of proper psychiatric treatment for institutionalized resident requires thinking about modalities of treatment and administering treatment that meets minimum professional standards.

54. Mental Health ⇐51.5

Institution provided psychiatric care that met minimum professional standards even though documentation was weak; expert testimony failed to supporting finding that processes for providing psychiatric care were generally flawed or that professional judgment was not being exercised where expert concluded lack of documentation indicated deficient psychiatric care was being provided and expert did not take additional and necessary step of determining whether underlying process was as flawed as documentation.

55. Mental Health ⇐51.15

Institution's use of psychotropic medications met constitutional minimum standards where, based on percentages of residents on psychotropic medications, one physician concluded overall percentages were consistent with medication management in similar populations and another concluded use of psychotropic medications was within accepted professional practice.

56. Mental Health ⇐51.5

Presence of tardive dyskinesia in institutionalized residents does not, of itself, indicate that institution failed to exercise professional judgment in monitoring usage of antipsychotic medications.

57. Mental Health ⇐51.5

Institution met minimum standard of professional judgment in avoiding unnecessary chemical restraints that would result in stiffness, rigidity, and constraining of one's movement where testimony was there were no signs in residents showing chemical restraint.

58. Mental Health ⇐51.5

Occurrences of aspiration pneumonia or deaths, without evidence that they were result of medical treatment which substantially deviated from accepted professional practice, do not compel finding that right of institutionalized residents with gastroesophageal reflux (GER) to appropriate medical care was violated.

59. Mental Health ⇐51.5

Institution exercised professional judgment consistent with accepted medical practice in treatment of resident with gastroesophageal reflux (GER) who died while hospitalized for aspiration pneumonia where staff documented her persistent trouble with coughing and mucous production, monitored her condition, and treated her with anti-reflux medication.

60. Mental Health ⇐51.5

Institution's treatment of resident with gastroesophageal reflux (GER) who died, and decision not to perform fundoplication surgery, did not fall outside realm of acceptable medical practice where his condition was treated surgically by inserting gastrostomy tube and decision whether to proceed with fundoplication surgery was highly dependent on individual medical condition, was matter to be resolved pursuant to sound discretion of professional, and experts in field of GER for mentally retarded persons remain divided over benefits.

61. Mental Health ⇐51.5

Institution rendered care that was consistent with accepted professional standards to resident with gastroesophageal reflux (GER) who died where resident was treated with anti-reflux medication, antacids, and underwent fundoplication surgery that necessarily included gastroenterological consults.

62. Mental Health ⇐51.5

Institution's care of resident who died of aspiration pneumonia was consistent with accepted professional standards where his treating physician was very familiar with his seizure disorder and its refractory natures, and recognized that seizure medications produced viscous secretions that affected ability to swallow and as result gastrostomy tube was used, despite claim that tube should not have been used.

63. Evidence ⇐571(3)

Mental Health ⇐51.20

District Court refused to find constitutional violations for institutionalized residents' deaths from aspiration pneumonia based on expert's conclusory statements that were not supported by record where particulars of residents' care were absent and court could not determine whether care substantially deviated from accepted medical practice.

64. Mental Health ⇐51.5

Fact that institutionalized residents have died or sustained recurrent pneumonias did not support conclusion that institution was violating their constitutional rights to adequate medical care; it was to be expected that some residents may become ill and not recover even though advanced medical care was provided.

65. Mental Health ⇐51.5

Food is essential of care that state must provide to involuntarily institutionalized mentally retarded persons, and institution must provide for management of nutritional status of its residents pursuant to exercise of professional judgment consistent with accepted professional standards of practice.

66. Mental Health ⇐51.5

In providing nutritional management to institutionalized residents, accepted professional practice requires some type of screening mechanism to determine which residents are nutritionally at risk.

67. Mental Health ⇐51.5

While there were deficiencies in identifying institutionalized residents who were nutritionally at risk prior to development of various screening mechanisms, where institution later developed various screening devices and was in process of implementing and revising them, there were no deficiencies remaining to be remedied by injunctive relief.

68. Mental Health ⇐51.5

Nutritional assessment performed by institution satisfied accepted professional standards where, although annual review was not labeled nutritional assessment, it satisfied interdisciplinary process and addressed acuity of problem and necessary interventions; adequacy of nutritional assessments was further supported by fact that assessments regarding physical therapy, psychiatric issues and neurologic care, all of which affected nutri-

tion and feeding, were found constitutionally sound.

69. Constitutional Law ⇐255(5)
Mental Health ⇐51.5

Institution's nutritional assessments constitutionally met needs of residents as basic evaluation was in place which could be augmented when need arose.

70. Mental Health ⇐51.5

Institution's mealtime intervention met minimum professional standards where feeding plans included elements appropriate for each individual.

71. Mental Health ⇐51.5

Institution had adequate mechanism for monitoring resident's mealtimes intake, meeting accepted professional practice that requires some mechanism for tracking meal time, through unwritten policy that was eventually written regarding meal refusals and through nursing practice of documenting in resident's summary the status of his appetite.

72. Mental Health ⇐51.5

Institution adequately trained staff to implement resident's feeding plans and met accepted professional practice where staff's knowledge in feeding residents did not requiring training start at square one, where direct care staff consulted special procedure books and asked questions of professional staff that were always present in dining room, and where professionals' day-to-day assessments of actual feedings presented ample opportunity for additional training to correct deficiencies or reinforce proper method.

73. Mental Health ⇐51.5

Fact that institution's professionals desired additional training in nutritional management did not prove constitutional violation.

74. Mental Health ⇐51.5, 52.1

When state takes person into its custody and holds him there against his will, Constitution imposes on it corresponding duty to assume some responsibility for his safety and general well-being. U.S.C.A. Const.Amend. 14.

75. Constitutional Law ⇐252.5

Due process clause generally confers no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which government itself may not deprive individual. U.S.C.A. Const.Amend. 14.

76. Mental Health ⇐51.5

Constitution imposes duty on state, pursuant to exercise of professional judgment, to provide physical therapy service to involuntarily committed mentally retarded persons that maintain residents' maximum ability to move, but not duty to achieve some optimal level of performance, and duty may differ for residents in developmental stage versus those who have reached skeletal maturity. U.S.C.A. Const.Amend. 14.

77. Constitutional Law ⇐255(5)

Infringement of mentally retarded resident's liberty interests may occur if loss in physical movement results from institution's failure to provide necessary physical therapy training and/or services, but not every instance of loss of movement indicates constitutional violation.

78. Constitutional Law ⇐255(5)

Failure of institution to provide training that improves residents' basic care skills, absent proof that failure to provide training results in loss of recognized liberty interest, does not implicate constitutional Due Process concerns. U.S.C.A. Const.Amend 14.

79. Mental Health ⇐51.5

There was no constitutional deprivation where institution provided broad spectrum of physical therapy services and where professional judgment was exercised in effort to preserve and/or maintain residents' maximum ability to move.

80. Mental Health ⇐51.5

Constitutional duty imposed on institution for involuntarily committed mentally retarded residents does not require institution to embrace unorthodox method, even if it is promising. U.S.C.A. Const.Amend. 14.

81. Mental Health ⇐51.5

Institution's physical therapy assessment documentation was not constitutionally infirm where forms used were adequate in light of fact that other portions of chart and supplemental procedures detailed and provided additional information.

82. Mental Health ⇐51.5

Institution's frequency of physical therapy assessment met professional judgment standard where they were adequate for maintenance as state was not required to improve residents' conditions and, while expert testified to required yearly assessment, evidence indicated there was no published standard within field and yearly standard was expert's personal opinion.

83. Compromise and Settlement ⇐7.1
Constitutional Law ⇐47
Mental Health ⇐51.5

Explication of constitutional obligation should not be guided by settlement agreements, which may contain terms beyond constitutional minimum to reach amicable resolution, and District Court accorded little weight to any standard based on result of consensually resolved lawsuits, as opposed to adjudication.

84. Mental Health ⇐51.5

Institution's physical management of residents did not substantially deviate from accepted professional practice where it included range of motion (ROM) therapy to maintain residents' movement capabilities, regularly changed positions of residents who were unable to move, used splinting to assist in prevention of skin irritations, provided physiotherapy or percussions, used therapeutic positioning, provided gross motor function programming, and used professional judgment in determining what physical management efforts would be used, even though institution did not utilized best or most current options.

85. Mental Health ⇐51.5

Institution's adaptation of wheelchairs through trial and error was exercise of professional judgment where method was accepted within physical therapists's judgments, even though there was sophisticated piece of equipment to replace trial and error method.

86. Mental Health ⇐51.5

Institution's care in lifting and transferring residents was not constitutionally remiss where institution had lifting policy that incorporated cardinal rules for lifting and transferring; even though injuries occurred record did not reveal that injuries due to improper lifting were commonplace or went uncorrected and isolated injuries were bound to happen within population that required lifting and transferring on daily basis.

87. Mental Health ⇐51.5

Professed desire of institution's staff to receive continuing education in physical management of residents was not evidence of deficiency that violated constitution.

88. Mental Health ⇐51.5

Institution's physical therapy services that provided only maintenance was constitutional.

89. Mental Health ⇐51.1

Institution's physician staffing ratio was within acceptable professional standards and took into account medical needs of residents and familiarity of physicians with residents where it was about 120 residents to physician and went higher when physician's were gone for vacations, holidays, sick time and continuing education.

90. Mental Health ⇐51.5

Inadequate medical documentation does not mandate finding that institution's medical care is constitutionally deficient; paperwork exists to aid in patient care and not to satisfy some independent constitutional duty.

91. Mental Health ⇐51.1

Institution's medical record documentation, though sometimes flawed or inadequate, met acceptable professional practice standard as it was effective at maintaining continuity of case and, despite guidelines that required extensive documentation by physicians, accepted professional practice tolerated documentation that did not necessarily meet those goals.

92. Mental Health ⇐51.5

Failure of institution's nursing staff to initiate tests of vomitus or stool for occult blood did not show deficiencies in nursing care where tests were performed by laboratory pursuant to order of physicians, where testing was diagnostic and could be executed by registered nurse only as part of medical regimen prescribed by physician, and where there was no evidence that nursing staff failed to carry out testing as directed.

93. Mental Health ⇐51.5

Occurrence in institution of seven deaths in 472 residents who received nursing care over three years did not demonstrate in and of itself constitutionally inadequate acute and chronic nursing care.

94. Mental Health ⇐51.5

Institution's nursing care could not be found constitutionally remiss on basis of delayed reporting of injury to patient where delay was attributable to action by residential service aid and not nursing staff, where 15 minute lapse between report to nurse and nurse's report to doctor was not substantial deviation from accepted nursing practice, and where resident suffered no additional harm due to delay in treatment.

95. Mental Health ⇐51.5

Delayed responses to injuries that was attributable to residential service aid staff, not nursing staff, could not be basis for finding that nursing care at institution was constitutionally deficient.

96. Mental Health ⇐51.5

Fact there is a better way to accomplish task dealing with institutionalized residents, such as documentation on patient, is not tantamount to constitutional violation.

97. Mental Health ⇐51.5

Institution's standardized nursing care plans that were modified, amended and tailored for each resident fulfilled requirements of accepted professional practice and were not constitutionally deficient; accepted professional practice required individualized plans, so standardized plans for problems frequently encountered by residents, standing alone, would not meet accepted professional practice.

98. Mental Health ⇐51.1

Institution's additional training for nurses was not inadequate where it was not substantial departure from accepted professional practice, where state nursing law did not require acquisition of specified number of continuing education hours per year for license renewal, where institution provided additional training, both optional and not, and where it offered training throughout year on formal and informal basis.

99. Mental Health ⇐51.5

Institution was not under constitutional duty to provide services that enhanced mentally retarded residents' level of functioning.

100. Mental Health ⇐51.5

Institution's use of age inappropriate materials, such as those designed for young children, with mentally retarded and disabled adult population was not substantial departure from acceptable professional practices.

101. Mental Health ⇐51.5

Institution's interdisciplinary approach to residents' training and behavior management did not substantially depart from acceptable professional standards where review approval and monitoring of treatment plan was structured with key people reviewing programs beforehand, where psychologists were involved in development of plans, where primary collection of behavior management data was recording target behavior defined in plan, and where behavior management committee met regularly.

102. Mental Health ⇐51.1

Malpractice is not governing standard in determining whether involuntarily institutionalized mentally retarded person's constitutional rights were violated.

103. Mental Health ⇐51.5

Institution met constitutional minimum for psychological treatment where it had psychologists on duty weekdays and administrative person could be contacted on weekends and bring in psychologist if needed, and hav-

ing psychologists on duty weekends or nights was not required.

104. Mental Health ⇐51.5

Institution exercised professional judgment in attempting to treat resident's severe behavior problems where staff had considerable difficulty in reducing resident's self-injury, made efforts to protect her and sought external constitution, even though efforts had not been successful.

105. Mental Health ⇐51.10, 51.15

Institution's use of chemical and physical restrains did not substantially depart from acceptable professional practice where use of medication came after trying alternatives, where use of restraint was well below levels that occurred in settings serving similar populations, and where restraint was used for safety and habilitative purposes.

106. Mental Health ⇐52.1

State must provide institutionalized residents with adequate safety.

107. Mental Health ⇐52.1

Number of injuries to residents could not be sole criterion for determining whether institution violated its constitutional duty to provide reasonably safe conditions as injury itself was not constitutional violation unless it was result of unconstitutional action or omission by institution; numbers could not establish constitutional violation and it had to be demonstrated that institution failed to exercise professional judgment in addressing issue of safety.

108. Evidence ⇐571(3), 574

Institution did not violate constitution by continuing use of dining rooms, despite expert's testimony that area was unsafe, dehumanizing and was health hazard with flies, where expert's testimony failed to shed any light on what constitutional minimum was with regard to dining facilities, where expert's characterizations of dining room were disputed by institution's expert, and where videotape of mealtime practices did not reveal any overwhelming problems with flies.

109. Mental Health ⇐51.5

Duration of meal should not be sole criterion of whether institution's care in feeding residents meets accepted professional standard.

110. Mental Health ⇐51.5

Institution's care with regard to mealtimes for residents who feed themselves met constitutional minimum where, though residents appeared to eat at rapid rate, residents were swallowing between mouthfuls, even though there was some choking.

111. Mental Health ⇐51.5

Institution's care in feeding residents was constitutionally adequate where videotape showed residents being fed with ease and where institution's feeding practices with regard to head position was not departure from accepted practice, were often accommodation of resident's behavior, and weighed risks of aspiration or choking against fact that correction of some behaviors could prompt residents to decompensate and not eat or would require restraint.

112. Mental Health ⇐51.5

District Court would not infer substantial deviation from accepted practice for institution's failure to use particular feeding position in absence of evidence that residents at issue possessed necessary mouth control for that position.

113. Mental Health ⇐51.5

Institution's care in regard to elevating head and trunk of residents for feeding was not constitutionally inadequate where evidence showed staff strove to elevate head and trunk above pelvis and legs, videotape showed institution did elevate head and trunk, and staff was aware that residents confined to carts needed to be elevated, despite claimed deficiency that head was usually all that was elevated.

114. Mental Health ⇐51.5

Institution's exercise of professional judgment in feeding residents was shown by decisions made to change method of providing nutrition to residents and assessment of impossibility of easily feeding resident at some point resulted in decision to institute

mechanical means of meeting resident's nutritional requirements.

115. Mental Health ⇐51.5

Competing liberty interests are at issue involving elopements by mobile, institutionalized residents and expert testimony should identify parameters of acceptable professional practice in providing residents with freedom of movement while also attempting to prevent, detect and respond to elopements; court was unable to determine whether problem of constitutional proportions existed where United States relied on fact that elopements occurred without providing evidence that such occurrences demonstrated substantial deviation from accepted professional practice.

116. Mental Health ⇐53

While sexual behavior problems of certain residents posed grave risk of harm, institution exercised professional judgment in addressing behavior where it held numerous staff meetings/interdisciplinary team conferences, where it contacted outside consultants and therapists, where it tried transferring resident to another facility, where it sent staff members to attend classes to become certified sex therapists, and where it contracted with sex therapist to provide in-service training for staff regarding how to deal with problematic sexual behavior.

117. Civil Rights ⇐206(3)

Mental Health ⇐51.5, 51.20

Professional judgment was exercised in provision of care to mentally retarded individuals residing at institution where care, although frequently not optimal, was, with exception of one remedied defect, consistent with accepted professional practice and met constitutional requirements; in cases where there were lapses in care, United States failed to demonstrate that deficiencies were result of state's official customs and policies as implemented at institution to warrant injunctive relief.

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OPINION AND ORDER

D. BROOKS SMITH, District Judge.

I. *INTRODUCTION*

This action presents a claim by the Attorney General, on behalf of the United States of America ("United States"), under the Civil Rights of Institutionalized Persons Act of 1980, 42 U.S.C. §§ 1997–1997j ("CRIPA"). The United States contends that the Commonwealth of Pennsylvania ("Commonwealth") and the individually-named defendants (officers of the Executive Branch of the Commonwealth sued in their official capacities) are depriving institutionalized mentally retarded persons at the Ebensburg Center (the "Center") of rights, privileges or immunities secured by the Constitution of the United States. Complaint (Docket No. 1), ¶¶ 1, 6–11. The United States seeks equitable relief, the sole remedy authorized by CRIPA (*see* 42 U.S.C. § 1997a(a)), and asks this Court to enjoin defendants from "continuing the acts, practices and omissions" at the Center which allegedly violate the Constitution, and "to require defendants to take such action as will provide constitutional conditions of care to persons" who reside at the Center. Complaint, p. 5.

The instant CRIPA action was tried before this Court over the course of twenty (20) days. Extensive testimony by lay and expert witnesses was presented, hundreds of exhibits were received into evidence, and this Court conducted a detailed view of the facility in the presence of counsel.

Inasmuch as "[d]ecisional law interpreting [CRIPA] is virtually nonexistent" (*United States v. Pennsylvania*, 863 F.Supp. 217, 218 (E.D.Pa.1994)), and in order to properly evaluate the evidence presented, I will first address the applicable standard of proof. Thereafter, for each alleged constitutional violation, I will discuss the nature of the duty owed, my findings of fact regarding the alleged violative conduct, and my conclusion regarding whether a violation exists.

For the reasons explained below, I find that the residents at the Ebensburg Center are not being deprived of their rights, privileges, or immunities secured or protected by

the Constitution or laws of the United States. Accordingly, the United States' request for injunctive relief shall be denied.

II. *STANDARD OF PROOF*

A. *CRIPA Actions*

The Commonwealth submits that the standard of proof in this CRIPA action requires the United States to satisfy five elements set forth in 42 U.S.C. § 1997a. According to the Commonwealth, the United States must demonstrate:

1. egregious and flagrant conditions in a State institution resulting in;
2. a deprivation of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States;
3. said deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges or immunities; and
4. said deprivation causes;
5. grievous harm to persons residing in an institution.

See Docket No. 22, pp. 34–35.[1] The United States argues that the Commonwealth's extrapolation of these elements from 42 U.S.C. § 1997a is in error because that statute merely establishes the elements of the "Attorney General's 'reasonable cause' determination that conditions at the institution in question merit Department of Justice involvement." 30/3–4.

None of CRIPA's provisions specifically address the elements which must be demonstrated by the United States at trial in order to obtain the equitable relief sought. *See* 42 U.S.C. §§ 1997–1997j. Section 1997a is entitled "Initiation of civil actions," and subsection (a)'s caption reads: "Discretionary authority of Attorney General; preconditions." 42 U.S.C. § 1997a. Subsection (a) provides:

> Whenever the Attorney General has reasonable cause to believe that any State ... is subjecting persons residing in or confined to an institution, as defined in section 1997 of this title, to egregious or flagrant conditions which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice of resistance to the full enjoyment of such rights, privileges, or immunities, *the Attorney General*, for or in the name of the United States, *may institute a civil action* in any appropriate United States district court against such party for such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities ...

42 U.S.C. § 1997a(a) (emphasis added).

[1] The plain language of § 1997a(a) reveals that the statute simply confers standing upon the Attorney General, thereby providing authority for the United States to initiate a lawsuit on behalf of mentally retarded persons, and others, who reside or are confined in an institution. *See Patsy v. Florida Bd. of Regents*, 457 U.S. 496, 507–08, 102 S.Ct. 2557, 2563, 73 L.Ed.2d 172 (1982) ("The Civil Rights of Institutionalized Persons Act ... was enacted primarily to ensure that the United States Attorney General has 'legal standing to enforce existing constitutional and Federal statutory rights of institutionalized persons.'" (quoting H.R.Conf.Rep. No. 96–897, 9 (1980) U.S.Code Cong. & Admin.News 1980, p. 787, 833); *United States v. Pennsylvania*, 863 F.Supp. at 219–20 ("From this language [in § 1997a(a)] the Court must hold that the Attorney General is vested with the discretion to bring suit whenever she is satisfied that a case is serious enough to warrant federal involvement. Once such a determination is made by the Attorney General, the standard of proof to be borne by the United States at trial must be the same as any other plaintiff."); *United States v. Ten-*

1. Because resolution of this matter is fact intensive, frequent citations to the record appear throughout this opinion. In an effort to minimize the length of this adjudication (admittedly not by much), all record citations will reference the docket number and the appropriate page(s) separated by a diagonal slash. Hence, Docket No. 22, pp. 34–35, would be designated by 22/34–35.

nessee, 798 F.Supp. 483, 488 (W.D.Tenn.1992) ("CRIPA is a standing statute.").

[2, 3] The five elements identified by the Commonwealth apply only to the Attorney General's "reasonable cause" determination, which must be made before the Attorney General may properly institute a CRIPA action. 42 U.S.C. § 1997a(a). One court has concluded that this plain reading of the statute is supported by its legislative history.[2] Inasmuch as I conclude that it is clear from the text that § 1997a(a) is a standing statute, I believe an examination of its legislative history is unnecessary.[3]

[4, 5] As the Supreme Court of the United States has noted, CRIPA is legislation pertaining to "a specific class of § 1983 actions." *Felder v. Casey*, 487 U.S. 131, 148, 108 S.Ct. 2302, 2312, 101 L.Ed.2d 123 (1988) (state statute creating exhaustion requirement for § 1983 action held violative of Supremacy Clause). For purposes of the instant action, it is important to remember that § 1983 did not *create* any new rights, but was enacted by Congress "to give a *remedy* to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position." *Monroe v. Pape*, 365 U.S. 167, 172, 81 S.Ct. 473, 476, 5 L.Ed.2d 492 (1961) (emphasis added). *See also Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913, 68 L.Ed.2d 420 (1981) (Section 1983 provides "a 'civil remedy' for deprivations of federally protected rights caused by persons acting under color of state law without any express requirement of a particular state of mind.").

[6] The Supreme Court has identified "two essential elements" to a § 1983 civil rights action:

> (1) whether the conduct complained of was committed by a person acting under color of state law; and
>
> (2) whether this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.

Id. Accord Shaw v. Strackhouse, 920 F.2d 1135, 1141–42 (3d Cir.1990). Because CRIPA was enacted to provide standing for the Attorney General to initiate civil rights actions on behalf of institutionalized persons, the "essential elements" that the United States must prove are the same as in any civil rights action. *See United States v. Pennsylvania*, 863 F.Supp. at 220 ("[T]he United States has no greater standard of proof than an individual plaintiff would bear in a case alleging the same illegal conduct on the part of a state.").

[7–10] In this case, the United States alleges—and the Commonwealth does not dispute—that "defendants have acted or failed to act ... under color of state law." Complaint, ¶ 15. The core of the dispute here concerns whether defendants have "deprive[d] residents of Ebensburg of rights, privileges, or immunities secured or protected by the Constitution of the United States." *Id.*, ¶ 21. The individually-named defendants have been sued in their official capacities, which "'generally represent only another way of pleading an action against an entity of which an officer is an agent.'" *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) (quoting *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 n. 55, 98 S.Ct. 2018, 2035 n. 55, 56 L.Ed.2d 611 (1978)). *Accord Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989) ("Obviously, state officials literally are persons. But a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself.").[4]

2. *United States v. Pennsylvania*, 863 F.Supp. at 219.

3. *See Chicago v. Environmental Defense Fund*, — U.S. —, —, 114 S.Ct. 1588, 1593, 128 L.Ed.2d 302 (1994) (when text of statute is clear, it is inappropriate to resort to legislative history for purposes of interpreting statute).

4. For purposes of the Eleventh Amendment, the Supreme Court has held that "official-capacity actions for prospective relief are not treated as actions against the State." *Graham*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14 (citing *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908)). In *Ex parte Young*, the Supreme Court held that the Eleventh Amendment interposes no bar to an action in federal court for prospective injunctive relief against a defendant official named in his or her official capacity because the defendant state official "comes into conflict with

[11] In an official-capacity suit, a "governmental entity is liable ... only when the entity itself is a ' "moving force" ' behind the deprivation; thus, in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law." *Graham*, 473 U.S. at 166, 105 S.Ct. at 3105 (citations omitted). The United States' Complaint in this action alleges that the Commonwealth's "policy or custom" as implemented at the Center has violated the residents' constitutional rights. *See* Complaint, ¶ 21 ("The acts and omissions alleged ... constitute patterns or practices of resistance to the full enjoyment of rights, privileges or immunities secured or protected by the Constitution of the United States, and deprive residents of Ebensburg of such rights, privileges or immunities.").

B. *Substantive Due Process Rights of Institutionalized Mentally Retarded Persons*

The United States contends that the Commonwealth has subjected the residents of the Center to a deprivation of their liberty interests protected by the Due Process clause of the Fourteenth Amendment of the United States Constitution,[5] because they have not been provided:

a. adequate basic care—in particular, adequate food, shelter, clothing, and hygiene;

b. adequate medical care;

c. freedom from undue restraint, and training programs to ensure freedom from undue restraint; and

d. safe conditions.

[12] In *Youngberg v. Romeo*, 457 U.S. 307, 314, 102 S.Ct. 2452, 2457, 73 L.Ed.2d 28 (1982), the Supreme Court considered "for the first time the substantive rights of involuntarily committed mentally retarded persons under the Fourteenth Amendment to the Constitution." The *Youngberg* Court acknowledged that "[t]he mere fact that Romeo has been committed [to a Pennsylvania state institution] under proper procedures does not deprive him of all *substantive liberty interests* under the Fourteenth Amendment." *Id.* (emphasis added).

[13] The defendants in *Youngberg* (three administrators of the Pennsylvania institution) "concede[d] a duty to provide adequate food, shelter, clothing, and medical care." *Id.* at 324, 102 S.Ct. at 2462. The Supreme Court noted that these duties "are the essentials of the care that the State must provide." *Id.* Separate and apart from these interests, however, the plaintiff argued that he had "a constitutionally protected liberty interest in safety, freedom of movement, and training within the institution; and that [the defendants] infringed these rights by failing to provide constitutionally required conditions of confinement." *Id.* at 315, 102 S.Ct. at 2457. The Court's task, therefore, was to "decide whether liberty interests also exist in safety, freedom of movement, and training,"

the superior authority of [the] Constitution, and he is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct." 209 U.S. at 159–60, 28 S.Ct. at 454. Although the Eleventh Amendment typically bars actions for damages in federal court against States and state officials sued in their official capacities (*see Will*, 491 U.S. at 66, 109 S.Ct. at 2309–10 (§ 1983 was not intended "to disregard the well-established immunity of a State from being sued without its consent"; in actions for damages, neither States nor state officials acting in their official capacities are considered "persons" within the meaning of § 1983)), the Eleventh Amendment poses no bar to actions for prospective injunctive relief against state officials sued in their official capacities, and in such circumstances, the state officials are considered "persons" for purposes of § 1983. 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14. Nevertheless, the Court still considers such actions for prospective injunctive relief as addressing the State's official policy or custom. *Graham*, 473 U.S. at 167 n. 14, 105 S.Ct. at 3106 n. 14 ("[I]mplementation of state policy or custom may be reached in federal court only because official-capacity actions for prospective relief are not treated as actions against the State."). Moreover, the Eleventh Amendment does not apply to suits by the United States against a State. *United States v. Mississippi*, 380 U.S. 128, 140–41, 85 S.Ct. 808, 814–15, 13 L.Ed.2d 717 (1965).

5. The Fourteenth Amendment provides, in pertinent part, that a State shall not "deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, § 1.

and, if so, to "decide whether they have been infringed in this case." *Id.*

[14] The *Youngberg* Court found that the first two claims—safe conditions and freedom from bodily restraint—involved "liberty interests recognized by prior decisions of this Court, interests that involuntary commitment proceedings do not extinguish." *Id.* (footnote omitted). The plaintiff's other claim—a constitutional right to minimally adequate training—was, in the words of the Court, "more troubling." *Id.* at 316, 102 S.Ct. at 2458.

> In addressing the asserted right to training, we start from established principles. As a general matter, a State is under no constitutional duty to provide substantive services for those within its border. When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioner that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities. Nor must a State "choose between attacking every aspect of a problem or not attacking the problem at all."

Id. at 317, 102 S.Ct. at 2459 (citations omitted). The Court noted that the plaintiff's "primary needs" were "bodily safety and a minimum of physical restraint," and the plaintiff "clearly claim[ed] training related to these needs." *Id.* at 317–18, 102 S.Ct. at 2459. The Court therefore held that "[i]n the circumstances presented by this case, and on the basis of the record developed to date, we agree ... that [the plaintiff's] liberty interests require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319, 102 S.Ct. at 2460.[6]

[15, 16] Significantly, although the Court found that a constitutional liberty interest existed that required Pennsylvania to provide "minimally adequate or reasonable training," the Court cautioned against adopting an unrestrained notion of liberty interests that would impose additional duties on a State:

> It is not feasible, as is evident from the variety of language and formulations in the opinions below and the various briefs here, to define or identify the type of training that may be required in every case. A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case. *A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.*

6. The Commonwealth, as it did at an earlier stage of this proceeding, argues that the Supreme Court's decision in *DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989), limits the reach of *Youngberg* (and the Due Process protections recognized there) to those mentally retarded individuals who have been *involuntarily* committed to the Center. *See* 489 U.S. at 199–200, 109 S.Ct. at 1005 (*Youngberg* stands "only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465–66 (3d Cir.1990) (severely mentally retarded individual's Due Process rights not curtailed by the state because his parents voluntarily placed him at the facility and, pursuant to the reasoning in *DeShaney*, he was not deprived of freedom " 'through incarceration, institutionalization or other similar restraint of personal liberty' "). *But see United States v. Pennsylvania*, 832 F.Supp. 122, 124 (E.D.Pa.1994) ("[W]here the initial institutionalization of an individual is made pursuant to a 'voluntary' decision, such institutionalization in its course may become one which necessarily curtails an individual's liberty, for instance, through excessive or inappropriate use of physical or chemical restraints. In such a case, the fundamentals of due process would be offended if treatment and care were not provided."). The instant action challenges the Commonwealth's policy and customs as implemented "across the board" at the Center (as opposed to an action vindicating the liberty interests of a single individual, as in *Fialkowski*). The testimony presented during the trial demonstrated that, with respect to some of the residents, their backgrounds and the severity of their conditions make it difficult to characterize their institutionalization as being "voluntary." In addition, the Commonwealth appears to concede that some of the individuals at the Center were placed there involuntarily. *See* Docket No. 22, at 34 ("Most, if not all, of the residents at Ebensburg Center are voluntarily placed without any restraint.").

Id. at 319 n. 25, 102 S.Ct. at 2460 n. 25 (emphasis added).

[17] After establishing that the plaintiff in *Youngberg* retained "liberty interests in safety and freedom from bodily restraint," the Court explained the need to set forth a standard to apply in determining whether the State has violated these substantive due process rights of an involuntarily committed mentally retarded individual.

> The question ... is not simply whether a liberty interest has been infringed but whether the extent or nature of the restraint or lack of absolute safety is such as to violate due process.
>
> * * * * * *
>
> [W]hether [the plaintiff's] constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests. If there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge or jury.

Id. at 320–21, 102 S.Ct. at 2460–61. The Court then held that " 'the Constitution only requires that the courts make certain that professional judgment in fact was exercised. *It is not appropriate for the courts to specify which of several professional choices should have been made.*' " *Id.* at 321, 102 S.Ct. at 2461 (emphasis added) (citation omitted).[7]

[18] With respect to the plaintiff's claim for minimally adequate training, the *Youngberg* Court explained the deference to be shown in applying the "professional judgment" standard:

> In this case, the minimally adequate training required by the Constitution is such training as may be reasonable in light of respondent's liberty interests in safety and freedom from unreasonable restraints. In determining what is "reasonable"—in this and in any case presenting a claim for training by a State—we emphasize that the courts must show deference to the judgment exercised by a qualified professional. By so limiting judicial review of challenges to conditions in state institutions, interference by the federal judiciary with the internal operations of these institutions should be minimized.... [T]he decision, if made by a professional, is presumptively valid; *liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment.*

Id. at 322–23, 102 S.Ct. at 2462–63 (emphasis added) (footnotes omitted). *See also Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1248 (2d Cir.1984) ("*Youngberg* held that due process is satisfied if restraints are imposed on mentally retarded individuals in accordance with the judgment of qualified professionals and that courts should defer to this professional judgment.").

C. *The Professional Judgment Standard*

[19] The United States contends that the "professional judgment" standard set forth in *Youngberg* is not applicable, but if it is applicable, the standard pertains only to the claim regarding training. 87/30–33.[8] The United

7. The Court defined a "professional" decision-maker as "a person competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded. Of course, day-to-day decisions regarding care—including decisions that must be made without delay—necessarily will be made in many instances by employees without formal training but who are subject to the supervision of qualified persons." *Id.* at 323 n. 30, 102 S.Ct. at 2462 n. 30.

8. The United States' argument is undermined by its own Complaint in this action, which makes repeated references to the defendants' alleged failure to exercise "professional judgment." *See, e.g.*, Complaint, ¶ 20 ("Defendants have failed and are continuing to fail to prescribe and administer psychotropic medication safely and pursuant to the exercise of professional judgment by appropriately qualified staff."). The United States' effort to avoid application of the professional judgment standard—and its presentation of evidence and argument throughout this case that was not tailored to address the professional judgment standard (instead, for example, presenting evidence of and argument about "deficient care" or "malpractice")—was unhelpful to

States' argument is based on a tortured reading of *Youngberg*, and completely ignores Third Circuit precedent interpreting *Youngberg*, which is binding on this Court. *See Shaw v. Strackhouse*, 920 F.2d 1135, 1146 (3d Cir.1992) ("Absent even a hint that the Court meant to so limit its holding, we must read *Youngberg* at face value and apply the professional judgment standard to all failure to protect, excessive restraint, and failure to habilitate claims brought by mentally retarded persons who are institutionalized, whether such claims are brought independently or in tandem.").

The United States argues: "As contemplated in *Youngberg*, safety is an objective standard that can be measured through objective criteria." 87/30. The United States fails to explain how this novel proposition is "contemplated" in *Youngberg*, and fails to indicate the source of the "objective standard" that this Court should apply. To the contrary, the Supreme Court in *Youngberg* specifically stated that, in determining whether the constitutional rights of an institutionalized individual have been violated, a court must balance the individual's liberty interests against the relevant state interests, and that "[i]f there is to be any uniformity in protecting these interests, this balancing cannot be left to the unguided discretion of a judge or jury." 457 U.S. at 321, 102 S.Ct. at 2461. For this very reason, the Supreme Court set forth the "professional judgment" standard. The United States' argument must be rejected.[9]

[20, 21] In *Shaw*, the Third Circuit attempted to clarify the meaning of the "professional judgment" standard established in *Youngberg*, and stressed that mere negligence "cannot trigger due process protection." *Id.* at 1146.

> Professional judgment is a relatively deferential standard. It requires *only* that a state actor exercise professional judgment in choosing the appropriate course of action. Negligence, however, imposes on a state official the burden of choosing, from among alternatives, a course of action consistent with the exercise of 'due care.' That means, as we see it, rejecting negligent alternatives that might nonetheless satisfy the demands of professional judgment. .... [Professional judgment] appears to us to be a substantially less onerous standard than negligence from the viewpoint of the public actor. Indeed, in our view, professional judgment more closely approximates—although, as we have discussed, remains somewhat less deferential than—a recklessness or gross negligence standard. Professional judgment, like recklessness and gross negligence, generally falls somewhere between simple negligence and intentional misconduct.

Id. (emphasis added). *Accord Society for Good Will to Retarded Children*, 737 F.2d at 1248 (" '[P]rofessional judgment' has nothing to do with what course of action would make patients 'safer, happier and more productive.' Rather, it is a standard that determines whether a particular decision has substantially met professionally accepted minimum standards.").

[22] As *Shaw* and other cases decided since *Youngberg* explain, the "professional judgment" standard (*i.e.*, deciding whether a decisionmaker's action, or inaction, constituted "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment," 457 U.S. at 323, 102 S.Ct. at 2462,) is a less onerous standard for a state actor to meet than that of negligence

this Court as it labored with the difficult task of adjudicating this factually complex controversy.

9. Alternatively, the United States submits that the "professional judgment" standard is not applicable in this case because CRIPA actions enable the Attorney General to seek only equitable relief, and *Youngberg*'s professional judgment standard was fashioned in response to a § 1983 action for money damages so that professionals would not be "required to make each decision in the shadow of an action for damages." 87/31–32 (quoting *Youngberg*, 457 U.S. at 325, 102 S.Ct. at 2463). The United States' injunctive relief argument is unavailing for the reasons explained in *Association for Retarded Citizens of North Dakota v. Olson*, 561 F.Supp. 473, 487–88 (D.N.D.1982) (relying on principles of federalism and avoiding unnecessary judicial intervention in state institutions), *aff'd*, 713 F.2d 1384 (8th Cir.1983).

or medical malpractice. Optimal courses of treatment as determined by some expert, while laudable, do not establish the minimal constitutional standard. *Society for Good Will to Retarded Children*, 737 F.2d at 1248.[10] Instead, the factfinder must determine whether the decision made by the professional comports with minimally accepted professional standards.

[23] In making this determination, expert testimony is "relevant not because of the experts' own opinions—which are likely to diverge widely—but because that testimony may shed light on what constitutes minimally accepted standards across the profession." *Society for Good Will to Retarded Children, Inc.*, 737 F.2d at 1248.

> The role of the experts is only to assist the court in ascertaining what the minimum professional standard is; the ultimate question is whether " 'professional judgment *in fact* was exercised.' " Even if every expert testifying at trial agrees that another type of treatment or residence setting might be better, the federal courts may only decide whether the treatment or residence setting that actually was selected was a "substantial departure" from prevailing standards of practice.

Id. at 1248–49 (citations omitted). *Accord Society for Good Will to Retarded Children, Inc. v. Cuomo*, 902 F.2d 1085, 1090 (2d Cir. 1990) (district court erred in finding constitutional violations without first determining whether the conditions and treatment substantially departed from accepted professional judgment; "the district court should use expert testimony to identify 'substantial departures', but not to choose from among several professionally acceptable remedies").

III. *FINDINGS OF FACT AND CONCLUSIONS REGARDING LIBERTY INTERESTS AT ISSUE IN THIS LITIGATION*

[24] The United States alleges that four separate categories of "liberty interests" have been violated at the Center. To properly analyze the evidence, I must evaluate (1) the nature of the liberty interests of the residents at issue (and defendants' corresponding duty to protect those rights); and (2) whether defendants' official customs and policies, as implemented at the Center, so substantially departed from accepted professional judgment, practice, or standards as to demonstrate that defendants actually did not base their decisions on professional judgment.

This case has been carefully and exhaustively litigated by the United States and the defendants. Constraints of time and space do not permit me to respond to every one of the manifold factual and legal contentions raised by the United States with respect to the liberty interests at issue in this litigation. As the lengthy opinion which follows demonstrates, however, I have attempted to address in detail the more serious issues, while confronting the remaining issues in a general manner. Before addressing the United States' contentions, a brief overview of the Center's structure and services is in order.

A. *The Center's Structure and Services*

The Ebensburg Center is an institution operated by the Commonwealth for mentally retarded persons, serving Bedford, Blair, Cambria and Somerset Counties. The Center is licensed as an intermediate care facility for persons with mental retardation and is geared toward caring for individuals with significant behavioral deficits who require assistance to meet their daily needs, and who have been unable to procure like services elsewhere. Exh. 11. The Center has a full operating license under the federal standards of the Title XIX Medicaid Program, which is a prerequisite for participating in the Medicaid Program. 62/158.

The Center was built in the 1950s. Many of the residents were placed at the center as children, and currently the median age of the residents is 32.5 years. 62/163. The Center's 475 residents live in five buildings or living units, each of which has four separate wings. There are approximately 96 residents to each building or 24 residents to each

10. *Cf. DeShaney*, 489 U.S. at 202, 109 S.Ct. at 1006 ("[T]he claim here is based on the Due Process Clause of the Fourteenth Amendment, which, as we have said many times, does not transform every tort committed by a state actor into a constitutional violation.").

wing. 62/140–41; Exh. 608/62.[11] The Center currently provides four private rooms per unit and plans to increase the number of private rooms available. Exh. 603/104; 63/27.

The living units are the Keystone House, Laurel House, Sunset House, Horizon House, and the Villa House. The Keystone Unit houses the residents who are more profoundly mentally retarded and more physically disabled. Some physically handicapped residents also live in the Laurel, Horizon, Sunset and Villa living units. 34/98. Approximately one third of the residents of the Keystone unit are essentially immobile—meaning that, as a result of their physical handicaps, they have no active movement, except for the ability to move their head, or to slightly move an arm or leg. 34/98. The physical handicaps manifested by the residents at the Center are a result of damage to the brain. 34/107.

Laurel Unit houses mentally retarded women. Some of the mentally retarded men reside in the Sunset House. Horizon House houses residents who are visually impaired or blind. Villa is home for the Center's higher functioning individuals who are mildly to moderately mentally retarded. 43/81.

The Center has been budgeted a total of 790 full-time staff, which includes direct staff, professional staff and administrative staff. Exh. 601/53, 95. Additional staff may be requested during or before the fiscal year from a pool of staff serving facilities operated by the state. Exh. 600/95–99. Approximately 366 of the Center's staff are involved solely with direct care. Exh. 600/99.

Alan M. Bellomo was appointed as Director of the Ebensburg Center in 1985 and continues to serve in that capacity. 62/130. As Director, he oversees the total operation of the facility to insure that the residents are receiving adequate services, care and treatment. Exh. 600/51–52. All staff of the Center are ultimately responsible to Mr. Bellomo. Exh. 600/52. Mr. Bellomo relies in part on the judgments of his division director, disciplinary coordinator, outside reviews, advocacy groups and family association members to keep him updated on the needs of the facility. Exh. 600/63.

Mr. Bellomo reports to Dr. Sneed, who is the Director of the Bureau of Direct Program Operations for the OMR. 63/25. Dr. Sneed supervises the direction of eight other mental retardation facilities and is supervised himself by the Pennsylvania Deputy Secretary for Mental Retardation. Exh. 600/64–67. Dr. Sneed speaks with Mr. Bellomo at least once a week and attends monthly meetings with Mr. Bellomo. Exh. 600/67–73.

Under Mr. Bellomo's direction, the Center's Executive Staff perform rounds of the facility to remain abreast of resident's concerns and care. These rounds give management the opportunity to know the residents personally, provide oversight when there would otherwise be none, and give the employees an opportunity to speak openly with facility management. Exh. 600/11–12; 63/8–9; 63/59. Management submits weekly observations and criticisms of the facility to Mr. Bellomo for consideration. Exh. 603/10. Mr. Bellomo addresses these concerns as they arise and creates incremental plans to relieve problems. Exh. 600/25–27.

As facility director, Mr. Bellomo also chairs the Executive Staff and Risk Management committees and participates on the Mortality and Morbidity Review and Budget committees. Exh. 600/49. Mr. Bellomo often attends the annual reviews that occur at the facility. *Id.* Additionally, Mr. Bellomo chairs town meetings so that he may address concerns of the residents. Exh. 600/49.

11. The deposition testimony admitted in this case is delineated by the United States' line designations and the Commonwealth of Pennsylvania's counter-line designations, while some citations to the record refer to testimony which is neither. Such testimony was considered, and cited in some instances, because it aided me in understanding the context of the testimony. In addition, some testimony was considered because it was a means of fully appreciating the structure of and the services provided by the Center. The consideration of such evidence is consistent with the spirit of Federal Rule of Evidence 106, which provides: "When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it."

As part of his management and oversight, Mr. Bellomo receives copies of the Center's incident reports. Exh. 600/42–43; 63/16. Mr. Fulton, the Center's safety director, also receives copies of the incident reports. As safety director, Mr. Fulton investigates all suspicious injuries, as well as any incident which Mr. Bellomo believes warrants further investigation. Exh. 601/131–35.

Richard G. O'Brien has been Director of Program Services at the Center since 1982. 64/65. As Director of Program Services, Mr. O'Brien is responsible for monitoring discipline coordinators in the areas of psychology, nursing, speech pathology, volunteer resources and social services. He also is responsible for the contract services provided to the Center by Liberty Health Care, Mercy Hospital, Camco's physical therapy services, and various laboratory services. In addition, Mr. O'Brien is responsible for the operation of and monitoring of the quality assurance program. 64/66. This program insures that Ebensburg complies with various federal standards and properly implements the standard for Intermediate Care Facilities for the Mentally Retarded (ICFMR). Exh. 600/53.

The Center is organized along the lines of a "unit system"—a method of operation that became popular in the 1970s in an effort "to get away from the clearly delineated—what became isolated—roles of different professionals." 51/17. The unit system strives to better coordinate the services of all the professional disciplines that are provided to the residents, with each unit director or manager administratively supervising the provision of services to his or her residents. 51/17–19.

Under the unit system, all of the living units are served by the Center's Director of Residential Unit Management (DRUM), David Devine. Mr. Devine supervises each building's Unit Manager, and Mr. Devine is ultimately responsible for providing adequate residential services and care to the residents of the facility. Exh. 608/22; 63/8. Mr. Devine's direct supervisor is Mr. Bellomo. Exh. 608/34.

The Unit Managers run each unit in three shifts. The first shift is supervised by a Residential Service Supervisor (RSS), who is a Qualified Mental Retardation Professional (QMRP). The QMRP is the staff person responsible for a resident's case management, which includes a ninety-day review to insure that all services are being properly provided. The QMRP also coordinates that resident's annual staffing and insures that any provider of a program service documents activity in the chart. 64/130. The RSS also supervises the Residential Service Aids (RSAs) who provide direct care to the residents. Exh. 608/190. Residential Service Aide Supervisors (RSAS) and Residential Service Night Aide Supervisors (RSNAS) act as RSA supervisors on the second and third shifts, respectively. Exh. 601/78.

Mr. Devine also is responsible for scheduling staff and meeting direct care employee quotas. Quotas, the minimum number of RSAs allowed for a shift, are set by Mr. Bellomo to insure that residents receive adequate attention and care. Currently, the Center employs approximately 366 full-time and twenty-nine substitute RSAs to meet the existing quotas. Exh. 601/7–8. Professional staff are not included when determining the quota, but the record reveals that approximately 30% of the RSAS' time per month is spent working in cooperation with the RSA quota, providing hands-on care and at the same time monitoring their staff. Exh. 600/140; Exh. 601/69–71; Exh. 608/97. RSASs are not included in the quota because they also are responsible for administrative tasks, such as assisting in the design and implementation of the residents' programs. Exh. 601/78.

On occasion, Mr. Devine also uses unit "pulls" to meet his minimum quota. Generally RSAs are "pulled" from one unit to work in another so that both units are able to make quota for that shift. Exh. 601/78–80. Occasionally, Mr. Devine must pull nurses, so that the Registered Nurse Supervisors are properly supported. Exh. 601/80. The Center's quota minimums exceed Title XIX's requirements and are reviewed on a monthly basis by the OMR. Exh. 600/149, 152.

Mr. Devine's duties also include the supervision of infection control, all staff of the third shift, as well as three nurse supervisors. Finally, as DRUM, Mr. Devine sits on

the Executive Staff Safety Committee, Risk Committee, Budget Committee, Approved Purchase Committee, Record Committee, Probationary Review, Mortality/Morbidity Committee, and the Policy Committee. Exh. 608/16–18, 188.

Mary Kay Bennett acts as the Center's guardian officer, and ensures that the residents' money is safeguarded and reasonably spent. Exh. 603/25, 56. Ms. Bennett is court-appointed and supervised by a western regional officer. Exh. 603/25–26.

The state, through the Pennsylvania Protection and Advocacy Organization (PP & A), also provides some residents with advocates. PP & A is recognized by Pennsylvania's governor as an advocate for the disabled and occasionally subcontracts its duties with the state Association for Retarded Citizens (ARC). Due to an inadequacy of representation, however, the Center began a program which utilizes citizens from the Ebensburg area as "special friends" and advocates for the residents. The special friends form relationships with the residents, visit on holidays, and attend the residents' annual care review if possible. Exh. 603/26–27.

The facility also attempts to place residents in the surrounding area so that they have an opportunity to live in a non-institutional community. 63/171. Mr. Bellomo recommends that residents be placed in the community, but the county's mental health/mental retardation administrator makes final determinations on placement. Exh. 600/81; 63/18. Although the Center has residents who could be placed in the community, no such facilities are currently available. In an effort to ameliorate this unfortunate situation, for those residents who qualify for community placement, the facility awards "grounds privileges," which allows those residents to walk independently on the grounds or go to the mini-mall located near the facility. 63/160.

The standards of Title XIX require that facilities such as the Center be subjected to an unannounced, annual survey. 62/158. The survey team is present for approximately one week and scrutinizes the Center for its compliance with approximately 475 different standards. 64/42. The survey team then provides a report to the Center listing its concerns, and the Center must provide a plan of correction, which specifies a particular date for compliance. Thereafter, the survey team will return unannounced to ascertain if the various deficiencies previously cited have, in fact, been completely corrected. 64/42.

As a result of a Title XIX survey in October 1990, the Center received a Provisional I license under Title XIX for January 31, 1991, to July 31, 1991. 62/144; Exh. 1101. The provisional license was recommended by the Title XIX survey team to the OMR (which is responsible for the licensure process and is under the aegis of the Pennsylvania Department of Public Welfare). 62/144–45. The survey team recommended the provisional license as a result of problematic sexual behavior presented by one male resident, Clifford P. The Title XIX survey team was of the opinion that the Center had to develop a sexuality program to address this problematic sexual behavior before a full operating license could be recommended. 602/113. Significantly, the Title XIX survey team noted "the deficiencies during this survey do not individually or collectively jeopardize client health and safety or seriously impair the facility's ability to render care." 62/144. The Provisional I license issued by the Pennsylvania Department of Public Welfare was not equivalent to the decertification process that exists under the Health Care Finance Administration. 62/147.

Subsequently, the Provisional I license was replaced by a full operating license issued by the Pennsylvania Department of Public Welfare. The record contains no evidence of the issuance of any other provisional license. A full operating license under the Title XIX Medicaid Program is not an indication that a facility does not have any deficiencies. In fact, it is rare for a Title XIX survey team not to find some deficiencies in a facility which it has inspected. 64/44.

In addition to the Title XIX Medicaid Program inspection and licensing process, the Center also is subject to the Inspection of Care (IoC) survey process carried out by the Office of Medical Assistance, a division of the Pennsylvania Department of Public Welfare.

The federal Title XIX survey and the Pennsylvania IoC survey are two separate processes. 62/159; *compare* Exh. 60 (11/92 Title XIX survey) and Exh. 67 (8/92 IOC survey). The IoC surveyors who visit the facility actually go page by page through all records of the Center, noting any deficiency which is apparent. A plan of correction for these deficiencies must be submitted and approved by the Office of Medical Assistance. 62/158–59; Exh. 63. If a plan of correction is not approved and implemented, the Center risks the loss of Medicaid funding. Exh. 63. The record does not contain any evidence of any plans of correction which have not been approved or implemented.

B. *Adequate Basic Care*

The United States contends that defendants have failed to provide the residents at the Center with the constitutionally required level of basic care. In particular, the United States alleges that insects have been found on food and on the residents,[12] the clothing of some residents has been soiled, residents have not been bathed properly, and there is a disregard for the privacy of residents. 87/8–9; 92/22–3.[13]

As noted above, adequate food, shelter and clothing are "essentials of . . . care that the State must provide" to the residents of the Center. *Youngberg*, 457 U.S. at 324, 102 S.Ct. at 2462. The United States' allegations with respect to inadequate food (nutritional management) are addressed below in the discussion concerning adequate medical care, and I limit this portion of the opinion to the right to receive adequate shelter and clothing.

In *Society for Good Will*, 737 F.2d at 1244, the Court of Appeals for the Second Circuit affirmed a district court's finding that "the quality of the shelter at [a state operated school for the mentally retarded] did not meet constitutional minimums." The Second Circuit noted the conditions of filth, insect and rodent infestation, unsanitary conditions resulting in the transmission of various diseases, and inordinately hot rooms and/or temperature control problems, and held that the record contained sufficient evidence to support the district court's conclusion that the shelter was constitutionally infirm. *Id.* The court specifically noted that the problems at the facility were pervasive, and were not simply isolated lapses in care—"there was sufficient evidence for the district court to conclude that problems in the living conditions at [the institution] were either not being corrected or were arising on a recurring basis and that these problems caused the living environment to fall below constitutional standards." *Id.*

In this case, the United States has persistently focused on two incidents involving insects as a basis for its assertion that the Center, as an institution, has failed to provide adequate shelter. The first instance involved the discovery of ants on two residents who had been placed on floor mats in the day room to sleep overnight because their rooms were being painted. The staff discovered the ants on their bodies on two separate mornings (*i.e.*, the first resident was discovered with ants on her body on one morning, and the other resident was discovered with ants the following morning). Exh. 87. Thereafter, the staff took steps to exterminate the insects, and the residents' beds were moved out to the day room for overnight sleeping purposes while the rooms were being painted. *Id.* at 00000918.

The other, more serious incident involved the discovery of an infestation of maggots in a resident's ear. Exh. 1022. Just how this infestation occurred could not be definitively established, but the Center's investigation concluded that this resident's ear most likely became infested as a result of outdoor activity in the grass, which was confirmed by the emergency room physician. 63/77. No other similar incidents were reported.

12. The issue of "flies on the food" is addressed, *infra*, in the discussion concerning alleged constitutional deficiencies at meal time.

13. The United States also contends that instances when the staff has been unable to locate a resident's whereabouts support a conclusion that inadequate care is provided. This is an issue of safety and will be discussed in that section of the opinion.

[25] These two isolated instances related to insects, without more, are insufficient to demonstrate that the Center provides constitutionally inadequate basic care by tolerating insect infestations. To the contrary, the Commonwealth proffered credible evidence that these incidents were promptly reported by the staff. Upon notification of circumstances warranting attention, professional judgment was exercised; the situations were addressed, and the problems did not recur.

[26] As the Third Circuit in *Shaw* explained (in addressing a claim for alleged inadequate safety), isolated examples of problems, while regrettable, do not establish constitutional violations.

> Although the failure to prevent a "pattern of attacks, injuries, or violent behavior" is actionable, "[t]he right to protection is not activated by an isolated mishap, or called into question by each bruise that a patient may suffer." We do not mean to minimize the seriousness of Shaw's February 3 injury. We conclude, however, that the failure of the responsible staff member to keep watch over Shaw at the instant he happened to leave or be taken from his ward on February 3 amounts to just such an "isolated mishap." It cannot amount to more than simple negligence.

920 F.2d at 1143 (citation omitted). *See also Society for Good Will*, 737 F.2d at 1245 ("While there have been occasions when patients' specific medical problems have been treated improperly, the district court's decision should not have been based on isolated instances of improper treatment, but on a finding that medical care was inadequate on a class-wide basis. Isolated instances of inadequate care, or even of malpractice, do not demonstrate a constitutional violation.").

The United States also asserts that the clothing provided to the residents of the Center violates constitutional minimum standards because, on occasions, residents have been found with soiled clothing and soiled diapers. In support of its position, the United States cites expert testimony regarding a patient who he discovered with vomitus on his face and clothing. Dr. Stark, a psychologist who specializes in the care of persons with developmental disabilities, testified that he notified someone about the resident's condition, and that it "took a while" for someone to clean it up. Dr. Stark also stated that he saw residents with food stains on their clothes, and that some residents had a body odor and others an odor of urine. 43/220.

[27] Obviously, the presence of vomitus on one's person is unpleasant for that individual and repugnant to others. Again, however, the record indicates that this was an isolated occurrence, and, without more, I cannot deem this incident indicative of a failure by the Center to provide adequate clothing for the residents or to promptly respond to situations requiring care and attention. In particular, I note that the record contains credible testimony that the staff at the Center felt inhibited and hesitated to intervene on behalf of the residents in the presence of the United States' experts. 62/198.

[28] Moreover, even if I consider this incident together with the testimony that residents had food stains on their clothes, I cannot find defendants constitutionally deficient in providing adequate clothing to the residents. There are stains which by their nature alter the appearance of clothing, but which do not automatically make it unfit to wear. The United States' own witness, Mr. Tackett, acknowledged that the Center routinely changed the clothing of those residents in the Keystone unit who "needed it." 38/17. In addition, the United States' photographic exhibits reveal that each resident had clean, presentable, and properly-fitting clothing. *See, e.g.*, Exhs. 670–71, 678–82, 705, 709–10, 713, 734–40. This is a trivial matter that does not warrant the constitutional analysis which the Government's contention requires of me.

[29] With respect to the United States' contention that the residents smell like urine, the United States cites the conclusory testimony of Dr. Stark (which provided no evidence with respect to the frequency of this alleged problem), 43/220, and a November 6, 1992, Medical Assistance Survey. Exh. 60. The November 1992 Survey states that a Medicaid standard had not been met because 12 residents were confined to their wheelchairs for 5 hours without being changed,

and when changed, the Attends (a brand name of an adult diaper) worn by those residents were heavily saturated with urine. Exh. 60, 00503763. There is no reference to urine saturated residents or urine saturated Attends in any other of the Medical Assistance Surveys from 1983 to 1992 (*see* Exhs. 48–59) nor is there any other testimony in this regard. This single discovery by the survey team hardly proves a prevalent condition at the Center.

[30] The United States contends the residents are not bathed properly, citing the testimony of Mr. Tackett, a former Center employee, and an anonymous complaint at a union meeting about residents being "hosed up one side and down the other." Exh. 995. As I indicated during the trial of this matter, the anonymous complaint at a union meeting about bathing the residents is not competent evidence. It is hearsay which is being offered to prove the truth of the matter asserted, Fed.R.Evid. 801(c). The declarant has not been subject to cross-examination, nor is his/her identity even known. Moreover, the reliability of the evidence is suspect in light of the fact that the employee would not repeat the allegation at the request of the Center so that the Center might seek to validate the complaint and, if necessary, address it. 64/46–47. There is no evidence to suggest that the employee wished to remain anonymous because he feared retaliation.

[31] Mr. Tackett testified that the bathing process in the Keystone living unit was like an assembly line, "it could have been longer ... it was done very quickly...." 38/27–28. The substance of his testimony does not establish an inadequate bathing process. Although the procedure is done quickly, it is routine for the staff. Mr. Tackett's testimony does not assert that the residents were still dirty after being bathed, that they smelled, or that they were not bathed frequently enough. Rather, his testimony suggests no more than that they were bathed too quickly. This hardly demonstrates a failure to exercise professional judgment, or that the Center's bathing practices did not meet minimum professional standards.

[32] Finally, the United States submits that the Center fails to provide adequate care for the residents because it does not provide the residents with privacy. Although the Supreme Court in *Youngberg* did not explicitly acknowledge a "right to privacy" for institutionalized mentally retarded individuals, it is only logical to infer from the Court's recognition of the right to adequate clothing that there exists a correlative right to avoid being viewed unclothed. 457 U.S. at 324, 102 S.Ct. at 2462; *see also Association for Retarded Citizens of North Dakota*, 561 F.Supp. at 491.

The United States points to the fact that privacy issues have been addressed in every annual state survey, and yet the Center has failed to respond effectively. The United States further notes that even Mr. Bellomo observed an incident involving seven residents clothed in only Attends, milling about a hallway while locked out of their rooms. Exh. 109. These problems with privacy have by and large occurred in the Sunset, Horizon or Villa living units, where the residents are more mobile.

The November/December 1983 Medical Assistance Survey for the Center noted a lack of privacy for residents during toileting and bathing. Exh. 48, # 00800265. In the October 1989 Medical Assistance Survey, a deficiency was noted because residents in Keystone were dressed, changed and bathed without privacy, and two residents in Horizon II used the bathroom stalls without closing the privacy curtain. Exh. 56, # 00800324. In October of 1990, the Medical Assistance Survey noted a deficiency because a resident was observed while in a Villa unit TV room without a blouse on, and another resident was observed walking naked from the bathroom to the TV room. Exh. 57, # 00004041.

[33] For each of these deficiencies, the Center's Plan of Correction provided for inservicing or teaching the staff regarding the need to afford greater privacy to residents. The privacy issues were not ignored, and I find that the Plan of Correction implemented at the Center fully comports with accepted professional standards. The record is clear that the Center responded to the breaches of privacy by instituting more training. The

professional judgment exercised, therefore, is not a substantial departure from accepted professional standards.

[34] The fact that the training did not bring about a complete cessation of incidents like those described above does not compel the finding of a violation of the residents' right to privacy. Improvements were made, and the United States failed to offer any testimony, expert or otherwise, concerning how the Center's action in responding to the privacy breaches constituted a substantial deviation from acceptable professional standards.[14]

[35] To summarize, I find that the United States has failed to prove that the cited lapses in basic care at the Center—either individually or in total—have risen to the level of a constitutional violation, much less that the Commonwealth's official "policy or custom" played any role in the alleged deprivation of care. *See Graham*, 473 U.S. at 166, 105 S.Ct. at 3105 (in official-capacity suit, the governmental entity's "policy or custom" must have played a part in the violation of federal law). In response to each of the problems with care discussed above (which occurred in different areas over the course of several years at this large institution), the Center responded with corrective measures pursuant to the exercise of professional judgment. While the lapses by the Center may have been negligent—and are at least regrettable—I conclude that the basic care provided at the Center does not constitute a substantial deviation from professional standards and is not constitutionally infirm.

14. It is worth noting that some of the breaches of privacy (involving the more mobile residents) cited by the United States do not necessarily reflect even ineffective training on the part of the Center. For example, there is no indication that the staff had any involvement in the incident involving the two residents in the Horizon unit who used the bathroom without closing the curtains in the stall. If staff were not toileting these individuals, the fact that the state surveyor observed the residents utilizing the stall without closing the curtain does not necessarily indicate a failure on the part of the Center to respond appropriately to a breach of privacy. I note that the record contains evidence of appropriate responses by the staff to privacy issues. *See* Exh. 594b, # 00050400 (wherein an RSA observed a resident who was stripping and directed her to the toilet).

C. *Adequate Medical Care*

[36] The right of an institutionalized mentally retarded person to receive adequate medical care—acknowledged without discussion by the Supreme Court in *Youngberg* as a substantive liberty interest protected by the Fourteenth Amendment (457 U.S. at 315, 324, 102 S.Ct. at 2457–58, 2462)—has been discussed by a number of courts. *See, e.g., Society for Good Will*, 737 F.2d at 1245 (district court's finding of inadequate medical care at facility was clearly erroneous; "Isolated instances of inadequate care, or even of malpractice, do not demonstrate a constitutional violation."); *Lelsz v. Kavanagh*, 673 F.Supp. 828, 834 (N.D.Tex.1987) (constitutionally required medical care "includes not only life-preserving or emergency care, but also regular and preventive treatment for ordinary or chronic ailments."). The United States challenges the following areas of medical care at the Center: neurologic care; psychiatric care; treatment of gastroesophageal reflux and aspiration; nutritional management; physical therapy and physical management; general medical care; and general nursing care.

1. NEUROLOGIC CARE

The United States contends that the Center's efforts to provide emergent neurological care for its residents who sustain status epilepticus [15] constitutes a substantial deviation from accepted professional judgment. 87/77–82. It further contends that the Center's provision of regular and preventive neurological care is likewise deficient. In particular,

15. Status epilepticus is a condition in which a resident manifests seizure activity that is either constant or recurrent without full recovery of consciousness before the next seizure activity begins. 48/118; 81/14; Exh. 1107, p. 854. Usually the diagnosis of status epilepticus is made in hindsight because the time frame of thirty minutes is a diagnostic criterion. That is, constant seizure activity of more than thirty minutes is consistent with the diagnosis of status epilepticus. Recurrent seizure activity within a thirty minute time frame that is not accompanied by a full recovery of consciousness also is consistent with a diagnosis of status epilepticus. *Id.*

the United States claims that the Center's treatment of residents with seizure disorders substantially deviates from accepted professional judgment because: (1) the residents receive more medication and combinations of medication to prevent seizures and sustain more adverse side effects than are acceptable, 87/84–86; (2) some of the residents receive anticonvulsant medication despite the fact that a diagnostic test, which has not been administered, may indicate that the resident does not experience seizure activity, 87/83–84; and (3) residents who experience seizure activity continue to sustain injuries of varying magnitude, 87/83.

In one sense, any seizure activity is an emergency. True status epilepticus, however, presents special concerns not only because of the seizure and its associated loss of consciousness, but also because of the potential to compromise an individual's respiratory status and the ability to oxygenate the tissues of the brain and other vital organs. 49/235; 36/50–51; 81/17. The longer the seizure activity persists, the more difficult it is to control with medication. 81/141. On the other hand, most seizures spontaneously cease within a few minutes. 36/201. A seizure that lasts one, two or three minutes and then ends with the resident responding, while clinically significant, is not an emergency situation. 81/34. To further complicate the assessment of status epilepticus and its treatment, neither the onset nor the duration of a seizure can be predicted. Exh. 1107, p. 854; 81/33, 119–20.

Against this backdrop, I must determine whether the Center's care of its residents with status epilepticus constitutes a substantial deviation from acceptable professional standards. Dr. Alvarez, an expert neurologist for the United States, testified that the Center's treatment of status epilepticus—which consists of observation and monitoring, the administration of oral or intramuscular anticonvulsants pursuant to a physician's order, and ambulance transportation to a hospital—is not acceptable treatment. Dr. Alvarez testified that the most acceptable treatment for status epilepticus is the use of intravenous Valium, and that the intramuscular administration of anticonvulsants is a substantial deviation from acceptable professional standards. 36/55; Exh. 1107. The Commonwealth responded with evidence from Dr. Chamovitz, the Center's consulting neurologist, that the Center is not licensed to provide intravenous therapy to its patients (64/171–2; Exh. 633 (1–19–93), pp. 25–26)), but that the treatment provided for residents in status epilepticus comported with acceptable medical treatment.

On rebuttal, Dr. Coulter, also a neurologist, emphasized the deficiency in the Center's treatment of status by reference to a protocol recommended by the Epilepsy Foundation of America (EFA) stating that "intramuscular therapy has no place treating status epilepticus or seizures in general." Exh. 1107/856. Dr. Coulter explained that the treatment protocol "pull[ed] together for the general medical community what neurologists have known for ten or fifteen years." 81/24. Dr. Coulter noted that although the EFA treatment protocol recommendation was not new, it had been recently codified and published in the August 18, 1993 *Journal of the American Medical Association.* 81/64. He noted that neurologists are the medical professionals most qualified to treat status epilepticus, and that the thrust of the EFA treatment protocol recommendation was for other medical practitioners who encountered patients in status. 81/18. The protocol recommendation was published in the *JAMA* for that reason—"the intent was to put it in a place where all general physicians would see it ..." 81/19.

The primary care physicians at the Center who ordered the intramuscular administration of anticonvulsants are not neurologists, but general practitioners. This is the audience the EFA treatment protocol was hoping to reach. As Dr. Coulter's testimony and the EFA treatment protocol itself establish, the "[t]reatment of status epilepticus varie[d], and archaic therapies with sedatives, insufficient doses, and intramuscular administration [were] still practiced in some areas." 81/18–25; Exh. 1107/854. As such, there was a tacit acknowledgment within the medical community that the protocol for the treatment of status epilepticus among medical practitioners, other than neurologists, before

the publication of the EFA treatment protocol in August of 1993, was anything but clear. 81/18, 25; *see also* 48/118–21 (Dr. Kastner's testimony regarding confusion in medical literature about treatment of status epilepticus).[16]

[37] As a result, the direction by the Center's primary care physicians to administer anticonvulsants intramuscularly to treat status epilepticus was made pursuant to an exercise of professional judgment that had some basis in accepted professional practice among general practitioners at that time. The Center's administration of anticonvulsants intramuscularly for the treatment of status epilepticus during the period for which testimony was offered did not violate constitutional minimum standards.[17]

The Center's treatment of status epilepticus also includes observation and monitoring of the resident, and ambulance transportation to a hospital. Both Dr. Chamovitz and Dr. Coulter testified that this is the accepted modality of treatment for their patients who reside at home. 49/231–34; 81/33. Inasmuch as the Center is the "home" for the residents, both of these interventions are acceptable professional practices. Moreover, the observation and monitoring of a resident would appear to be a necessary component for purposes of determining whether that resident actually is in a state approaching status epilepticus, or has reached the point where additional services should be provided. 81/59. Once a determination has been made that the resident requires treatment that cannot be rendered at the Center, ambulance transportation is appropriate. 49/231–34. The Center's contract with an ambulance association provides access to practitioners licensed to administer advanced life support services in conjunction with a physician from one of the local hospitals. 64/98–99.[18]

Dr. Alvarez also challenged as deficient the regular neurologic care for the residents pertaining to the administration of anticonvulsants. Dr. Alvarez alleged that there were too many residents on multiple anticonvulsants, despite the fact that they had few seizures or were experiencing side effects. 36/114. It is undisputed that the acceptable standard for the treatment of seizures is the administration of the smallest dosage of anticonvulsant medications necessary to control seizures. 36/112; 48/126. However, if one anticonvulsant does not control an individual's seizures, another anticonvulsant may be added to the regime. If two anticonvulsants do not control the seizures, a third anticonvulsant may be added. Occasionally, if an individual's seizures still are not controlled, a fourth anticonvulsant may be added. 36/112–13; 49/241. Dr. Alvarez admitted that he himself had some patients on four anticonvulsants to control their seizures. 36/149–50.

Dr. Alvarez supported his opinion that the Center had too many of its residents on multiple anticonvulsant medications by re-

16. I take judicial notice (Fed.R.Evid. 201) that the *1995 Physicians' Desk Reference* provides that "[i]njectable valium is a useful adjunct in status epilepticus ... and severe recurrent convulsive seizures." *PDR*, at 2077. The intravenous route is preferred, but if that route is impossible, the intramuscular route may be used. *Id.*, at 2078.

17. Intramuscularly administered Valium for the treatment of status epilepticus in the future may in fact constitute a departure from professional judgment inasmuch as it is now clear to the Center that this means of treatment has lost acceptance within the medical community. Rectal administration of anticonvulsants, however, appears to remain acceptable. 81/59; Exh. 1107.

18. Dr. Alvarez believed that the Center's decision to summon ambulance transportation was inadequate because it was usually delayed. 36/218. This was reiterated by Dr. Coulter on rebuttal, when he testified that after ten minutes of seizure activity, it is appropriate to call an ambulance. 81/33. According to these doctors, the "ten minute time frame" should serve as a point to access emergency services, because continuous seizure activity may develop into status epilepticus. 81/33. This facet of the Center's treatment of status epilepticus does not alter my decision regarding the constitutionality of treatment rendered up to the time of trial, because I have found the primary care physicians exercised acceptable professional judgment in the administration of intramuscular valium. This treatment necessarily has an impact on the physicians' decisions as to the appropriate time to summon emergency services. The various components of treatment for status epilepticus cannot be dissected and evaluated in a vacuum—particularly since it cannot be ascertained with any certitude in many of the situations when an ambulance should have been summoned.

viewing the medication regime of residents on four anticonvulsants. *See* Exhs. 307(a) and 351(a). Dr. Alvarez noted that the recommendation of the consulting neurologist, Dr. Chamovitz, to reduce the dosage of certain anticonvulsants for these residents on four different medications had been ignored by the primary care physician.

In response to this testimony by Dr. Alvarez, however, Dr. Chamovitz explained that the decisions of the primary care physicians not to reduce the number of and dosages of anticonvulsants were acceptable professional practices. Dr. Chamovitz described the manner in which he discussed his recommendation with the primary care physicians, who ultimately implemented or rejected them, and that the rejection of his recommendation was based on the fact that the primary care physician was more familiar with the resident and aware of previous unsuccessful efforts to reduce the amount of medication needed to control a resident's seizure disorder. 49/241, 244–47. Dr. Chamovitz also testified regarding his confidence in the judgment of the primary care physicians, who although they were not neurologists, were very well versed in the treatment of seizures because 50% of the Center's population is epileptic. 49/245.

Dr. Alvarez opined that even though polypharmacy with four drugs may be acceptable in some circumstances, it should only be instituted for a short period of time and for no more than two months. 36/112–13. The United States contends that the Center's use of four anticonvulsants has gone on for years, as opposed to acceptable short periods of time. In response, Dr. Chamovitz testified that although treatment with four anticonvulsants is not desirable, it is acceptable practice. 49/241.

Significantly, the Center has a total of 312 residents with a diagnosis of epilepsy, Exh. HH, Table 6, of whom 240 are prescribed anticonvulsant medication. Of the 312 epileptic residents, 17.63% are treated with polypharmacy: 13.46% are treated with three anticonvulsants and 4.17% treated with four anticonvulsants. Exh. HH, Table 6.[19] In addition, the Center has improved its treatment of seizures by reducing the number of anticonvulsants prescribed to control seizure activity. Dr. Kastner, a former Department of Justice consultant and a pediatrician who works with the developmentally disabled, testified that the Center's efforts to reduce polypharmacy started in 1990, shortly after the publication by researchers in the field of a protocol calling for such action. 48/110. The result of this effort was illustrated by Dr. Kastner in a table documenting the treatment from 1990 through 1992 of the epileptic residents for whom Dr. Shertz, one of the Center's primary care physicians, provided care. 48/109–10; Exh. HH, Table 7. Dr. Kastner opined that the "rate of polypharmacy is not high" at the Center. 48/111.

[38] Although it is preferable for residents with seizure disorders to be treated with less than four anticonvulsants where possible, I find that the administration of multiple anticonvulsants to some of the Center's residents does not itself constitute a violation of the residents' right to adequate neurological care. My role is not to decide whether adding this drug or continuing that one is the better course of treatment; rather, I am to evaluate whether the care provided met professionally accepted minimum standards. *See Society for Good Will*, 902 F.2d at 1090 ("In its inquiry, the district court should use expert testimony to identify 'substantial departures', but not to choose from among several professionally acceptable remedies."). In each case of polypharmacy, the decision to use an additional anticonvulsant was the result of the exercise of professional judgment that is consistent with acceptable professional standards. 49/247.

Dr. Alvarez also claimed that the regular neurologic care for the residents was deficient because the residents manifested too many side effects and no efforts were made to reduce the incidence of the side effects.

19. While the United States contends that these percentages are skewed by including in the calculations 72 residents who are no longer epileptic, I note that the United States' own expert, Dr. Sulkes, recommended to the Center that it should have a neurologic consult for all residents who have a diagnosis of epilepsy, regardless of whether they experience active seizures. 64/88–89.

36/120. According to Dr. Alvarez, a successful treatment for seizure disorders involves obtaining control of an individual's seizures with the least amount of medication and with the fewest possible side effects. 36/152. To support his opinion that the residents manifested too many side effects from their anticonvulsant medications, Dr. Alvarez noted that Jeffrey K. continued to receive dosages of Depakote in an amount exceeding that recommended by the manufacturer, even though Dr. Chamovitz had questioned the high dosage. Exh. 393. Despite the high levels of Depakote, Jeffrey K.'s seizures were not controlled, and he was transferred to a local hospital for treatment. Although his Depakote level was within the therapeutic range, Jeffrey K. had developed thrombocytopenia,[20] a side effect of Depakote. In explaining the Center's care of Jeffrey K., Dr. Chamovitz testified that the treatment was acceptable because the high dosage was being administered in an effort to keep his blood level in the therapeutic range, in order to determine its effectiveness. 50/201–02. Thus, for this patient, the high dosage was consistent with the treatment recommendation of the manufacturer.

Dr. Alvarez also pointed to the case of Neil S. 36/125–7. Dr. Alvarez noted the documentation of persistent lethargy over a period of months, and blood levels of Dilantin which exceeded the upper limit of the therapeutic range. Neil S. was eventually hospitalized, treated for an infection, and his Dilantin dosage was reduced. His blood level returned to the therapeutic range, and he was discharged alert and improved. Exh. 468. *See also* Exhs. 462A (Charles S.), 372A (Roberta H.), and 36/125–33 for other residents with dilantin toxicity.

Dr. Alvarez was critical of the care provided to Neil S. and these residents because, despite the manifestation of sedation and lethargy, common symptoms of Dilantin therapy, either no blood levels were obtained (*i.e.*, the residents' blood levels were not tested) or the anticonvulsant dosage was not adjusted in response to high blood levels. 36/127–32. Dr. Chamovitz testified that the blood levels are routinely monitored. But Dr. Chamovitz's testimony failed to establish why blood levels were not obtained when there is evidence of lethargy and sedation, or why the dosage of an anticonvulsant was not adjusted in light of facially toxic levels.[21] The Center provided no explanation, through documentary evidence or otherwise, for why these anticonvulsants were continued without adjustment.

[39] Although monitoring by observation and obtaining more frequent blood levels may be acceptable in some cases, in the situations highlighted by Dr. Alvarez, there is no indication that the Center's physicians made any conscious decision whatsoever regarding this aspect of treatment. As a result, professional judgment was not exercised. For this reason, I find the Center's care in monitoring and responding to sedation caused by Dilantin [22] substantially devi-

20. Thrombocytopenia is a condition in which the circulating blood has an abnormally small number of platelets, the blood component which functions in clotting. *Stedman's Medical Dictionary*, 1596 (25th ed. 1990).

21. Dr. Chamovitz also explained that a Dilantin level may increase due to an infectious process or the dumping of Dilantin into the blood stream from soft tissues. 50/192, 193, 195. Although that testimony is relevant to understanding how a resident's Dilantin level may suddenly exceed the upper limit of the therapeutic range, it has no relevance to why the professional did not act to address a side effect that has become apparent over a course of time, or a blood level that may be toxic.

22. This finding pertains only to the Center's care as it relates to detecting and responding to the side effect of sedation produced by Dilantin. Although reference is made in passing to other side effects, the record does not present any discussion of a failure to detect or respond to other side effects on a widespread basis, and I need not address it. Presumably, this is why Dr. Chamovitz testified about routine monitoring of liver enzymes and blood counts which may be adversely affected by anticonvulsant therapy. 49/244. I also note that this finding pertains to the anticonvulsant Dilantin. The record is inadequate to make a determination regarding the acceptability of the Center's detection and response to side effects produced by other anticonvulsants. *See* 84/28–32 (United States' proposed finding re: Center's failure to manage side effects and citation of seven residents, five of whom suffered from Dilantin toxicity).

ates from acceptable professional standards for patients with seizure disorders.

Injunctive relief in this action, however, is not warranted because the United States did not even attempt to establish that this lapse in the Center's neurological care was the result of the Commonwealth's "policy or custom" as implemented at the Center. *See Graham*, 473 U.S. at 166, 105 S.Ct. at 3105 (in official-capacity suit, entity's "policy or custom" must have played a part in the violation of federal law). The United States' constitutional challenge to neurological care in this "official-capacity" action, therefore, fails as a matter of law.

The provision of regular neurologic care to the Center's residents also was faulted by Dr. Alvarez because the Center does not utilize videotaped EEGs. Dr. Alvarez explained that a videotaped EEG is a noninvasive diagnostic procedure that entails gluing electrodes to a patient's scalp, with the patient's brain activity then being recorded, while videotaping the patient. If the videotape captures a seizure event, the physician may be able to determine (in some cases) by comparing the tracing of the brain's electrical activity and the patient's activity on the videotape, whether what is being observed is in fact seizure activity. 36/97–98. Such identification is helpful because the detection of pseudoseizure activity would obviate the need for trial or long term administration of anticonvulsant medication. 36/97.

[40, 41] Dr. Alvarez's testimony clearly establishes that utilizing a videotaped EEG is one option, and is a course of treatment to which many in the medical community aspire. Other evidence presented at trial, however, revealed that other acceptable options exist within the medical community to determine if activity is seizure-related, including direct observation of seizure activity, prescribing medication and evaluating its effectiveness. 50/236. Deciding whether to perform a particular diagnostic study is a matter of professional judgment. 49/239; *see also* Exh. 633 (1–19–93)/28–29.[23] The fact that Dr. Chamovitz did not believe that he needed a videotaped EEG to validate the existence of seizure activity supports a finding that the Center exercised professional judgment in this regard. 49/239.[24] Dr. Alvarez's opinion appears to be attributable to the fact that he espouses a newer school of thought. But the adherence by a professional to the older of two widely-accepted schools of thought does not establish a failure to exercise acceptable professional judgment.

Finally, Dr. Alvarez opined that the Center's provision of neurological care was not proper, and therefore deficient, because residents who experienced seizure activity continued to sustain injuries of varying magnitude. 36/78–79. Dr. Alvarez testified that physical injuries are common with epileptics because the sudden loss of muscle tone during the seizure causes the epileptic to fall or hit objects. 36/76. Dr. Alvarez stated that an institution has the responsibility to provide an individualized plan of protection and prevention for epileptics who are prone to sustain injuries as a result of seizure activity. 36/78.

To support his opinion, Dr. Alvarez again cited examples of care for individual residents. For example, he noted the care provided to Barbara K., who frequently sustained injuries as a result of seizure activity which caused her to "fall[ ] straight as a rock right on her face." 36/80; Exh. 611–A. Dr. Alvarez testified that her seizures occurred once or twice a month, that the use of a helmet was discussed at interdisciplinary team meetings, Exh. 268a, but that there was a substantial delay in obtaining one for her. He further noted that even when a helmet was procured for her, she continued to sustain injuries. 36/81–87, Exh. 392(c).

[42, 43] The addressing of Barbara K's falls by an interdisciplinary team and the obtaining of protective gear illustrate that professional judgment was exercised on her

23. Dr. Alvarez found Dr. Chamovitz to be a competent neurologist. 36/159.

24. Indeed, Dr. Kastner believed that the "value of the EEG is over-estimated...." 48/165. Some individuals with seizure activity have a normal EEG and some individuals without a seizure disorder have abnormal EEGs. 49/240; 48/164–5; Exh. 633 (1–19–93), p. 28.

behalf.[25] The record indicates that the delay in obtaining the helmet was not due to any omission by the medical professionals at the Center, but rather was attributable to the Human Rights Committee, an independent body which must approve all restrictive devices placed on the residents. Exh. 392(a). Past efforts to use a helmet had been unsuccessful with this resident, and that factor may have contributed to the delay in its approval. Exh. 392(c), # 00203661.

In addition, the continued occurrence of injuries after securing the helmet for Barbara K. does not in and of itself indicate that professional judgment has not been exercised. Instead, it indicates that a helmet may not protect a resident from all possible injuries. 49/257; 50/187–88.

Dr. Alvarez also cited the care of Ronald A. as an example of how the Center's provision of neurological care to prevent injuries from seizure activity was deficient. Ronald A. sustained multiple cuts and bruises because of falls due to seizures, and at one point, the Pennsylvania Inspection of Care report noted Ronald's injuries and questioned whether a helmet had been considered. 36/87–91; Exhs. 66 and 268(b). Ronald A.'s seizures were not as frequent as Barbara K.'s seizures, however (*compare* Exhs. 268a and 268b), occurring on a sporadic basis, with periods of four to five months between seizure activity. Dr. Alvarez opined that in light of the Inspection of Care report and the Center's documentation, the Center was aware of the seizure related injuries and failed to utilize a protective helmet. *See also* Exh. 67 (Pennsylvania Inspection of Care recommending helmet tolerance in view of three uncontrolled seizures and injuries for resident Glenn A.).[26]

[44, 45] Dr. Alvarez' opinion that the Center's care is constitutionally deficient, based on the Center's alleged failure to use protective helmets, is not persuasive. As with the control of seizures through polypharmacy, there are tradeoffs in the use of physical restraints between protection from injury and freedom from restraint. Because helmets are a restrictive measure and constitute an infringement of a resident's liberty interests if implemented, the right to be protected from harm due to seizure activity requires such protection as may be reasonable in light of the liberty interest in freedom from unreasonable restraints. *See Youngberg,* 457 U.S. at 316, 102 S.Ct. at 2458. At the Center, the final decisionmaker with regard to implementing the use of a helmet is the Human Rights Committee—an independent body that conducts an evaluation and either approves or rejects the proposed restrictive device. Exh. 93. Because the Center utilizes this additional step to insure that professional standards are followed before restraining an individual, I do not find the neurological care deficient for those instances when a helmet has not been approved, or approved as quickly as Dr. Alvarez would have liked.

[46] The United States' arguments with respect to this aspect of the Center's neurological care suffer from an additional flaw. For a number of reasons, the frequency and severity of injuries sustained by the residents who have seizure disorders—disorders which obviously are difficult to control—cannot of themselves constitute sufficient evidence to establish a lack of professional judgment. The evidence showed that a protective helmet, like a football helmet, will re-

25. For example, in an incident report of an injury sustained after Barbara K. began wearing the helmet, an RSAS suggested that Barbara K. should be kept in the T.V. room for the administration of her afternoon medications. This change was suggested because it appeared that her afternoon seizure activity often was triggered by her physical movement from the T.V. room to the day room for her medications. The QMRP agreed to implement the suggestion. Exh. 392(c). This is another exercise of professional judgment, as it manifests an assessment of the situation, and a decision to incorporate the suggestion into her plan of care. Similarly, elbow pads were obtained for Barbara K. to further decrease the incidence of injuries. Exh. 392(b), # 00600458.

26. Dr. Alvarez also noted several other residents who sustained injuries as a result of their seizure activity. According to Dr. Alvarez, some injuries necessitated sutures. The focus of Dr. Alvarez' opinion centered on the failure to utilize helmets generally, and the failure to utilize helmets that would protect the residents from injury. 36/94, 154.

spond to the impact it receives and cannot provide complete protection. 50/188. The helmet may shift and injuries may occur despite the helmet's presence. In addition, helmets may not be able to prevent injuries that result from contact with a portion of the head not intended to be protected by the helmet. *See* Exh. 392b, # 00590535 (injury from impact with flat block held by resident at time of seizure).

Seizures by their nature are unpredictable, and injuries can occur when helmets have been removed for reasons of hygiene and for sleeping. *See* Exh. 392b, # 00001073 (seizure occurred in bathroom before bathing). All that Dr. Alvarez' testimony established was the frequency of injuries. It did not include discussion of either the nature of the injuries or why the Center's care for those residents failed to meet minimum professional standards. *See* 36/92–94. The mere quantification of injuries, without more, does not establish the failure to exercise professional judgment.

2. PSYCHIATRIC CARE

[47] According to the United States, the defendants' provision of psychiatric services is constitutionally inadequate because the Center: (1) fails to provide adequate psychiatric assessments; (2) fails to provide adequate psychiatric diagnoses; (3) fails to provide adequate psychiatric treatment; and (4) fails to provide adequate monitoring of the psychiatric treatment. 84/IX. The right of an institutionalized mentally retarded person to receive adequate medical care, as acknowledged by the Supreme Court in *Youngberg*, 457 U.S. at 315, 102 S.Ct. at 2457–58, must include provision for psychiatric care, where needed.

a. *Psychiatric Assessment Techniques*

At the Center, psychiatric care is provided by a contract psychiatrist consultant, a psychology department, and the direct care staff. From 1986 to July 1993, Dr. Pauline Goldschmidt was the Center's contract psychiatrist consultant (Exh. 616, exh. 1; 64/81), and she provided psychiatric services to the Center twice each month during two eight-hour sessions. The services were provided to residents pursuant to referrals from the primary care physicians and the interdisciplinary team. Dr. Goldschmidt's psychiatric services consisted of psychiatric evaluations, management of psychotropic medications, and supervision of the screening for side effects such as tardive dyskinesia. Exh. 616, exh. 3; 64/80.[27]

The Center employs Dr. Stratton, a psychologist, as the Director of Psychology. 62/220–21. Dr. Stratton supervises the psychological services provided to the residents by eight psychological service associates (PSAs). 62/220–1; 51/19. Six of the PSAs have master's degrees and the remaining two have bachelor's degrees. 37/15–16. The PSAs work Mondays through Fridays during daylight hours and are not available on evenings and weekends. 37/16. Psychological services can be obtained during off hours by contacting the professional on call. 51/20.

The PSAs have varying caseloads. Five have caseloads of forty-eight residents, two have caseloads of seventy-two residents, and one has a caseload of ninety-six residents. 37/15. Some psychological services are performed by nonpsychology staff. 51/135.

The United States contends that accepted professional practice requires the utilization of a disciplined medical approach to the provision of adequate psychiatric care. This approach entails obtaining an assessment of the resident, rendering a diagnosis, formulating a treatment plan, monitoring the treatment plan for its effectiveness, and revising it as indicated. 38/63–64. The United States asserts that the Center's psychiatric assessments are constitutionally deficient because the Center fails to employ this disciplined medical model. According to the United States' experts, the behavioral data and information collected by the Center is either non-existent or inadequate, and the psychiat-

27. Tardive dyskinesia (TD) is an irreversible side effect of certain antipsychotic medications. 50/34. TD produces an involuntary movement disorder (50/34), and the onset of this disorder is insidious, usually occurring only after the antipsychotic drug has been administered for years. 38/67. The disorder is manifested by tremors of the face, mouth, and hands as a result of a change in the brain's chemistry. 49/12.

ric consults are chaotic, disorganized, undisciplined and too infrequent. 84/IX/4–15.

Dr. Fahs, a neuropsychiatrist who specializes in the psychological care of mentally retarded individuals, testified that the Center's psychiatric assessments are inadequate because 100% of the records he reviewed were deficient. 38/79, 85, 88. Dr. Fahs explained that a psychiatrist usually sees an individual because of a particular concern which, in a population like that of the Center, is typically labeled as a "target behavior." In a setting such as the Center, the target behavior "presents" (*i.e.*, is manifested) as aggression or self-injurious behavior (SIB). 38/71. In addition to the target behavior, other behavioral difficulties may be present. 38/72. A proper psychiatric assessment involves the collection of information from an interdisciplinary team, including doctors, staff, and other personnel, in an effort to gain a thorough picture of the resident. 38/71. The team should gather information regarding the resident's symptoms, his behavior and his functioning with others. 49/144–45. Such information should detail the frequency, intensity and duration of the target behavior, as well as any other behavioral difficulties. 38/73. Objective information of this nature is essential for an assessment of a mentally retarded individual, since subjective symptoms may not be communicated effectively. 49/145. An assessment should also include information regarding the resident's past psychiatric history, past medication history, as well as the individual's past and present medical history. Such longitudinal data may facilitate the approach to treatment. 38/74. Dr. Fahs claimed that these components of a psychiatric assessment are universally accepted in the psychiatric profession. 38/75.

Dr. Fahs testified that the Center's assessments are inadequate for a number of reasons. 38/75. First, Dr. Fahs found the assessments deficient in that the Center collects the information for a psychiatric assessment on a universal data collection sheet (UDCS). 38/76. The UDCS is the data collection tool used to chart all behaviors for all of the residents. 38/76. It is designed to collect a single type of interval data; that is, it tabulates the frequency of the target behavior by noting whether the target behavior occurred during a particular hour interval. The UDCS does not necessarily denote the number of times the target behavior occurs during that hour interval, nor does the UDCS account for the intensity or duration of the target behavior. 38/76. Additionally, the UDCS is geared to deal with only one target behavior. As a result, if there is more than one target behavior, or if other behavioral difficulties are present, it is difficult to distinguish this on the UDCS. 38/77.

Dr. Fahs next identified deficiencies with the psychiatric consultations that allegedly contribute to the overall inadequacy of the assessments. He observed some of the psychiatric assessments performed by Dr. Goldschmidt, and testified that the assessments were chaotic, disorganized and totally lacking in the conveyance of relevant information to the psychiatrist. 38/77. In particular, Dr. Fahs stated that behavioral information that was in the chart was not conveyed to the psychiatrist. 38/78. In addition, according to Dr. Fahs, Dr. Goldschmidt had related that she did not feel that she had sufficient time to complete a psychiatric assessment. 38/82.

Dr. Lubetsky, a psychiatrist and Director of the John Merck Multiple Disabilities Program, testified as one of the Center's expert witnesses in this area. He also had observed the psychiatric consultations of Dr. Goldschmidt. According to Dr. Lubetsky, each of Dr. Goldschmidt's consultations was performed at the resident's living unit, in the presence of the resident's psychologist, QMRP, primary care physician (if possible), and a member of the direct care staff. Often these consultations were attended by the Center's pharmacist. 49/109–10. Dr. Lubetsky testified further that Dr. Goldschmidt then obtained information from the staff members present concerning the resident's behaviors, daily activities, and medications. Dr. Lubetsky noted that if Dr. Goldschmidt did not receive enough information, she would ask questions. 49/112–13. In light of these observations, Dr. Lubetsky concluded that the consultations were adequate and satisfied professional standards.

Dr. Lubetsky agreed with Dr. Fahs that there was room for improvement in two areas. First, he opined that completing the consultation form before the consultation would improve the process. However, he did not believe that this flaw impaired Dr. Goldschmidt's ability to make a professional judgment. 49/114. Second, Dr. Lubetsky stated that documentation of the psychiatrist's "thought processes" during the consultation should be improved. According to Dr. Lubetsky, the events that occurred at the consult were not well-summarized in the chart. Nevertheless, Dr. Lubetsky concluded that this deficiency did not impair Dr. Goldschmidt's clinical treatment or preclude the exercise of professional judgment, and that Dr. Goldschmidt's reliance on information orally-conveyed at the consultation was not an impediment to the exercise of her professional judgment. He observed that psychiatrists in private practice often rely entirely on such information to render a professional judgment in the treatment of their clients. 49/114–15, 118.

Dr. Lubetsky's observations were confirmed by Dr. Hauser, another psychiatrist, who explained that the Center utilized an interdisciplinary team approach in providing psychiatric care. 50/27. Like Dr. Lubetsky, Dr. Hauser found Dr. Goldschmidt's written documentation of her consults to be sparse, and provided the Center with a form that he had created for purposes of documenting his own psychiatric consultations. The Center has since adopted the form and incorporated it into the psychiatric consultations. 50/58–60. Dr. Hauser noted that by providing his own form, he was not implying that the Center's care was deficient in this regard, but only that it was an area that could be improved. 50/60.

Dr. Hauser also evaluated the collection of data regarding a resident's target behaviors. He noted that the Center collects some hard data, and that this data is used at the consultations. 50/65. According to Dr. Hauser, hard data is not an essential resource for the psychiatrist because subjective data from the resident and the staff also are obtained at the consultation. Dr. Hauser testified that reliance on subjective data is consistent with acceptable professional standards, because most psychiatrists rarely have hard data available to them. 50/64. Dr. Hauser unequivocably testified that professional judgment can be exercised without hard data to formulate an appropriate treatment plan, and that Dr. Goldschmidt received sufficient information to enable her to exercise professional judgment. 50/63, 68.

According to Dr. Hauser, the characterization of Dr. Goldschmidt's consultations as chaotic and disorganized probably resulted from the fact that the resident himself usually was present at the consult. Dr. Hauser, however, did not believe that the consultations were chaotic or disorganized. He noted that the presence of the resident at a consultation may, in fact, be an effective means of understanding the residents' behaviors. 50/106. Dr. Hauser conceded that the rooms where the consultations occurred were not ideally suited for the procedures, and that staff seemed to be always coming and going, much like consultations he has completed in group homes. 50/107.

Despite these sub-optimal conditions, Dr. Hauser found that Dr. Goldschmidt was able to gather and process data, talk with staff about treatment, and render a recommendation. 50/68–69, 108. He further noted that in his discussion with Dr. Goldschmidt, she reported that she did have an adequate amount of time in which to perform her consultations.[28] 50/68.

[48] Dr. Lubetsky's and Dr. Hauser's opinions that the psychiatric assessments at the Center meet acceptable minimum profes-

28. With respect to the issue of whether Dr. Goldschmidt is afforded sufficient time for her consultations, the United States points to testimony from Dr. Fahs, Dr. Lubetsky, Dr. Hauser and Dr. Goldschmidt in support of its position that more time at the Center would improve psychiatric services. It goes without saying that it would benefit the residents if Dr. Goldschmidt could spend more time at the Center, but the issue in this litigation is whether the care provided is constitutionally deficient, not whether it could be improved. My review of the record fails to identify any evidence indicating that the two monthly, eight-hour sessions at the Center constitute a substantial deviation from accepted professional practice.

sional standards are persuasive.[29] I find that accepted professional practice includes use of assessments completed by an interdisciplinary team, collecting both objective data and subjective data. Because psychiatric assessments at the Center are consistent with accepted professional practice, they evidence the exercise of professional judgment, and do not violate the Constitution. 50/27.

b. *Differential Diagnoses*

Dr. Fahs also testified that the Center fails to provide adequate psychiatric diagnoses for its residents because it does not properly formulate "differential diagnoses" for the residents. A differential diagnosis is the result of an evaluation which considers information obtained in the assessment phase to identify a resident's possible disorders. 38/160–61. After identifying the possible disorders, a practitioner then considers which particular disorder is most likely that resident's actual diagnosis. 50/71; 49/147. That is, the practitioner gives full consideration to the alternative hypotheses and selects the most likely cause for the resident's problem. 50/71.

The utilization of the differential diagnosis is an accepted practice in psychiatry. 38/85; 50/71. Initially, the process is "mental" in nature. 50/71. After completion of this thought process, however, standard professional practice requires some documentation in support of the diagnosis. 50/71. The United States asserts that the Center's care is deficient in this regard because the records do not contain documentation concerning the alternative diagnoses and the basis for the selection of the working diagnosis. 38/85. Dr. Fahs testified that Dr. Goldschmidt's documentation was too succinct, and that it failed to explain why alternative diagnoses were not applicable and/or why changes were made. Instead, Dr. Fahs found that considerations of the differential diagnostic possibilities were scattered throughout the chart. 38/85–87. The United States points out that Pennsylvania's Inspection of Care Survey also found this area deficient in its October 21, 1991 survey. 38/90; Exh. 67/2–B.

Dr. Fahs contends that the Center's failure to employ the differential diagnosis method is evident from the fact that diagnoses are added or changed after treatment already has been initiated. 38/87. According to Dr. Fahs, the diagnosis normally precedes the treatment selection, and a faulty diagnosis results in a high probability that an improper treatment will be selected. 38/87, 89.

Dr. Fahs cited the diagnoses for several residents as examples of diagnoses which substantially depart from accepted professional practice. He pointed to the diagnosis of schizophrenia for one profoundly retarded resident who had self injurious behavior (SIB) and aggressive behavior, and noted that virtually universal agreement exists within the medical community that it is impossible to make a diagnosis of schizophrenia in a profoundly retarded person. 38/102. Dr. Fahs found no support for the diagnosis of schizophrenia in that resident's record except for his SIB and aggression toward others. 38/103. Another resident, Gary K., "seemed to be depressed," but had only a "so-called" diagnosis of aggressive behavior. 38/107. Dr. Fahs stated that aggression is not a diagnosis, and that the diagnosis of depression had never been articulated in the resident's chart. 38/107–08.

The case of Darren W. also was cited as an example of a disorganized diagnostic process. Darren W. was being treated for akathisia[30] with Inderal. The medication was abruptly discontinued, however, after a diagnosis of

29. Dr. Lubetsky's candor was telling. He had never before testified as an expert, and he candidly identified weaknesses in the Center's psychiatric practice—weaknesses which the United States stressed in its efforts to characterize the care provided at the Center as unconstitutional. The United States ignores the fact that the weaknesses identified by Dr. Lubetsky were areas that he said could be improved. They did not constitute substantial departures from acceptable professional practices, and Dr. Hauser confirmed Dr. Lubetsky's findings.

30. Dr. Fahs defined "akathisia" as a neuropsychiatric condition marked by excessive restlessness, typically manifested by an individual engaged in a significant amount of general movement and pacing. The condition also may be associated with overactivity, aggression and other behavioral difficulties. 38/121.

asthma was made. Dr. Fahs criticized this diagnosis because asthma typically is a childhood disorder. 38/121–28. Darren W.'s condition deteriorated after this abrupt change, and he was then diagnosed with obsessive compulsive disorder (OCD). Dr. Fahs claimed that there was no supporting evidence for the OCD diagnosis. 38/128. He further testified that no supporting evidence existed for the diagnosis of OCD in any of the other residents receiving Anafranil, a medication used to treat OCD. 38/129.

Dr. Lubetsky explained in reply that psychiatric diagnosis of the developmentally disabled is very difficult. 49/119. Indeed, diagnosis of psychiatric conditions is difficult in a population that is *not* developmentally disabled. *See Heller v. Doe*, —— U.S. ——, ——, 113 S.Ct. 2637, 2644, 125 L.Ed.2d 257 (1993). Dr. Lubetsky explained:

> It's very difficult to use the DSM–3, which is a guideline for making psychiatric diagnoses; ... it is very difficult to use [the DSM–3] in the developmentally disabled population, mainly because of the cognitive impairment, the lower functioning I.Q.s, and the nonverbal nature of many of the clients; so it is very difficult to make a diagnosis.
>
> The best attempt is to utilize those guidelines and see if you can come up with a differential diagnosis which is a variety of considerations. Many times the best you can come up with is looking at the symptoms and attempting to cluster the symptoms to give you some guide to make a choice about medication.
>
> In addition, you're always working through the diagnostic process. As you are seeing clients over years, your opinion may change about their diagnosis depending on the pattern of their symptoms, the pattern of behaviors. In response to medication. In general, psychiatry—what you're taught is to try to make the best diagnosis you can and try not to make your diagnosis based on the response to a medication.
>
> But I think most physicians will also agree that they do look at the response to medication to help in re-thinking whether a diagnosis was accurate or whether there's another diagnosis to consider.

49/119–20.

[49] Taken together, all of the experts' testimony of Dr. Lubetsky and Dr. Hauser provides strong evidence for the proposition that rendering a differential diagnosis for the mentally retarded is more of an art than a science. Against this backdrop, Dr. Fahs' specific cases of allegedly flawed differential diagnoses are, at worst, indicative of erroneous psychiatric evaluations, not constitutional violations.

Dr. Hauser explained that it is an accepted national standard in psychiatry that a diagnosis follow the classifications of the American Psychiatric Association's *Diagnostic and Statistical Manual*, 3rd edition revised, DSM–3–R. 50/36. Unfortunately, the DSM–3–R was not designed for specific use with developmentally disabled persons, who often are nonverbal. 50/37. Nevertheless, Dr. Hauser found that pressure exists at the Center to use the DSM–3–R coded diagnoses for purposes of "inspection surveys" which are conducted on a regular basis by the Pennsylvania Department of Welfare and other agencies for purposes of accreditation and licensure (Medicare, Medicaid, etc.). 50/40. The DSM–3–R is the most current DSM, and certain diagnostic terms used in earlier editions of the DSM have become outdated. This outdated nomenclature, however, may continue to be used for certain residents. 50/41.

The allegedly erroneous diagnosis of the resident with schizophrenia, though outdated according to Hauser, was generally consistent with the first *Diagnostic and Statistical Manual* and the liberal application of the diagnosis of schizophrenia for anyone manifesting a psychosis. 50/89–90. That is, the diagnosis is "a lingering artifact of the historical context" of diagnosing patients. 50/92. Dr. Hauser also observed that the persistence in the diagnosis of schizophrenia may be due to the fact that DSM–3–R does not account for persons who no longer can be diagnosed as schizophrenic because of their limited cognitive functioning. 50/90. In any event, Dr. Hauser was not troubled by the persistence of this diagnosis at the Center,

because the treatment for schizophrenia was appropriate treatment for that resident, who under DSM–3–R would be diagnosed with atypical psychosis. 50/91. The use of the outdated nomenclature, though perhaps not technically accurate, did not detrimentally affect the residents' treatment.

[50] In contrast to Dr. Fahs' finding, Dr. Lubetsky testified that Gary K.'s chart *did* include the diagnosis of depression. 49/124. Nevertheless, even if the chart did not include that diagnosis, the documentation of the resident's behavior was indicative of depression, and he was treated with an antidepressant in a low dose in an effort not to precipitate seizure activity. 49/124–5; 38/189. This course was consistent with Dr. Lubetsky's observation that, at times, the best that one can do is look at the symptoms, and attempt to "cluster" the symptoms in order to find some guide to selecting a medication to treat that individual. Again, the Center's *treatment* of the resident was consistent with acceptable psychiatric practice, and the constitutional standard is concerned with the care provided to the residents, not conformity of nomenclature to the latest APA revision of the DSM.

According to Dr. Hauser, Darren W.'s asthma diagnosis and the discontinuation of the medication Inderal was not improper. Typically, asthma is considered a childhood ailment, but the diagnosis actually is consistent with the diagnosis of a bronchospastic condition, regardless of one's age. As Dr. Hauser explained, Inderal may have the side effect of causing bronchospasms, which would exacerbate an individual's asthmatic or other bronchospastic condition. As a result, as Dr. Fahs conceded on cross-examination (38/141–42), Inderal should be discontinued to avoid precipitating any bronchospasms, regardless of the risk of any withdrawal reaction that may occur. 50/108–11.

Dr. Hauser also testified that he did not find the diagnosis of OCD for Darren W. or other residents troublesome. While Dr. Fahs claimed that too many residents (although he could not provide the exact number) had this diagnosis (38/165–66), Dr. Hauser explained that one of the exciting developments in the field of psychiatry is the increasing recognition of OCD as a disorder affecting millions of individuals. 50/112. Dr. Hauser then explained that if the disorder OCD is widespread in the general population, it is logical that this disorder will be more prevalent among mentally retarded individuals. 50/112–13. Consequently, when Dr. Hauser sees a mentally retarded patient with "ritualistic behavior" (*i.e.*, behavior that occurs over and over again), he is willing to try treatment with a drug used for OCD. 50/114.[31]

[51] I find that it is within acceptable professional practice for a complete differential diagnosis to be constructed from documentation found throughout a resident's chart. This, in fact, is what Dr. Fahs found: "a piece here in the record, a piece here in the record, a piece here in the record ..." 38/85–6. Moreover, a correct differential diagnosis may be dynamic, initially eluding the practitioner and only becoming clear as time passes and additional data is available to consider. For this reason, treatment may have to be geared to the symptoms presented, as opposed to treatment of a diagnosis consistent with the DSM–3–R.

[52] Documentation alone cannot establish that there is a deficiency that reaches constitutional dimensions. The focus must be on whether professional judgment was exercised, that is, whether the practitioner has considered the options and has made a differential psychiatric diagnosis for a resident that is in keeping with minimal professional standards. I find the Center meets this requirement.

I credit the testimony of Dr. Lubetsky and agree that the thought processes in this area of care at the Center are evident from the live consultations, although those consultations could often be better documented. 49/114. As Dr. Lubetsky pointed out, the

31. Darren W.'s behavior described by Dr. Fahs included overactivity, pica (persistence in eating that which is inedible), severe rectal digging and smearing of his feces—behavior that was persistent enough to require resort to the use of a jumpsuit to preclude further rectal digging. 38/125.

mini-staffing notes in the charts detail why changes are made, as well as the status of the residents' care. 49/115. Accordingly, I find that the live consultations and the treatment process itself do not fall below accepted professional standards.[32] While I agree that the Center's documentation of the differential diagnosis can and should be improved, the problems with documentation do not prohibit the exercise of professional judgment.

c. *Psychiatric Treatment*

The United States alleges that the Center fails to provide adequate psychiatric *treatment* in these respects: (1) the decision-making process for treatment is inadequate because different treatment options are inadequately considered and there is a poor coordination of treatment efforts; (2) inappropriate treatment selection unnecessarily exposes residents to the risks of drug side effects and unnecessary chemical restraint; and (3) the Center fails to provide adequate and appropriate behavioral programs at the treatment stage. *See* 83/IX–22–29.

The United States relies heavily upon Dr. Fahs' testimony in support of its first and third contentions.[33] Dr. Fahs testified that treatment efforts include behavioral treatment, drug therapy, or manipulation of an individual's social environment. More than one treatment may be appropriate at any particular time. 38/91. Thus, consideration of the available treatment modalities should result in the selection of the "treatment which has the best benefit to risk ratio." 38/91. Ideally, treatment changes should not coincide with other changes in a resident's environment, medication regimen or behavior programming. 38/105–06.

Dr. Fahs claimed that some of the Center's documentation gave the illusion that different treatment options were weighed, but he found that, generally, this was not the case. 38/92–93. According to Dr. Fahs, behavioral programs were not considered, and drug changes were not coordinated with program changes, and vice versa. 38/93. Dr. Fahs testified that, instead of careful consideration of treatment options, the Center relied on the diagnosis as justifying the treatment. 38/93. He further believed that the residents responded only by luck, and that they would continue to suffer from behavioral difficulties. 38/93.[34]

Dr. Fahs, Dr. Hauser and Dr. Lubetsky all agreed that non-drug treatment should be provided together with medication in treating psychiatric impairments. 38/113; 50/46; 49/148–49. Dr. Fahs explained that non-drug treatments should be selected before drug treatment if the benefit from each is equal because they do not pose the risk of side effects. 38/92, 169. Dr. Hauser agreed that the premature initiation of medication is a red flag in the field of psychiatry. 50/46.

I find that Dr. Hauser's testimony about trends in treatment at the Center to be credible evidence of acceptable professional judgment in psychiatric treatment. Dr. Hauser testified that the Center was: (1) reducing the number of antipsychotic medications prescribed, as well as reducing the dosage when used, 50/24; (2) administering only those medications which are necessary and avoiding the administration of multiple psychotropic medications, 50/33; (3) prescribing medications in concordance with the diagnosis, 50/36; (4) prescribing alternative medications to treat psychiatric manifestations, 50/26; (5) decreasing the restrictiveness of the intervention used to treat psychiatric impairments, 50/27; and (6) resorting to an interdisciplinary team process to provide

32. In making these findings, I also credit Dr. Hauser's opinion that the psychiatric services at the Center are within the range of accepted professional standards. 50/67, 128.

33. I will address the United States' first and last contentions at the same time, because behavioral programs actually constitute one component of the treatment options that, according to the United States, are neither considered nor coordinated with other treatment efforts at the Center.

34. The United States further submits that the Center has been cited repeatedly for its failure to integrate adequate behavior programs with its use of psychotropic medications, and even Dr. Goldschmidt noted that certain PSAs at the Center rely on psychotropic medications. Exh. 615/59. Finally, the United States relies upon Dr. Fahs' testimony regarding the alleged inadequacy of the treatment of six residents at the Center. *See* 83/IX–32–39.

psychiatric care, 50/27.[35]

[53, 54] The exercise of professional judgment in the selection of the proper treatment for a resident "requires thinking" about the modalities of treatment, and administering treatment that meets minimum professional standards. 38/91. The Center meets this requirement. Its weakness is its documentation of the process, a weakness that is not in dispute. But, even in the face of this shortcoming, the Center still provides psychiatric care that meets minimum professional standards.[36]

As noted above, the United States also contends that inappropriate treatment selection unnecessarily exposes the Center's residents to the risks of drug side effects. Dr. Fahs testified that accepted professional standards mandate that prescriptions for antipsychotic medications should be avoided if they are not indicated. 38/65. Dr. Hauser agreed, and noted that the current trend in the field of psychiatry is to avoid unnecessary antipsychotic medication in order to guard against the development of side effects such as tardive dyskinesia, neuroleptic malignant syndrome, and extrapyramidal syndrome. 50/24.

While the United States contends that residents are unnecessarily exposed to side effects such as neuroleptic malignant syndrome, it fails to cite one example of a resident who developed this syndrome. On the other hand, tardive dyskinesia (TD) is known to afflict some residents at the Center, but the record in this case contains no evidence to suggest that residents actually in need of medication who have this condition became afflicted as the result of the *unnecessary* administration of antipsychotic medication. Instead, the United States' evidence on this issue pertains solely to the Center's alleged inadequacy in screening to detect this condition, a matter discussed *infra*.[37]

Dr. Fahs asserts that a determination regarding the adequacy of the Center's psychiatric care cannot be based on just the raw percentage of residents on psychotropic drugs. Instead, he believes that the "only way the care could be determined is by looking at each individual, each individual client." 38/135. Dr. Fahs further testified that the Center's Behavioral Intervention Committee (BIC) and the 30–day review, elaborate "convoluted mechanisms" established to guard against inappropriate psychotropic drug use, fail to safeguard the residents. These procedural safeguards, according to Dr. Fahs, actually were just rote exercises that entailed minimal review of a resident's psychological status and the need for chemical treatment. 38/135–37.

Although Dr. Fahs rejected the relevance of the Center's raw percentage of residents on psychotropic medications, I do not. Dr. Hauser testified that percentages are "just

35. Dr. Hauser specifically noted that the Center used the interdisciplinary team approach (50/27), as evidenced not only by having the professional disciplines and direct care staff present during a psychiatric consultation but also by the use of a 30–day review, the behavior intervention committee, and the Human Rights Committee. Consideration by the team of the treatment options is evidenced by the fact that the Center has consistently reduced the dosage of antipsychotics prescribed, as well as the number of residents who receive them. 50/24–25. In addition, the Center has initiated treatment with alternative medications. 50/26–27.

36. I find the opinions rendered by Dr. Hauser and Dr. Lubetsky highly persuasive and credible. These experts attempted to maintain an objective analysis. Both recognized that few institutions are perfect, and both readily noted the documentation as the Center's weakness. The lack of documentation, however, did not preclude them from proceeding with their analysis of the psychiatric care provided to the residents. Dr. Fahs, on the other hand, essentially concluded that the lack of documentation indicated that deficient psychiatric care was being provided to the residents, and he did not take the additional (and necessary) step of determining whether the underlying process was as flawed as the documentation. In addition, Dr. Fahs reviewed thirty to forty records in rendering his opinion in this area, but he highlighted the care of only six residents. Although Dr. Fahs' testimony indicates his disagreement with the treatment chosen for these six residents, it does not support a finding that the processes for providing psychiatric care at the Center are generally flawed or that professional judgment is not being exercised.

37. The United States' position with respect to the side effect of extrapyramidal syndrome is, at best, a makeweight argument. The United States' experts did not address this syndrome, and neither will I.

numbers" which can be misused or taken out of context, but he still believed that there is "some usefulness for looking at frequencies of use of medication or the breakdown of categories of medication." 50/119. The percentages can serve as "red flags" indicating that something is wrong. 50/120–21. Dr. Hauser related how he initially counted the number of residents on antipsychotics and antidepressants in order to determine whether the use of these drugs at the Center was "in the ballpark" of what is reported for similar facilities. One of the sources he used was a book authored by Dr. Fahs. 50/120. Dr. Hauser concluded that the overall percentages were consistent with medication management in similar populations. 50/121.

[55] Dr. Lubetsky, agreeing with Dr. Hauser, found that the Center had a "rough average of twenty-five percent of clients on psychotropics," 49/127, and that this was within the broad range of twenty-five to forty percent use of psychotropics reported in the *American Journal on Mental Retardation*. In addition, Dr. Lubetsky reviewed individual cases and concluded that the Center's use of psychotropic medications was within accepted professional practice. 49/128. Based upon my review of all of this evidence, I agree with the Commonwealth that its use of psychotropic medications meets constitutional minimum standards.

Finally, the United States argues that the Center fails to adequately monitor the psychiatric treatment provided. Dr. Fahs described this "monitoring" component of the medical approach as an objective weighing of the benefit the person is receiving from the treatment versus the impact of any side effects—or, stated another way, "monitoring" entails an evaluation of whether the drug did what it was prescribed to do, and whether this result can be proved. 38/99. If monitoring demonstrates that the drug did not benefit the resident, then the treatment should be changed. 49/153. Dr. Fahs testified that the Center's monitoring was inadequate in 100% of the cases he reviewed. 38/101.

The record at trial established that the medical community places great emphasis on monitoring the effects of antipsychotic medications to detect the development of tardive dyskinesia (TD), an irreversible side effect of certain antipsychotic medications. 50/34. TD is a red flag—it is an area closely scrutinized by the medical community, as well as surveyors, in an effort to reduce its occurrence. 50/34. As a result, a tracking form (the AIMS form [38]) has been developed by the medical community to screen for TD.

Dr. Fahs opined that the Center's monitoring efforts in general were inadequate, and he supported his opinion by specifically referencing the Center's monitoring efforts with regard to TD. Dr. Fahs claimed that the Center had a policy in place requiring the AIMS screening, but he believed that the Center did not engage in a regular, consistent review for side effects, including TD. 38/100.

Dr. Fahs' testimony also addressed the alleged inadequacy of the Center's monitoring efforts with respect to chemical restraints. Dr. Fahs defined chemical restraints somewhat loosely as including both the emergency sedation of a resident as well as the administration of medication without any indication of its efficacy. 38/94–95. Dr. Fahs concluded that the emergency chemical restraints at the Center were adequate, but that the Center routinely administered medication that might not be helping the residents, and that this practice resulted in an unnecessary "chemical restraint." 38/95.

In response to Dr. Fahs, Dr. Lubetsky explained that the AIMS tracking form actually was utilized and could be found in many of the charts. 49/111, 192. Dr. Lubetsky's observation is corroborated by the Inspection of Care Survey for August 1992, which noted an AIMs form in James R.'s chart. Exh. 67\8D. The evidence also demonstrated that Dr. Goldschmidt consistently made an effort to reduce the overall use of antipsychotic medication by either refusing to prescribe the medication for a resident or reducing the

38. The significance of the letters in the acronym AIMS is not discussed in the record by any of the experts.

dosage for a resident who had previously been prescribed the medication. 50/25; Exh. 616\53, 61.

[56] The presence of TD in residents, some of whom may have developed TD before the medical profession began screening and prevention measures, does not of itself indicate that the Center has failed to exercise professional judgment in monitoring the usage of antipsychotic medications. To the contrary, the record evidence indicates that when Dr. Goldschmidt began treating the Center's residents in 1986, she noticed that a number of individuals already had TD as a result of the long-term administration of antipsychotics. Exh. 616\53, 102. As a result, Dr. Goldschmidt insisted that the Center monitor residents for this very condition in an attempt to avoid the development and/or exacerbation of side effects. Some residents continued to receive antipsychotics because the benefit derived outweighed the detriment of discontinuing the medication. 50/35. At least since 1986, professional judgment has been exercised in monitoring for TD.

Dr. Hauser described the emergency sedation aspect of chemical restraint, and explained that "chemical restraint" may also be found when medication is chronically used to restrain an individual. Signs of this type of chemical restraint are use of high doses of antipsychotic medications which cause stiffness, rigidity, and a blank facial expression in residents. 50/122. Dr. Hauser testified that he did not observe *any* chemical restraint of this nature at the Center.

[57] I find Dr. Hauser's testimony persuasive in determining whether the Center meets the minimum standard of professional judgment in avoiding unnecessary chemical restraints that would result in stiffness, rigidity, and the constraining of one's movement. *See Sabo v. O'Bannon*, 586 F.Supp. 1132, 1140 (E.D.Pa.1984) ("Because the use of 'soft' restraints was found to implicate a liberty interest in *Youngberg*, it can scarcely be doubted that the use of drugs in order to restrain a patient must activate a similar interest."). As Dr. Hauser explained, the Center has consistently endeavored to reduce the dosage of antipsychotics and thereby avoid unnecessary chemical restraints.

In summary, the psychiatric care provided satisfies constitutional requirements. The Center's weak point is its documentation, but this deficiency does not preclude the exercise of professional judgment. The assessment and treatment routines established at the Center are not "substantial departures" from accepted professional standards.

3. GASTROESOPHAGEAL REFLUX AND ASPIRATION

Dr. Sulkes, one of the United States' experts, testified that the Center fails to provide appropriate medical care to residents with gastroesophageal reflux (GER) and/or who are at risk of aspiration, because the Center fails both to identify the residents who have GER and/or are at risk of aspirating, and fails to provide a proper medical "work-up" and treatment of the residents.[39]

Aspiration is the "inspiratory sucking into the airways [*i.e.* lungs] of fluid or [a] foreign body...." *Stedman's Medical Dictionary* 143 (25th ed. 1990). GER is the escape of the stomach contents into the esophagus, 41/88, a condition which afflicts approximately 10–15% of developmentally disabled children and adults. Crocker, Allen C., and Rubin, I. Leslie, *Developmental Disabilities: Delivery of Medical Care for Children and Adults* 178–79 (1989). Individuals with GER are at risk of aspirating because the stomach contents may travel backward from the esophagus into the pharynx and enter the trachea and lungs, 41/88, which predisposes the person to developing pneumonia. Reflux into the esophagus also causes discomfort because the stomach contents are normally very acidic, and over time, may erode the mucosa of the esophagus and precipitate bleeding. 41/89–90.

[58] The United States contends that in "several cases, individuals had documented reflux and nevertheless were continuing to suffer bouts of aspiration pneumonia." 84/X–10, *citing* 34/107. The United States asserts that most of the residents reviewed

39. The United States' contention with respect to deficiencies in identification of residents with GER is addressed in the section regarding nutritional management. *See infra* at § III.C.4.

by Dr. Sulkes died at some point from 1988 to 1992. The occurrence of aspiration pneumonia, or even deaths without evidence that it was the result of medical treatment which substantially deviated from accepted professional practice, however tragic a loss, does not compel a finding that the constitution was violated.

Dr. Sulkes reviewed the care of Margaret D., who died in January 1992. Dr. Sulkes testified that her condition of reflux was known since at least 1979. 41/114. Treatment in 1991 included prescriptions of anti-reflux medication and iron for anemia. Margaret D. also received postural drainage and percussion on a regular basis. Despite these treatments, seven months later, she developed problems with mucous and choking after eating. Margaret D.'s physician noted that she experienced the excess mucous and choking only after eating, and he questioned whether she had an allergic rhinitis. He started treatment with an antihistamine, but did not order any further evaluation of the reflux. 41/115.

Two months later, Margaret D. was hospitalized for aspiration pneumonia. Her sixty-day nursing note after this hospitalization indicated that the same treatment was to continue. Tussi-organidin, an expectorant, was added to her medication regime. Exh. 331aa, # 00523176. Antibiotics were instituted when it was discovered that her mucous had pus in it. Thereafter, Margaret D. lost weight, and she continued to produce large amounts of thick mucous. At some point, the Center initiated manual suctioning of the mucous secretions to aid Margaret D.'s breathing. Exh. 331AA. No other intervention was initiated despite persistent documentation of chronic congestion and coughing. 41/119. In January 1992, during treatment for postural drainage, Margaret D. died. 41/120. According to Dr. Sulkes, there was a "lack of close monitoring and lack of a sufficiently aggressive work up early on, diagnostically, which might have led to some medical interventions, that might have prevented all of this ..." 41/120.

[59] The record at trial revealed, however, that the Center exercised professional judgment consistent with accepted medical practice in the treatment of Margaret D. The Center staff documented her persistent trouble with coughing and mucous production, monitored her condition, and treated her with anti-reflux medications. 34/82.

Steven S. died in May 1991 due to complications resulting from GER. Dr. Sulkes opined that Steven S. needed aggressive management of GER early on and did not receive it. He further testified that, in his opinion, Steven S. entered a "pipeline that ... carried him inexorably on to his death. All the way along, interventions might be available, but nobody thinks about them until it's way too late for them to do any good." 41/121.

The record reveals that the Center was aware of Steven S.'s GER since at least 1989. *Id.* In November of 1990, a gastrostomy tube was inserted into his stomach. This procedure had little effect, according to Dr. Sulkes, and emesis was discovered in Steven S.'s mouth as early as November 13, 1990. In December of 1990, blood was discovered in the emesis. Later that month, Steven S. was hospitalized for pneumonia. 41/122.

Dr. Sulkes lamented that this resident could have received fundoplication surgery up to two years before his death, but that he never did. 41/123. Fundoplication, using a cuff of the stomach muscle to wrap around the bottom of the esophagus as support for a weak gastroesophageal sphincter, could have prevented the escape of stomach contents into the esophagus when the stomach muscle contracted, 34/69, but the mortality rate for this surgery approaches fifty percent. 34/71. Fundoplication is major surgery, however, and the decision whether to perform this procedure is largely dependent upon the individual's health. The physician must assess the risks of additional surgery against the possible medical benefits to be obtained. 34/69.

[60] Steven S.'s physicians were aware of his condition and treated it by surgically inserting a gastrostomy tube. Unfortunately, Steven S.'s gastrostomy tube did not remedy the problem. Whether to proceed with fundoplication surgery was highly dependent upon Steven S.' individual medical condition,

and was a matter to be resolved pursuant to the sound discretion of the professional. 81/157. Experts in the field of gastroenterology for mentally retarded persons remain divided over the benefits of gastrostomy alone, as opposed to gastrostomy coupled with fundoplication surgeries. *See* Exh. HH., Bui, Hum D., *et al., Does Gastrostomy and Fundoplication Prevent Aspiration Pneumonia in Mentally Retarded Persons,* 94 American Journal on Mental Retardation 16–19 (1989). Accordingly, I find that the Center's decision not to perform fundoplication surgery on Steven S. does not fall outside the realm of acceptable medical practice.

Keith T. also had GER and died. Keith T. had spastic quadriparesis, profound mental retardation and a history of problems with aspiration. 41/125–26. Dr. Sulkes noted that Keith T. had respiratory problems dating back to a respiratory arrest in 1986, and had been hospitalized repeatedly for aspiration pneumonia. In April of 1991, documentation indicated that Keith T. had reflux when he was sleeping which precipitated bronchospasms. One of his anti-reflux medications was increased at that time, 41/126, and he was continued on antacids, 41/127. The Center's care for Keith T.'s GER included well-recognized treatments in this field: anti-reflux medications, antacids, and even fundoplication surgery. 34/77, 82–83. Once fundoplication surgery is performed, positioning therapy and medications remain the only viable treatment options for such an individual. *See* 81/155.

Dr. Sulkes testified that at least some of Keith T.'s hospitalizations, as well as his death, were preventable. 41/128. Dr. Sulkes found it problematic that Keith T. had never had an evaluation for feeding problems, never had an evaluation to determine whether he had reflux, and had no records showing consults with a gastroenterologist. 41/126.

[61] In rendering his opinion concerning the acceptability of care provided to this resident, however, Dr. Sulkes failed to acknowledge that Keith T. had undergone fundoplication surgery. This omission is particularly glaring in light of the importance placed on this surgical procedure by Dr. Sulkes in rendering his opinion regarding the acceptability of Steven S.'s care. The record is clear that fundoplication surgery is complicated and could not have been performed by the Center's medical staff. Gastroenterological consults necessarily occurred to determine that such surgery was warranted, in light of Keith T.'s compromised medical status. *See* 34/55. I find that the Center rendered care which was consistent with accepted professional standards in the case of Keith T.

Jeff K. also died of aspiration pneumonia. Dr. Rubin, an expert pediatrician retained by the United States, noted that Jeff K. had a seizure disorder which required multiple medication changes. He then developed petit mal seizures which increased in frequency. Thereafter, Jeff K. became very difficult to feed, and he sustained a significant weight loss. A gastrostomy tube was placed, and he continued to lose weight while he was hospitalized. 81/109. Subsequently, he died.

Dr. Rubin opined that the medical care Jeff K. received was not consistent with accepted professional standards of care because it is well recognized among surgeons and gastroenterologists that a gastrostomy should not be done in individuals who have GER. The procedure, he testified, increases the risk of vomiting and aspiration because large amounts of food may be put into the stomach over a short amount of time. 81/109–10.

Dr. Rubin formulated his opinion regarding Jeff K.'s care after reviewing several documents, including a "Mortality and Morbidity" report prepared after his death. Jeff K.'s physician detailed in the report the patient's increasingly uncontrolled seizure disorder, and how the side effects from the anticonvulsant medication and the frequent petit mal seizures interfered with his ability to eat. As a result, a gastrostomy tube was placed to feed Jeff K. He then received his nutritional feeding continuously over a twenty-four hour period (*not* large servings over a short period of time, as Dr. Rubin erroneously assumed). Exh. 1108.

[62] I find that Jeff K.'s care was consistent with accepted professional standards.

His treating physician was very familiar with his seizure disorder and its refractory nature. She also recognized that his seizure medications produced viscous secretions that affected his ability to swallow. As a result, a gastrostomy tube was used to avoid aspiration while eating. Exh. 1108.

While Dr. Rubin contends Jeff K. should not have had a gastrostomy tube to feed him in light of his reflux, I have not been able to find any reference in his record to GER or reflux. Rather, it appears from the record that the complications and risk of aspiration resulted from the thickness of his oral and pharyngeal secretions, factors which made the safe feeding of Jeff K. more complicated. Furthermore, Dr. Rubin's opinion regarding the inadequacy of Jeff K.'s care is undermined by his statement that he was impressed by the thoughtfulness that the staff had given to the Mortality and Morbidity report. 81/105–06. This thoroughness, I believe, more accurately reflects the quality of care that Jeff K. received at the Center.

The United States also challenged the care of three other residents: Sam B., James O., and Bobby Y. Sam B. died of aspiration pneumonia in April 1993 after a diagnosis of reflux esophagitis in 1980 and recurrent pneumonias thereafter. 41/132–33. Dr. Sulkes contended that after ten years of warnings, in March of 1993, Sam B. experienced increased difficulty swallowing and aspirated barium when a diagnostic procedure was being performed. 41/132. Despite this incident, the Center failed to request a respiratory evaluation.

James O. was hospitalized twenty-three times before his death in 1989. At no point in time did James O. have a swallowing work-up or a gastrointestinal or respiratory evaluation. Rather, his sixty-day medical note consistently noted as the plan of treatment "continue present therapy and care." 41/139.

Bobby Y. also died of aspiration pneumonia in December 1988. 41/139. Dysphagia had been diagnosed eleven years earlier, but his medical record revealed only two corresponding interventions. *Id.*

[63] I cannot, based on the trial record, determine whether the care Sam B., James O., and Bobby Y. substantially deviated from accepted medical practice. The particulars of their care, despite the diagnosis of GER or the identification of the risk of aspiration, are absent. Nevertheless, Dr. Sulkes concluded that the Center's care was constitutionally inadequate because these residents died of aspiration pneumonia without the benefit of certain evaluations. I will not find constitutional violations merely on the basis of the unfortunate fact of their deaths and Dr. Sulkes' conclusory statements that are not supported by the record.

Finally, the United States cited the treatment of several current residents in support of its contention that the Center's medical care of GER is inadequate. For example, Dr. Sulkes disagreed with the Center's treatment of Patricia W. In response, the Commonwealth submitted testimony by a pulmonologist who examined her and concluded that "[g]iven her severe kyphoscoliosis, she will inexorably progress to chronic respiratory failure as a result of her respirative lung disease and repetitive pulmonary infections. Your current therapy is just about optimal, given her inability to cooperate.... I think her survival to this time is a testimony to the care you have provided her." 34/38. The pulmonologist's opinion supports a determination that the Center's care met the constitutional minimum.

[64] That residents have died or sustained recurrent pneumonias does not support a conclusion that the Center is violating their constitutional rights to adequate medical care. Dr. Sulkes focused his analysis and testimony on the residents at Keystone, who are the most medically compromised at the Center. It is well-recognized that "[t]he life expectancy of people with mental retardation is shorter than that of the general population." Exh. HH, Eyman, Richard K., *et al., The Life Expectancy of Profoundly Handicapped People with Mental Retardation*, The New England Journal of Medicine 584 (1990). Life expectancy in that population is further decreased if motor disability is present. 34/60. Consequently, it is to be expected that some of the Keystone residents, who are

severely and profoundly retarded and physically disabled, may become ill at times and not recover, even though advanced medical care is being provided. GER by its nature is chronic, and it is accepted that non-surgical medical management should be attempted before resorting to surgical interventions. 81/155. During that period of non-surgical management, it is to be expected in some cases that the condition may worsen, and even if surgery can be performed, it is not a cure-all. 81/155. I find that the Center follows accepted medical principles in treating GER and the risk of aspiration.

4. NUTRITIONAL MANAGEMENT

The United States contends not just that the Center fails to provide adequate nutritional management to its residents, but that nutritional management does not even exist at the Center. 84/X–41. In particular, the United States asserts that the Center (1) fails to identify residents who are nutritionally at risk; (2) fails to assess residents with regard to their nutritional management needs; (3) fails to adequately and appropriately intervene at mealtime for residents with nutritional management needs; (4) fails to adequately monitor mealtime intake and interventions; (5) fails to provide adequate staff training in how to implement feeding plans; and (6) fails to insure that its professional staff is adequately trained in nutritional management. 84/X.

[65] *Youngberg* establishes that the Center has a duty to provide food for its residents. Food is "an essential of the care that the State must provide." 457 U.S. at 324, 102 S.Ct. at 2462. There is no dispute that the Center provides food portions which are generous. 35/104. But the provision of food in a disabled population is not met simply by preparing food and presenting it at mealtimes. Consequently, the Center must provide for the management of the nutritional status of its residents pursuant to the exercise of professional judgment which is consistent with accepted professional standards of practice. 457 U.S. at 323, 102 S.Ct. at 2462.

a. *Screening*

The United States' expert witness, Ms. McGowan, testified that the Center fails to identify residents who are nutritionally at risk. Such identification is the first element in any adequate nutritional management system. 35/159–60. Residents at risk include those with feeding, swallowing and oral motor disorders, in addition to those residents who have any history of choking. 35/159. The constitutional flaw, according to the United States, is that the Center does not have any screenings for these disorders, and even when screening devices are prepared, the devices are inadequate and screenings are not completed as quickly as they should be. The United States points to the facts that dysphagia screening has been completed only in the Laurel unit and that the Keystone unit was in the process of screening as late as July 1993. The Center now plans to incorporate aspiration screening into each resident's care at the annual review, Exh. 637/42, but, the United States contends that the Center's efforts to identify residents who are nutritionally at risk has been too little, too late.

[66] Ms. McGowan testified that identification of residents who are at risk nutritionally should be accomplished by identifying

> people that look like they might be in trouble, then you go on to some more in-depth type of assessment, so that you can both figure out if, in fact, your screen produced persons who really were having difficulties, and then you actually go in some depth, take a look at what real kind of problems they're having, because they are not always what they seem.

35/160. Dr. Sheppard, the Commonwealth's witness, did not dispute that identification of potential nutritional problems by screening is important. 61/100. I conclude that accepted professional practice requires some type of screening mechanism to determine which residents are nutritionally at risk.

The Center has attempted to implement screening of residents at risk, by implementing an aspiration screening procedure, Exh. 855. The Center's dysphagia team has developed a dysphagia screening to be conducted on all residents, and has responded to

weaknesses noted by Dr. Sheppard and has developed a swallowing and screening tool. 61/102.

On direct examination, Dr. Sheppard was asked if the Center met accepted professional standards *prior* to the implementation of its screening tool for swallowing and screening. Dr. Sheppard hedged her response and opined:

> [T]here was an aspiration screening tool that had been developed by the nursing staff, and there was good attention to individuals who were more severely involved, who were at risk for aspiration. I think most of the individuals in the Keystone Unit had been evaluated by the dysphagia team, and individuals who had had choking episodes were evaluated by the team following any choking episode; so individuals who were more impaired, who had a greater degree of dysphagia were being attended to; and certainly acceptable professional standards were being met in that area. It was the individuals who were less impaired that were not being—getting the attention that they needed; and also there was nothing in place that would track the deterioration with age of these individuals. Those individuals have marginal skills, so in that sense it was a needed component to make the program good; but I must say that there are not many institutions that have these things in place that I've been in, and so I think they were doing a job that was certainly acceptable by general practice.

61/103–04.

[67] In light of Dr. Sheppard's demeanor during her testimony and the context of her opinion, I conclude that there were deficiencies in identifying residents who were nutritionally at risk prior to the development of the various screening mechanisms. However, since Dr. Sheppard's inspection, the Center has developed various screening devices, and is in the process of implementing and revising them. I therefore find that no deficiencies remain to be remedied.

b. *Assessment*

The United States also asserts that the Center fails to assess residents with regard to their nutritional management needs. In February of 1990, it notified the Center that it failed "to ensure that all residents' nutritional needs are met." Exh. 637, exh. 50, p. 3. Ms. McGowan testified that the assessment phase is an interdisciplinary process that evaluates the resident and how his nutritional status is impacted by his neurological system, medications, psychiatric factors, gastrointestinal conditions, respiratory status, and musculoskeletal considerations (such as positioning). 35/161–64. She opined that the Center focuses on "what happens during the actual meal time.... [But,] they are missing many of the real important components of this process." 35/164.

As explained above, the Center's efforts to identify residents who are nutritionally at risk were inadequate until it developed and implemented better screening procedures. Following this development and implementation by the Center, however, Dr. Sheppard concluded that residents "who presented with a problem [were] being attended to." 61/104. Dr. Sheppard's review of John B.'s chart illustrated her opinion. She noted how this resident had a problem with weight loss associated with a refusal to eat. The annual review noted the following: his loss of weight; that he was essentially a dependent eater; he had a body mass index of nineteen; his weight was adequate although it was the low range of normal; he had a pureed diet with double portions; he had good lip and jaw closure, but was practically edentulous; and his response with efforts to encourage independent feeding. Dr. Sheppard further noted input from the following disciplines regarding John B.'s nutritional status: dietary, nursing, OT, pharmacy, and the physician. 61/94–95. She opined that John B. had a moderate problem in light of the fact that his nutrition was fairly good, he was still eating, and he was not showing any compromise of his respiratory system. Dr. Sheppard concluded that the Center's nutritional management for this resident was appropriate and adequate. 61/96.

[68] I am persuaded by Dr. Sheppard's testimony and find that the nutritional assessments performed by the Center satisfy

accepted professional standards. Although the annual review is not labeled "Nutritional Assessment," it satisfies the interdisciplinary process which is required by the accepted professional standards and addresses the acuity of the problem and the necessary interventions. The adequacy of the nutritional assessments performed by the Center is further supported by the fact that the assessments regarding physical therapy (PT), psychiatric issues, and neurologic care, all of which affect nutrition and feeding, have been found constitutionally sound.

The United States attempts to undermine Dr. Sheppard's testimony regarding nutritional assessments by pointing out the fact that Dr. Sheppard recommends utilizing the "body mass index" (BMI)[40] as a gauge of nutritional health and the fact that the BMI for the majority of the Keystone residents was below the normal range. Exhs. 967, 970. This statistic in and of itself has no bearing on the sufficiency of the assessment. Rather, it is a confirmation of the fragility of the population of the Keystone unit and the prevalence of dysphagia. 65/67.

The United States asserts that the inadequacy of the Center's assessments is evident in not only those assessments completed by the dysphagia team, but also those which the team has failed to conduct. The dysphagia team was created approximately in June of 1990. Exh. 641/12. The team includes the following: Kathleen Wagner, a speech therapist; Mary Frye, a Licensed Occupational Therapy Aide (LOTA); Karen Fulton, a registered dietician; and Marcia Stiles, a registered nurse (RN). Exh. 641/17. This team was created in response to what was perceived as the fragmented way dysphagia and swallowing difficulties were being managed, not because of any one incident that had occurred. Exh. 641/21. A regular scheduled meeting time was established in October of 1992. Exh. 641/26.

The dysphagia team first received referrals in January of 1991, Exh. 641/48, and the number of referrals has increased each year since then. Exh. 641/51. As of January 1993, the team relied exclusively on referrals in determining which residents to evaluate. Exh. 641/44. Any resident that had a choking episode was referred to the dysphagia team. Exh. 641/47; 35/166. The dysphagia assessment focused on the resident's ability to swallow. 35/165.

Since the team's inception, the basis for seeking dysphagia assessments has expanded. Dysphagia assessments increased over time as they were deemed necessary due to feeding problems or residents who were at risk of aspirating. Subsequently, a "meal observation" form was created as a means of identifying unsafe eaters. Exh. 637, exh. 16. This tool was to be completed by direct care staff. Subsequently, the team developed a dysphagia screening tool which was applied on a unit wide basis starting in April of 1993 in the Laurel unit. 61/130. The dysphagia screenings were then conducted at Keystone. *Id.*

The United States submits that the nutritional assessments which have been completed are inadequate. It notes that Dr. Sheppard agreed that the dysphagia evaluations need to include contributing causes and information regarding oral anatomy, 61/199, and points out that the team does not evaluate the effect of the resident's medication regimen.

[69] These contentions do not alter my previous conclusion. Nutritional assessments are addressed by an interdisciplinary approach. Undoubtedly, there are ways to improve these assessments, but they meet professional standards. As Dr. Sheppard explained:

> [T]here is a range of dysphagia problems that can be managed with fairly routine modifications and meal time procedures, and elaborate evaluations are not truly needed in those individuals. The—many of the mildly and moderately impaired individuals can be managed with limited assessment information.
>
> It's when you have the severely involved individual who is eating at the very limits

40. The BMI is a ratio of weight to height that gives an indication of the adequacy of the weight. It is a standard utilized with the developmentally disabled because of the fact that their growth is atypical. 61/100.

of their capability, and eating poorly, that having total information may be more critical because there may be things in it that you—that it would lead you to do that, would help this individual continue to be able to eat orally; and it's in those individuals that a—a—the most comprehensive evaluation is useful.

61/201. I credit this opinion, which sheds light on the constitutional minimum required in this area. The record reveals that the Center's nutritional assessments meet the needs of the residents (*i.e.*, the basic evaluation is in place, which can be augmented when the need arises).

c. *Intervention*

The United States asserts that the Center's mealtime interventions for nutritional management are inadequate. To the extent this contention raises the issue of unsafe feeding by the staff, that issue is addressed in the section regarding unsafe staff actions, under the duty to provide reasonable safety, and will not be repeated herein. *See infra* at § III.E.

The thrust of the United States' position, however, is that the Center failed to develop feeding plans for each resident who must be fed by staff (*i.e.*, those requiring assistance) until after Ms. McGowan's tour in 1992. Even though such feeding plans were then developed, the United States contends that this last minute effort is deficient because the feeding plans devised do not adequately address proper positioning and feeding techniques. *See* 84/X–56.

Ms. McGowan noted that the Center developed supplemental procedures for most of the individuals in Keystone which related to feeding techniques. 35/148. She reviewed the supplemental procedure for all 94 residents of the Keystone unit and found 25 of them to be "completely inappropriate." 35/149. That is, the photographs incorporated in the supplemental procedure showed heads in extension, poor positioning, and staff pushing the head back into extension. *Id.* She further opined that the feeding plans devised after her first tour of the Center were deficient because they did not detail "where to put the food in the mouth, what kinds of pressure needs to be applied, how then to pull the spoon out of the mouth, what things not to do in terms of scraping the face; and so there are—that needs to be very specific for direct care staff, because they—they can't generalize those instructions to the very specific and very individual requirement of many of these individuals." 36/31–32.

Dr. Sheppard agreed that a feeding plan should address proper positioning and bolus presentation. 61/201. Dr. Sheppard noted that there are "specific components to bolus presentation; and for any one individual, fewer or more of those elements may be needed in the descriptives. Usually you only include in the prescription those elements that are special for this individual." 61/202. Dr. Sheppard concluded that the Center's feeding plans include the elements "as is appropriate, those items that are considered to be modified for this individual and need to be special...." 61/203.

[70] My review of some of the supplemental procedures reveals that the Center included specific components regarding bolus presentation. For example, James M.'s supplemental procedure directed that "[f]irm pressure is applied on midline of tongue with spoon." Exh. 137. Tim P.'s procedure addressed the feeder's positioning during the meal, presentation of the spoon and the manipulation of the spoon. *Id.* Moreover, the Center included components as appropriate for the individual. For example, Michael F.'s procedure notes that he will cooperatively open mouth and swallow when the food is placed on the tongue. Common sense dictates that the plan for this resident need not include any components regarding how to apply pressure to open the mouth, prompt the swallow, or remove the spoon. Accordingly, upon my review of the Center's plans and the testimony of both experts, I find that the Center meets the minimum professional standards in this regard. The Center's feeding plans include the elements appropriate for each individual.

d. *Monitoring*

The United States also asserts that the Center fails to adequately monitor mealtime

intake and interventions. It contends that the Center did not have any system in place in living units other than Keystone to record the amount of food that residents consume until October 1993. The United States submits that it is accepted professional practice to have some type of mechanism to monitor how well residents eat at mealtimes. 61/133.

The Center has a policy regarding meal refusals by residents. The policy was documented in August of 1992 after Ms. McGowan's evaluation of the Center revealed there was no written policy. Prior to the approval of this written policy, however, the Center had been "doing exactly what the policy said for many, many, many years ... it was well understood by all staff that this was the procedure to be followed." Exh. 637/11. A "Meal Checklist" form was also generated in October of 1992 after Ms. McGowan's evaluation of the Center. Exh. 673, exh. 16. This checklist is completed daily for each resident and indicates the quality of the resident's intake. All forms are forwarded to the Unit Manager on Fridays after review by the nurse. *Id.* Although the checklist was generated in October of 1992, "the nurses have always summarized appetite or lack of appetite or an individual's preference for foods." Exh. 637/21.

[71] I find that the Center has in place an adequate mechanism for monitoring how well residents eat at mealtimes as evidenced by the "unwritten policy," which was eventually memorialized in Ebensburg Center Policy # 356, as well as the long-standing nursing practice of documenting in a resident's summary the status of his or her appetite. These practices are consistent with accepted professional practice, which requires some mechanism for tracking meal times. 61/133–34.

The United States, however, contends that even these policies are flawed because they do not address liquids. It points out that policy # 356 states: "when an individual refuses a meal, or a substantial portion of a meal, staff are to notify the nurse on duty. When an individual has refused three consecutive meals, the nurse will notify the physician. Liquid supplements are not considered an individual's meal." Exh. 637, exh. 15. This policy refers to refusals, and it is logical that a refusal of liquid *supplement*, an addition to one's regular meal, would not constitute a meal refusal. Consequently, this policy has no relevance to the Center's practice of monitoring the liquid intake at a meal.

As further support for its argument that the Center fails to properly monitor liquid intake, the United States asserts that Ms. Sponsky, the Director of Nursing, does not "consider liquids as part of a meal." Exh. 637/13. Ms. Sponsky's indication that liquids are not considered part of the meal was not emphatic. She admitted that she could not say whether a failure to take in liquids during a meal would be reported to the nurse and she did not know how the staff actually implemented the policy. Dr. Sheppard noted, however, that liquids are addressed in some of the units. She described how Keystone documents intake for food and liquids, and that the assessment of the meal in the Laurel unit included liquid intake as a component of the meal in its entirety. 61/135–36. She specifically recalled documentation noting "liquids refused" and her observations of mealtime intake, including liquids, were 100% congruent with the documentation of the feeders. 61/137.

The United States further contends that the Center's nutritional care is flawed because no formal policy exists for summarizing the information from the meal checklist. Dr. Sheppard noted that the information is conveyed to the physician after three meal refusals and to the QMRP after four fair intakes, *i.e.*, 50% to 74% of meal, and asserted that she was not sure that a written policy is so important. 61/139; *see* Exh. 637, Exh. 16. Dr. Sheppard's opinion is persuasive. At some point, the utility of a "summary of summaries" is questionable. I find professional judgment was exercised in monitoring mealtime intake which was consistent with accepted standards of practice.

e. *Training*

The United States' next contention is that the Center fails to adequately train staff to implement feeding plans. Ms. McGowan testified that staff training is key to ensuring

adequate nutritional management. 35/161–61. Ms. McGowan claimed that competency-based training should be part of feeding training. 34/28. Such training not only addresses general principles, but also gears the training for each feeder to the unique needs of each individual. 35/161–2. The United States contends that even the Center's expert, Dr. Sheppard, agreed that staff need frequent training that is specific with respect to the residents for whose feeding they are responsible. 84/X–60.

Dr. Sheppard's actual testimony, however, recognizes that professional literature regarding effectiveness of staff training and repetition is not extensive. In her opinion, staff training needs must be based on an assessment of the staff's abilities, how well feeding procedures have been retained and how effectively such skills have been implemented to determine how frequent training must be provided. 65/18. Dr. Sheppard then noted that although there had not been any formal training sessions by the dysphagia team, numerous mini-staffings are given every time a special procedure is developed or changed. Dr. Sheppard specifically opined that "there were professional judgments involved in determining how the program was to proceed." 65/20.

The United States submits, however, that Dr. Sheppard's opinion is not credible because the method utilized to train the direct care staff was nothing more than reading the supplemental procedure books for feedings. 65/21. I am not persuaded by this assertion in light of Velda Malloy's deposition testimony. Ms. Malloy is an RN who has worked at the facility since 1963 and served as a supervisor and QMRP in the Keystone unit since 1992. Exh. 622/8. Ms. Malloy noted that she feeds residents in Keystone and had been trained in the supplemental procedure. She further explained that she helped write the procedures after first discussing the specific needs of each individual with the OT (Lois Graham), a speech therapist (Kathy Wagner), and the direct care staff. In addition, Ms. Malloy actually observed the staff feeding every individual. Exh. 622/84. Ms. Malloy explained that the direct care staff consult the special procedure books and ask questions of the professional staff that are always present in the dining room. Exh. 622/89. She further noted that if staff are feeding inappropriately, they are approached immediately by a professional to address the proper method of feeding. Exh. 622/95–96.

[72] I find the Center's efforts to provide adequate staff training to implement the feeding plans satisfies the accepted professional practice described by both Ms. McGowan and Dr. Sheppard. In light of the staff's knowledge base in feeding the residents, training need not start at square one. Day-to-day assessments of actual feedings by the professionals present in the dining room provide ample opportunity for additional training to correct deficiencies or reinforce the proper method. Professional judgment is exercised.

[73] The United States' final claim of deficiencies in the nutritional area is that the Center fails to insure that its professional staff is adequately trained in nutritional management. The evidence offered by the United States in support of this contention is nothing more than a list of training that the professionals at the Center would like to receive. That the Center's professionals desire additional training hardly proves a constitutional violation.

5. PHYSICAL THERAPY

The United States contends that the Center's physical therapy ("PT") services [41] are a substantial deviation from acceptable professional practice because the Center allegedly: (1) fails to conduct proper PT assessments; (2) fails to develop and provide adequate physical management for residents with physical disabilities; (3) fails to provide acceptable wheelchairs; (4) fails to properly handle, lift and transfer residents; and (5) fails to adequately train its staff in the physical management of its residents. 84/XIV.

41. PT, as developed by the United States in its pleadings and arguments, encompasses physical management, which is the manner in which the residents are handled, touched, transferred, positioned and facilitated to be functional, active individuals. 34/146. For that reason, this opinion will treat physical management as a component of PT, and not as a separate discipline.

The United States argues that the Constitution requires the Center to provide physical therapy services which enhance the residents' capacity to function, *i.e.*, help the residents to live as safely and as independently as possible. The United States believes that physical therapy, a professional discipline concerned with maintaining, restoring and/or acquiring one's maximum range of motion, should achieve the following benefits for the residents: (1) enable them to move more easily and efficiently; (2) avoid the development of contractures, deformities, and acute curvatures of the spine due to scoliosis; and (3) provide them with the opportunity to learn functional skills to enhance their independence. In effect, the United States argues that the Constitution requires the Center to provide residents not just maintenance to avoid or minimize loss, but also the therapy necessary to reach their maximum potential.

In support of this proposition, the United States cites the analysis of District Judge McCalla as set forth in his supplemental findings of fact in *United States v. Tennessee,* No. 92–2062–M1/A (February 17, 1994), ¶¶ 113–14 (*see* 92/Exh. A for the full text of Judge McCalla's supplemental findings of fact). As pronounced by Judge McCalla, the constitutional duty to provide physical therapy is quite far-reaching, and entails the provision of services at an institution in an effort to obtain the greatest possible amount of movement for the residents, resulting in their greatest possible independence.

[74, 75] Although mentally retarded individuals do not lose their liberty interests simply by virtue of their institutionalization, *Youngberg,* 457 U.S. at 315–16, 102 S.Ct. at 2458, the Supreme Court in *DeShaney* cautioned against an overly-expansive interpretation of the Due Process Clause, and clarified that the Clause "generally confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." 489 U.S. at 196, 109 S.Ct. at 1003. As the *DeShaney* Court explained, *Youngberg* stands for the simple, albeit important, proposition "that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." *DeShaney,* 489 U.S. at 199–200, 109 S.Ct. at 1005.

[76] This constitutional obligation, however, differs dramatically from the type of affirmative duty that the United States seeks to place upon the Commonwealth here—to actually *improve* the condition of the residents by means of its physical therapy services. Justice Blackmun's concurrence in *Youngberg,* joined by Justice Brennan and Justice O'Connor, suggests that the failure of a State to *preserve* self-care skills acquired before institutionalization (an issue that was not before the Court in *Youngberg*) may present a question of whether there has been a constitutional deprivation. 457 U.S. at 329, 102 S.Ct. at 2465 (Blackmun, J., concurring). Consistent with the reasoning of Justice Blackmun's concurrence in *Youngberg,* I hold that the constitution imposes a duty upon the Commonwealth, pursuant to the exercise of professional judgment, to provide PT services at the Center which maintain the residents' maximum ability to move, but not a duty to achieve some optimal level of performance.[42]

[77, 78] Stated differently, an infringement of a mentally retarded resident's liberty interests may occur if a loss in movement results from the Center's failure to provide necessary physical therapy training and/or services, but not every instance where there is a loss of movement indicates that a constitutional violation has occurred. The failure of the Commonwealth to provide training at

42. In articulating the duty imposed by the Constitution as it pertains to the provision of PT services for institutionalized mentally retarded residents, I am determining only the duty owed by the Center to its current population, which has a median age of 32.5 years, and all of whom have reached skeletal maturity. 62/163; 43/79. I note that the duty articulated by Judge McCalla in *United States v. Tennessee, supra,* applied to a population which included individuals under the age of 22 years. While I have no occasion to decide this issue here, the nature of the duty to provide PT services may differ for individuals in a developmental stage.

the Center which *improves* the residents' basic care skills, absent proof that the failure to provide training results in the loss of a recognized liberty interest (*e.g.*, minimally adequate or reasonable training to ensure safety and freedom from undue restraint, as recognized in *Youngberg*), does not implicate constitutional Due Process concerns.

> Where the state does not provide treatment designed to improve a mentally retarded individual's condition, it deprives the individual of nothing guaranteed by the Constitution; it simply fails to grant a benefit of optimal treatment that it is under no constitutional obligation to grant.

Society for Good Will, 737 F.2d at 1250.

[79] As explained below, pursuant to the foregoing standards, I find that the Center provides a broad spectrum of physical therapy services, and that professional judgment is exercised in an effort to preserve and/or maintain the residents maximum ability to move. Accordingly, I find no constitutional deprivation.

Most of the physical therapy services provided at the Center are rendered to residents who have a physical handicap. The Keystone unit is home to most of the residents who have one or more physical handicaps that impair their ability to move. Some physically handicapped residents also live in the Laurel, Horizon, Sunset and Villa living units. 34/98.

Approximately one-third of the residents of the Keystone unit are essentially immobile because of their physical handicaps. They have no active movement except for the ability to move their head or an arm or a leg slightly. 34/98. Another one-third of the residents of the Keystone unit have significant limitations. They may be able to perform a functional skill such as rolling over or sitting up, but not the host of functional skills that would enable them to move independently. 34/98. The other one-third of the residents of the Keystone unit have limitations of a minimal to moderate degree in their ability to move. Their physical handicaps impair but do not preclude independent movement. 34/98.

The physical handicaps manifested by the residents at the Center are the result of damage to the brain early in their lives, in almost all cases before preschool age. 34/107. As the residents age, they progress through three stages of development. The first stage is consistent with neuroplasticity, and involves a period of growth in response to abnormal neurological influences and secondary muscle imbalances. This stage lasts until approximately age seven. During this first stage, deformities actually begin to develop, and PT intervention is useful in order to prevent or limit their development. 52/45–47.

The second stage is that of skeletal maturation. This period spans from approximately age seven until skeletal maturity has been attained, and intervention efforts are geared toward retarding any progression of deformities that developed during the neuroplasticity stage. 52/45–47.

The third and final stage begins after skeletal maturity has been attained. At that point, the Center's intervention efforts focus on attempting to prevent the further progression of deformities, maintaining comfort, and providing positioning that is conducive to general health considerations. 52/45–47, 58.

[80] The residents at the Center who have physical handicaps have attained skeletal maturity. 52/60–61. As a result, the physical handicaps arising from the structural deformities are fixed and cannot be reversed. 52/60–61. These residents have a corresponding limitation in movement, and they have been in the positions they present for fifteen to twenty years. 32/151–52. The United States' PT expert, Ms. McAllister, and the Commonwealth's PT expert, Mr. Arnall, are diametrically opposed on the possibility of reversing postural deformities after skeletal maturity. My conclusion from hearing them testify is that Ms. McAllister may be on the leading edge of the PT field, but that Mr. Arnall represents the mainstream school of thought. The constitutional duty imposed by *Youngberg* and *Shaw* does not require the Center to embrace an unorthodox method, even if it is promising.

For these residents, maintenance of maximum movement has several benefits: (1) it

prevents a loss of mobility and skills associated with that movement; (2) it prevents a loss of strength; (3) it prevents the development of pressure areas, since movement can be effected to eliminate pressure; and (4) it can slow the progression of osteoporosis. 34/149–50. In short, preservation of a resident's maximum ability to move prevents or delays the development of osteoporosis or contractures, which, in conjunction with the structural deformity, may contort the body and affect the internal organs. 34/149.

The Center contracts for the services of a licensed physical therapist (LPT) to oversee the provision of PT services to Center residents. Prior to December 1992, the Center contracted for the part-time services of three LPTs, which was equivalent to one full-time LPT position. One of the contract LPTs retired at the end of December 1992, however, and had not been replaced as of the time of trial. Exh. 619, p. 11. One LPT was physically present on the premises for 222 hours from July 1989 to August 1993. Exh. 97. The facts do not indicate how many hours the other LPT spent at the Center during that same time period. The LPTs supervise six full-time physical therapy aides (PTAs). 34/229.

The Center also provides physical management services by employing one or two full-time licensed occupational therapists (OT), eight licensed occupational therapy assistants (LOTAs), and six occupational therapy aides. 64/131; 34/230–1. The Center staff provides PT and occupational therapy (OT) services Monday through Fridays, from 8:00 a.m. to 4:00 p.m. 34/231.

PT and physical management services at the Center are initiated and maintained pursuant to the order of a licensed physician. 52/28. *See* 63 P.S. §§ 1309, 1514. The PT and OT services at the Center are provided in the same manner as a care provider in a private home. 62/107; 34/146–47.

The Center performs an annual assessment for each resident who receives any PT or OT service. 34/126; Exh. 619/20. If a resident is not receiving any PT or OT service, then that resident is assessed for PT needs every three years. 34/127; Exh. 691/20. If a resident uses a wheelchair but otherwise receives no PT or OT services, that resident also is assessed for PT every three years. 32/127.

The annual assessment for a resident receiving PT services is not attended by the LPT or the OT. Rather, a physical therapy aide or a LOTA attends and provides information to the primary care physician about that resident and the modalities employed. Discussion at the annual assessment does not necessarily address additional measures which could improve the resident's program. 32/127.

The PT's annual assessments are recorded on an interdisciplinary report. The report includes the PT's assessment of the resident's physical abilities (including range of motion flexion and abduction, strength and tone), and any recommendations the PT has for that particular resident. Exh. 34. Each patient's medical history—including ICD–9 codes,[43] physical development, and health and behavior modification programs—is kept in a separate chart. 52/40–41. Documentation of PT or OT service provided is done periodically by the physical therapy aide or the LOTA. The LPT or OT countersigns the documentation. 62/92, 94.

a. *Assessment*

The United States asserts that the Center fails to conduct PT assessments according to acceptable professional practice. 34/119. The United States asserts that an adequate PT assessment of a resident's physical handicaps must establish what movement patterns a resident possesses and how that resident's movement is limited, which enables the development of a plan to maintain the degree of movement the resident possesses. 34/115.

The United States points to the fact that the Center utilizes a one-page PT assessment form (Exh. 34), which is rarely completed in its entirety. The form does not provide an area to denote the resident's diagnosis or pertinent historical information (*e.g.*, a resident's ability to maintain different positions

43. ICD–9 codes is a reference to the International Classification of Disease Codes. That is, a system used to denote the applicable diagnosis(es). 52/40.

or perform functional and motor skills; the resident's existing reflexes; issues pertinent to the resident's physical management such as positioning, transfers and lifting). 34/120. In short, the United States asserts that the Center's PT forms provide neither a baseline of the resident's physical condition nor the most appropriate means to care for the resident. In contrast, the United States proffers an eighteen-page assessment form created by its PT expert, Ms. McAllister. Her form contains the areas and analyses that she contends are commonly accepted in the field. 34/124; *see* Exh. 71, Appendix III.

The United States also contends that the Center fails to meet acceptable professional standards by performing assessments only every three years, 34/127, and that the analysis performed at the assessments is inadequate, usually providing no more information than "reviewed,; no PT recommended." Exh. 979. Ms. McAllister testified that the assessments are flawed because they assume that the goal for the residents is nothing more than maintenance. 34/128.

[81] The Center's assessments fall short of the assessments urged by the United States. The United States' own expert admits, however, that those residents with physical disabilities receive a PT assessment. 35/3. The record reveals that a great deal of the information that the United States argues should be placed on the proffered eighteen-page assessment form is available elsewhere in the resident's chart. 52/40–42. Other sections of the eighteen-page form simply are not applicable to a number of residents. *See* Exh. 71, Appendix III (portions of assessment tool pertaining to sitting and walking inapplicable to resident who is confined to cart).[44] The documentation of the Center's PT assessments is not constitutionally infirm. *See* 52/41–42 (forms are adequate in light of the fact that other portions of the chart, as well as supplemental procedures, detail and provide additional information).

[82, 83] I also find the frequency of the PT assessments meet the professional judgment standard. The United States argues that the acceptable professional practice requires yearly assessments, relying on Ms. McAllister's opinion that yearly assessments are appropriate if there is an expectation of change for those individuals and that such assessments are commonly accepted in the field of PT. 34/127. Other credible record evidence indicates that there is no published standard within the field with respect to the need for annual evaluations, and that the standard to which Ms. McAllister testified is merely a personal opinion. 48/151; *see also* 52/41; Exh. 619/54 (the frequency of assessments at the Center is consistent with accepted standards for such a fixed and stable population). More importantly, the Due Process Clause does not require that the State improve the resident's condition. The record indicates that the Center's assessments are adequate for maintenance, which is constitutionally acceptable.[45]

One key aspect of the PT treatment provided to the Center's residents is the modality of range of motion (ROM) exercises. ROM may be active or passive in nature, and is geared toward maintaining the movement patterns that residents currently possess. ROM sustains the integrity and existing mo-

44. Portions of Ms. McAllister's eighteen-page form may serve as an excellent tool for detailing the range of motion that a resident has attained and how the Center is endeavoring to maintain that movement. That does not mean that the Constitution requires the Center to adopt it.

45. The United States argues that the Center's PT assessment analysis should be considered inadequate because the expectations of the assessments entail "maintenance, pure and simple." 34/128. The United States argues that the expectations should be to prevent the development of physical disabilities, prevent continued deterioration and attempt to reverse some of the deformity patterns. 34/155. Ms. McAllister opined that these expectations are accepted across the country, noting that they have been relied upon in numerous lawsuits regarding individuals living in institutions. 34/158.

I accord little weight to any standard that is based on the result of lawsuits which have been resolved by consent decrees as opposed to adjudications. 34/158. The explication of a constitutional obligation should not be guided by settlement agreements, which may contain terms requiring the provision of services above and beyond the constitutional minimum simply in order to reach an amicable resolution among the parties and to avoid further litigation.

bility of the joint. 34/209; 52/102. The ROM exercise (that is, the movement of the joint by flexion and contraction of the muscles) helps to hold the minerals in the bone matrix by preventing further osteoporosis and increasing fragility of the bone. 34/151. Therefore, ROM is therapeutic for the residents because it maintains their current movement capabilities. 35/43; 52/102. ROM exercises are being provided to many of the residents of the Keystone unit, including the residents who are confined to carts. Due to the skeletal fragility of the residents in carts, the Center's orthopedic physician recommends ROM as the safest therapy. 52/25–27. The Center's LOTAs provide this service for the resident's upper extremities. 52/25. ROM for the lower extremities is provided by the PTAs. 610/59–60.

In addition to ROM exercises, the Center regularly changes the position of those residents who are physically handicapped and unable to effectively move. Repositioning a resident helps to maintain the integrity of the skin, avoids the development of pressure sores, and provides comfort. 34/152; 52/56. The residents of the Keystone unit who are confined to carts are routinely provided position changes. Currently, no resident at the Center has a decubitus (bed sore). 35/60; 52/91. Although residents sometimes experience redness of the skin, that condition is not necessarily indicative of skin breakdown. 52/91.

In addition to position changes, the Center utilizes "splinting" to assist in the prevention of skin irritations. Exh. 610/58. After residents undergo ROM therapy, they are "splinted" to allow air to reach their joints and to maintain their maximum amount of range. Exh. 610/59. Although one individual's range was actually increased due to splinting, the Center generally uses splinting to maintain the existing ROM and to improve the skin integrity. Exh. 610/59.

Another modality of treatment provided to eight of the Keystone residents is chest physiotherapy or percussion. 52/103. This assists the resident to effectively mobilize and expectorate fluid accumulations or secretions in his/her lungs, in an effort to decrease congestion and improve breathing. 32/20; Exh. 619/60.

Therapeutic positioning is also used at the Center to sustain the integrity and mobility of a joint. 52/102. Therapeutic positioning places a resident in a manner which attempts to approximate normal body alignment. 34/163. In addition, some therapeutic positions afford an opportunity for the muscles to work in opposition to the forces of gravity or the reflex pattern of spasticity manifested by the resident, allowing for weight bearing by certain joints. 34/165. As a result of therapeutic positioning, the muscles that are worked may be strengthened, and the mobility of some joints maintained. 34/163. It also may promote improved breathing and avoid the compression of organs. 52/31.

Therapeutic positioning, which provides an opportunity to experience normal body alignment conditions, and weight bearing may be contraindicated for some residents due to the progression of their physical handicaps and the attendant complications of immobility. Contraindicators are a fragile skeletal system and joints which are dislocated, common features of Center residents. 52/30–31.

If therapeutic positioning is contraindicated, adaptive positioning may be provided. This is positioning which places an individual in a comfortable position. It essentially adapts to the resident's deformity pattern. 34/162. Adaptive positioning is used for the eight Keystone unit residents who utilize carts during the day. Adaptive positioning is therapeutic for these individuals in that it aids in the prevention of further deterioration. 52/94.

Another modality of PT provided to approximately 125 (or one-fourth) of the Center's residents is gross motor function programming. 52/35. This programming, administered by mobility experts, vision specialists, and psychology staff, maintains or improves a resident's skills or ability to move utilizing large muscle groups, and includes activities such as ball throwing, treadmill walking and bicycle use. 52/35.

Despite the numerous PT services provided to the residents, the United States argues that the Center fails to develop and provide

adequate physical management for residents with physical disabilities, and that too many of the residents do not receive necessary therapeutic positioning and gross motor function programs to improve their functional capabilities. The United States notes that it is undisputed that the Center does not, in therapeutic positioning, place any resident in the "prone on forms" position or the "quadruped" position. 34/175, 177.[46]

On the other hand, the record reveals that the Center initiated "side-lying" into its program in the early 1980's (Exh. 610/28–29); "side-lying" positions oppose the reflex pattern of extension of the back and flexion into the fetal position. 34/168–69; Exhs. 710, 989. Mr. Arnall, the Center's contract LPT, asserts that its residents who are confined to a cart are not provided therapeutic positioning because of the fragility of their skeletal systems. 52/61. This assertion is supported by Ms. McAllister's published training guide, which states that certain positioning may be contraindicated for individual residents due to the resident's physical condition. Exh. 71, App. VI. Mr. Arnall further explained that the therapy received by residents is consistent with the recommendations of physicians treating those particular residents. 52/25–30. Furthermore, he noted that many of the residents are receiving physical management services in ROM exercises, or another modality of treatment. 52/63–67.[47]

46. The United States asserts that the Center staff believes that more could be accomplished with regard to physical management efforts than has been accomplished to date (*see* Exh. 604/94; Exh. 610/35–36), and that the Director of Occupational Therapy, Lois Graham, admitted that the residents would benefit if they received better positioning. Once again, it is not in dispute that the residents at the Center would benefit by the deployment of additional physical management efforts. The goals of the Center staff are irrelevant to whether the Center fails to meet its constitutional obligations. None of the Center's staff stated that positioning was inadequate or that the positioning employed at the Center was a substantial deviation from accepted professional practice.

47. Mr. Arnall admits that despite these measures, some residents have sustained a loss of movement. For example, Joe T. lost some ROM in his upper extremities despite receiving ROM exercises and a splinting program. 52/66. This regression is explained, however, in Ms. McAllister's published training manual, which acknowledges that adults become increasingly immobile as a result of abnormal development patterns, slower rates of skill acquisition, and their increasing size. This process, as explained by Ms. McAllister, can render an adult "stuck" in one position or lead to a decrease in developed skills. Exh. 71.

[84] I find that the Center's physical management of the residents does not substantially deviate from accepted professional practice. The fragility of many of the residents' skeletal systems is not disputed and warrants serious consideration by the professionals. The decision not to provide some residents with therapeutic positioning which may stress delicate joints is accepted practice. Moreover, the record reveals that professional judgment has been exercised in determining what physical management efforts will be deployed, whether ROM, splinting, percussion, or adaptive positioning. Here, as in many other areas of care at issue in this litigation, although the Center may not utilize the "best" or the "most current" options available, I find that professional judgment is exercised, and that the care meets the constitutional minimum.[48]

b. *Wheelchairs*

The United States contends that the Center fails to provide wheelchairs that meet acceptable professional standards. Approximately 117 to 127 residents at the Center use a wheelchair as their primary means of mobility. 34/97. When a resident is placed in a wheelchair, the optimal position is for the pelvis to be tipped slightly forward in an anterior pelvic tilt. This places pressure on the ischial tuberosity and off of the tailbone or coccyx. This body position, if maintained, resembles an L, and is very stable and provides an element of control for one's trunk

48. As noted earlier, the United States contends that the Center's gross motor function program is inadequate. I find that the United States wholly failed to carry its burden in this regard because its expert, Ms. McAllister, spent most of her time at the Center focusing on the residents of Keystone, although the majority of residents who receive gross motor programs are located in the Horizon Unit and the JFK Learning Center. 52/35.

and head. 34/181. The seat belt to a wheelchair is one means of attempting to maintain a resident in the anterior pelvic tilt position. Seat belts should traverse a resident's body at the top of their pelvis or across their hip bones. 34/182. The seat belt should not be too tight. 34/189.

A loose seat belt and the movement of a resident while positioned in a wheelchair can result in that resident assuming a "C" position. 52/82–6. A "C" position is synonymous with a posterior pelvic tilt position in which an individual is positioned more on their tailbone or coccyx. As a result, the head falls forward and down, and the shoulders follow. 34/182.

Wheelchairs are individualized for the residents by the adaptive equipment department to provide a comfortable chair that is safe and properly supports the resident. Exh. 619/82–83. The Center's PTs, PTAs, and nurses monitor the needs of the residents, and the PTs determine the modifications necessary for the resident's safety, positioning and comfort. Exh. 619/81, 83–84. One section at a time of the wheelchair is modified in order to evaluate how the revision will work; at times, the adaptation process may take several weeks. Exh. 619/82, 86. While the resident's chair is in the adaptive equipment department, another chair is provided for him or her. Exh. 619/86. The LPT supervises the adaptations which have been requested. 52/99.

Ms. McAllister, testified that she did not see anyone in an appropriate wheelchair during her entire week-long observation at the Center. 34/206. Ms. McAllister also claimed that the staff never properly positioned residents in their wheelchairs. 34/188–89. The United States listed positioning deficiencies for thirteen residents which were described by photographs and a videotape. 84/XIV–50 n. 17.

Ms. McAllister opined that accepted professional practice requires the utilization of a mechanized positioning chair or simulator to produce wheelchairs for residents which meet their needs. 34/193–95; Exh. 731. A positioning chair is capable of having every conceivable angle and dimension changed while an individual is in the chair in an effort to identify exactly which position is best for that individual, based on comfort, safety and proper support. 34/194. The Center does not have a positioning chair. 34/195; Exh. 619/87. Instead, it continues to utilize the services of the adaptive equipment shop and the professional judgment of the LPT or OTR to adapt and modify standardized wheelchairs purchased from manufacturers. 52/98–101; 32/195; Exh. 619/84, 88.

The United States contends that positioning chairs or simulators have replaced the trial and error method of adapting wheelchairs that is used by the Center. 84/XIV–55. Mr. Arnall, however, who testified on behalf of the Center, explained that the simulator is a "high tech" substitute for adaptive wheelchairs which may increase convenience, but cannot act as a substitute for professional judgment. 52/98.

[85] That technology can now boast a sophisticated piece of equipment as a replacement for the earlier trial and error method offers no insight whatsoever into whether an appropriate exercise of professional judgment has been made. Because the Center's method is accepted within the practice and demands of the exercise of professional judgment by the PTs (Exh. 619/87; 52/101), I find that it satisfies the obligations imposed by the Constitution.

The United States' arguments with respect to the thirteen residents who allegedly were provided with improper wheelchairs and/or positioned improperly are not compelling. 34/180–99. The Commonwealth explained that a number of those residents have the ability to move themselves from the correct positions in which the staff initially placed them. Exh. 619/80. Rather than unduly restrain the resident via a seat belt or other device, the resident is permitted to move and is repositioned as needed. 52/82.

In addition, as noted before, the record demonstrates that some of the staff were reluctant to intervene or act on behalf of the residents in the presence of the United States' experts. Other factors, such as the preferences of a resident or his family for a particular wheelchair, also have played a part in the Center's determination whether to ob-

tain a more therapeutic wheelchair for the resident. 52/81.

c. *Transfers*

The United States also asserts that the Center fails to handle, lift and transfer residents according to acceptable professional standards. Residents are lifted and transferred to and from wheelchairs on a daily basis. These lifts should be accomplished by two care providers. Exh. 24. Some of the lifts and transfers are accomplished by the care providers placing their arms underneath the resident's arms and/or knees to lift them from one surface and lower them onto another. Such action exerts a pressure which, if sustained, could cause damage to the resident's arteries and nerves, and possibly to a joint. 34/216–17. Usually, such lifts and transfers do not last longer than thirty seconds. 52/104. The LPTs who provide PT services to the Center prefer to lift residents by placing their arms under a resident's arms and around the trunk, and then taking the forearms and positioning the resident close to their own trunk and lifting in conjunction with someone who is controlling the legs. This is set forth in the Center's policy regarding lifting and transferring. Exh. 82.

Ms. McAllister concluded that the staff's handling and lifting of residents is flawed because: (1) staff lift residents under the armpits; (2) staff lift residents under the knees; (3) staff do not control the head and trunk of the resident being lifted; (4) staff do not position the resident properly in a wheelchair or on the mat; (5) staff use the resident's limbs for turning; (6) staff resort to momentum for lifting and transferring which results in a "whisk and thud" transfer; (7) staff fail to arrange the environment before initiating the lift and transfer; and (8) staff use poor body mechanics. 84/XIV–58.

As a result of these flaws, Ms. McAllister contends the staff's care with regard to lifting and transferring residents fails to meet acceptable standards and subjects the residents to harm. 34/217, 221. The United States argues that Ms. McAllister's opinion is supported by the number of injuries sustained by residents while being lifted and transferred. Exhs. 85 and 791. The injuries allegedly resulting from improper lifting range from abrasions, black and blue marks, scratches and/or lacerations, to fractures. Exh. 791.

Some residents sustain injuries while being lifted or transferred. The injuries range from abrasions to bruises, scratches, lacerations or fractures. Exh. 85. Historically, the LPTs have provided training to the care providers regarding lifting. 52/105. The Center currently is in the process of completing a Competency Based Lifting and Transferring Technique Inservice which is geared to review and reinforce principles relevant to safe lifting and transferring. Exh. 85, # 00004032; 52/105. The competency based training insures that each provider is capable of lifting and transferring an individual by actually performing a certain type lift and transfer under the supervision of an instructor. 52/105, 164–66. Such lifts would not be accomplished by the lifting of a resident under their arms.

The Center does not dispute that the cardinal rules for lifting and transferring are: (1) to control the environment; (2) to stay off the arms; (3) to lift as high on the legs toward the pelvis as possible; and (4) to control the body parts which do not have control or are abnormal. 52/172. Additionally, staff from the Center indicated that the Center's training with respect to lifting is consistent with the lifting procedures desired by Ms. McAllister. Exh. 610/105. The Commonwealth's evidence indicated, however, that the most "changeable" part of the environment is the resident, who may change the situation in the course of any transfer. 52/172; Exh. 85, # 00591020 (appropriate lifting procedures followed, resident jerked own head causing laceration); Exh. 85, # 0076504 (resident threw head back when being properly placed into bed, causing injury).

In addition, residents with osteoporosis may be injured during lifting and transferring even when the lifting complies with acceptable standards. Exh. 85, # 00006442 (fracture in resident with severe osteoporosis may have occurred during PT, seizure activity or self-repositioning). Finally, some of the injuries submitted by the United States

did not occur during lifting. Exh. 85, # 00589451 (injury occurred while resident was lying on the changing table).[49]

Historically, when the Center found that an injury occurred due to improper lifting methods, the Center provided additional staff training. For example, Harvey B. received "grasp" type bruises on two occasions caused by improper lifting. The facility director recommended lifting retraining, which had already been prescheduled by the Center's Facility Training Department, and additional training was provided by the Center as recommended. Exh. 85, Aug. 12, 1991, # 00589452.

[86] I recognize that there are incidents which have resulted in harm to the residents. For example, the United States points to the fracture sustained by Harold M. when he was lifted from his wheelchair and his leg was still contained in a velcro strap utilized to maintain his leg on the leg supports of his wheelchair. Exh. 85 (incident review of Harold M. of 6/11/91). Obviously, this lift was improper because the care provider negligently failed to release the velcro strap prior to lifting the resident, although she believed that she had. Isolated injuries, though extremely unfortunate, are bound to happen within a population which requires lifting and transferring on a daily basis. *See Society for Good Will*, 737 F.2d at 1245. The record does not reveal that such injuries due to improper lifting are commonplace, however, or that they go uncorrected.

In light of the residents' abilities to dramatically change a lift which is in progress, the presence of significant osteoporosis in this population, and the fact that the Center has a lifting policy which incorporates for the most part the above cardinal rules (Exh. 82), I do not find the Center's care in this regard constitutionally remiss. The evidence is clear that the presence of significant osteoporosis results in injuries which are neither related to actions by the staff (*e.g.*, fractures precipitated possibly by self-repositioning or seizure), nor totally precluded by the complete adherence to acceptable professional standards.

Finally, the United States asserts that the Center fails to adequately train its staff in the physical management of residents, arguing that too often training is learned on the job and no formal inservice is provided. The United States claims that the Center's own staff recognizes the need for more inservices, and it points to the testimony of Mr. Tackett, who stated that he was handling residents on his first day on the job. 38/7–8. In addition, the United States faults the Center because it does not have an individualized written or photographed plan for handling each resident.

[87] I do not find persuasive the United States' contention that the Center's own staff recognizes the need for more training. This "admission" was obtained in a discussion after a demonstration by Ms. McAllister of positioning techniques for one of the residents. Exh. 610/35–36; Exh. 615/113. Ms. McAllister, an enthusiastic and motivating individual, sparked an interest in several staff members that undoubtedly will benefit the residents. Hopefully, the Center will take advantage of that interest and encourage learning opportunities in this and other areas of care. The professed desire of staff to receive continuing education, however, is hardly evidence of a deficiency which violates the Constitution.

Ms. McAllister testified that she believes that an individualized plan illustrated by photographs is common practice with therapists who work with the developmentally disabled. 35/63–64. She acknowledged, however, that such a plan comports with her own, personal standard for optimal treatment, and that only two states (Florida and Oregon) have embraced it. As a result, Ms. McAllister's testimony merely establishes the existence of var-

49. Some of the injuries attributed by the United States to flawed lifting and transferring have an unknown origin or no relation to lifting and transferring. For example, Beth S. sustained a fractured femur in April of 1993. Her injury was detected during morning care and it was surmised that it could have occurred while being lifted or changed. Exh. 85(a). Michael F. sustained a two inch laceration of his scrotum. His injury was detected during perianal care for a soiled Attend, and the injury could not be accounted for or related in any manner to a mechanical defect. Exh. 85, # MR 34–Sequence no. 0010D.

ious options from which a professional could choose, and provides no support for a finding that the Center's training substantially departs from accepted practice. *See Youngberg*, 457 U.S. at 321, 102 S.Ct. at 2461 (" '[T]he Constitution only requires that the courts make certain that professional judgment in fact was exercised. It is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.' ").

The record demonstrated that the Center's training for direct care staff in this area included the viewing of a videotape about proper body mechanics and demonstrations of various lifts. 34/232–33. The Center's training sometimes provided the opportunity for return demonstrations, but this varied according to the class size. 34/232. The fact that each new hire was not provided an opportunity for a return demonstration on each type of lift, however, is not significant. The record is clear that training was provided, basic lifts were demonstrated, and inservices were given thereafter on an "as needed" basis. 52/105; *see* Exh. 85. I also note that the Center's practice requires that lifts be performed by two persons, thereby providing an additional "check" on improper lifting techniques. As a result, I find that there has been an ongoing exercise of professional judgment at the Center to provide training with regard to lifting and transferring.

[88] To summarize, I find that the Center's provision of PT services meets accepted professional standards. The United States' expert lamented that the Center provides only "maintenance, pure and simple." But that is what the Constitution permits. *See Society for Good Will*, 737 F.2d at 1250. While it may be regrettable that the Center's residents do not receive the optimal PT services available nationwide, my task is to determine only whether the record demonstrates that the physical therapy services provided at the Center substantially deviate from accepted professional practices. I find that they do not.

6. GENERAL MEDICAL CARE

The United States contends that the Center fails to provide adequate continuity of care. Such care allows medical professionals to be "proactive" or preventive in nature, as opposed to being merely reactive. 41/146. Continuity of care is provided by a physician or group of physicians who provide medical care for an individual on a consistent basis for all of that individual's ailments. This long-term relationship between the medical practitioner and patient enables the medical practitioner to anticipate and identify problems which may arise. As a result, the medical practitioner can initiate treatment either to prevent or reduce the intensity of problems. 41/147.

Dr. Sulkes believes that proactive care is essential for the developmentally disabled population, and is "the reason to have physicians in a place like [the Center]." 41/147. He further opined that the Center's proactive care is inadequate because the size of the medical staff is too small and the medical record documentation upon which long-term proactive care is based is deficient. 41/148.[50]

Dr. Sulkes noted that the Center has four physicians, each physician with a caseload of approximately 120 residents. Dr. Sulkes believes this doctor/patient ratio is reasonable. 41/150. Vacations, holidays, sick time, and continuing education commitments raise the real average caseload, Dr. Sulkes contends, to 160 residents per doctor, which is too high because the physician must consider chronic problems, see more residents and consider long-range planning. 41/150.

Dr. Kastner, a pediatrician who works with the developmentally disabled, testified on behalf of the Center that the increased case-

50. The proposed findings of fact submitted by the United States regarding proactive medicine concentrate on the staffing ratios for the physicians and the inadequate documentation. *See* 84/XII. Mr. Bellomo testified that the Center routinely conducts the following: screenings for tuberculosis, the administration of flu vaccines, mammograms, chromosome studies, routine blood work such as chemistry and blood counts, pap smears, urinalysis, breast exams, and visual screening including glaucoma testing. 62/186. All of these measures constitute proactive medicine inasmuch as they are provided for the purpose of identifying an ailment before symptoms become apparent.

loads resulting from a physician being temporarily unavailable was not unacceptably high. He was "completely comfortable with a physician managing a hundred-nineteen residents and with that ratio going up when a physician is ill, on vacation, or at a continuing education program." 48/99. He noted that he has observed staffing ratios ranging from one physician per 96 patients, to one physician for 258 patients, 48/99, although he found the latter ratio unacceptable. 48/99.

Dr. Shertz, the Center's medical director and a physician, noted that the actual caseload for each physician varies, and that the residents with the "greatest medical problems have a better physician ratio." Exh. 632/32. Dr. O'Connor covers the Keystone living unit and her caseload is approximately 92 residents. Dr. Shertz' caseload is approximately 90 residents, and Drs. Lightbourne and Rayes have a caseload of approximately 130 residents. Exh. 632/33. Nor does coverage of another physician's caseload necessarily result in an equal division of that caseload among the three other physicians. The distribution is dictated by the demands of the caseloads which staff physicians have at the time that coverage is needed. Exh. 632/35–37. Dr. Shertz believed that the coverage provided was adequate and did not feel that another physician was necessary. Exh. 632/37–38. Dr. Shertz' comfort with the staffing ratios was partly attributable to the fact that the Center's physicians have a low turnover rate, which has enabled the physicians to become familiar with all of the residents over time. Exh. 632/41.

[89] I find that the Center's physician staffing ratio is within acceptable professional standards, and takes into account both the medical needs of the residents, as well as the familiarity of the physicians with those residents.

Dr. Sulkes' opinion that inadequate medical record documentation exists at the Center is grounded in his contention that that documentation does not accurately depict the resident's long-term care, and fails to coordinate and document input from consultants and/or hospitals. 84/XII–2–15. Dr. Sulkes opined that medical documentation enables the practitioner to grasp a long-term picture of the resident's health, and prevents medical problems from getting "lost in the shuffle." 41/157. Dr. Sulkes further described that there should be two levels of medical documentation: documentation of acute medical problems, and documentation on a chronic level. 34/2–3. He acknowledged, however, that the Center has three levels of documentation: daily progress notes for documenting acute medical matters; sixty-day notes for an overview of that two-month time period; and an annual review, which provides a summary of the chronic care for that resident. 34/3.

Despite these three levels of documentation, Dr. Sulkes concluded that the Center's documentation did not accord with accepted professional practice, and that it was incomplete, episodic and reactive. 41/149; 34/5. Dr. Sulkes opined that the documentation failed to establish follow-up on medical problems or acknowledgment of the resolution of a medical problem. 34/12. The United States contends that this inadequacy in documentation was noted in the January 1993 Inspection of Care survey. 34/12, *citing* Exh. 67/8–E.

Dr. Kastner agreed with Dr. Sulkes that there were problems with the medical records maintained by the Center. 48/142–45. He explained that the medical records were maintained on the residential living units, and that staff were familiar with and able to use the records. He noted that a resident's medical record did not include a list of active and inactive problems, but did include incident reports, and behavioral data. Laboratory data, procedure results and consultation reports also were maintained in the record, but there was rarely any documentation by the physician regarding such results or evaluations. Annual review notes were generally thorough and effective at maintaining continuity of care, he said, but could be more complete. Transfers from the Center to Mercy Hospital were noted as either incomplete or non-existent. Exh. HH, § G. As a result, Dr. Kastner opined that the medical records at the Center were "somewhat disorganized," *Id.* and the "most significant deficiency was the organization of the record." 48/145.

[90] Inadequate medical record documentation does not mandate finding that medical care is constitutionally deficient. Paperwork exists to aid in patient care, not to satisfy some independent constitutional duty. Dr. Kastner concluded that these were "[w]eaknesses at the Center I did not feel were significant and did not adversely affect the quality of [care]." 48/148; *see also* Exh. HH, § G. Furthermore, he opined that "[i]n general, these [summary notes] are thorough and effective at maintaining continuity of care," and "[o]verall, the medical records of clients at the Ebensburg Center are effectively used by the medical staff to provide care to the residents." Exh. HH, § G.

Dr. Kastner also noted that residents have one comprehensive record that addresses not only medical care, but also habilitative programming, social services and other areas of concern. 48/142. This comprehensiveness, he noted, is both "its strength and weakness" because some parts are emphasized at the expense of other portions. 48/142–43. He also acknowledged that, as a physician, he feels that the record should emphasize medical issues, although the Center "made a very clear decision to deemphasize the medical nature of the records." 48/143.

[91] I find the Center's medical record documentation, though sometimes flawed or inadequate, meets the acceptable professional practice standard. It is effective at maintaining continuity of care, which is how Dr. Sulkes defined proactive medicine. In addition, Dr. Kastner's objective testimony[51] shed light on what constitutes minimally accepted standards across the medical profession because it noted that the physician input into the medical record could be better, "just like in anyplace." 48/143. Despite guidelines which require extensive documentation by physicians, accepted professional practice tolerates documentation which does not necessarily meet those goals.

7. GENERAL NURSING CARE

The United States contends that the Center provides inadequate nursing care in the following respects: (1) acute and chronic nursing care does not meet professional standards; (2) nursing responses to injuries have been delayed; (3) nursing care plans are inadequate; (4) nurse recordkeeping is inadequate; (5) nurses need additional training; and, (6) the role of the Ebensburg Director of Nursing is too limited. 84/XII–20–29.

The United States' expert in nursing care, Ms. McGowan, asserted that acute and chronic nursing care did not meet professionally accepted standards. 35/168. In particular, she asserted that nursing care failed to identify or assess significant health care problems and formulate adequate treatment interventions for residents. 35/170–01. She claimed that, as a result, the health of some residents has deteriorated and necessitated hospitalization at times. 35/168–69.

[92] Ms. McGowan opined that nursing care assessments, which should be initiated when a resident's health is compromised or at risk, are inadequate because they fail to include such basic nursing measures as auscultation of breath sounds, measurement of abdominal girth, testing for occult (hidden) blood in vomitus or stool, or a resident's vital signs. The failure of the nursing staff to initiate tests of vomitus or stool for occult blood does not show deficiencies in nursing care. Carole Sponsky, the Center's Director of Nursing, explained that tests for occult blood are performed by the laboratory pursuant to the order of the physician. Exh. 638/22. This testing is diagnostic, and may be executed by a registered nurse only as part of a medical regimen prescribed by a licensed physician. *See* 63 P.S. § 212. There was no evidence that nursing staff failed to carry out testing as directed.

The remainder of the United States' evidence about acute and chronic nursing care concerned the treatment of seven residents who died between 1990 and 1993, and testimony from a Center nurse acknowledging that assessments need to be more "in-depth." Exh. 638A/85. It is undisputed that nursing assessments can be improved at the Center.

51. Dr. Kastner scrutinized the Center and was willing to acknowledge not only its pros, but also its cons. I note his past experience as an expert consultant for the Department of Justice, various states and other entities. 48/27.

The relevant question, as in other areas, is whether the assessments meet minimum constitutional standards.

[93] I credit the testimony of Marcia Stiles. Ms. Stiles, an employee of the Center for at least fourteen years as a registered nurse supervisor (RNS), conceded that she would like to see more "in-depth" assessments and documentation of such assessments. Nonetheless, she opined that nursing care was adequate. Exh. 638A/85–86. Carole Sponsky, the Director of Nursing, echoed this sentiment. Exh. 636/41. In contrast, Ms. McGowan could find nothing at the Center that was adequate. I am skeptical of such a blanket condemnation. The Center has 472 residents who receive nursing care, and the occurrence of seven deaths over a three-year period, while regrettable, does not demonstrate in and of itself constitutionally inadequate acute and chronic nursing care.

The United States also alleges that the Center's nursing care is inadequate because there have been delayed nursing responses to injuries; one resident, James W., was seriously injured by a resident who was hitting and kicking him. An RSA discovered the incident at approximately 8:30 a.m. and failed to report the same to the nurse until approximately 11:00 a.m., when James W. complained of chest pain. The nurse assessed James W. and observed bruising of the left lower rib cage and noted a "clicking" sound upon palpation. The nurse notified Dr. Shertz at 11:15 a.m., he ordered James W. sent to Mercy Hospital for evaluation, and an ambulance transported James W. to Mercy Hospital at 12:30 p.m. A CT scan at the hospital revealed a ruptured spleen, and a pneumothorax. A splenectomy had to be performed and a chest tube inserted. Exh. 501(dd)

[94] The United States contends that such delayed response was unacceptable in light of professional standards. The initial delay in reporting the incident, however, was attributable to action by the RSA, and not the nursing staff. Exh. 501(dd). Therefore, nursing care cannot be found constitutionally remiss on this basis. Nor do I find the lapse of time between the report to the nurse and the nurse's report to Dr. Shertz—fifteen minutes—a substantial deviation from accepted nursing practice which requires the nurse to assess the resident and then advise the medical practitioner of her findings. Further, no evidence showed that James W. suffered any additional harm due to the delay in treatment.

[95] The United States also points to alleged delayed responses in nine other recent incidents as further support for its contention that nursing care is inadequate. Exh. 790. Review of that exhibit, however, again shows that the delay in seven of the nine instances was attributable to the RSA staff, not the nursing staff. *Id.* Again, this cannot be the basis for finding nursing care constitutionally deficient. The evidence is insufficient to establish that the nursing care is inadequate because of delayed responses to injuries.

Documentation by the nurses at the Center is also constitutionally inadequate, according to the United States. The United States asserts that Ms. Stiles admitted the inadequacy of the recordkeeping. The United States also points to Ms. McGowan's testimony that in reviewing the records of residents, she "often had to search in as many as four or five different places to track one piece of information." 35/172. Ms. McGowan stated that the "[c]harting system is faulty. The nurses are not using accepted patterns." 35/180.

Ms. McGowan's testimony, however, failed to shed any light on what constitutes accepted minimum professional "patterns" for nursing care documentation. Because nursing documentation is used by both the nursing staff and the physicians, it is logical that nursing documentation would be consistent with the physicians' documentation and include entries on both an acute and chronic level. *See* 34/2–3 (two levels of medical documentation for medical practitioners) and discussion of physician proactive care, *supra.*

In this case, the evidence establishes that nurses document on two levels as well. Nursing documentation regarding acute care is set forth on the interdisciplinary progress notes addressing day-to-day matters. Exh. 637/13–14, 27; Exh. 622/49–54. Nursing documentation regarding chronic care is set

forth on the 90–day summaries. Exh. 637/27; Exh. 622/55. In addition to these two types of documentation, there is a daily log on each unit and a "Cardex" for each resident that relates the treatment ordered for that resident by the various disciplines. Exh. 636/72. There are also "quarterly physical assessments, nursing physical exams, ... and annual in-depth assessments ..." Exh. 638A/86.

[96] While it may have been onerous for Ms. McGowan to search through the file to find such information, she does not work at the Center and therefore lacks the familiarity that would come from using the chart on a regular basis. Her personal viewpoint does not warrant a finding of constitutional inadequacy. Neither does the United States' assertion that Marcia Stiles "agrees that Ebensburg nurses need to better document their nursing assessments." 84/XII–27. Ms. Stiles stated that she would "like to see more in-depth assessment. I'd like to see documentation showing that assessment." Exh. 638A/85–6. She then elaborated that there is "a lot I'd like to see." *Id.* "I'm not criticizing what we're doing now, it's just that it can always be better." Exh. 638A/86. I find Ms. Stiles' testimony insightful. She finds the documentation acceptable, but she acknowledges that it can be improved. Undoubtedly it can. But the fact that there is a better way to accomplish a task is not tantamount to a constitutional violation.

Next, the United States submits that the nursing care is inadequate because nursing care plans do not meet accepted standards. Instead, the nursing care plans consist of nursing diagnoses which are not supported by data, and objectives which are not capable of being measured. 35/190–91. In addition, the United States notes that the nursing care plans are not individualized to identify, and provide for, each resident's needs, but instead consist of general instructions to direct care staff. *See* Exh. 638/exh. 30. As an example of a nursing care plan which fails to meet accepted professional standards, the United States points to the nursing care plan for Tim P., a resident confined to a cart at the Keystone unit.

The Center's nursing care plans are general, *see* Exh. 638/exh. 30, but the nursing staff modifies the plan to suit the residents' individual needs. Exh. 637/65. In fact, the nursing care plan for Tim P., which has been applied since March 1987, has been individualized, specifically references his cart, and addresses the potential for skin breakdown. Exh. 973. This nursing care plan for skin breakdown has been in effect pursuant to consistent reviews for its continued application. *Id.* The mere fact that it has been on Tim P.'s chart since March 1987, is of no significance. Tim P.'s inability to bear weight (*i.e.*, he has been confined to a cart) has been a constant. He therefore remains at risk for skin breakdown, and it is logical that the nurses continue to monitor him for signs of this condition.

[97] The Center's standardized nursing care plans for problems frequently encountered by its residents, standing alone, would not comport with the accepted professional practice, which requires individualized plans. However, because these standardized plans are modified, amended and tailored for each of the Center's residents, I find that the plans fulfill the requirements of accepted professional practice and cannot be deemed constitutionally deficient.

The United States also asserts that the Center is deficient because the nurses lack sufficient training. 35/210. The United States cites Ms. Sponsky's deposition testimony that "training is important for nurses" (Exh. 637/88–89), and faults the Center for not requiring nurses to have any educational background or experience in working with the developmentally disabled at the time of hire, nor requiring additional training once hired. Exh. 637/82, 89. The Center's collective bargaining agreement with its nurses provides for the allotment of a certain sum of money for training. Exh. 624/29. The United States suggests that the Center's assistant director, Mr. O'Brien, acknowledged that "most nurses do not use that." Exh. 624/29.

[98] The United States' position that the nursing care is deficient because of inadequate training constitutes nothing more than an assertion that mandatory continuing edu-

cation for the nursing staff would be better than the current practice, payment for optional training outside the Center. Whether another set of rules regarding training and/or mandatory continuing education for nurses would be better is not the issue that is before me. The Center's practice regarding additional training for its nurses is not a substantial departure from accepted professional practice. Pennsylvania's Professional Nursing Law, 63 P.S. §§ 211, *et seq.*, does not require the acquisition of a specified number of continuing education hours per year for license renewal. *See also* Exh. 624/29–30. Moreover, the record demonstrates that the Center does provide additional training, both optional and otherwise, for its nurses. As noted previously, the Center's collective bargaining agreement with its nursing staff includes an allotment for each nurse to obtain training outside of the Center, and some of the nurses take advantage of this opportunity. Exh. 624/29–30. In addition, training is offered at the Center on both a formal and informal basis throughout the year. Exh. 638/69. While the United States contends that Mr. O'Brien acknowledged that most nurses do not use the money for outservice training, I note that his deposition testimony did not specifically refer to the Center's nursing staff, but instead was a statement applicable to nurses throughout the Commonwealth.

Finally, the United States contends that the nursing care is inadequate because the role of the Center's Director of Nursing is too limited. It submits testimony from the Center's Director of Nursing and another nurse at the Center as support for this contention. *See* 84/XII–29–30. The United States offered no evidence to establish what constitutes an acceptable standard for a Director of Nursing position. I cannot create out of whole cloth what the acceptable standard should be.

D. *Adequate Training And Freedom From Undue Restraint*

The next category of "liberty interests" secured by the Constitution that the United States claims has been violated at the Center concerns the right to adequate training and freedom from undue restraints. According to the United States, the administrators of state public institutions must provide training programs and other services that are "based upon appropriate assessments, developed to meet residents' individualized needs, consistently implemented, and designed to teach residents those skills necessary to live more normally and to avoid developing or exhibiting dangerous and other anti-social behaviors." 87/13.

The United States argues that the Center's training and behavior management practices are deficient in (1) assessment; (2) program development; (3) program implementation; and (4) program review. 87/15. The United States claims that the Center's living areas are barren and lack meaningful activity; the Center generally fails to develop and implement training programs, and those programs that do exist are inadequate (they are not appropriately revised, skills training programs lack psychology input, occupational therapy services are inadequate, and the speech and hearing staff at the Center fail to meet the residents' needs); the Center's behavior management services are deficient and do not comport with accepted professional standards; the Center has insufficient psychologists to provide services that meet accepted standards; the behavior programs are not individualized, effective, properly implemented, properly reviewed or properly revised. *See* 83/VI–1 through VII–60.

This failure to provide adequate training and behavior programs, the United States claims, has resulted in residents suffering "both serious injury and undue restraint" (87/13–14) in the following respects: 1) the Center's failure to implement proper training programs has resulted in the deterioration of residents' self-care skills and/or has failed to provide residents with the ability to enhance their level of functioning; 2) the Center has failed to implement behavior training programs and/or therapeutic living environments to address maladaptive behaviors, and residents are harming themselves and others; and 3) instead of developing training programs to address maladaptive behaviors,

the Center relies upon physical and chemical restraints to control the residents.[52]

[99] A number of these issues are addressed elsewhere in this opinion, in part or in full (*e.g.*, the Center's duty with respect to safety; the Center's duty with respect to training; the issue of chemical restraints), and those discussions will not be reiterated here. For the reasons explained in the discussion above concerning physical therapy services, I reject the United States' contention that the Center is under a constitutional duty to provide services that *enhance* the residents' level of functioning. *See Society for Good Will*, 737 F.2d at 1250 ("We conclude that [the deprivation of a liberty interest] exists when institution officials fail to exercise professional judgment in devising programs that seek to allow patients to live as humanely and decently as when they entered the school, *i.e.*, when there is no individually oriented, professionally devised program to help [the] residents *maintain* the fundamental self-care skills *with which they entered the Center.*" (*citing Youngberg*, 457 U.S. at 327, 102 S.Ct. at 2464)) (emphasis added).

As with all other areas in this case, the parties on both sides presented expert testimony concerning training programs, the treatment of maladaptive behaviors in the mentally retarded population, and the provision of behavior management programs. The United States' three psychology experts (Dr. Stark, Dr. Russo, and Dr. Amado) and the Center's psychology expert (Dr. Reid) all agreed that "the more programming with meaningful activities that go on, generally the fewer accidents and injuries that occur." 51/35. *See* 43/53 ("[I]f you fail to provide adequate training programs to anybody, any human being, what happens after a while is that inactivity, boredom ... withdrawal, self stimulation, frustration, anger begins to set in. That leads to ... self injurious behavior."). Beyond this basic starting point, however, the parties' positions widely diverged.

At trial, Dr. Stark testified on behalf of the United States about the progress that has been made in the provision of services to mentally retarded individuals (43/67–71), asserting that care providers have "gotten away from custodial care." 67/71.

> Custodial care, meaning where you feed them, you clothe them, you just take care of their very basic needs. We're saying that that's not enough. We've gone to teaching, adaptive functioning skills. People have a right to habilitation, they have a right to training.

67/71–72. Dr. Stark's testimony, however, while certainly well-intended and a fine demonstration of the care to which many professionals aspire, provided little assistance to the Court in determining the applicable constitutional standard with respect to minimally adequate training and behavior management programs. *See* 67/85 ("My second concern is that the environment at Ebensburg is one which could be described as largely custodial as opposed to a teaching environment.");

52. The general tenor of the United States' position on these points is best summarized by its description of the alleged "pattern of harm" at the Center:

> This pattern of harm is pervasive at [the Center]. There are too many individuals with special needs confined in too small a space with too few staff and a lack of meaningful and stimulating things for the residents to do. This cramped and monotonous existence would be difficult for most individuals to endure for a prolonged period of time. It has been dangerous and destructive for the mentally retarded individuals who have been subjected to decades of this existence at [the Center]. Residents live in groups of approximately twenty-four individuals, with whom they spend the majority of their time, day after day, idle in large dayrooms on the living units. The residents do not have adequate activities and staff interaction, particularly during mealtimes, medication administration, and afternoon and evening hours. Significant periods of the day are consumed waiting for toileting, and dressing, for the many residents for whom they are responsible. Rather than staff using these occasions as learning opportunities, these duties take on a custodial function. The scanty block of time during weekdays devoted to "program" hours off the living units is similarly wrought with much idle time for a number of individuals. Often, staff spend so little time with residents that programming is rendered meaningless.

87/16 n. 7. *See also* 87/14 ("Behavior management programs are grossly inadequate to address residents' serious behaviors, many of which have been created by the Defendants' deficient care and long term institutionalization in the first instance.").

67/223 ("And it simply is very hard to work in this environment to accomplish the kinds of things that can be accomplished. There's too many people, there's no individualization, and there's no hope that—the attitude is certainly not an habilitative attitude or it's an environment, custodial care."); 67/224 ("The point that I'm making here and the bottom line is that an awful lot can be done with that kind of money if you re-think and re-allocate how things are done, which are—we're losing ground here. People are getting hurt at an accelerated pace. And they're going to continue to get hurt because the aggression I feel is increasing; because what's happened is that people feel there's nothing that can be done and there's nowhere to go, and there's a loss of hope.... [T]hese individuals have had their body taken, but they still have a heart and a soul and a mind. And we need to attend to that.").[53]

According to Dr. Stark, he reviewed a large number of the Center's "Incidence Occurrence Reports" (a form at the Center which lists the name of a resident, categorizes the type of injury that has occurred, contains a narrative description, any medical interventions that took place, and what recommendations were made (43/101–02)), and determined that one of the reasons for what he characterized as "a lot of aggressive behavior, self injurious behavior" (43/105) at the Center was that "there's no meaningful activity going on. There's no training, there's no habilitation. And that causes that ... cycle of harm." 43/106. *See also* 43/120 ("Lots of times people, when you just get them doing something meaningful, enjoyable, and you could get rid of a lot of these behaviors."); 43/125 ("Aggression breeds aggression. People are both victimized and they're victimizers. It's almost as if there is a climate of aggression at this facility, and it's disturbing to see that it continues to be sort of a way of life there. It's like it's an accepted thing or it's like this is what mental retardation is supposed to be like, and it's not."); 43/163 ("This [type of activity] is what we did twenty years ago. This kind of thing is like walking back in time for me, into the early seventies. This kind of program, it's not programming; it's simply trying to keep somebody busy and putting something in front of them.").

Dr. Stark acknowledged on cross-examination that he could not point to any objective standard in support of his conclusion that too many injuries were occurring at the Center, and that this was simply his personal, professional opinion. 41/27.[54] In addition, much of Dr. Stark's testimony appeared to be offered for its shock value, or was conclusory and failed to provide an informative analysis of the situation.[55] Because of this, I accord little evidentiary weight to his testimony.

53. Dr. Stark acknowledged on cross-examination that he (as well as the associations with which he works) favors community placement for mentally retarded individuals over an institutional setting. 43/234. This bias was apparent throughout Dr. Stark's testimony. *See* 43/235 (Q. "Do you also remember, Doctor, criticizing Ebensburg because you say there is, quote, no mandate to move people out." A. "Yes, sir; I do remember that. And that was described to me by Mr. O'Brien, who I asked him if they were moving people out, and I was told that they were not and that that—that Ebensburg as an institution would always have to be there because there are not services in the community, which I disagree with."); 43/236 ("You asked me what my professional feelings are, the feelings of my association, the feelings that we have promulgated, our policies throughout the country, and in law. We gave an award to the State of New Hampshire because it's closed all of its institutions. State of New York has made a mandate to close theirs by the year two thousand. This is happening around the country, to close institutions, particularly larger institutions."); 43/237 (Q. "Doctor, if you were giving an unbiased report, why weren't you able to think of even a single positive thing at Ebensburg when I asked you at the deposition to name one single positive thing?" A. "Single positive thing?" Q. "That's correct." A. "I don't know; was that the end of the day?").

54. Dr. Stark also acknowledged on cross-examination that the Center had recently revised its reporting criteria for injuries to include incidents that were "no injuries and very minor injuries." 41/30. This change in reporting to include additional incidents (previously unreported as "incidents") may have contributed to the alleged increase in injuries about which Dr. Stark testified.

55. For example, Dr. Stark made reference in his testimony to "Doug":

> Another person, thirty-three, Doug, bit off three fingers of his hand in 1984, bit them off. All of his teeth were extracted following the incident. A lot of self injurious behavior, has not progressed ... I observed Doug during my

At trial, the Commonwealth presented compelling testimony by an expert in psychiatry, Dr. Hauser, about the complexities and the competing concerns in providing treatment for mentally retarded individuals:

> [A]fter a process of the primary psychiatrist and even a second opinion, there might be controversy about management. There might be controversy because of the natural tendency for polarization. You'll have the behavioral psychologist saying, "We should tackle this behaviorally"; and you have the medical doctors saying, "We should treat this with medication more aggressively"; and then you might have an advocate for the client saying, "Don't use medication, you're just trying to sedate them"; and then you might have a guardian saying, "What are the whole bunch of you doing," ...—so people are stuck, people are in conflict. There are competing principles, and you might call in someone like me to try to help everybody achieve a consensus and focus back on the client and try to think of a treatment plan.
>
> * * * * * *
>
> There is definitely a tension between the two modalities of treatment [behavioral treatment and mental illness treatment], and that tension can reach the point of an adversarial process; and it has happened in the field of care for people with retardation over decades that that polarization has switched back and forth, and it has eventually come to rest now in the effort to have a combined approach or a comprehensive treatment plan of which behavioral modalities are one component and medication modalities are another; and it takes some effort and teamwork to get people to coordinate the care from the two different disciplines.
>
> But there is inevitable tension because some people will believe that further behavioral effort will work and allow to you [sic] avoid medication, but those same people are at risk for avoiding medication when it's appropriate.

50/56, 81–82.

The evidence at trial revealed that within this "polarized field" of care for mentally retarded individuals (where opinions differ widely concerning the appropriate training and treatment to provide to any given individual), the Center has an interdisciplinary system in place which allows it to exercise professional judgment and provide training and behavioral management services within the sphere of acceptable professional prac-

> tour, and he's—an extremely agitated individual. The type of individual that I've treated, written about, trained about, etcetera. And he's been on the scene, behavior program since March of '88. That's five years or so. There's changes in time, but most of that is medication, not much of a change in behavior program.

43/150. On cross-examination, however, the following exchange took place:

> Q. Doctor, would it surprise you if I told you the medical records indicate this history from him: He bit his index finger, he went to the hospital, it became infected, it was amputated at the hospital. He nibbled on his thumb and mutilated it; that had to be amputated also at the hospital. The doctor at the hospital—doctor recommend that his teeth be pulled, and they were pulled at the hospital.
>
> A. That's fine. I think that's a pretty drastic move by any doctor to recommend that a person with mental retardation have their teeth pulled because you can't set up a behavioral program to keep them from biting their fingers.
>
> Q. You do understand [the Center has] no control over Mercy Hospital ...
>
> A. I think you ought to have control over the hospital. I think somebody ought to stand up for that individual's rights and say to that doctor who recommended that that that not be done.

41/63–64. *See also* 62/147–49 (following amputation of right index finger while in Mercy Hospital, on "the first post op day, despite high doses of sedation, [Doug] became very difficult to control, and he was subsequently found to have bitten his amputation site and both his thumbs.... It was feared that his self-abusive behavior would result in a loss of all his digits. This was thoroughly discussed with the family [by the doctors at Mercy Hospital], and it was agreed that he should undergo surgical removal of all his teeth.... the night prior to the full mouth dental extraction [at the hospital]—his behavior became erratic and very difficult to control; and he subsequently autoamputated the distal phalanges of his right thumb with his teeth and also bit the left thumbnail off. The following morning the distal thumb was surgically amputated and the left thumbnail completely excised. Full mouth dental extraction was simultaneously performed ...").

tice. For each concern raised by the United States' experts, the Commonwealth responded with credible expert testimony which demonstrated that professional judgment had, in fact, been exercised, and that the care provided did not substantially depart from acceptable professional practice.

Dr. Reid, an expert in applied behavior analysis, behavioral disorders, skill acquisition training and psychology services to the mentally retarded, testified at trial on behalf of the Commonwealth defendants. Dr. Reid, who in the past has been retained by other facilities involved in Department of Justice investigations and has found certain institutions to be *inadequate* (51/42), provided a broad overview of the psychological services provided at Ebensburg and compared them to the services provided in other institutional facilities and community-type agencies. 51/11. Dr. Reid explained that he made two separate visits to the Center to "evaluate the environment and the degree to which people living at [the Center] were participating in meaningful therapeutic activities" and to collect data "regarding the degree to which psychological programs for people with severe behavioral problems" were implemented by the Center's staff. 51/8.

With respect to the United States' contention that the Center is barren and lacks meaningful activities, Dr. Reid testified that he "found the treatment environment overall, based on the data we collected, comparing it to other institutional facilities and community-type agencies, that the degree to which people living at Ebensburg Center are participating in what we call active treatment or meaningful purposeful activities, while there's certainly room for improvement, it's representative of about the average in the field." 51/11.[56]

As Dr. Reid explained, the Center is organized along the lines of a "unit system":

> A unit system is ... [a] method of operation that really became popular in the 1970's, and the purpose there was to get away from the clearly delineated—what became isolated—roles of different professionals. Prior to the unit system there were a whole lot of problems in service settings in which the psychologist would come in and do one thing, the occupational therapist would come in and do one thing, and no one had any idea of what the other person was doing; and there was no person really responsible for coordinating all those services for one particular client.
>
> The unit system generally was established to try to get a better coordination of all those services.
>
> * * * * * *
>
> [I]n our field not many things are perfect; and the unit system certainly isn't perfect, but I think the biggest advantage of the unit system is that it does allow for better coordination of services across disciplines.

51/17–18.

The Center has three levels of behavior programs, which are categorized according to the restrictiveness of the intervention. Not everyone at the Center has a serious behavior disorder or needs a behavior program plan. 51/16. A nonrestrictive program is designated as a "Level One." A "Level Two" program is more restrictive, and a "Level Three" program calls for intervention of physical restraints if a resident's maladaptive behavior poses the risk of harm to himself. 51/10; 37/26; Exh. 592.

The Level Two and Level Three behavior programs follow standard forms, Exh. 592, and are tailored to the resident. For each resident, the program identifies the undesirable behavior, the positive reinforcers for that resident, and the situations which help predict the occurrence of that behavior. The program also contains training of adaptive

56. Dr. Reid acknowledged that "although the degree to which their residents are involved in meaningful activities is representative of the average it could certainly be improved. The less time people spend doing nothing, the better." *Id. See also* 51/23 ("This is not to say that there shouldn't be improvements. I think there should, but that's a kind of service delivery that never goes away. I mean keeping individuals with severe and profound mental retardation involved in meaningful activities is very difficult. It takes constant effort. So I would not agree that they [the residents] were perpetually in a situation of nonactivity. But I think it's an area that Ebensburg is doing relatively well, in light of the task at hand.").

behaviors (rather than merely attempting to eliminate undesirable behaviors (51/21)), as well as "DROs" (differential reinforcement of other behavior),[57] which the psychology staff create and implement. 51/21. Since behaviors such as biting, self-injurious conduct, aggression, kicking, and hitting are not limited to a single resident, it is to be expected that some behavior plans will be similar. *See* Exh. 856.

Dr. Reid specifically reviewed all of the plans for residents with the most severe behavior problems, and testified that "all of those were individualized." 51/21 ("There were individual differences in behavior definitions listed in the programs. There were individual differences in the reinforcers to be used or the consequences for desirable behavior. There were differences in the situations likely to evoke behavior problems. There are a lot of similarities across the programs, too, but there were differences.").[58] Dr. Reid also concluded that psychologists are involved in the development of "positive habilitative plans." 51/24–25.

[100] The behavior plans are implemented throughout a resident's day—during leisure time as well as during active treatment. "Active treatment" is a means of providing stimulation to a resident to promote the acquisition or maintenance of skills and to reduce the occurrence of maladaptive behaviors. 51/44–45.[59] Most professionals now agree that such treatment should attempt to incorporate the use of "age appropriate" materials (for example, avoiding the use of a child's toy in a training program for an adult). This cannot always be achieved, however, because some residents have mental retardation of a severe and profound nature, and some age appropriate materials do not provide safety features that are found in age inappropriate materials, such as those designed for young children. 51/35–36.[60] Most workshops, day activity centers, group homes and schools for mentally retarded individuals still utilize age inappropriate materials (51/36), and I do not find the Center's continued use of such materials a substantial departure from acceptable professional practice.

I further note that training is provided by the Center at the Gary Bain Center, a sheltered workshop that serves as a vocational program. Approximately one hundred individuals attend the workshop (some nonresidents participate in the program, but the vast majority are residents of the Center), Mondays through Fridays, from approximately 9:00 a.m. to 3:00 p.m. 37/17; 51/173. Dr. Russo, testifying on behalf of the United States, found the Gary Bain Center to be a

57. As explained by Dr. Reid, "if an individual is engaging in aberrant or maladaptive behavior, say aggression, then the DRO component of a program would be that we would want to reinforce that person for any other behavior besides aggression, with the idea being we could increase other behavior; as other behavior increases, the aggression is going to go down." 51/22.

58. In responding to the criticism by the United States that many clients have only one behavior program even though they have a multiplicity of problem behaviors, Dr. Reid explained, "[I]t varies from client to client and need to need. Sometimes individuals will need separate programs for separate [problems]; sometimes one program is sufficient for all the behavior problems. In some cases particular behavior problems are part of what we call 'response class.' They all serve the same function for the individual, even though their topography is different; and in that case one program would be sufficient. So it's an individual thing. In some cases one program is sufficient, and in other cases they're not." 51/31. It is a matter of professional judgment.

59. Dr. Reid did not find it problematic that the Center has been cited in state surveys as failing to provide active treatment to some residents, because the Center has never been "decertified" (which would occur if the Center was truly not providing such services). 51/83. *See also* 51/82 ("You know, I've gone through a lot of ICF state surveys. I have not in the Commonwealth of Pennsylvania. I've never seen a survey except one time in my twenty years in the field where they didn't cite anything. And I've experienced a lot of surveys. So, in all honesty, I don't put a whole lot of weight on ICF level deficiencies. If a facility has been decertified or is going through the steps to be decertified, then I would look at that carefully . . .").

60. *See also* 51/95 ("By definition if it's a toy, unless it's an adult toy, it's not going to be age appropriate. It might be therapeutic, it might not. By definition, it's age inappropriate if it's a children's toy being used by an adult.").

positive aspect of the Center, and stated that it "is a program that is very representative of supported work programs for the mentally retarded." 37/120. *See also* 51/38 (the Center provides a variety of paid employment training opportunities for the residents).

The Center's primary data collection system with respect to behavior management, which is "relatively standard in the field" (51/28), involves the staff recording "on a twenty-four hour basis the frequency of target behaviors, behaviors that have been defined through the program plan." *Id.* For individual, special cases, the Center may utilize other data collection systems as well, "which is a pretty standard process, too; to have one overlying recording process, and then in individual cases bring in others." 51/28–29. The intensity or duration of behaviors are not documented as part of the Center's standard practice, but most schools, group homes and institutions do not maintain such data. 51/98–99. The data collection at the Center is adequate to provide acceptable treatment. 51/152.

With respect to the review approval and monitoring process for treatment plans (which Dr. Reid characterized as "excellent"), the Center is properly structured, with its "key people" reviewing programs beforehand, the behavior management committee meeting regularly, and the senior staff at the Center reviewing accidents and injuries. 51/36, 120–21; Exh. 93. Credible evidence was presented at trial that the staff implements the behavior programs effectively. 51/112.

In deciding whether medication should be utilized as part of a resident's program, "the model of service delivery at Ebensburg, as well as most agencies in the country, is a team process" (51/30), and the psychologists are involved in making the decision. As Dr. Reid explained:

> [A] psychologist certainly should be involved in the process through which it is decided whether medication is or is not going to be used in regard to behavior problems. It's not the psychologist's responsibility to prescribe it, or make a final determination; that should be the psychiatrist. But we certainly want a lot of individuals to have comments and offer recommendations.

Id.

[101] In light of all of the foregoing, I find that the Center's interdisciplinary approach to providing training and behavior management services does not substantially depart from acceptable professional standards. In reaching this conclusion, I credit the expert testimony of Dr. Reid, who compared the services at Ebensburg with those provided at other places of care for mentally retarded individuals. 51/9–10. The "weaknesses" at the Center are an unfortunate part of the difficult task that confronts care providers in this field, both institutions and other care environments. 51/162–63. This is not to say, however, that because things are "bad" elsewhere, the problems at the Center are acceptable. As Dr. Reid explained:

> Some of the weaknesses that I found at Ebensburg are characteristic ... of weaknesses in lots of different types of programs serving groups of people with severe disabilities, be it institutions, schools, group homes or whatever.
>
> Now, I'm not saying, getting back to your other question, if you find a whole bunch of agencies that are providing, in my opinion, poor services, does then finding one agency providing similar services make them adequate; no, I wouldn't make that conclusion. What I'm saying is, you know, our technology or lack thereof, if you will, of providing services to people with severe disabilities—and keep in mind I don't mean to be lecturing—but people at Ebensburg Center and the other agencies I'm talking about, they are a very small portion of the people with mental retardation. They have the most serious type of mental retardation and other types of problems.
>
> Our ability to provide an optimal therapeutic environment for them, frankly, is not real good. And I can go into what's considered the best school program that I know of, and I can find, a lot of time, a lot of weaknesses; so that's kind of how I'm evaluating it. If the weaknesses I found on [sic] the Ebensburg Center were much more serious or much more prevalent than

what I typically see in applied settings, then I would be very seriously concerned; and I have found those in agencies, but I did not find those at Ebensburg.

* * * * * *

What I'm saying is it's within the realm of standard practice, and it's not just—keep in mind the day treatment programs at Ebensburg were compared to school programs serving people with severe disabilities. The living units were compared to other living units in other institutions. It's not just an institutional area.

What I'm saying, if you take all the observations in the classroom—and I do qualify it, all the classrooms, thirty or forty something classrooms were in North and South Carolina, more restrictive part of the country.... The institutions were in a lot of different states. But Ebensburg services were at a par with what the average of those services in all those other sites were.

51/161–62.

The injuries that occur at the Center, which are sometimes quite serious and obviously not desirable, are "not unusual by any means" in similar care settings. 51/173.[61] The staff at the Center is "concerned and involved" (50/126–27), and expects the residents "to be able to benefit from the staffs' interaction and from the treatment modalities." 50/97.

[102] The United States claims that the Center does not utilize a "functional analysis" in its treatment of the residents' maladaptive behaviors, and that the failure to utilize functional analysis in conducting a behavioral suppression program constitutes malpractice.[62] Functional analysis endeavors to ascertain the function of a certain behavior for a particular individual—a "way in which causation is potentially inferred for a behavior problem, and it's a way in which one attributes a possible treatment to the behavior." 37/43. *See also* 51/26; Exh. 30/8. Ideally, if it can be ascertained why a resident resorts to maladaptive behaviors, behavior management plans can be developed which might be more effective in decreasing the incidence of maladaptive behavior and replacing it with alternative acceptable adaptive behavior. Exh. 30/9.[63]

Functional analysis does not always identify the cause of the behavior. Experts in the field do not agree on the degree to which it actually results in better treatment, and whether a formal functional analysis is necessary in order to exercise professional judgment in providing treatment. 51/26–27, 103. The Center began to perform formal written functional analyses on some of its residents beginning in March of 1993, and less formal, broadly defined "functional analyses" (as utilized in Pennsylvania's 1988 statewide policy on this issue) have been performed at the Center for "quite some time." 51/100–02; Exhs. 963, 964.

[103] The United States complains that the Center does not have psychologists on duty on weekends and nights, and that the Center does not have enough qualified psy-

61. *See also* 51/125 ("Now, if you take people with severe disabilities, with severe behavior problems—and I assume you're taking the fifteen people whose programs I reviewed ...—those reflect the most serious behavior problems at Ebensburg Center; and their current rate of injuries resulting from those is one per person per month. This might sound crude; that's not an unusual rate of injuries for those types of behaviors, for the most severe behavior disorder cases out of all of Ebensburg's client population. That would not be unusual. I—I'm not saying it's acceptable. Serious injuries are not acceptable, but they occur. That would not be unusual in a similar population in any setting I'm aware of, one per month."); 51/14 ("[M]y experience over the last twenty years is that [the mentally retarded population is] more accident-prone; and it seems to me to be expected, given the high incidence of seizure disorders, the many types of physical disabilities that interfere with coordination.").

62. Malpractice, as explained a number of times already in this opinion, is not the governing standard in this action. Here, again, the United States chose to present evidence that was not tailored to the applicable constitutional standard.

63. The Pennsylvania Office of Mental Retardation's Statewide Behavior Management Policy, dated December 1, 1988, identifies functional analyses as a component of developing a formal habilitative plan, including the development of alternative acceptable adaptive behaviors. Exh. 30, p. 1.

chologists. The Commonwealth's expert responded:

> Well, I can assume that [having psychologists on duty on weekends and nights] could improve services; it would be extremely rare. I know of no residential agency in a community setting or state institution that has that. I mean what's generally expected is that there is some administrative person or senior person on administrative watch or on call that can be contacted on the weekends, twenty-four hours a day, if a psychologist is needed. Typically, it would be that person's responsibility to pull in the psychologist.
>
> * * * * * *
>
> I do not find a problem with the number of psychological staff [the Center has]. I based my conclusion on the finding that I thought their services are within the realm of acceptable practice. So then I assumed if their services fall within that realm, that they have sufficient staff to do that. I also assumed they could probably do more if they had more staff.

51/19–20. *See also* 51/129, 135. I find that the Center meets the constitutional minimum in this regard.[64]

With respect to the United States' contention that the Center does not properly address the problem behavior of biting, the Commonwealth responded with credible evidence that "many people manifest the behavior of biting, and it is a challenging problem to deal with in a facility like Ebensburg." 50/125. *See also* 51/14. Regardless of the treatment employed or the vigilance of the staff, the behavior cannot be eliminated in some individuals. 50/125–26; 51/14. Also, when medication and restraints are lowered, there is a corresponding rise in biting incidents. 50/126 ("If you have a certain level of biting and then you alter the level of one of the treatments, then it's inevitable if they're related, that the biting will go up or down depending on the impact on that particular person; and that you should assess that, and then weighing the risks and benefits of either leaving the medication low and having the behavior high or ... having the medication high and then have the behavior go lower again."). The record further reveals that, to the extent that "biting" has been identified as a target behavior in any given resident, the Center has an adequate treatment plan in place, including documentation, review of injuries, and follow-up action. 51/146–47.

[104] The United States challenged the Center's behavior programs by examining the care of Ann B., a resident who spends a great deal of time in a restraint chair to prevent injuries caused by self-injury. In response, Dr. Reid explained:

> [Ann B.] has a lot of restraint, and that is not good, no doubt about that, and I was alarmed when I saw that. So I checked into it further. She's obviously a difficult case, very difficult harmful self-injurious behavior; and what I found when I looked into it was that Ebensburg staff had had considerable difficulty in finding ways to reduce her self-injury. They are currently primarily trying to protect her.
>
> And my comment was: "Well, you need to do more." I mean we just can't keep this—this is one case, mind you; and in response to that what they said, ... "We're not sure what to do. We have ... sought external consultation," from the Kennedy Institute, I believe, and ... they were doing the kind of things that should be done when you have a very difficult case, calling in external consults.
>
> Okay. From what I could tell, that external consultation, nor Ebensburg's efforts at that point, had been successful in figuring out how to treat this gal's real severe self-injury, so they were protecting her. So it's a case that I'm not comfortable with. I work with cases like that too, where I don't know what to do, I haven't been able to find anybody else who does. The problem is they have gone through the process of seeking external professional help; good. If you're asking am I satisfied

64. Much of Dr. Stark's testimony suggested that the goal of care for the mentally retarded is to nurture them, much as if they were in a family home. Obviously, in that setting it would not be possible to have a psychologist always on duty as the United States suggests the Constitution demands.

with this case, no, I'm not. I hope Ebensburg is not and they continue to find ways to get her out of restraint.

51/116–17. Professional judgment has been exercised by the Center in attempting to treat the residents' severe behavior problems.[65]

[105] Contrary to the United States' claim that the Center relies excessively upon physical and chemical restraints to control the residents, I find that the record contains ample credible evidence that the Center's use of restraints does not substantially depart from acceptable professional practice. *See, e.g.,* 50/47 (Center's use of medication came after trying alternatives); 51/43 (Center's use of restraint is well below levels of restraint that occurs in settings serving similar populations); 51/70–71 (restraint used for safety and habilitative purposes).

E. *Reasonable Safety And Protection From Harm*

[106] The United States claims that defendants have violated the residents' due process right to adequate safety by failing to protect them from harm in numerous ways. As explained above, the Supreme Court in *Youngberg* recognized safety as an "unquestioned duty" that the state must provide to institutionalized residents. 457 U.S. at 324, 102 S.Ct. at 2462. The United States argues that the number of incidents and injuries at the Center is increasing, and that serious injuries are pervasive, chronic and repeated. According to the United States, these injuries primarily have been caused by inadequate staff supervision, unsafe staff actions (particularly with respect to feeding and lifting), the failure of staff to intervene to stop dangerous behavior, and the general failure of staff to protect residents from repeated and preventable harm.

The United States contends that the total number of incidents and injuries sustained by residents at the Center has increased over the past four years. 43/88. It notes that the total number of reported incidents from February 1991 until February 1992 was 1,707. The number of reported incidents increased the following year to 2,433 (43/97), a 43% increase.

The United States also complains that a large proportion of the incidents are due to unknown causes or are behavior related. 43/103. Dr. Stark opined that such injuries are "easily preventable if the environment is structured properly." 43/103–04. He also claimed that the mentally retarded are not necessarily more injury-prone than the general population. 43/28. As an example, he noted that his son, who is "as severe as anybody" at the Center, had only one incident the whole year. 43/28.

Dr. Stark characterized the incidents occurring at the Center as widespread. He found that 77% of all of the residents had one incident during 1991, and that in 1992, 86% of the residents were involved in at least one incident. 43/98–99. He further noted that 131 residents were involved in an incident every other month during a fifty-month period from January 1989 to February 1993. *Id.,* Exh. 777. Dr. Stark's testimony specifically referenced a number of incidents that resulted in relatively serious injuries. According to Dr. Stark, the harm the residents sustain is visible "as you look at these individuals and talk to them, you can see that there is a lot of withdrawal, a lot of anger, a lot of scarring—both physical and emotional, mental scarring." 43/149.

Dr. Stark also claimed that the Center underreported incidents (43/19), and that the actual number of incidents is higher than the number of reports completed.[66] In addition, Dr. Stark faults the Center for allegedly minimizing the seriousness of the injuries, arguing that the Center rates most incidents as minor by designating them as an "01." Dr. Stark contends that, in reality, many of the incidents such as biting, pica and chok-

65. For another example of the challenged care of a resident and the Commonwealth's demonstration that professional judgment was exercised *see* 50/103–06 (treatment of Franklin B.) ("This is where we all have to sit together and tolerate the uncertainty and make a kind of a coherent treatment plan for the future and methodically try things.").

66. Mr. O'Brien conceded that there are a few occasions when this occurs. 66/56.

ing, are more serious and should be rated accordingly. 43/32, 34–35.

According to the directives of the Pennsylvania OMR, whenever a resident has been involved in a situation that could have resulted in an injury to a resident, an incident report must be completed. Mr. Bellomo explained that the Center fills out a report for the resident who did or could have sustained an injury, as well as a separate report for any resident who acted as an aggressor. 63/15. Consequently, situations involving two residents result in at least two incident reports; situations involving three residents result in at least three reports. 41/49. An incident report must be completed regardless of physical manifestation of an injury. 64/73.

Mr. O'Brien explained that the incident reports categorize the seriousness of an injury, and that the categories are determined by the Pennsylvania OMR. 64/81. There are three categories: 01, 02 and 03. An 01 incident is a minor injury which need not be reported to the OMR. If an incident requires a physician's intervention, it is categorized as an 02 injury. Such incidents are reportable to the OMR and include injuries such as fractures, sutures, unacceptable absences where non-facility persons participate in the search, clinically significant medication administration errors, reportable communicable infectious diseases, and deaths not categorized as an 03 injury. An 03 incident involves serious injuries that must be communicated to the OMR within twelve hours of its occurrence, including suspicious situations requiring some type of follow-up by an outside agency. Exh. 73. Such incidents include fires, abuse with serious physical injury, sexual abuse, negligence, accidental deaths, sudden/unexplained deaths without known causes, and unusual injuries of an unknown origin. 41/31; 63/105; Exh. 73.

The record reveals that the standards for classifying an occurrence are changed occasionally by the OMR. 64/81. For example, in July of 1992, injuries requiring the utilization of ethistrips or butterfly bandages could no longer be classified as an 01 incident; instead, such injuries are now reportable as an 02 incident. 62/82. Despite this change to include more injuries as 02 incidents as opposed to 01, the number of occurrences of injuries of a more serious nature at the Center actually has remained stable. *See* 64/83 (from 1991 to 1992, 153 02 injuries (which did not include ethistrip or butterfly treatments); from 1992 to 1993, 155 02 injuries (which did include ethistrip or butterfly treatments)).

The Center's incident reports not only provide a classification regarding the seriousness of the event, but also set forth information regarding the cause and effect of the incident, and the body part affected. Exh. 73. From February 10, 1992, to February 10, 1993, the cause for 40.8% of the occurrences was unknown, the cause for 34% was attributable to behavior, and the cause of 25.2% was due to other factors. Exh. FF. In an effort to better document incidents, the Center instituted daily "risk management" meetings in March of 1993. 63/77. These meetings address all incident reports from the previous 24 hours, and enable management to obtain any missing information from the reports much more quickly and efficiently than before. As a result, the percentage of occurrences attributable to an unknown cause has decreased to 28.1% since implementation of the meetings. 64/74–77; Exh. GG.

The Center has repeatedly attempted to improve, and has improved, its incident reporting system. As of March 1993, the night nurse supervisor must review the nurses' log in each living unit for any occurrence which happened that day requiring an incident report. At the risk management meeting the following day, the review of the nurses' log is presented. The absence of an incident report for any occurrence noted in this review log prompts an immediate request for completion of the necessary report. 64/123–24. In this sense, the Center has developed a cross-checking system to monitor the incident reporting procedure.

Dr. Kastner responded to many of the United States' criticisms about the number of incidents occurring at the Center. He disagreed with Dr. Stark's opinion that the mentally retarded population does not have to be more injury prone than the general population. 48/147. Dr. Kastner explained that the frequency of epilepsy is higher in the mental-

ly retarded population, and that factor alone places those individuals at risk of injuries. In addition, psychiatric and behavioral concerns further compound the risk of injuries. Given the extreme disabilities of the Center's population, "it's impossible to imagine that we could prevent all injuries." 48/148. *See also* 51/125 (number of injuries for Center's residents with severe behavior problems not unusual).

I conclude that the Center has not violated the residents' constitutional right to reasonably safe conditions. The increasing number of reported incidents is of minimal significance, because the evidence shows that the Center instituted daily risk management meetings in an effort to improve incident reporting. 66/56–57. It is to be expected, then, that the number of incidents reported would increase. *See* 63/83. It is also to be expected that as the use of restraints and psychiatric medications decreases, the number of incidents would increase. *See Youngberg*, 457 U.S. at 320, 102 S.Ct. at 2460 ("an institution cannot protect residents from all danger of violence if it is to permit them to have freedom of movement.").[67]

Nor do I find the actual number of incident reports troubling. First, a fair number of the incident reports involve relatively minor occurrences, such as bruises, brush burns, scratches, and red marks. Exh. 85. Additionally, as noted above, one incident often generates more than one report. *See* Exh. 117 (incident reports completed on aggressor). I find Dr. Kastner's opinion that it is "almost impossible to accept that" the mentally retarded population is not more injury prone to be more credible than Dr. Stark's opinion. 48/147. *See also* 6/61 ("[P]eople with developmental disability at times are physically challenged and, therefore, it makes it more difficult for them to be able to get from one place to another. By definition also, people who have a developmental disability often have difficulty in making sound judgments; and, therefore, they will occasionally put themselves in harm's way."); 37/118 (aggression cannot always be predicted).[68]

[107] Moreover, the number of injuries cannot be the sole criterion for determining whether the Center has violated its constitutional duty to provide reasonably safe conditions. As Judge Marsh observed in a CRIPA action resolved by consent decree, "the injury itself is not a constitutional violation unless it was the result of an unconstitutional action or omission by the defendants." Accordingly, in order to establish a constitutional violation in this area, the United States cannot simply rely on numbers, but must demonstrate that the Center failed to exercise professional judgment in addressing the issue of safety.

The United States contends that mealtimes at the Center are unsafe and a substantial departure from accepted professional practice because: (1) the Center allegedly permits eating to occur while the residents are in unsafe positions; (2) staff feed residents using unsafe practices; (3) residents eat unsafely without staff intervention; and (4) the dining environment is generally unsafe. 84/XI–1.

The United States relies upon the opinion of its expert Ms. McGowan to prove what they consider to be unsafe practices. Ms. McGowan is a registered nurse who has extensive experience with severely and profoundly retarded individuals who have developmental disabilities. 35/75. She has concentrated her career over the last ten to twelve years on "teaching health professionals to identify the unique set of health problems that are inherent to this population." 35/76. She was offered as an expert in nurs-

67. In light of these findings, I also reject the United States' virtually identical contention that the Center has systematically failed to determine the cause of injuries and/or to take preventative action.

68. Dr. Kastner also observed that Dr. Stark and some of the United States' other experts appeared to be more concerned with advocacy, rather than addressing the constitutional analysis of minimally adequate treatment. "They want these clients to not have injuries; and because they want the injuries to disappear, they should disappear." 48/148. I concur with Dr. Kastner's observation. Dr. Stark's testimony constitutes advocacy for optimal treatment—treatment approximating that which his son has been provided.

ing services and nutritional and physical management services for individuals with developmental disabilities. 35/84. Ms. McGowan has no formal education in nutritional and physical management services, or in speech pathology. She explained that the knowledge she has acquired is from working extensively with interdisciplinary projects. 35/84.

During a tour of the Center, Ms. McGowan directed the videotaping of several meals. This evidence was offered by the United States and was described by Ms. McGowan, in an attempt to demonstrate the unsafe eating behaviors of some residents. 35/109–36.

Ms. McGowan testified that the dining area was "unsafe and very dehumanizing. That is, too many people, in a very loud cacophonous environment, where you can't pay attention to anything that is going on. There was some genuine health hazards around; flies all over the place." 35/92. She further testified that she recommended to Mr. Bellomo that the Center should "get out of those mass dining rooms.... If I had my option here, I'd blow these damn things up." 35/142.

[108] Ms. McGowan had little difficulty containing her distaste for the dining environment at the Center. But expert testimony is "relevant not because of the experts' own opinions—which are likely to diverge widely—but because that testimony may shed light on what constitutes minimally accepted standards across the profession." *Society for Good Will*, 737 F.2d at 1248. In this instance, Ms. McGowan's testimony fails to shed any light on what the constitutional minimum is with regard to dining facilities. Ms. McGowan's characterizations of the dining room were disputed by the Center's expert, Dr. Sheppard (61/42), and a videotape of the mealtime practices did not reveal any overwhelming problem with flies. *See* Exh. 258. I find no constitutional violation by the Center based on its continuing use of dining rooms.

Ms. McGowan also opined that residents engage in unsafe eating behaviors such as: eating at excessively rapid rates, taking large overfilled spoonfuls of food, shoveling food into their mouths, stuffing large chunks of food in their mouths, drinking cups of fluid without any visible pause, swallowing whole food without chewing, stealing food from other residents, eating food that had fallen to the floor, and jabbing utensils deep into their mouths. 35/91, 103–06, 134. Her opinion hinged largely on the amount and frequency of the food that was placed into the mouths of the residents and the potential for aspiration of that food due to poor head position, poor clearance of the oral cavity, or staff inattention to defensive mechanisms such as coughing. The United States asserts that more staff are needed at mealtimes to remedy these conditions. The United States notes that in a sixteen week period of time at the beginning of 1993, there were sixteen documented instances of a resident choking as a result of unsafe eating behaviors. Exh. 273; 35/144.

Ms. McGowan illustrated her testimony with a videotape of Kathy W. feeding herself at an extremely rapid pace. Exh. 258. A staff person across the table monitored the meal, but only intervened to offer a napkin when the meal was over. 35/134. The United States asserts that fast paced eating is exhibited by many residents, and that the Center is aware of the behavior but fails to intervene. It points to memoranda from Mr. Bellomo regarding the excessively rapid rate of eating by residents and the need to slow down the pace of eating. Exh. 165. Mr. Bellomo documented that meals concluded in as little as six, nine and twelve minutes. Exh. 165. He also documented eating at a rate of a spoonful every two and one half to three seconds. Exh. 165a.

To the lay observer, eating at a rate of a spoonful every three seconds or completing a meal in four or six minutes appears to be too fast. The Center's expert, Dr. Sheppard, a speech pathologist with training in eating and swallowing disorders, viewed the United States' videotape and analyzed the behaviors of the residents. 61/45–74. Dr. Sheppard's analysis carefully discussed the delivery of the food to the resident, the resident's control of his or her body, the resident's ability to receive and transport the bolus of food, and the actual swallowing. She noted the

pacing of individuals during their meals as it related to their swallowing. Dr. Sheppard agreed that Kathy W. does indeed stuff food and eat too rapidly at times, but she noted she was swallowing between mouthfuls in the videotape. 61/70. Dr. Sheppard cautioned that intervention is not simple with a resident like Kathy W., due to her psychiatric history. Intervention may cause her to decompensate and stop eating, or further aggravate the stuffing because the individual is afraid her food will be taken away. 61/70–01. In addition, Dr. Sheppard opined that ten to twenty minutes is an optimum for duration of a meal, 61/88, with the appropriate focus being actual swallowing, not the overall pace, 61/89.

[109] I find Dr. Sheppard's testimony persuasive. The duration of a meal should not be the sole criterion of whether care meets an accepted professional standard. I observed from the videotape that residents were afforded, for the most part, the opportunity to swallow before the next bite of food was offered. *See* Exh. 258.

The United States contends that the incidence of choking at the Center is evidence of the Center's inadequate care in feeding. It asserts that the Center has a 6.2% choking rate, 84/XI–45, and that rate continues to increase over time, 35/144. This increase is unacceptable, the United States contends, because Ms. McGowan's experiences over the past ten years have not included a facility with such a systemic choking problem. 35/204.

The increase in the choking rate is readily explained by the evidence. Choking is often prompted by food stuffing or stealing of a sudden nature which is not necessarily capable of correction by adding more staff to monitor a meal. *See* Exh. 273 (3 of 16 incidents involved stealing food and 1 incident was the result of stuffing). It is also doubtful that increased monitoring would prevent choking incidents for residents who have had or require a change in the consistency of their diet and a tailoring thereto of permissible foods. *See* Exh. 273 (Deborah S. choked on chopped bread, which now must be pureed as well; Charles M., who choked on grapes after his diet was modified from pureed to chopped; James R., who choked after diet modification from pureed to chopped). Moreover, as Dr. Sheppard noted, the Center's population is stable and aging, and statistics for a general population reveal an increase in choking with age. 61/80, 84. Dr. Sheppard further opined that she did not find the choking incidents at the Center high in light of the nature of the Center's population and the marked swallowing problems. 61/85.

The United States contends, however, that the Center had notice of its deficiency in this regard because it has been cited since at least 1983 in the Inspection of Care surveys for deficiencies. Exh. 688. Dr. Sheppard noted, however, that of the twenty-one incidents listed as deficiencies in Inspection of Care Surveys, the few that relate to health and safety matters in the dining rooms occurred before 1989. 61/86.

[110] The Center's care with regard to mealtimes for residents who feed themselves meets the constitutional minimum. The upper end of the continuum of acceptable care is described by Ms. McGowan's testimony, which would require constant surveillance and monitoring in hopes of eliminating choking altogether. This objective is laudable, but it does not establish the minimum required by the Constitution. Moreover, the standard espoused by Ms. McGowan would restrict the residents' opportunity to eat on their own.

The United States' submits that the Center feeds residents at excessively rapid rates, feeds residents too large a quantity to swallow, uses spouted cups which do not permit the staff to control the volume of liquid delivered, feeds residents while they are coughing or their heads are in hyperextension, feeds residents while standing above their eye level, forcing the residents to place their heads in extension to be fed, scrapes food off of residents' faces, does not adhere to feeding programs, and the Center has too many different staff members feed residents with complex needs. 84/XI–19–20.[69]

69. The United States consistently expands the number of alleged constitutional deficiencies by

Dr. Sheppard opined that the practices utilized by the Center at mealtimes, with the exception of very isolated instances, comports with accepted professional standards, and that the Center exercises appropriate professional judgment. 61/74–75.

Dr. Sheppard opined that the rate of feeding a resident need not consume a full thirty minutes, contrary to the opinion of Ms. McGowan. Dr. Sheppard testified that for severely compromised individuals, a meal of ten to twenty minutes may be optimal, and the focus should be the ability to swallow. She further noted that the time provided to swallow for many residents need not be very long since the bolus does not require any chewing, and socialization is minimal because the resident's focus is eating. 61/19. Moreover, although some residents ate rapidly, Dr. Sheppard observed that they were eating "steadily and moving food into their mouths in a continuous manner, that they swallow between each subsequent mouthful in eighty or ninety percent of the instances." 61/18.

I find Dr. Sheppard's opinion insightful in light of what I observed while viewing the videotape during the direct examination of Ms. McGowan and Dr. Sheppard. I find that residents who are fed either pace their feeder, or their feeder paces them. For example, Dr. Sheppard noted how Paul G. was able to control his upper body movement as a means of signalling his feeder regarding when he was ready for food, and the feeder used cues such as placing the spoon where he wanted Paul G.'s head to be, and shaping his position for swallowing by tapping his shoulders. 61/54–55. Harold B. also was allegedly fed unsafely because food was placed in his mouth while his head was rotated, the spoonfuls were overflowing and the pace was too fast. 61/117–8. Dr. Sheppard noted, however, that Harold B. "tends to move [his head] off of upright a few degrees for reception and then to bring it forward for oral transport ..." 61/55. She further noted that while the spoons were large, the feeder paced the resident so he could swallow before the next spoonful. Significantly, she observed that a nonchewable bolus can be moved through the mouth rather quickly even by an individual with a degree of disability. 61/56.

The United States submits that staff feed residents too large a quantity to swallow. I observed instances where residents were fed quantities which were too large for them. *See* Exh. 258. Most notably, Frank was a dependent feeder in a cart who was presented spoonfuls of food and a spouted cup. Dr. Sheppard observed that Frank regulated the amount he was going to swallow by ejecting the rest and signaling his feeder with his head movements. 61/49–50. I viewed the tape differently since it appeared to me that the feeder consistently provided Frank quantities which were too large. This was, however, an isolated instance within the evidence presented, and was not the norm even for those episodes depicted in the videotape.

The use of spouted cups is also a practice within the realm of accepted professional practice, because swallowing is provided for when the cup is used. For example, Beth S. was allegedly fed with a spouted cup for a solid fifteen seconds without a break. 35/120. Carefully viewing the videotape, however, Dr. Sheppard explained that "[o]ne can see by the throat sequential sips and swallows by this individual as the liquid is dispensed." 61/58.[70] She further noted there was not overfilling and the cup was withdrawn for the resident to take a breath and finish what was in her mouth. 16/59.

stating the same allegation in several different ways. For example, in this list of unsafe feeding practices, the United States lists "feeding residents at excessively rapid rates" and also lists feeding "in such a manner that they do not allow sufficient time to swallow between bites." Again, the United States lists as an infirmity "feeding residents with their head in hyperextension" and rewords this flaw by also listing feeding "by standing above their eye level forcing the residents to place their head in extension to be fed." Such duplication is not confined to this section about feeding, and it has resulted in the unnecessary expenditure of time and effort in the preparation of this opinion for a case which, even in the absence of such redundancy, is hugely fact-intensive.

70. Dr. Sheppard refers to this resident as Andrea S. 61/57. Although Ms. McGowan and Dr. Sheppard used different names, the residents are the same, as revealed by a comparison of the transcripts and the discussion of this resident immediately after Duane P. 35/118–19; 61/57–58.

While the United States submits that Dr. Sheppard opined that the spouted cups are a departure from accepted professional practice in her deposition and again at trial, Dr. Sheppard actually opined that she "would have made other choices, maybe, in regard to the spouted cups." 61/205. Dr. Sheppard's disapproval of spouted cups does not equate with a finding of a substantial deviation from accepted professional practice.

Dr. Sheppard also disputed the contention that staff fed residents while they were coughing. She observed that coughing consistently caused the feeders to stop feeding. This was evident in the videotape for Ronald E. Exh. 258; 61/48.

The United States vigorously asserts that the Center's care is constitutionally flawed because staff feed residents with their heads in improper positions such as hyperextension or rotation. 35/92. Ideally, a resident should have his head perpendicular to the floor when being fed. This position helps prevent the aspiration of food or drink while swallowing because the airway is covered by the epiglottis. 35/92–94. The videotape showed residents who accepted food from their feeder with their heads in hyperextension or rotated to one side. An example would be Harold B. accepting food with his head off of upright and then bringing his head forward to swallow. 61/55. Paul G., another example, also extended his head back to receive food. Because Paul G. uses his head and upper body to signal his feeder and establish a pace, Dr. Sheppard opined that a feeder should not immobilize his head to bring it to the desired neutral position because this could upset and irritate the resident and compromise his nutritional status. 61/53.

Dr. Sheppard further opined that the delivery of food to a resident who has his head slightly tilted back is acceptable if the resident brings his head forward during the swallowing phase. 61/79. She also opined that she did not observe any staff actively pushing a resident's head back to feed him or her. 61/20. She further stated that a bald spot on the back of a resident's head is indicative that a resident spends a significant time on his back; it is not the result of a nutritional management procedure that pushes a resident's head back. 61/45.

Based on my observations of the tape, which revealed residents who were being fed with ease, and Dr. Sheppard's testimony and opinion, I find that the Center's feeding practices with regard to head position when receiving food are not departures from accepted practice. They are often an accommodation of a resident's behavior which may pose a risk of aspiration or choking. These risks are weighed against the fact that correction of some of these behaviors may prompt residents to decompensate and not eat, or would require restraint (or additional restraint) to properly position their head to receive food which otherwise would not be necessary. Such action is consistent with the accepted professional judgment in the field.

Ms. McGowan asserted that scraping food from a resident's face is wrong because it causes "involuntary reflexes in individuals whose oral motor skills are already compromised." 35/114. Ms. McGowan fails to indicate how this adversely affects the residents, however. In contrast, Dr. Sheppard noted that certain reflexes may be elicited by touching the face. But, she opined that face wiping may be appropriate depending on the individual. 61/43–44. As a result, the fact that some food is scraped from a resident's face without more is not tantamount to a substantial departure from accepted professional standards.

The United States also contends that there is a failure to have the same staff members regularly assigned to feed residents with complex needs, but fails to indicate any testimony that supports such a finding. In contrast, Susan Fagan, a LOTA, testified in her deposition that she and another LOTA regularly alternate feeding Timmy P., Michael B., and James C. for breakfast and lunch. The LOTAs work Mondays through Fridays, and they alternate feedings so as to be current with regard to that resident's status. Exh. 610/61–62.

[111] In light of the above, I find that the Center's care in feeding residents is constitutionally adequate. This conclusion is based largely on my observation of the videotape,

evidence which to a great degree requires no elaboration, and on the testimony of Dr. Sheppard, which I found to be persuasive. In contrast, Ms. McGowan's assessments were less complete, evaluating the factors affecting the resident's ability to eat, but rarely analyzing the mouth action of the resident. This may be due to the fact that she has no formal training as a speech pathologist, a discipline requiring considerable knowledge of disorders related to the use of the mouth.

Finally, the United States asserts that the Center uses the following unsafe positions to feed residents: flat on their back during the meal and immediately thereafter; head in hyperextension; head in hyper-extension and rotated; and trunks in improper alignment. I will not address hyperextension of the head again.

With respect to the argument that residents are being fed while flat on their backs, Ms. McGowan testified that such a practice is unacceptable because it can result in aspiration. It is clear to me, even as a matter of common sense and lay experience, that this is not a desirable way to be fed, but what positions are acceptable if a resident cannot be positioned upright? It appears that the alternatives which are professionally acceptable are to elevate the head and trunk above the pelvis and legs, and to position the resident in an elevated right side-lying position. 34/199–200.

[112] The United States asserts that the Center positions no one in the right side-lying position even though its speech therapist admits that it is an acceptable position. However, Dr. Sheppard's testimony that the elevated right side lying position should only be used if the individual has adequate control on that side of his mouth to effect the transport from the teeth to the pharynx. 61/97–98. The United States failed to proffer any evidence indicating that the residents at issue possessed the necessary mouth control, and in the absence of such evidence, I will not infer a substantial deviation from accepted practice from the Center's failure to use a particular feeding position.

[113, 114] The videotape illustrated that the Center does elevate the head and trunk of the residents. Even Ms. McAllister, the United States' PT expert, acknowledged that the Center staff is aware that the residents who are confined to carts need to be elevated. 34/199. She asserted, however, that the deficiency is that the head is usually all that is elevated. *Id.* I find that the Center's care in this regard is not constitutionally inadequate. Evidence showed that the staff strive to elevate the head and trunk above the pelvis and legs. *See* Exh. 258. Moreover, the fact that the Center exercises professional judgment in feeding residents is apparent in the decisions which are made to change the method of providing nutrition for residents. The record indicates that the assessment of the impossibility of easily feeding a resident at some point results in the decision to institute some mechanical means of meeting the resident's nutritional requirements, such as gastrostomy tubes. *See supra* re: Keith T. and Steven S.

I also note that the United States' contention that mealtimes are unsafe because residents' bodies are not properly aligned is another attempt to argue the inadequacy of the Center's wheelchairs. This point has already been covered in the section regarding physical therapy and physical management, and will not be addressed here. The section on physical therapy and physical management also addressed the United States' contention that the staff do not lift and transfer residents according to accepted professional standards. *See supra* § III.C.4.

The United States also argues that the Center does not adequately supervise and monitor residents, which results in injuries and the violation of the residents' right to reasonably safe conditions. The United States asserts that the majority of incidents are due to unknown causes and occur when the staff are involved in other functions. It specifically focuses on the occurrences of elopement and pica incidents [71] as evidence of inadequate supervision.

71. Pica is an "abnormal craving to eat substances not fit for food...." *Webster's New World Dictionary* 1021, 3rd College Ed. (1988).

The Center characterizes a wide range of occurrences as "elopements." An "elopement" is noted whenever a resident actually leaves the Center's grounds, as well as when a resident simply leaves a room without authorization and/or hides from staff. 41/50. The record reveals that the Center has taken several steps to curtail the number of elopements. For example, head counts are routinely taken on an hourly basis and in conjunction with the transfer of residents from one area to another. *See* Exh. 594c; 594a: 594d, # 00006800; and 594f, # 00560867. *See also* Exh. 594d, # 00006800 (Center's escort procedure revised after head count detected that resident was left behind in program area).

[115] Elopements involve individuals who are mobile and able to navigate to a certain extent. As a result, competing liberty interests are at issue. *See Youngberg*, 457 U.S. at 320, 102 S.Ct. at 2460 ("[A]n institution cannot protect its residents from all danger of violence if it is to permit them to have any freedom of movement."). Expert testimony, therefore, should identify the parameters of acceptable professional practice (*i.e.*, providing the residents with freedom of movement, while also attempting to prevent, detect and respond to elopements in such a population). Here, however, to a large extent, the United States simply relies on the fact that elopements occur, without providing any evidence that such occurrences demonstrate a substantial deviation from accepted professional practice.

For example, the United States points to a statistic that 31 elopements occurred from July 1, 1990 to June 26, 1993. Exh. 594(g). This statistic is taken from a report that fails to set forth any underlying factual details of the elopements. Consequently, it is impossible to determine whether any individual elopement actually involved the disappearance of a resident (or simply an attempt to elude staff), or whether the elopement was due to a lapse in monitoring by the Center's staff. Without such evidence, I am unable to determine whether a problem of constitutional proportions exists at the Center. Moreover, I note that the record contains evidence of action by the Center in response to specific incidents of elopement. *See, e.g.*, Exh. 594, # 00590686 (Diana D. eloped on two occasions, staff surmised the elopements demonstrated an effort to obtain a quiet place to look at magazines, and Diana D.'s interdisciplinary team revised her care to provide for a period of time on a quieter unit).[72]

The United States submits that incidents involving pica prove that staff are not adequately supervising and monitoring residents. It argues that the Center's staff were often unaware that residents had ingested a substance not fit to eat until after the resident was found in distress or the inedible object was discovered by observation of feces or vomitus, or confirmed by x-ray. 43/116. Dr. Russo admitted that pica is a common problem in the mentally retarded population, and that it is difficult to treat. 37/106, 108. In fact, pica is not curable; it can only be managed. 37/108.[73] My evaluation, therefore, focuses not on pica itself, but on the Center's efforts to manage this problem.

The record reveals that residents with pica have "flare-ups" of this behavior problem. *See* Exh. 590. The record also contains ample evidence demonstrating the Center's management of these flare-ups. *See* Exh. 590 (Margaret M., who had no history of

72. The United States emphasizes the elopement of Joseph C., one of the residents with ground privileges on October 1, 1992. *See* Exh. 313 (Joseph C. missing overnight and found hiding the following morning in trunk of employee's car). This incident, admittedly quite serious, cannot reasonably be characterized as a lapse in the Center's care of this individual. This particular elopement by Joseph C. was uncharacteristic of his prior behavior; his absence was immediately noted and efforts were made to locate him. A reassessment and revision of Joseph C.'s behavior plan followed, which included a consult with Dr. Goldschmidt.

73. Dr. Russo argued that the Center fails to individualize its behavior programs for residents with pica. 37/74–75. Dr. Russo's testimony, however, does not establish that the Center's care with regard to pica is a substantial departure from accepted practice. *See* 37/106 (admitting that, although he knew how to assess and evaluate pica, he did not know how he would treat it in any particular case). I have already rejected the United States' contentions with respect to behavior programs, and that discussion will not be repeated here.

pica, ingested part of a silk flower arrangement in her bedroom; staff intervention consisted of closely monitoring to determine if a new behavior was developing and referral to the dysphagia team for evaluation); Exh. 638, exh. 46 (refinement of Center's policy regarding disposal of medical treatment, diagnostic and examination material after resident ingested plastic cover from thermometer).

Finally, the United States faults the Center's efforts to address residents' inappropriate sexual behaviors, specifically citing the care of James W. and Clifford P. *See*, Exhs. 501(a) and 440. For both of these residents, however, the Center held numerous staff meetings/interdisciplinary team conferences, and contacted outside consultants and therapists in an effort to contain the residents' dangerous behaviors. *See* Exh. 501(a); Exh. 440; 63/119–20. In fact, Clifford P. was even transferred to another facility, Torrance Mental Retardation Unit, with the hope that he would improve. Unfortunately, that facility was unable to handle Clifford P.'s problems, and he was transferred back to the Center. 63/119–20.

[116] At times, the Center's efforts to address these problems have been hindered by the unavailability of outside experts in this field. 63/116–119. The Center therefore has taken the initiative to send two of its staff members to attend classes to become certified sex therapists. The Center also has contracted with a sex therapist, Dr. Farr, to provide in-service training for its staff regarding how to deal in-house with problematic sexual behavior. 63/119. Thus, while the sexual behavior problems of certain residents pose a grave risk of harm, the Center exercises professional judgment in addressing these behaviors.

IV. *CONCLUSION*

[117] Professional judgment has been exercised in the provision of care to mentally retarded individuals residing at Ebensburg Center. The Center's care, although frequently not optimal, is, with the exception of blood level monitoring, a now remedied defect, consistent with accepted professional practice, and thereby meets the requirements of the Constitution. Moreover, where there have been lapses in care, the United States has failed to demonstrate that those deficiencies were the result of the Commonwealth's official customs and policies as implemented at the Center.

Advocates for the mentally retarded often strongly disagree on what constitutes appropriate care for these individuals. My task, however, has been to determine whether the Center exercised professional judgment in providing the minimum level of care required by the Constitution, not whether the difficult lives of the Center's residents can be improved. It is clear that many of the residents—probably most of them—would be better served by placement in the community. Mr. Bellomo conceded as much, but vigorously defended the quality of care offered by the Center:

> Do I think that it's better for people to live in a ranch-style home on the corner of someplace with a white picket fence and a station wagon in the driveway rather than living in a large congregate facility? Absolutely. And I believe Pennsylvania is moving in that direction. We have finally gotten to the point where there are more people living in the community than there are living in institutional settings, and I think that is a commendable trend.
>
> And until such time as I could see that those four hundred seventy-five people that live with us are going to be afforded that opportunity, it's my job to be critical of everything that goes on at the facility that I don't think is meeting the needs—the very specific, the very special, and the deserved kind of recognition that these people have. I'm not in the—I will not accept any kind of suggestion that we are overlooking things and that people that are living at our facility are not being afforded an adequate level of service.

63/170–71.

One of the hallmarks of a good and just society is the concern it shows for the needs of its least fortunate and most vulnerable members. If this litigation has proved anything, it is that the care of mentally retarded citizens evokes powerful emotions, that deep-

ly committed advocacy on behalf of the mentally retarded in this country is alive and well, and that it transcends differing schools of thought and competing professional interests. My lengthy review of the evidence, and especially my vivid recollection of the view conducted of the Center and its operations, has not left me unmoved. Indeed, it has left an indelible mark.

The operation of Ebensburg Center by the decent, fallible, human beings who administer it and who toil there in stressful and often thankless tasks conforms with constitutional dictates. Its administrators and employees must not, however, turn a deaf ear to their critics or to the voices of innovation. Constitutional minimums are not goals to which any professional should aspire. Much can be improved, and fiscal constraints should be no impediment to an institution's leadership to constantly exhort its professionals: "We can do better."

An appropriate order follows:

AND NOW, this 27th day of July, 1995, consistent with the foregoing opinion, the United States' Motion for Judgment (Docket No. 111) is DENIED. Judgment is entered for the defendants. The Clerk of Court shall mark this case CLOSED.

Hope BOND,

v.

TRUSTEES OF THE STA-ILA PENSION FUND.

Civ. No. K-95-1338.

United States District Court,
D. Maryland.

Oct. 18, 1995.

Widow of pension plan participant brought suit in state court against plan trustees, seeking declaration that she was entitled to preretirement survivor annuity under plan, and action was removed to federal court. On cross-motions for summary judgment, the District Court, Frank A. Kaufman, Senior District Judge, held that: (1) case was ripe for review, despite contingent nature of annuity; (2) trustees reasonably denied annuity when widow and participant were not legally married for one year prior to participant's death, as required by plan, although they lived together for many years; (3) Employee Retirement Income Security Act (ERISA) did not preempt Maryland marriage law so as to preclude trustees' interpretation of plan; (4) even assuming preemption, court would not create federal common-law definition of "married" to undermine trustees' discretionary authority; (5) to extent that city ordinance prohibiting employment discrimination on basis of marital status applied, it was preempted by ERISA.

Defendants' motion granted.

1. Federal Civil Procedure ⇐2543

On motion for summary judgment, nonmoving party is entitled to have all reasonable inferences drawn in its respective favor. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2544

Any party resisting summary judgment must go beyond pleadings and by its own affidavits, and admissions on file, designate specific facts showing that there is genuine issue for trial. Fed.Rules Civ.Proc.Rule 56(c), 28 U.S.C.A.

3. Declaratory Judgment ⇐145

Case brought by widow of pension plan participant, seeking declaration that she was entitled to preretirement survivor annuity under plan, was ripe for adjudication, despite contingent nature of annuity, for which there would only be qualifying payee if widow lived until certain future date; widow's entitlement to benefits was predominantly legal inquiry, there were no likely future factual developments which would clarify question, and deferral of case could create hardship by hindering parties in their financial planning. Employee Retirement Income Security Act

tory conduct. *See Mt. Healthy City School Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977). Although *Mt. Healthy* dealt with a constitutional claim of retaliation, it has been applied to claims under the NLRA as well. *See Webster v. Dept. of the Army*, 911 F.2d 679, 696 (Fed.Cir.1990) (citing *National Labor Relations Bd. v. Transportation Management Corp.*, 462 U.S. 393, 103 S.Ct. 2469, 76 L.Ed.2d 667 (1983)).

In his Amended Complaint, plaintiff alleges that a coworker made a harassment charge against plaintiff "solely to punish Plaintiff for attempting to enforce seniority and job posting rules." Amended Complaint, ¶ 33. During his deposition, plaintiff repeatedly stated that the disparate disciplinary treatment that he faced resulted from his asserting his rights under the CBA. However, plaintiff does not mention a claim for retaliation in his Amended Complaint, and it is unclear exactly which of defendant's actions plaintiff perceives to have been in retaliation for exercising his rights under the CBA, and which actions he perceives to have been aimed at his sexual orientation. The Court also notes that there is a paucity of evidence on the claimed link between the harassment and the exercise of a protected right.

Under 28 U.S.C. § 1367 ("§ 1367"), a district court may decline to exercise its supplemental jurisdiction over state law claims if "the district court has dismissed all claims over which it has original jurisdiction...." 28 U.S.C.A. § 1367(c)(3) (West Supp.1999). In interpreting this provision, the Third Circuit has held that "where the claim over which the district court has original jurisdiction is dismissed before trial, the district court must decline to decide the pendant state claims unless considerations of judicial economy, convenience, and fairness to the parties provide an affirmative justification for doing so." *Borough of West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.1995).

The Court concludes that no affirmative justification to retain jurisdiction over the state law claim is present in this case. Because the Court is granting summary judgment as to the only federal claim, the Court declines to exercise supplemental jurisdiction over plaintiff's state law claim of intentional infliction of emotional distress.

V. CONCLUSION

The Court concludes that plaintiff's Title VII claim is premised on sexual orientation discrimination. Because sexual orientation is not a protected class under Title VII, the Court grants defendant's Motion for Summary Judgment as to Count I, and enters judgment in favor of defendant and against plaintiff on Count I of the Amended Complaint. The Court declines to exercise supplemental jurisdiction over plaintiff's state law claim for intentional infliction of emotional distress, and therefore dismisses that claim without prejudice.

PEERLESS WALL AND WINDOW COVERINGS, INC., Plaintiff,

v.

SYNCHRONICS, INC., a Tennessee Corporation, Defendant.

No. CIV. A. 98–1084.

United States District Court, W.D. Pennsylvania.

Feb. 25, 2000.

Licensee of cash register software which was not year 2000 (Y2K) compliant sued licensor, alleging breach of contract, express and implied warranties, fraud and negligent misrepresentation. Licensor moved for summary judgment. The Dis-

trict Court, D. Brooks Smith, J., held that: (1) possibility of recovering punitive damages satisfied amount in controversy requirement for diversity jurisdiction purposes; (2) implied warranties of merchantability and fitness were disclaimed; (3) 90-day express warranty covered only media containing software, not software itself; (4) integration clause in license precluded fraud claims based on sales literature; (5) under Tennessee law as interpreted by federal court, licensor had duty to disclose that software was not Y2K compliant; (6) fraud claims failed due to lack of showing of reliance; (7) economic loss doctrine precluded recovery for negligent misrepresentation; and (8) nominal damages showing precluded summary judgment based on absence of damages.

Summary judgment for licensor.

1. Federal Courts ⇐337

Possibility of punitive damages, in putative class action suit by buyer of computer software seeking free upgrade to Y2K compliant software, satisfied amount in controversy requirement for diversity jurisdiction, despite upgrade cost of only $1,500 to $2,000.

2. Copyrights and Intellectual Property ⇐107

"Shrink-wrap" software licenses, which the customer impliedly assents to by, for example, opening the envelope enclosing the software distribution media, are generally valid and enforceable.

See publication Words and Phrases for other judicial constructions and definitions.

3. Copyrights and Intellectual Property ⇐107

All implied warranties of merchantability and fitness were disclaimed in software license agreement, through disclaimer statement prominently displayed on outside of software container, and by licensee's having signed and returned software registration form including recitation that licensee had read and agreed to software license terms.

4. Copyrights and Intellectual Property ⇐107

Provision of license agreement covering cash register software, extended express 90-day warranty that software diskettes and user manual would be free from defects in materials and workmanship, read in conjunction with provision that entire risk of performance of software was with licensee, created express warranty of software media, rather than software itself.

5. Evidence ⇐400(6)

Broad integration clause contained in software license agreement precluded claim that sales literature for software created warranty more extensive than warranty provided in license.

6. Copyrights and Intellectual Property ⇐107

Statement in sales literature for cash register software, that user would remain up to date, did not commit provider to offer free upgrade to make software Y2K compliant; reference was to ability of software to keep current records of user's business transactions.

7. Evidence ⇐400(3)

Presence of integration clause in computer software license precluded resort to parol evidence to elaborate upon statement in license making it effective for "useful life" of software.

8. Contracts ⇐94(4)

Under Pennsylvania law, "fraud in the execution" applies to situations in which parties agree to include certain terms in an agreement, but the terms are not included.

See publication Words and Phrases for other judicial constructions and definitions.

9. Fraud ⇐3

Under Pennsylvania law, "fraud in the inducement" involves allegations of repre-

sentations on which the other party relied in entering into an agreement but which are contrary to the express terms of the agreement.

See publication Words and Phrases for other judicial constructions and definitions.

10. Evidence ⚖434(8)

Under law of Pennsylvania and Tennessee, parol representations that contradict the express language of a fully integrated contract are admissible only to show fraud in the execution, not fraud in the inducement.

11. Fraud ⚖36

Presence of integration clause in software license agreement precluded claim that licensee entered into agreement based upon affirmative misrepresentations contained in sales literature.

12. Fraud ⚖11(1)

Claims in sales literature touting cash register software, that software would keep user up to date, were puffery rather than misrepresentation allowing user to demand free upgrade to make system Y2K compliant.

13. Fraud ⚖17

Under Pennsylvania law, in a typical arms-length business relationship, absent one party's surrender of substantial control of his affairs to the other, there is no duty to disclose information to other party.

14. Fraud ⚖17

Under Tennessee law, as predicted by federal court, software developer has obligation to disclose to customer material information requested by customer and information necessary to make affirmative disclosure that would otherwise by half-truth not misleading.

15. Fraud ⚖17

Under Tennessee law as predicted by federal court, licensor of cash register software had obligation to disclose to licensee that software was not year 2000 (Y2K) compliant.

16. Fraud ⚖20

Declaration by licensee of cash register software, that year 2000 (Y2K) compliance was not factor when he decided to acquire license, precluded determination that reliance requirement for fraud claim under Pennsylvania or Tennessee law was satisfied in suit based upon nondisclosure of compliance situation.

17. Fraud ⚖32

Under Pennsylvania and Tennessee law, "economic loss doctrine," barring recovery for negligent misrepresentation when parties are in contractual privity, licensee of cash register software could not succeed on claim that licensor negligently misrepresented product by failing to state that it was not year 2000 (Y2K) compliant.

See publication Words and Phrases for other judicial constructions and definitions.

18. Fraud ⚖32

Exception to economic loss rule denying recovery for negligent misrepresentation when parties were in contractual privity, if party making misstatement was in business of supplying information, did not cover case of cash register software licensor who did not disclose that product was not year 2000 (Y2K) compliant; licensor was in business of supplying information systems, not information.

19. Fraud ⚖25

Fraud claim brought against licensor of cash register software, by licensee asserting that licensor failed to disclose that software was not year 2000 (Y2K) compliant, was not precluded despite showing of only nominal damages.

20. Fraud ⚖25

Fact that cash register software was not year 2000 (Y2K) compliant could be cause of harm sustained by licensee, for purposes of fraud action against licensor, even though licensor alleged that there were other problems with software that were causing harm.

David J. Manogue, Joseph N. Kravec, Specter, Specter, Evans & Manogue, for Plaintiff.

Kerry A. Kearney, Frederick H. Colen, Roy W. Arnold, Reed, Smith, Shaw & McClay, Pittsburgh, PA, for Defendant.

MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge.

This case is a putative class action involving the so-called "Y2K problem" [1] in a massmarketed business software package. Plaintiff has filed this suit alleging breach of contract, express and implied warranties, fraud and negligent misrepresentation. Presently before the court is defendant's motion for summary judgment, dkt. no. 51.[2] For the following reasons, I will grant the motion and enter summary judgment for defendant.

I.

The facts are undisputed. Plaintiff Peerless Wall & Window Coverings, Inc. is a small, Pittsburgh-based retail business owned and operated by Michael Lando, an experienced, Harvard-educated lawyer currently practicing law as a nonequity partner in one of the city's major firms, and his wife, Fran Lando, who handles the day-to-day operations of the business. Dkt. no. 54, exh. 2, at 4, 8, 12. In late 1993, Peerless wished to acquire computer software that would run the cash registers in its several stores, manage inventory and link the stores together electronically. It sought proposals from two local concerns, Alpern Rosenthal Consulting and Roth Computer Register Company; both recommended "Point of Sale V6.5" software produced by defendant, Synchronics, Inc. *Id.* at 161. Plaintiffs were given sales literature prepared by Synchronics about its Point of Sale software. This literature contained a number of representations, among them:

> With SYNCHRONICS Point of Sale and related software, you'll **stay up-to-date.** Every minute. Every day. Automatically. It's that simple.
>
> . . . . .
>
> Synchronics introduced point-of-sale software for retailers in 1986. Since then, SYNCHRONICS Point of Sale has been installed in more than 15,000 businesses worldwide. And this number is growing every day!
>
> . . . . .
>
> Best of all, you can tailor SYNCHRONICS software to meet your specific needs. And it will continue to meet those needs as you increase sales, expand your business or add locations.

Dkt. no. 56, exh. A (Goldstein dep. exh. 2, at PL0338).

Roth's proposal was significantly less expensive, and, cost being the major concern of Peerless, it retained Roth to procure a package of hardware and Synchronics "Point of Sale V6.5" software to run in

1. This refers to the inability of certain computer software to accurately process dates after December 31, 1999. Other names for this malady include "year 2000 computer bug" and "millennium bug." *See generally* Jeff Jinnett, *Legal Issues Concerning the Year 2000 Computer Problem,* 506 PLI/Pat 103 (Feb.1998), *subsequently modified in Legal Issues Concerning the Year 2000 Computer Problem: An Awareness Article for the Private Sector* (1998) <*http://www. llgm.com/firm/article1.htm*> (visited Feb. 21, 2000); Jack E. Brown, *The Year 2000 Litigation: Focusing on the Issue of Cost* (1998) <*http://www.lawhost.com/ lawjournal/98spring/y2k.html* > (visited Feb. 21, 2000); D. Brooks Smith, *The Managerial Judge and Y2K Litigation,* 18 Rev. Litig. 403 (1999), and other articles contained in same symposium issue. For an interesting article on the Y2K problem written by a current computer law attorney who formerly was a computer programmer as far back as 1969, see Mark A. Murtha, *The Law of Y2K: An Introduction,* 17 Temp. Envtl. & Tech. L.J. 1 (1998).

2. Also ripe for adjudication is defendant's motion for sanctions and to compel expert discovery, dkt. no. 46.

Peerless' PC–DOS environment. Dkt. no. 54, exh. 2, PL0244–46. No one from Peerless had any contact with Synchronics in making this decision. Dkt. no. 54, exh. 2, at 123–24. Moreover, at the time of the purchase, plaintiff had no knowledge that the "year 2000 problem" even existed, much less expressed any desire that the software it acquired be Y2K-compliant. *Id.* at 83–87, 210–11. For that matter, there is no evidence on this record that Y2K-compliant software for plaintiff's application was commercially available. *Id.* at 83–87, 134.

Defendant Synchronics is also a small, closely-held corporation. Based in Tennessee, it develops and markets business applications software. Dkt. no. 54, exh. 1 (Goldstein aff.). It is owned and operated by Jeff Goldstein, and it employs about fifty people. *Id.* At the time Peerless was in the market for software, Synchronics was acting as a value-added reseller for the predecessor of RealWorld Corporation. *Id.* As such, Synchronics would take more-or-less generic RealWorld applications software and customize certain enhancements for particularized "niche" applications like those of plaintiff. *Id.* To accomplish this, Synchronics was required to obtain the RealWorld source code written in the COBOL programming language and write its own software that interfaced with the RealWorld code. Accordingly, Synchronics was forced to use data formats that were compatible with those already programmed by RealWorld, and thus the Point of Sale software, the earliest version of which was first released in 1986, followed this practice. *Id.;* dkt. no. 56, exh. A at 26, 29, 32, 35.

RealWorld software at that time used only a two-digit year field, storing only the last two digits and ignoring those representing the century and millennium. Thus, 1999 would be stored as "99," 2000 as "00" and 2001 as "01." Unfortunately, this meant that when the twentieth century ended, all subsequent dates would be interpreted essentially as falling in the early part of that century, meaning that 2001 would be mistaken for 1901. *See* dkt. no. 56, exh. A at 65. Nevertheless, this was a commonly used programming convention, dating from the early years of computing when memory was orders of magnitude more expensive than it is today, and persons involved in data processing generally ignored the fact that the convention that saved money then would wreak havoc later.[3] In any event, Synchronics was forced by the design of the RealWorld software to emulate its two-digit year storage rather than employ a four-digit year field, which no doubt would have been the better practice. As a result, the Point of Sale V6.5 software that plaintiff acquired from it in 1994 was not Y2K compliant.

Meanwhile, Synchronics was concerned that RealWorld, for reasons unrelated to any issue in this case, would stop licensing source code to it and essentially cut the rug out from under what had become a profitable business for Synchronics. Indeed, this concern would be realized at the end of 1995 when RealWorld terminated Synchronics' license. Dkt. no. 54, exh. 1, at 3. Synchronics therefore embarked in December 1993 upon a campaign to develop its own software from scratch that would compete against the RealWorld offerings. Dkt. no. 56, exh. A at 61. At that point, Synchronics was no longer constrained by the compatibility issues that had previously forced it to use two-digit year fields, and, aware of the Y2K date rollover problem, decided to use four-digit fields instead and make the software Y2K-compliant. *Id.* at 62, 75. In addition, it designed its new software packages to run under Microsoft Windows instead of PC–

3. Indeed, COBOL programming texts of two decades ago implicitly taught the use of two-digit year fields without so much as a passing reference to the implications of the date rollover that would take place at the end of the twentieth century. *See, e.g.,* Peter Abel, *COBOL Programming: A Structured Approach* 63, 126, 140–42 (1980); Mike Murach, *Standard COBOL* 62–63, 142–43 (1975).

DOS. This new offering was named Counterpoint, dkt. no. 56, exh. A at 61, and went to market in December 1995, *id.* at 75. At the end of that year, with the RealWorld license terminated and without further lawful access to the source code, Synchronics stopped supporting Point of Sale V6.5.

The Point of Sale V6.5 software was licensed pursuant to a "shrink-wrap" agreement printed on and occupying substantially all of both sides of the sealed envelopes containing the diskettes; this license, by its terms, indicated that opening the envelope would act as an acceptance. In pertinent part, it read (formatting slightly altered from original):

READ THIS FIRST

You should carefully read the following terms and conditions before opening this diskette envelope. Opening this envelope indicates your acceptance of these terms and conditions. If you do not agree with the license below, do not open this envelope. Return the entire package to your supplier for a refund.

If you accept the terms and conditions below, complete the Software Registration Information card found in your User Manual....

LIMITED WARRANTY ON DISKETTES AND USER MANUAL

Synchronics warrants the diskettes and User Manual to be free from defects in materials and workmanship under normal use for 90 days after the date of original purchase. If during this period you discover a defect in the diskette(s) or User Manual you may return it to your supplier for a free replacement. This is your sole remedy in the event of such defect(s).

No Synchronics Distributor or Dealer is authorized to make any modification, extension, or addition to this warranty on behalf of Synchronics or its Licensors. All implied warranties on the documentation and diskettes, including implied warranties of merchantability and fitness for a particular purpose, are limited in duration to 90 days from the date of the original purchase....

LIMITATIONS ON WARRANTY AND LIABILITY

Except as expressly provided above for diskettes and user manual(s), Synchronics, its Licensors, Distributors, and Dealers make no warranties, either express or implied, with respect to the Software, its merchantability, or its fitness for any particular purpose. *The Software is licensed solely on an "as is" basis.*

The entire risk as to the quality and performance of the Software is with you. Should the Software prove defective, you assume the entire cost of all necessary servicing, repair or correction, and any incidental or consequential damages.

In no event will Synchronics, its Licensors, Distributors, or Dealers be liable for any damages, including loss of data, loss of profits, or direct, indirect, incidental, special, or consequential damages resulting from any defect in the software, even if they have been advised of the possibility of such damage.

TERM

This license is effective for the useful life of the software....

GENERAL

. . . . .

C. This is the complete and exclusive statement of the agreement between you and Synchronics, and this Agreement supersedes any prior agreements or understanding, oral or written, with respect to the subject matter of this agreement.

Dkt. no. 54, exh. B to exh. 1. This language was also contained in the user manuals

provided to plaintiff, dkt. no. 54, exh. 2, dep. exh. 6 at PL1273–74, and plaintiff saw those terms. In addition, the user manual specifically recited that

> Synchronics makes no warranties or representations with respect to the information contained herein; and Synchronics shall not be liable for damages resulting from any errors or omissions herein or from the use of the information contained in this manual.

Dkt. no. 54, exh. 2, dep. exh. 6 at PL1272. Although no Peerless employee opened any of the diskette envelopes because the software installation was performed by Roth, Fran Lando did sign and mail to Synchronics a software registration form in which she acknowledged that she read and understood the above agreement and agreed to its terms and conditions. Dkt. no. 54, exh. D to exh. 1; exh. 3, at 85–86.[4]

The user manual makes no reference to Y2K-compliance as an issue, nor does it make any express representation of how the software would handle dates after December 31, 1999. In one section on how the user should enter dates, however, it recites:

> Type dates in the format MMDDYY (6 numeric digits, with no slashes). For example, for "October 9, 2005", type 100905. The date will automatically be redisplayed in the format "MM/DD/YY" (with the slashes). Dates are checked to make sure that the month and the day are valid.

Dkt. no. 56, exh. A (Goldstein dep. exh. 5, at SYN00839). Mr. Goldstein, when questioned about this portion of the manual, admitted that it gave a misleading impression of the capabilities of the V6.5 software because the software would not recognize whether "05" referred to 2005 or 1905. Dkt. no. 56, exh. A at 188–92. Mr. Lando, however, admitted that he did not receive the manual until after the software was purchased and hence he did not rely on any of the above language, nor did the language form any part of the contract[5] for the software. Dkt. no. 58, exh. 6, at 301, 304, 310.

From all that appears from the record, the Point of Sale V6.5 software was installed and, after some early issues were resolved, the software ran successfully on plaintiff's computers thereafter. In March 1997, however, Fran Lando and another Peerless employee attended a Synchronics "dog-and-pony show" in which Goldstein apprized them personally that Point of Sale V6.5 was not Y2K-compliant and that Peerless should purchase Counterpoint. Dkt. no. 54, exh. 3, at 108–10; dkt. no. 56, exh. A at 85–86. Nevertheless, even after receiving this information, plaintiff acquired a Novell networking system (version 3.12) without inquiring whether it was compliant (it turned out in retrospect not to be). Dkt. no. 54, exh. 4.

[1] Sometime after learning of the Y2K-noncompliance of Point of Sale V6.5, plaintiff demanded that Synchronics provide it with a free upgrade to Counterpoint. When Synchronics refused, plaintiff instituted this class action litigation on June 19, 1998,[6] with jurisdiction based upon diversity of citizenship.[7] Subsequently, Synchronics developed a free up-

4. Mrs. Lando claimed not to have read the language acknowledging and assenting to the software license agreement, but admitted that she did sign it. Dkt. no. 54, exh. 3, at 86.

5. This testimony was over plaintiff's counsel's objection that the question called for a legal conclusion. Aside from the fact that Mr. Lando is a practicing attorney and would not have been expressing a layman's opinion in any event, I interpret this statement to mean that Lando simply did not consider anything in the manual to be a term of the "deal" between Peerless and Synchronics.

6. On July 20, 1999, Congress enacted the "Y2K Act," P.L. 106–37, 113 Stat. 185, *codified at* 15 U.S.C. §§ 6601–6617. By its own terms, it applies only "to any Y2K action brought after January 1, 1999." 16 U.S.C. § 6603(a). Accordingly, it has no applicability here.

7. The parties do not address in these motions how the jurisdictional amount of $75,000 is met, but the complaint indicates that plaintiff is alleging as actual damages "the cost of replacing, modifying or upgrading the computer software purchased from Synchronics

grade patch to correct the year 2000 problem, a software program which it called Point of Sale V6.6/Y2K.[8] Dkt. no. 56, exh. A at 172, 175–76. Plaintiff has had the opportunity to test this patch, but has not yet chosen to install it on its computers. Indeed, as of his May 6, 1999 deposition, Mr. Lando admitted that Peerless had done nothing to become Y2K-compliant, dkt. no. 51, exh. 2, at 96–97, despite having been advised to do so the previous year by his own consultant, *id.* at 104–05.

During the course of pretrial motions practice, I denied class certification without prejudice pending discovery on nonclass issues. Dkt. no. 25. Defendant has moved for summary judgment, dkt. no. 51, which motion is fully briefed and ripe for adjudication. As of the date of those briefs filed late in 1999, plaintiff admits it has suffered no damages, *id.* at 12, and there has been no supplemental submission by way of affidavit or otherwise to indicate to the contrary.

II.

Summary judgment is appropriate where admissible evidence fails to demonstrate a genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). If the nonmoving party bears the burden of persuasion at trial, the moving party must show that the nonmoving party's evidence is insufficient to carry that burden. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The nonmoving party can create a genuine issue of material fact by pointing to evidence in the record sufficient to support a jury verdict in its favor at trial. *Brewer v. Quaker State Oil Refining Corp.*, 72 F.3d 326, 330 (3d Cir.1995). Alternatively, "the burden on the moving party may be discharged by showing ... that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325, 106 S.Ct. 2548 (internal quotation marks omitted). "[S]ince a complete failure of proof concerning an essential element," *id.* at 323–24, 106 S.Ct. 2548, on which a party bears the burden of proof at trial establishes that the moving party is "entitled to a judgment as a matter of law," the nonmoving party must establish

and the attendant computer hardware so that it will function...." Dkt. no. 1 ¶ 4. It is difficult to understand how, given that Peerless has only a handful of stores and the upgrade to the Y2K-compliant Counterpoint software costs $1,500–$2,000, dkt. no. 56, exh. A at 133, the jurisdictional amount can be met on these damages. One is hard-pressed to conceive of a legal theory upon which Synchronics could be held responsible for the costs of upgrading plaintiff's DOS-based, noncompliant computers. Indeed, as of the time these briefs were filed, plaintiff had suffered no actual damages at all and relied on the availability of rescission and nominal damages to avoid summary judgment. Dkt. no. 55, at 13. Nevertheless, plaintiff makes the demand—ubiquitous in these cases—for punitive damages on its fraud claim. Because I cannot say as a matter of legal certainty that such an award of punitives was absolutely foreclosed at the time the complaint was filed, I conclude that the jurisdictional amount is met. *Compare Packard v. Provident Nat'l Bank*, 994 F.2d 1039, 1045–46, 1048 (3d Cir.1993) (dismissing diversity-based class action because class representative relied on punitive damages against a trustee to reach jurisdictional amount, and, as a matter of state law, punitive damages could not be recovered against a trustee under any circumstances) *with Carlough v. Amchem Prods., Inc.*, 834 F.Supp. 1437, 1460–62 (E.D.Pa.1993) (punitive damages properly counted where it could not be determined with legal certainty that they could not be awarded).

8. To develop a successful V6.5/Y2K patch Synchronics was required to modify the underlying RealWorld code as well as its own. It is not clear whether RealWorld gave its consent for Synchronics to do this. Dkt. no. 54, exh. 1 (Goldstein aff.); dkt. no. 56, exh. A at 208–10. Of course, this modification meant that V6.5/Y2K data files would no longer be compatible with standard RealWorld V6.5 files. Apparently this was no concern to Synchronics, which viewed both products as obsolete; indeed, as of Mr. Goldstein's August 19, 1999 deposition, only about ten users had downloaded the Y2K-compliant software out of an installed base of approximately 1,000, dkt. no. 56, exh. A at 132, 180, even though its free availability had been posted on Synchronics' website.

the existence of every element essential to its case. *Id.* Such evidence must be significantly probative and more than "merely colorable." *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994).

Once the moving party has satisfied its burden, the nonmoving party is required by Fed.R.Civ.P. 56(e) to establish that there remains a genuine issue of material fact. *Clark v. Clabaugh*, 20 F.3d 1290, 1294 (3d Cir.1994). The nonmovant "may not rest upon mere allegation or denials of [its] pleadings, but must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). A fact is material if it "might affect the outcome of the suit under the governing law[,]" *id.* at 248, 106 S.Ct. 2505,[9] and is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248, 257, 106 S.Ct. 2505.

In determining whether a nonmovant has established the existence of a genuine issue of material fact requiring a jury trial, the evidence of the nonmovant must "be believed and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255, 106 S.Ct. 2505. Whether an inference is justifiable, however, depends on the evidence adduced. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 595–96, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). An inference based upon speculation or conjecture does not create a material factual dispute sufficient to defeat summary judgment. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 382 n. 12 (3d Cir.1990). Likewise, "simply show[ing] that there is some metaphysical doubt as to the material facts" does not establish a genuine issue for trial. *Matsushita*, 475 U.S. at 586, 106 S.Ct. 1348.

9. The parties agree that Tennessee law applies in the case *sub judice*, but disagree whether it differs in any material respect from that of Pennsylvania. I will treat the two bodies of law as interchangeable (especially with respect to the contract claims under the U.C.C.) unless the difference is significant.

III.

A. WARRANTY

[2] As stated *supra*, the software plaintiff acquired was distributed pursuant to a license agreement printed on the diskette envelopes and in the user manuals. The recent weight of authority is that "shrink-wrap" licenses which the customer impliedly assents to by, for example, opening the envelope enclosing the software distribution media, are generally valid and enforceable. *See Hill v. Gateway 2000, Inc.*, 105 F.3d 1147, 1150 (7th Cir.1997) (Easterbrook, J.); *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447, 1452 (7th Cir.1996) (Easterbrook, J.); *M.A. Mortenson Co. v. Timberline Software Corp.*, 93 Wash.App. 819, 970 P.2d 803, 809–811, *review granted*, 138 Wash.2d 1001, 984 P.2d 1033 (1999); *Paragon Networks Int'l v. Macola, Inc.*, No. 9–99–2, 1999 WL 280385, *4 (Ohio App.Ct. Apr. 28, 1999) (unpublished). *But cf. Step–Saver Data Sys., Inc. v. Wyse Technology*, 939 F.2d 91, 95–106 (3d Cir. 1991) (analyzing enforceability of license under U.C.C. § 2–207 as a "battle of the forms" problem and finding license unenforceable because of prior conduct and manifested expectations of the parties).[10] As Judge Easterbrook insightfully opined:

> Vendors can put the entire terms of a contract on the outside of a box only by using microscopic type, removing other information that buyers might find more useful (such as what the software does, and on which computers it works), or both.... Notice on the outside, terms on the inside, and a right to return the software for a refund if the terms are unacceptable ... may be a means of doing business valuable to buyers and sellers alike.... Transactions in which the exchange of money precedes the communication of detailed terms are

10. Neither party contends that *Step–Saver* is controlling here.

> common.... [C]onsider the software industry itself. Only a minority of sales take place over the counter, where there are boxes to peruse.... On Zeidenberg's arguments, these unboxed sales are unfettered by terms—so the seller has made a broad warranty and must pay consequential damages for any shortfalls in performance, two "promises" that if taken seriously would drive prices through the ceiling and return transactions to the horse-and-buggy age.... A vendor, as master of the offer, may invite acceptance by conduct, and may propose limitations on the kind of conduct that constitutes acceptance.... Nothing in the UCC requires a seller to maximize the buyer's net gains. [Indeed], adjusting terms in buyers' favor might help Matthew Zeidenberg today (he already has the software) but would lead to a response, such as higher prices, that might make consumers worse off.

ProCD, 86 F.3d at 1451–53 (citation omitted). Arguably, the instant dispute might be distinguishable, for two reasons. First, Roth personnel opened the diskette envelopes and Peerless never had a chance to reject the terms of the license, although perhaps this is resolvable on traditional agency principles. Second, even if Mr. Lando himself had opened the envelopes, it is possible that the delay or cost occasioned by returning the software and obtaining an alternative product imposed unreasonable "switching costs" that would make enforcement of the license agreement inefficient. *See Hill*, 105 F.3d at 1150 (considering in dictum the effect of the buyer's cost of returning a computer system when the contractual terms enclosed in the shipping box proved unacceptable); *Step–Saver*, 939 F.2d at 102 (stating as part of § 2–207 analysis that party may have invested so much "time and energy in reaching this point in the transaction" that it is deterred "from returning the item").

I need not rely on the validity of the shrink-wrap license agreement, however, because Fran Lando signed the software registration form on which was a recitation that she had read and agreed to the license terms. Mrs. Lando claims never to have seen this recitation, but it is so well-settled as to be axiomatic that a competent person who signs a document but fails to read it is nevertheless bound by its terms. *E.g., Zawikowski v. Beneficial Nat'l Bank*, No. 98–2178, 1999 WL 35304, *2 (N.D.Ill. Jan.11, 1999) (citing *Hill*, 105 F.3d at 1148); *Teague Bros. v. Martin & Bayley, Inc.*, 750 S.W.2d 152, 158 (Tenn.Ct.App. 1987); *Louisville & N. R. Co. v. Smith*, 123 Tenn. 678, 134 S.W. 866, 871 (1911). Thus, I conclude that the software license is enforceable. *See Earl Brace & Sons v. Ciba–Geigy Corp.*, 708 F.Supp. 708, 710 (W.D.Pa.1989).

[3] That license specifically excludes, in a section set off by large, bold type entitled "LIMITATIONS ON WARRANTY AND LIABILITY," the implied warranties of merchantability and fitness, except for the diskettes and user manual, which an earlier portion of the agreement specifically limits to ninety days. Both sets of language, which are such that "attention can reasonably be expected to be called to" them, are clear, conspicuous, and therefore operational. *Id.* (applying U.C.C. § 1–201(10) cmt. 10); *accord New York State Elec. & Gas Corp. v. Westinghouse Elec. Corp.*, 387 Pa.Super. 537, 564 A.2d 919, 924 (1989); *Board of Directors of City of Harriman Sch. Dist. v. Southwestern Petro. Corp.*, 757 S.W.2d 669, 675 (Tenn.Ct.App.1988).[11] Thus, I conclude that all implied warranties were validly disclaimed or, in the case of the diskettes

11. In a half-hearted argument made briefly in a footnote, plaintiff relies on *Harriman* for the proposition that the warranty disclaimer was not sufficiently conspicuous. Dkt. no. 55, at 17–18 n. 2. But there, the disclaimer was buried on the back of a form, in very small type, and with a heading that merely read "Conditions." 757 S.W.2d at 674. *Harriman*, therefore, is distinguishable.

and user manual, temporally limited to a period long before plaintiffs discovered any basis for complaint about the software.

[4] The license agreement limits the duration of any warranty—whether express or implied—to ninety days, and to the diskettes and user manual only. There is nothing legally objectionable about such a temporal limitation. *See Against Gravity Apparel, Inc. v. Quarterdeck Corp.*, 699 N.Y.S.2d 368, 369 (N.Y.A.D.1999), *aff'g* 2 Mealey's Year 2000 Report C1, C3–C6 (N.Y. Sup.Ct., N.Y. County 1999) ("Courts have routinely upheld 90–day warranties on computer software and hardware.") (citing cases); *Paragon Networks*, 1999 WL 280385 at *3; *see generally Valhal Corp. v. Sullivan Assocs., Inc.*, 44 F.3d 195, 202–04 (3d Cir.1995) (limitation of liability clauses in general and "not disfavored under Pennsylvania law[ ]"). Moreover, this is a much more restrictive warranty than plaintiff realizes. As to the diskettes, it must be read *in pari materia* with the following language printed further down in the license:

> The entire risk as to the quality and performance of the Software is with you. Should the Software prove defective, you assume the entire cost of all necessary servicing, repair or correction, and any incidental or consequential damages.

Read together, these two terms conclusively demonstrate that the warranty on the diskettes can only be construed as a media warranty, not a software warranty. In other words, if one or more of the distribution disks containing the software were unreadable and plaintiff could not load the software onto its computers, plaintiff could obtain a free set of replacement diskettes containing the same software in readable form within ninety days of purchase. On the other hand, if the software contained on those diskettes, while machine-readable, proved defective, under the express terms of the agreement, plaintiff would bear the sole risk of such a condition and there would be no warranty coverage.

Likewise, as to the user manual, the warranty also runs only to the media and not to its content. In the manual itself appears the following language:

> Synchronics makes no warranties or representations with respect to the information contained herein; and Synchronics shall not be liable for damages resulting from any errors or omissions herein or from the use of the information contained in this manual.

Read in conjunction with the ninety-day warranty, again, the only rational conclusion is that while the user may obtain a new user manual if, for example, its binding falls apart within three months after the software is acquired, there is no warranty if information contained within that manual turns out to be inaccurate and causes damage.

[5] The software license also contains a broad integration clause, which by its terms "is the complete and exclusive statement of the agreement ... [and] supersedes any prior agreements or understanding, oral or written, with respect to the subject matter of this agreement." It is beyond cavil that such clauses are enforceable, *see, e.g., Sunquest Information Sys., Inc. v. Dean Witter Reynolds, Inc.*, 40 F.Supp.2d 644, 653–56 (W.D.Pa.1999) (Smith, J.); *Harrison v. Fred S. James, P.A.*, 558 F.Supp. 438, 442 (E.D.Pa.1983). Therefore, under the express terms of the integration clause, plaintiff's claims based upon the sales literature must fail because, at best, they created a prior written understanding or agreement. In addition, all of plaintiff's other express warranty claims must fail, for two reasons. First, they arose long after the ninety-day warranty period expired. Second, and more importantly, the inaccurate statement in the user manual-really an implication-that the software could process dates after 1999 is specifically excluded by the terms of the warranty printed in the manual itself.

[6] Even if the integration clause did not bar the claims based upon the sales literature, they would fail on their merits.

Plaintiff argues that, based upon the statements contained therein, it expected that the software would last eight years, but there is no such representation anywhere in the sales literature. The statement that "[w]ith SYNCHRONICS Point of Sale and related software, you'll stay up-to-date. Every minute. Every day. Automatically[,]" cannot reasonably be read as a promise that the software will function for eight years, or even past 1999. In context, it must be remembered that Point of Sale V6.5 was intended to track sales and inventory in a retail business. Thus, the term "up-to-date," particularly when modified by "every minute" and "every day" (but not "every year") cannot be interpreted as anything other than a promise that the user will stay up-to-date on the current affairs of his or her business, not as a promise of the useful life of the software. Likewise, the recitation that "Synchronics introduced point-of-sale software for retailers in 1986" cannot, even under the most strained interpretation, be interpreted to imply (in 1994, eight years after introduction) that the software could be expected to operate for *another* eight years, especially when the focus of the sentence was that, in those eight years, 15,000 users had purchased it. Finally, the statement that "SYNCHRONICS software ... will continue to meet [your specific] needs as you increase sales, expand your business or add locations" pertains only to the scalability of the software (that is, its ability to accommodate growth), not to its temporal life. No reasonable factfinder could find in favor of plaintiff on any of these three statements, and the claims based upon them will be dismissed for this alternate reason as well.

[7] Plaintiff argues that a single recitation in the license agreement, which states that "[t]his license is effective for the useful life of the software" but does not define "useful life," creates an ambiguity that permits the admission of parol evidence. That would be true, of course, in the absence of the integration clause, assuming that the above language created an ambiguity in the first instance. *See Resolution Trust Corp. v. Urban Redev. Auth.*, 536 Pa. 219, 638 A.2d 972, 975–76 (1994); *Jones v. Brooks*, 696 S.W.2d 885, 886 (Tenn.1985); *Rosenfeld v. Rosenfeld*, 390 Pa. 39, 133 A.2d 829, 834 (1957).[12] However, "[t]he parol evidence rule protects a completely integrated written contract from being varied or contradicted by extraneous evidence...." *GRW Enters., Inc. v. Davis*, 797 S.W.2d 606, 612 (Tenn. Ct.App.1990). Accordingly, plaintiff may not resort to parol evidence on the intended duration of the license to contradict either the express contractual exclusions of warranty on the performance of the software or the ninety-day limitation on the diskette and manual warranties. Alternatively, for present purposes the general phrase "useful life of the software" does not render ambiguous those specific exclusions and temporal limitations.[13] For this reason, plaintiff's reliance on the doctrine of *contra proferentem*, that is, that ambiguous contracts should be interpreted against their drafter, *see Betts v. Tom*

12. *Rosenfeld* does state that "[w]hen a contract is silent on its duration, parol evidence is always admissible ... to show whether the agreement was to endure for a reasonable time or for some particular period[,]" 133 A.2d at 834, but this does not help plaintiff. The license agreement specifically recites that it is to run "for the useful life of the software." This is not silence on the issue of duration, but an indication that the license runs for a commercially reasonable time. Arguably, that time has already passed due to obsolescence, discharging both parties obligations.

13. If, for example, the software were still working and defendant demanded that plaintiff cease using it and license an upgrade because the original license had expired, then of course "useful life" would be both ambiguous and the key in the case. It would be resolved, however, not by reference to what the parties represented to each other about the software's expected lifespan (which the parol evidence rule would exclude), but by whether the software was no longer commercially viable (probably by expert testimony).

Wade Gin, 810 S.W.2d 140, 143 n. 4 (Tenn. 1991); *Central Transp., Inc. v. Board of Assessment Appeals*, 490 Pa. 486, 417 A.2d 144, 149 (1980); *Black's Law Dictionary* 296 (5th ed.1979), is also misplaced.

Accordingly, I will dismiss all of plaintiff's contract and warranty claims.

B. FRAUD

Plaintiff bases its fraud and negligent misrepresentation claims upon the statements recited *supra* from the sales literature, and upon the implication given by the user manual that the software could recognize and accurately process dates after 1999. These claims also fail.

1. The Integration Clause

[8, 9] Initially, I must draw a distinction between fraud in the execution and fraud in the inducement. "Fraud in the execution applies to situations where parties agree to include certain terms in an agreement, but such terms are not included. Thus, the defrauded party is mistaken as to the contents of the physical document that it is signing." *Dayhoff, Inc. v. H.J. Heinz Co.*, 86 F.3d 1287, 1300 (3d Cir. 1996). That is not the situation here. Rather, this is a case of alleged fraud in the inducement, which involves "allegations of ... representations on which the other party relied in entering into the agreement but which are contrary to the express terms of the agreement." *Id.*

[10, 11] Under Pennsylvania law, parol representations that contradict the express language of a fully integrated contract are admissible only to show fraud in the execution, not fraud in the inducement. *Sunquest*, 40 F.Supp.2d at 653–56; [14] *accord Quorum Health Resources, Inc. v. Carbon–Schuylkill Comm. Hosp., Inc.*, 49 F.Supp.2d 430, 432 (E.D.Pa.1999); *Montgomery County v. Microvote Corp.*, No. 97–6331, 2000 WL 134708, *7 (E.D.Pa. Feb.3, 2000); *Armstrong World Indus., Inc. v. Robert Levin Carpet Co.*, No. 98–5884, 1999 WL 387329, *5 (E.D.Pa. May 20, 1999). Tennessee appears to have a similar rule, dating back at least three-quarters of a century. *See Litterer v. Wright*, 151 Tenn. 210, 268 S.W. 624, 624 (1925); *accord United Nat'l Real Estate, Inc. v. Thompson*, No. 01–A–01–9108–CV00269 2633, 1992 WL 69642, *4, *9 (Tenn.Ct.App. Apr.8, 1992) (unpublished) (discussing *Litterer*); *Lowe v. Gulf Coast Dev., Inc.*, No. 01–A–019010CH00374 7490, 1991 WL 220576, *6 (Tenn.Ct.App. Nov.1, 1991) (recognizing that, while fraud in the inducement is an exception to the parol evidence rule, "parties cannot use parol evidence to vary the terms of a written contract"). *Cf. Godwin Aircraft, Inc. v. Houston*, 851 S.W.2d 816, 821–22 (Tenn.Ct. App.1992) (fraud claim premised on representation of airworthiness permitted despite contract language that aircraft sold "as is, where is," but without integration clause); *Glanski v. Ervine*, 269 Pa.Super. 182, 409 A.2d 425, 429 n. 4 (1979) (similar, residential real estate). The *Litterer* court expressed the rule as follows:

> Parol proof of inducing representations to the making of a contract must be limited to matters not otherwise plainly expressed in the writing.... The fundamental distinction should be kept clearly in mind between the denied right to contradict the terms of the writing, and the recognized right without so doing to resist recovery thereon, or to rely upon matters unexpressed therein. The ultimate test is that of contradiction, which is never permissible.

268 S.W. at 624. Thus, I conclude that plaintiff's fraud claim, to the extent it is based upon affirmative misrepresentations, is barred by the integration clause as contrary to the express terms of the license agreement, in the same manner as the contract and warranty claims. *See Sunquest*, 40 F.Supp.2d at 656 (dismissing

14. In *Sunquest*, I synthesized the Pennsylvania jurisprudence on this distinction at considerable length. I cite that discussion, rather than rehearse it here.

fraud in the inducement claim as contrary to integrated contract).

2. Misrepresentations

[12] Even if the integration clause did not bar plaintiff's fraud claims, the representations in the sales literature would still not be actionable. As stated *supra*, they make no specific promises concerning the expected useful life of the software or its ability to process dates after 1999. At most, these are statements of puffery—"exaggeration or overstatement expressed in broad, vague and commendatory language"—not examples of actionable fraud. *See Castrol, Inc. v. Pennzoil Co.*, 987 F.2d 939, 945 (3d Cir.1993). Such statements of the sellers opinion are merely "sales talk" and should be recognized as such by a reasonable buyer and appropriately discounted, not stretched into the basis for a class action lawsuit. *See id.; Step-Saver Data Sys., Inc. v. Wyse Technology*, 752 F.Supp. 181, 190 (E.D.Pa.1990), *rev'd in part on other grounds*, 939 F.2d 91 (3d Cir.1991);[15] *Forbis v. Reilly*, 684 F.Supp. 1317, 1321–22 (W.D.Pa.), *aff'd mem.*, 862 F.2d 307 (3d Cir.1988); *Huddleston v. Infertility Ctr., Inc.*, 700 A.2d 453, 461 (Pa.Super.1997); *Klages v. General Ordnance Equip. Corp.*, 240 Pa.Super. 356, 367 A.2d 304, 310–11 (1976). *Cf. Garrett v. Mazda Motors*, 844 S.W.2d 178, 181 (Tenn. Ct.App.1992) (statement that automobile had been "babied to death" "cross[ed] over the line between 'puffing' or 'sales talk' and actual misrepresentation" when "the car had been stolen and driven 10,000 miles by a thief").

Nor can the implication created by the date examples in the user manual be considered an express representation. It too is vague, stating only that the user can enter a date after 1999 and perhaps that the software will correctly display it in MMDDYY format on a video display or printed report. It does *not* promise that the software will process the date correctly with respect to other dates. Plaintiff's fraud claim based upon the user manual is better characterized as an omission claim that defendant should have disclosed that the software, while accepting these dates, would not process them accurately.

3. Omissions

[13] "It is axiomatic, of course, that silence cannot amount to fraud in the absence of a duty to speak." *Sunquest*, 40 F.Supp.2d at 656; *accord Duquesne Light Co. v. Westinghouse Elec. Corp.*, 66 F.3d 604, 611–12 (3d Cir.1995); *In re Estate of Evasew*, 526 Pa. 98, 584 A.2d 910, 913 (1990); *Sevin v. Kelshaw*, 417 Pa.Super. 1, 611 A.2d 1232, 1236 (1992); *Patton v. McHone*, 822 S.W.2d 608, 614 (Tenn.Ct. App.1991). Such a duty does not arise without a confidential or fiduciary relationship between the parties generally; in a typical arms-length business relationship, absent one party's surrender of substantial control of his affairs to the other, there is no duty to disclose. *Sunquest*, 40 F.Supp.2d at 656 (quoting *Drapeau v. Joy Tech., Inc.*, 447 Pa.Super. 560, 670 A.2d 165, 172 (1996) (Beck, J., concurring)). In fact, "there is virtually no Pennsylvania case in which a defendant has been held to have a duty to speak when both the plaintiff and defendant were sophisticated business entities, entrusted with equal knowledge of the facts[ ]" "and ample access to legal representation." *Duquesne Light*, 66 F.3d at 612; *accord City of Rome v. Glanton*, 958 F.Supp. 1026, 1038 (E.D.Pa.), *aff'd mem.*, 133 F.3d 909 (3d Cir.1997).

15. While I agree with the statement of law expressed in *Step-Saver*, I question that court's application of the law to the facts of that case. There, the court found statements that a computer system could serve up to nine users and was compatible with certain other items of hardware and software to be subjective and therefore mere puffery. 752 F.Supp. at 190. To the contrary, these appear to be specific representations of existing fact, not mere opinion. The fact that information is technical and perhaps difficult for the layperson to understand does not make it subjective.

[14] Tennessee, however, may have a broader doctrine. In *Perkins v. M'Gavock*, 3 Tenn. (Cooke) 415, 1813 WL 259, *2 (1813), that state's highest court held that "each party to a contract is bound to disclose to the other all he may know respecting the subject-matter materially affecting a correct view of it, unless common observation would have furnished the information." *Accord Simmons v. Evans*, 185 Tenn. 282, 206 S.W.2d 295, 296 (1947). A review of the Tennessee jurisprudence reveals, however, that these cases almost always involve the sale of real (usually residential) property [16] or the sale of used automobiles. *See Garrett*, 844 S.W.2d at 181; *Gray v. Boyle Investment Co.*, 803 S.W.2d 678, 683 (Tenn.Ct.App.1990). In those cases, the "seller's duty to disclose information concerning the condition of a product arises from its superior knowledge of the product." *Patton*, 822 S.W.2d at 614.

I believe the Tennessee courts might find the existence of a duty in a computer software case like this one, as the technical knowledge of the internal design of a software product, particularly a consumer product distributed only in machine-readable object code rather than human-readable source code, is committed entirely to the licensor. Yet, there are many design details within a software developer's exclusive knowledge, and the duty to disclose surely cannot arise as to each one of them, or transactions would become hopelessly bogged-down in minutiae not to mention possible loss of trade secrets as well. Rather, that duty can extend only to material information, information specifically requested by the customer, and information necessary to make an affirmative disclosure that would otherwise be a half-truth not misleading. *See id.* at 615–16.

[15] Here, there is no evidence that the industry in general or plaintiff in particular was even thinking about Y2K compliance in 1994, and there was certainly no request for such information. On the other hand, the use of date entry examples in the user manual with dates after 1999 does tend to imply that the system was designed to process those dates properly. If it does not, then there is a duty to expand on the implicit representation of compliance by stating that the software will not process later dates accurately. Thus, while the issue is close, I conclude that there was a duty to speak under Tennessee law.

4. Reliance

[16] Nevertheless, misrepresentations and omissions are not actionable as fraud without reasonable reliance thereon. *In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 403–04 (6th Cir.1997) (predicting Tenn. law and rejecting fraud-on-the-market in favor of actual reliance for common law fraud and negligent misrepresentation claims), *cert. denied*, 523 U.S. 1106, 118 S.Ct. 1675, 140 L.Ed.2d 813 (1998); *Wittekamp v. Gulf & Western Inc.*, 991 F.2d 1137, 1144–45 (3d Cir.1993); *Mellon Bank Corp. v. First Union Real Estate Equity & Mortgage Invs.*, 951 F.2d 1399, 1411–12 (3d Cir.1991); *Speaker v. Cates Co.*, 879 S.W.2d 811, 816 (Tenn.1994); *Mellon v. Barre–National Drug Co.*, 431 Pa.Super. 175, 636 A.2d 187, 190 (1993); *Sevin*, 611 A.2d at 1236. Here, Mr. Lando admitted that he did not even receive the manual until after the software was purchased and hence did not rely on anything contained in it. Dkt. no. 58, exh. 6, at 301, 304, 310. Moreover, Fran Lando admitted that Y2K-compliance was not a factor in her decision to purchase Synchronics software. Dkt. no. 54, exh. 3, at 88–90.

Plaintiff urges that reliance should be presumed "where information material to the transaction was concealed by a positive misrepresentation and where the evidence shows that the deceived party would not

16. In Pennsylvania, residential property fraud cases tend to be "*sui generis* within that context and have no applicability when residential real estate is not involved." *Sunquest*, 40 F.Supp.2d at 655 (citing cases).

have entered the transaction if the truth had been disclosed." Dkt. no. 55, at 22–23. This is a fair, if perhaps tautological, statement of the law. *See Rowland v. Carriers Ins. Co.*, 738 S.W.2d 183, 185–86 (Tenn. 1987); *De Joseph v. Zambelli*, 392 Pa. 24, 139 A.2d 644, 647–48 (1958); *New York Life Ins. Co. v. Brandwene*, 316 Pa. 218, 172 A. 669, 671 (1934). When one would not have entered the transaction in the presence of full disclosure of a material fact or absent a misstatement of one, that person has obviously relied. But here, there is no evidence that plaintiff would not have acquired defendant's software in 1994 had it been disclosed that it was not Y2K-compliant.[17] Indeed, there is no evidence that any Y2K-compliant software for plaintiff's application was even on the market in 1994. Accordingly, reliance cannot be "presumed."

Accordingly, I will dismiss plaintiff's fraud claim.

C. NEGLIGENT MISREPRESENTATION

[17] Plaintiff also seeks recovery on a negligence/negligent misrepresentation theory, which fails for the same reasons as the fraud claim. Given the contractual relationship between the parties, moreover, the economic loss doctrine bars this tort claim in favor of the well-founded view that parties in privity should look to the contract itself for their remedies. As the Third Circuit, predicting Pennsylvania law, opined:

> [W]here there is privity in contract between two parties, and where the policies behind tort law are not implicated, there is no need for an additional tort of negligent misrepresentation.... A party who engages in contractual negotiations with another has the ability to protect itself in the contractual language against the other party's innocent, though wrong representations.

Duquesne Light, 66 F.3d at 620;[18] *accord Valhal*, 44 F.3d at 207; *Sun Co. v. Badger Design & Constructors, Inc.*, 939 F.Supp. 365, 371–72 (E.D.Pa.1996); *Eagle Traffic Control v. Addco*, 882 F.Supp. 417, 419 (E.D.Pa.1995); *Palco Linings v. Pavex, Inc.*, 755 F.Supp. 1269, 1271 (M.D.Pa.), *adhered to on reconsideration*, 755 F.Supp. 1278 (M.D.Pa.1990) ("[T]ort law is not intended to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement.... A buyer['s] ... desire to enjoy the benefit of his bargain is not an interest that tort law traditionally protects."); *PPG Indus. Inc. v. Sundstrand Corp.*, 681 F.Supp. 287, 289–91 (W.D.Pa.1988); *Carlotti v. Employees of Gen'l Elec. Fed. Credit Union*, 717 A.2d 564, 566–67 (Pa.Super.1998), *alloc. de-*

17. The testimony on which plaintiff asserts otherwise does not refer to the 1994 Point of Sale V6.5 transaction, but to the Novell system plaintiff purchased in 1997, after it had been informed of the Y2K problem. *See* dkt. no. 56, exh. B at 209–10, 218–19 (cited in dkt. no. 55, at 23).

18. This reasoning is not undermined by the fact that here, the license terms were imposed by Synchronics on a form license agreement, without bargaining. There is no evidence that Peerless objected to the terms or attempted to bargain over them. Moreover, if the term had turned out to be non-negotiable, it would probably be because the risk to be insured against (damages flowing from a negligently made misstatement times the probability of such an event) was far too high to be absorbed at the price charged for the software, particularly when the costs of defending the litigation are added. This would appear to be a common situation in mass-market software, which could increase significantly in price if burdensome legal duties were found to exist. While that would benefit *some* customers (those willing to pay more to shift risk to the software developer), many others would be forced to forego the software entirely as uneconomic. The current robust market for such software, which is almost always licensed under limitation of liability clauses, indicates that the *ex ante* demand for software developer risk-bearing in the mass-market context is limited or non-existent, even though the *ex post* demand is, as shown by the filing of this case and others like it, extremely high. Unfortunately for plaintiffs, one cannot purchase fire insurance after a fire.

nied, 739 A.2d 163 (Pa.1999); *Spivack v. Berks Ridge Corp.*, 402 Pa.Super. 73, 586 A.2d 402, 405 (1990) ("The general rule of law is that economic losses may not be recovered in tort (negligence) absent physical injury or property damage."); *Lower Lake Dock Co. v. Messinger Bearing Corp.*, 395 Pa.Super. 456, 577 A.2d 631, 634–35 (1990); *Ritter v. Custom Chemicides, Inc.*, 912 S.W.2d 128, 133 (Tenn. 1995) ("Tennessee has joined those jurisdictions which hold that product liability claims resulting in pure economic loss can better be resolved on theories other than negligence."). This is especially true when there is an integrated writing. *See Sunquest*, 40 F.Supp.2d at 651–56; *New York State Elec. & Gas*, 564 A.2d at 926 (fully integrated contract cannot be avoided by pursuing negligent misrepresentation theory).

[18] There are two exceptions to the economic loss rule: one is fraud (that is, an *intentionally* false statement), and the other applies when "the defendant is in the business of supplying information for the guidance of others and makes negligent misrepresentations[.]" *Sunquest*, 40 F.Supp.2d at 658 (quoting Restatement (Second) of Torts § 552 (1977)); *Ritter*, 912 S.W.2d at 130–31; *John Martin Co. v. Morse/Diesel, Inc.*, 819 S.W.2d 428, 431 (Tenn.1991). I have already dealt with plaintiff's fraud claim, and the section 552 claim can likewise be disposed of in short order by simply pointing out that, unlike the investment banker in *Sunquest*, defendant, while it is a software developer in the *information systems* business, is not in the business of *providing information*.

In *Ritter*, plaintiff suffered damage to their crops after reading defendant's advertising and applying its pesticide. The court, however, held that their claim for economic loss was barred because the advertising did not show that defendant was "in the business of supplying information for the guidance of others[,]" as required by § 552. 912 S.W.2d at 131. More specifically, the court in *Walter Raczynski Prod. Design v. IBM Corp.*, No. 92–6423, 1994 WL 247130 (N.D. Ill. June 6, 1994), held that a manufacturer/seller of computer hardware was not in the business of supplying information. *Id.* at *3. It opined:

> Even those businesses that provide products or services often provide operating instructions and warranty information, as well.... [D]efendants who provide such information are not, for that reason, "in the business of supplying information...." Any information supplied by the manufacturer [is] considered merely incidental to the sale of goods.... [C]omputer hardware and software manufacturers do not meet the definition of businesses engaged in providing information, against whom a negligent misrepresentation claim may be asserted.

Id. (citing cases; citations and some internal quotation marks omitted); *see generally Rankow v. First Chicago Corp.*, 870 F.2d 356, 363–64 (7th Cir.1989) (setting forth general principle and citing cases).

Accordingly, plaintiff's negligent misrepresentation claim must be dismissed.

D. LACK OF DAMAGES

[19] As an alternate basis for summary judgment, defendant asserts that its motion should be granted because plaintiff has suffered no actual damages. *See generally Brader v. Allegheny Gen'l Hosp.*, 64 F.3d 869, 878 (3d Cir.1995); *Kaufman v. Mellon Nat'l Bank & Trust Co.*, 366 F.2d 326, 331 (3d Cir.1966); *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa.Super.1999); *Ferry v. Fisher*, 709 A.2d 399, 402 (Pa.Super.1998). Indeed, the record indicates only that Mr. Lando stopped receiving his regular reports from the Synchronics software in June 1999, but there is no evidence why this happened sufficient to implicate the Y2K-noncompliance of the software as the culprit, nor is there any indication of monetary loss arising from the malfunction. Moreover, there has been no supplemental submission since the

beginning of the new century to indicate any subsequent malfunction or damage. Nevertheless, it is undisputed that the Point of Sale V6.5 software is not Y2K-compliant and thus will require replacement at some cost to Peerless.[19] Accordingly, I will not dismiss the contract claim on that basis. *See Barrack v. Kolea*, 438 Pa.Super. 11, 651 A.2d 149, 155 (1994) ("Damages are not speculative when they are certain in fact, even if uncertain as to amount."); *Overstreet v. Shoney's, Inc.*, 4 S.W.3d 694, 703 (Tenn.Ct.App.1999) (similar).

Plaintiff seeks nominal damages on its fraud claim, no doubt as a means of supporting a jury award of punitive damages. Under Pennsylvania authority, nominal damages are available as a remedy for fraud. *Sands v. Forrest*, 290 Pa.Super. 48, 434 A.2d 122, 124 (1981). Thus, this claim cannot be dismissed for lack of damages, either.

I reject, however, plaintiff's argument that it can satisfy the damage requirement by seeking rescission. Although this is an available remedy, *see Metropolitan Property & Liab. Ins. Co. v. Insurance Comm'r*, 525 Pa. 306, 580 A.2d 300, 302 (1990); *Richards v. Taylor*, 926 S.W.2d 569, 571–72 (Tenn.Ct.App.1996), plaintiff never tendered the software back to defendant and sought to recover the purchase price. This is fatal to a rescission claim in Pennsylvania. *Sunquest*, 40 F.Supp.2d at 662 (citing cases). Moreover, under Tennessee law, rescission is only granted "under the most demanding circumstances[,]" and is not permitted where, as here, an adequate remedy at law exists. *Richards*, 926 S.W.2d at 571–72.

E. PROXIMATE CAUSATION

[20] Finally, I address briefly defendant's other alternate ground for granting summary judgment, the argument that the noncompliance of the Sunquest software is not the proximate cause of any harm to Peerless because the rest of Peerless' computer system is itself noncompliant. All plaintiff must show, however, is that the defendant's acts or omissions were a "substantial factor" in bringing about plaintiff's harm. *Blum v. Merrell Dow Pharm., Inc.*, 705 A.2d 1314, 1316 (Pa.Super.1997), *alloc. granted*, 558 Pa. 597, 735 A.2d 1267 (1999); *Boling v. Tennessee State Bank*, 890 S.W.2d 32, 36 (Tenn.1994). Defendant's argument is akin to saying that the owner of an automobile with a defective transmission cannot recover against the company which made it because the brakes, engine and tires are defective as well, preventing the car from running in any event. This line of reasoning would permit not only the transmission manufacturer to evade liability, but those who made the engine, tires and brakes as well, even though the vehicle owner was entitled to have his car run properly again. Accordingly, I reject defendant's proximate causation argument.

IV.

For the foregoing reasons, I will grant defendant's motion for summary judgment and dismiss plaintiff's claims with prejudice. An appropriate order follows.

ORDER

AND NOW, this twenty-fifth day of February 2000, upon consideration of defendant's motion for summary judgment, dkt. no. 51, defendant's motion for sanctions and to compel expert discovery, dkt. no. 46, and the responses thereto, it is hereby ORDERED and DIRECTED that:

1. defendant's motion for summary judgment, dkt. no. 51, is GRANTED;

2. defendant's motion for sanctions and to compel expert discovery, dkt. no. 46, is DENIED AS MOOT;

19. Even if the "free" Y2K upgrade provided by defendant functions properly and is installed, plaintiff will still incur costs in installing it, even if those costs involve only the time of its personnel or those of a contractor.

3. the Clerk of Court shall mark the above-captioned civil action CLOSED.

SUNSHINE SHOPPING CENTER, INC., Plaintiff,

v.

KMART CORPORATION, Defendant.

No. Civ.1999–0099.

District Court, Virgin Islands, D. St. Croix.

Jan. 27, 2000.

Shopping center leasing space to retailer brought action against retailer, alleging breach of lease and seeking to evict retailer. Shopping center moved for partial summary judgment, and retailer cross-moved for summary judgment. The District Court, Finch, Chief Judge, held that: (1) phrase of commercial lease allowing retailer to sell no food items except candy, cookies, and other miscellaneous foods limited sale of "miscellaneous foods" to those foods related to candy and cookies; (2) shopping center did not voluntarily waive its right to enforce such provision; (3) retailer, in deciding to expand its store to include more food products, did not rely on fact that shopping center initially sought injunction rather than eviction to enforce lease provision; and (4) triable issues precluded summary judgment on issue of whether retailer was precluded from obtaining equitable relief from eviction due to "unclean hands."

Plaintiff's motion granted in part and denied in part; Defendant's motion denied.

1. Contracts ⇐147(2), 176(1)

Under Virgin Islands law, in examining a contract, the court is to interpret the contracting parties' intent as objectively manifested by them and make a preliminary inquiry as to whether the contract is ambiguous.

2. Contracts ⇐143(2)

Under Virgin Islands law, a contract provision is considered "ambiguous" if it is susceptible to two reasonable alternative interpretations.

See publication Words and Phrases for other judicial constructions and definitions.

3. Contracts ⇐176(2)

Under Virgin Islands law, if the court determines that the written terms of a contract are unambiguous, the court will interpret the contract as a matter of law.

4. Contracts ⇐176(3)

Under Virgin Islands law, if the court determines that a contract is ambiguous, then the interpretation of the contract is left to the fact finder to resolve the ambiguity in light of extrinsic evidence.

5. Contracts ⇐147(2)

In determining the intent of contracting parties, the Third Circuit applies the "plain meaning rule" of interpretation, which assumes that the intent of the parties to an instrument is embodied in the writing itself, and when the words are clear and unambiguous the intent is to be discovered only from the express language of the agreement.

See publication Words and Phrases for other judicial constructions and definitions.

6. Contracts ⇐169
Evidence ⇐448

The Third Circuit recognizes that a determination as to whether the language of an agreement is unambiguous may not be possible without examining the context in which the agreement arose; thus, in determining whether ambiguity exists, a

and the other arguments simply have no merit. Thus, his attorney committed no errors that prejudiced him, and there is no need to hold a hearing on this matter as the "files and records of this case conclusively show that the prisoner is entitled to no relief[.]" 28 U.S.C. § 2255.

CLEARFIELD BANK & TRUST COMPANY, Plaintiff,

Penn Laurel Financial Corporation and CSB Bank, Intervening Plaintiffs,

v.

OMEGA FINANCIAL CORPORATION, Defendant.

No. Civ.A. 99-180J.

United States District Court, W.D. Pennsylvania.

Sept. 10, 1999.

Corporation that was merger target sued investment company making competing solicitation for shares of corporation's stock, seeking injunctive relief for alleged violation of Williams Act provisions regarding tender offers, and violation of state banking law. The District Court, D. Brooks Smith, J., held that: (1) Williams Act applied to small merger transaction involving relatively few shareholders; (2) communication made to shareholders of merger target was "tender offer, " under Williams Act; (3) offer contained material omissions regarding need to first tender shares to corporation, and fact that regulatory approval of offer had not yet been sought and might take long time; (4) scienter requirement under Williams Act was satisfied; (5) tender offer violated state banking law restrictions on solicitation of shares of bank; (6) shareholders of target would suffer irreparable injury if relief was not granted; and (7) injunction would be issued delaying date of shareholder meeting to approve merger, requiring rescission of agreements already signed and returned in response to offer, and providing for dissemination of court's opinion to interested shareholders.

Permanent injunction granted.

1. Securities Regulation ⇐52.30

Williams Act regulation of tender offers applied to privately negotiated intrastate transaction involving merger of small banks, having relatively few shareholders. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

2. Securities Regulation ⇐52.31

Factors to be considered in determining existence of tender offer, subject to regulation by Williams Act, include (1) active and widespread solicitation of public shareholders for the shares of the issuer, (2) solicitation made for a substantial percentage of the issuer's stock, (3) offer to purchase made at a premium over the prevailing market price, (4) terms of the offer firm rather than negotiable, (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased, (6) offer open only a limited period of time, (7) offeree subjected to pressure to sell his stock, and (8) public announcements of a purchasing program concerning the target company preceding or accompanying rapid accumulation of large amounts of the target company's securities. Securities Exchange Act of 1934, § 14(d), 15 U.S.C.A. § 78n(d).

3. Securities Regulation ⇐52.31

The question of whether a solicitation constitutes a "tender offer," for purposes of regulation under the Williams Act, turns on whether, viewing the transaction in the light of the totality of circumstances, there

appears to be a likelihood that unless the pre-acquisition filing strictures of the Act are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them. Securities Exchange Act of 1934, § 14(d), 15 U.S.C.A. § 78n(d).

4. **Securities Regulation ⇐52.31**

Proposed agreement presented to shareholders of bank, as alternative to another merger agreement not yet final, was "tender offer," subject to regulation under Williams Act; shareholders representing over 20% of bank's shares were asked to exercise their dissenting shareholder rights, as necessary prior step to accepting alternative offer for shares, when nine percent rate of dissenting shareholders was sufficient to terminate proposed merger, price was firm and there were material omissions in information supplied to shareholders of type Williams Act was designed to protect against. Securities Exchange Act of 1934, § 14(d), 15 U.S.C.A. § 78n(d).

5. **Securities Regulation ⇐173**

A plaintiff seeking a permanent injunction under Williams Act provisions governing tender offers, must prove by a preponderance of the evidence that the defendant (1) made misstatements or omissions, (2) of material fact, (3) with scienter, (4) in connection with a tender offer. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

6. **Securities Regulation ⇐52.39(3)**

An omitted fact is "material," for purposes of William Act regulation of tender offers, if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

See publication Words and Phrases for other judicial constructions and definitions.

7. **Securities Regulation ⇐52.39(4)**

Tender offer seeking to acquire stock of shareholders dissenting from proposed merger contained material omissions prohibited by Williams Act; solicited shareholders were not informed that if they exercised their dissenting rights they would have to tender the shares to the corporation, and shares would not be available for tendering pursuant to the tender offer, and that regulatory approval of acquisition of shares, that might take months, had not yet been sought. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

8. **Securities Regulation ⇐52.46**

Scienter is necessary element of claim, under Williams Act, that tender offer contained material misrepresentations or omissions. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

9. **Securities Regulation ⇐52.46**

Tender offerors satisfied scienter requirement for Williams Act claim of material omissions in offer, by failing to mention in solicitation of shares of corporation that was target of merger that exercise by solicited shareholders of their dissenting shareholder rights would require them to tender their shares to corporation before they could be tendered in response to tender offer, and by not issuing any further statement after being challenged by corporation for providing misleading information. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

10. **Banks and Banking ⇐20**

Tender offer for shares of Pennsylvania bank violated Pennsylvania Banking Code prohibition on proposed acquisitions of more than ten percent of bank's shares, without prior Department of Banking approval, when offerors circulated to bank's shareholders proposed agreement for purchase of shares, even though agreement was not executed by offerors. 7 P.S. § 112(b).

11. Banks and Banking ⇐20

Tender offer for shares of Pennsylvania bank violated Pennsylvania Banking Code prohibition on proposed acquisitions of more than ten percent of target bank's shares, without prior Department of Banking approval, even though offerors contemplated eventual merger with target bank and mergers were exempt from prohibition. 7 P.S. § 112(b), (i, ii).

12. Securities Regulation ⇐177

Irreparable injury requirement was satisfied for permanent injunction under Williams Act, barring tender offer for shares of corporation which was subject of signed merger agreement awaiting final shareholder and regulatory approval; shareholders accepting tender offer would have difficulty proving money damages. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

13. Securities Regulation ⇐173

Remedy for tender offer, which failed to disclose that offerees would have to dissent to merger and offer shares to issuing corporation before they could be tendered in response to tender offer, was injunction postponing date of shareholders meeting on merger to allow for complete disclosure, rescission of all agreements to tender shares signed by shareholders, and providing of court's opinion to interested shareholders. Securities Exchange Act of 1934, § 14(e), 15 U.S.C.A. § 78n(e).

Gary P. Hunt, John E. Graf, Tucker Arensberg, Pittsburgh, PA, for Clearfield Bank & Trust Company, plaintiff.

Leonard Dubin, Blank, Rome, Comisky & McCauley, Philadelphia, PA, for Omega Financial Corporation, defendant.

Laurence W. Dague, David R. Breschi, Angela L. Dumm, Shumaker Williams, Harrisburg, PA, for Penn Laurel Financial Corp., intervenor-plaintiff.

Laurence W. Dague, David R. Breschi, Angela L. Dumm, Harrisburg, PA, for CSB Bank, intervenor-plaintiff.

Laurence W. Dague, David R. Breschi, Angela L. Dumm, Shumaker Williams, Harrisburg, PA, for Guy A. Graham movant.

Laurence W. Dague, David R. Breschi, Angela L. Dumm, Harrisburg, PA, for Carl A. Belin, movant.

OPINION and ORDER

D. BROOKS SMITH, District Judge.

I. *Introduction*

In the instant case, this court gets a closeup view of the Darwinian struggle that today animates most merger and acquisition activity in the commercial banking field. Any merger brings to the fore the sometimes converging and sometimes conflicting interests of target and suitor, shareholder and incumbent management. This case is no exception. It presents a pending merger with intervenor bank which plaintiff wishes to consummate and which defendant hopes to defeat. Plaintiff charges that defendant has violated both federal securities law and state banking law in its aggressive efforts to buy shares of plaintiff's common stock directly from some of plaintiff's shareholders. Plaintiff further contends that defendant's conduct warrants the grant of injunctive relief. Meanwhile, a September 20 meeting of plaintiff's shareholders looms,[1] at which the planned merger will be presented for approval. As appears from the following, this court's ruling will have profound implications for the market in plaintiff's shares, and for plaintiff and intervenor as on-going entities.

Having conducted an evidentiary hearing on August 24 and 25, the following constitute my findings of fact and conclusions of law.

1. The meeting, originally scheduled for September 8, was re-scheduled by plaintiff after the evidentiary hearing was concluded because no adjudication had yet been handed down.

II. *Facts and Procedural History*

Clearfield Bank & Trust Company ("Clearfield") is a Pennsylvania-chartered bank and trust company that has served Clearfield County, Pennsylvania since 1902. Exh. P–1, at 1; exh. P–4, at 1. Clearfield conducts business through six offices in Clearfield County, including its corporate office in the borough of Clearfield. Exh. P–4, at 1. "As of March 31, 1999, the bank had total assets of approximately $183.4 million...." *Id.*

CSB Bank ("CSB"), a Pennsylvania-chartered banking institution, also serves Clearfield County. It conducts business through five offices, including its corporate headquarters in Curwensville, Pennsylvania, a community located five miles from the borough of Clearfield. Exh. P–4, at 2; test. of Butler. Approximately four years ago, Clearfield entertained the possibility of merging with CSB Bank and its parent, Penn Laurel Financial Corporation ("Penn Laurel"), because neither institution could sustain adequate growth in the community without a larger lending base. Test. of Butler. CSB is the only bank owned by Penn Laurel, a registered bank holding company which, as of March 31, 1999, had total assets of approximately $134.9 million. Exh. P–4, at 2.

CSB, in Clearfield's view, was a potential merger partner because it shared Clearfield's conservative philosophy and commitment to the community, and enjoyed a greater growth rate. The initial investigation into a merger agreement between the companies did not lead to an agreement. Test. of Butler. The possibility of a merger resurfaced two years later, in 1997, and a definitive Agreement and Plan of Reorganization (hereafter referred to as the "Merger Agreement") was executed on December 31, 1998 by Clearfield, CSB and Penn Laurel. Exh. P–1, test. of Butler.

The Merger Agreement states that "Penn Laurel, CSB and Clearfield wish to affiliate through a business combination to form a stronger, more effective community financial institution." Exh. P–1, at 1. It explains that Clearfield would merge with CSB and that the resulting bank would bear the name Penn Laurel Bank & Trust. *Id.* Under the terms of the Merger Agreement, "each share of Clearfield Common Stock issued and outstanding" immediately before the effective date of the merger would be "converted into and become, without any action on the part of the holder thereof, the right to receive .97 shares of Penn Laurel Common Stock." *Id.* § 2.1(a) at 2. If the merger transaction is not consummated by October 31, 1999, the Merger Agreement automatically terminates, "unless extended, in writing, prior thereto." *Id.* § 9.1(d) at 49.

The merger was conditioned upon the approval of the Federal Reserve Board, the Pennsylvania Department of Banking, and the Federal Deposit Insurance Corporation, as well as the shareholders of Clearfield, CSB and Penn Laurel. Exh. P–1, § 8.1(a) at 40. The approval of this merger requires "66 2/3% of the outstanding shares at Clearfield and 75% at Penn Laurel." Exh. P–4, at 3.

In addition to the necessary approval from the regulatory agencies and the shareholders, the merger is also conditioned upon the transaction's qualifying for a type of accounting treatment known as the "pooling of interest" method. Exh. P–1, § 8.2(d) at 44; exh. P–4, at 3. The proxy explains that, by applying this accounting method, "we will treat the companies as if they had always been combined for accounting and financial reporting purposes." [2] Exh. P–4, at 4. Under this meth-

2. The pooling of interest accounting method is one of two generally accepted methods to be used when two or more businesses combine. Anthony Phillips *et al., Basic Accounting for Lawyers*, § 10.02, at 121 (4th ed.1988). This method is

> used when two enterprises combine their resources into a new enterprise. Each of the participants is a part of the new enter-

od, if the shareholders of "more than 10% of the outstanding shares of Clearfield exercise dissenter's rights, the accounting conditions [for the pooling of interest method] will not be met. If this occurs, the merger will not be completed." Exh. P–4, at 3. The Merger Agreement, however, specifically provides that the dissenting shareholders shall not exceed nine percent of the issued and outstanding shares and acknowledges that dissenting shareholders will be entitled to exercise their rights as provided under the law. Exh. P–1, § 8.1(i) at 42; § 10.1 at 50.

If the merger is successful, "the former Clearfield shareholders will hold approximately 61.03% of all outstanding Penn Laurel common stock and the current Penn Laurel shareholders will hold approximately 38.97% of the combined entity." Exh. P–4, at 2. From the perspective of the Clearfield board of directors, the merger is beneficial because Clearfield will remain locally controlled and the value of its stock should increase. Test. of Butler. In addition, the merged entity would possess the largest market share of any bank in Clearfield County. As a result, the merger should enable the resulting bank to contribute to growth in the community while enhancing shareholder value. Exh. P–4, at 25; test. of Butler, Wood, Downs.

The merger transaction agreed to among Clearfield, CSB and Penn Laurel was the subject of a press release. Timothy Anonick, an investment banker who had performed services for Clearfield in the past, read the press release in January of this year and was "confused" by the proposed merger because he understood that Clearfield was not interested in merging with any other institution. Test. of Anonick. He contacted Clearfield's then-President and CEO, Sherwood Moody, to offer his consulting services. Moody declined, explaining that Ryan, Beck & Company, another investment banking firm, had already been retained.

Anonick contacted Moody again in February to obtain further details about the merger. He also accessed the Merger Agreement on the Internet in early April. After reviewing the terms of the merger, Anonick concluded that the terms of the transaction were not "that good" because the proposed deal was, in his words, not a takeover but a "take-under" by a smaller bank. He contacted Moody again—this time in April—to express his concerns. Upon learning from Moody that some shareholders were unhappy with the terms of the merger, Anonick decided to find out if any other banks would be interested in acquiring Clearfield. In a conversation with Steve Martz, the chief operating officer of Omega Financial Corporation ("Omega"), Anonick was advised to speak with David Lee, Omega's CEO and Chairman.

Anonick met with Lee and Martz on April 27, 1999, and was later retained to help Omega acquire Clearfield. Working with bankers from Omega, Anonick analyzed Clearfield and arrived at an exchange price. With the assistance of counsel, he then drafted a letter expressing Omega's interest in acquiring Clearfield. The letter, signed by Lee and dated and delivered on Monday, May 10, 1999, informed the Clearfield board of directors that Omega was aware of the merger transaction with Penn Laurel and pointed out that "some of your shareholders have expressed opposition to the Agreement." Exh. P–2. Lee's letter further advised that

prise; the participants conduct business as a single enterprise after they combine. Because there is no buyer, the assets and liabilities are carried forward into the combined enterprise's financial statement at their book values, so there are no new values for tax purposes. No goodwill appears in the combined financial statements because there has been no purchase.

Id. § 10.02(a) at 122, *see also Allegheny Energy, Inc. v. DQE, Inc.*, 171 F.3d 153, 156 n. 4 (3d Cir.1999). The conditions which must be met to qualify for the pooling of interest method have been "interpreted very strictly by the accounting profession[.]" Phillips, *supra*, § 10.03, at 123. As a result, accounting for business combinations by the pooling of interest method is "very rare." *Id.*

Omega was interested in a merger with Clearfield if the Penn Laurel transaction was not completed. Although the letter carefully stated that it did not "constitute an offer or a definitive agreement," it set forth the terms of Omega's expression of interest. Those terms included, *inter alia*, that (1) Omega would acquire all of the outstanding common stock of Clearfield for $65 per share, (2) Clearfield would be merged into a newly formed, wholly owned subsidiary of Omega whose name would be Clearfield Bank & Trust Company, (3) Clearfield's current board of directors would be retained, with the addition of one or two Omega directors, (4) one of Clearfield's existing directors would join Omega's board of directors, and (5) all full-time "customer contact" employees would be offered full-time employment. The letter concluded as follows:

> Our purpose in writing this letter is to make our interest clear in merging with you if for any reason your current Agreement with Penn Laurel Financial Corp. is terminated pursuant to its terms on October 31, 1999 or earlier. We trust that you will comply with all of your legal obligations under your current Agreement and Plan of Reorganization with Penn Laurel Financial Corp. and CSB Bank. If our understanding of the facts is incorrect in any material respect and you wish to clarify or correct our understanding, please advise us.

Exh. P–2.

By contacting Moody, Anonick confirmed that the letter was actually received by Clearfield's board of directors on May 10. At the end of the week, Anonick telephoned Moody to determine if the Clearfield board had any questions regarding Omega's expression of interest. Moody advised Anonick that he had been advised by counsel not to speak with him.

Clearfield did not respond to Omega's letter of interest because the Merger Agreement precluded negotiating with any other institution. Exh. P–1, § 6.8. Members of Clearfield's board of directors wanted to include Omega's expression of interest in Clearfield's S–4 prospectus to be filed with the Securities and Exchange Commission ("SEC"), but deferred to the advice of Penn Laurel's counsel who advised that both Omega's identity and the share price quoted should be excluded from the public filing because Omega's letter was not an offer but simply an expression of interest. What the filed S–4, dated August 2, 1999, did disclose was that the board had received a May 10 letter "from an out-of-town bank indicating that the out-of-town bank had an interest in acquiring the outstanding stock of Clearfield." Exh. P–4, at 25. The S–4 further indicated that the board of directors did not respond to the letter because: (1) it was only an indication of interest and did not contain any binding commitment to acquire Clearfield common stock; (2) the letter, by its terms, was not to be considered unless the merger was unsuccessful; and (3) Clearfield did not want to breach its agreement with Penn Laurel which prohibited discussing merger acquisitions with a third party. *Id.* at 26.

Although dated August 2, 1999, the S–4 was available on EDGAR, a computer database, in mid-July, when Anonick accessed it to review Clearfield's disclosure of Omega's expression of interest. In the absence of a specific disclosure identifying Omega's willingness to pay $65 per share should the merger not be completed, Anonick decided to contact Jack Woolridge, one of the disgruntled Clearfield shareholders identified by Moody back in April. Anonick explained the terms of Omega's expression of interest to Woolridge, who said that he had not previously heard them.

Woolridge, who owned approximately 6,000 shares and was responsible for voting other shares held by family members, had numerous conversations with Anonick during the last days of July. Anonick showed Woolridge a proposed agreement which committed Omega to purchase Clearfield shares at $65 per share from

shareholders who committed to vote against the merger and to exercise their dissenters' rights, provided that (1) the Clearfield–CSB–Penn Laurel merger was defeated, and (2) Omega successfully negotiated a merger with Clearfield. Exh. D–B. Woolridge and another shareholder, Attorney Mikesell, objected to the contingent nature of Omega's initial draft agreement, and it was revised to eliminate the contingencies and provide for the payment of $65 per share regardless of whether the Penn Laurel transaction was successful or Omega succeeded in negotiating a future merger with Clearfield. Exh. D–B, D–C, ¶ 3. Thereafter, a meeting between Woolridge and Anonick was arranged for Monday, August 2, 1999.

Woolridge suggested that Anonick reserve a meeting room at the Clearfield Best Western so that Anonick could answer questions from shareholders. Anonick and Woolridge arrived at the motel at approximately 1:00 p.m. and were met by 32 or 33 of Clearfield's shareholders. Anonick introduced himself and explained his earlier relationship with Clearfield which had prompted his interest in the pending merger. He revealed to those in attendance that he was now representing Omega, and then reviewed some of the terms of Omega's May 10 letter of interest, emphasizing the $65 per share price and the promise that Clearfield would retain its name.

The overview of the terms of the May 10 letter was followed by a question and answer period. At some point during the meeting, Anonick made available a form Agreement on Omega letterhead, together with Omega's 1998 annual report, 1998 proxy and 1999 financial statements. The two-page Omega Agreement set forth the following paragraphs:

1. The undersigned agrees to vote all shares of Clearfield Common Stock which the undersigned owns or controls against the proposed merger of Clearfield with CSB Bank, a subsidiary of Penn Laurel Financial Corp., and to exercise dissenters right of appraisal with respect to the proposed merger for all of the shares of Clearfield Common Stock designated below.

2. In the event that he [sic] proposed merger of Clearfield with CSB Bank, a subsidiary of Penn Laurel Financial Corp. is terminated, Omega agrees to promptly attempt to negotiate a merger transaction with the Clearfield Board of Directors. The merger transaction would involve, subject to regulatory approval, the merger of Clearfield into a newly formed wholly owned Omega subsidiary, whose name would be changed to Clearfield Bank & Trust Company. Subject to the provisions of paragraph 4 below, in the proposed merger the holders of Clearfield Common Stock would receive $65 per share and each holder of Clearfield Common Stock would have the option of either (a) Omega Common Stock or (b) cash or (c) a combination of Omega Common Stock and cash. At least 51% and not more than 75% of the total consideration must consist of Omega Common Stock, with the balance payable in cash. Those holders of Clearfield Common Stock who elected Omega Common Stock (either in whole or in part) would receive the Omega Common Stock in a tax-free exchange for federal income tax purposes.

3. Subject to the provisions of paragraph 4 below, Omega agrees to purchase, and the undersigned agrees to sell, the shares of Clearfield Common Stock designated below at the price of $65 per share, payable in cash or by check, at such time as regulatory approval to complete such purchase is obtained by Omega. In lieu of cash, the undersigned may elect to receive Omega Common Stock at the time of the merger of Clearfield with the Omega subsidiary, subject to the limitations set forth in paragraph 2 and paragraph 4. The undersigned warrants and represents to Omega that, upon completion of the purchase, Omega will acquire good title to

the shares designated below, free and clear of all liens, claims and encumbrances of any nature whatsoever.

4. The Omega merger proposal set forth in paragraph 2 above, and the obligations of Omega under paragraph 3 above, both assume that all the information relating to Clearfield set forth in the Form S–4/A (including the exhibits thereto) filed with the Securities and Exchange Commission on July 16, 1999 by Penn Laurel Financial Corp. is true and complete through the date of the purchase set forth in paragraph 3 above, and the proposed merger of Clearfield with the Omega subsidiary.

5. This Agreement constitutes the entire understanding of the parties and may not be amended, supplemented, waived or terminated except by a written instrument executed by both parties. This Agreement may be executed in counterpart, each of which shall be deemed an original against any party whose signature appears thereon. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their executors, administrators, heirs, successors and assigns. Each party shall be entitled to specific performance of the obligations of the other set forth in this Agreement. The undersigned's offer contained herein shall remain open until 12/31/99.

Exh. D–E.

Anonick's presentation lasted fifteen to twenty minutes. The shareholders attending the August 2 meeting were invited to sign the Omega Agreement before leaving, or to take copies with them. Some shareholders signed the agreements and turned them in that day; others have since mailed signed agreements to Omega. As of the date of the evidentiary hearing, shareholders holding 20.42% of Clearfield common stock had executed the Omega Agreement. Dkt. no. 9, at 6.

Clearfield's board knew of Anonick's August 2 meeting with shareholders because John McGrail, Clearfield's Vice President and Trust Officer, notified the bank's new President and CEO, William Wood, that he would be attending. McGrail believed his attendance was necessary to fulfill his fiduciary obligation since Clearfield's trust department managed accounts which held Clearfield shares. McGrail later provided Wood with an overview of the meeting and a copy of the Omega Agreement. A member of Clearfield's board of directors, George Beard, also attended the meeting.

A special meeting of the Clearfield board of directors was held in the wake of Anonick's August 2 meeting. The board decided to send a letter to its shareholders advising them of what the board considered to be misstatements in the Omega Agreement. The Board also decided that it should now disclose to shareholders that Omega was the "out-of-town-bank" which had expressed an interest in Clearfield, and that the expression of interest contemplated a $65 per share price.

The letter issued by Clearfield's Board of Directors, dated August 9, 1999, urged the shareholders in capitalized text "NOT TO SIGN THE AGREEMENT OR SEND IT TO OMEGA." Exh. P–5. It suggested that the shareholders "consult an attorney before considering any action on the agreement." *Id.* It further stated:

> Paragraph 1 of the Omega agreement requires you to vote your shares against Clearfield's merger with Penn Laurel and to exercise a dissenter's right of appraisal. If you do so Omega is agreeing further on in the agreement to purchase your shares (under certain conditions). We are concerned that the agreement requires you to exercise dissenter's rights (i.e. offer your shares for sale to Clearfield) and, under paragraph 3 of the same agreement, to sell your shares to Omega. We don't see how you can agree to do both. Omega doesn't explain how.
>
> We understand that monetary penalties might be imposed under Pennsylvania law on shareholders who exercise

> dissenter's rights in bad faith or in a vexatious manner. We are concerned that such penalties could be imposed on you if you tender your shares to Clearfield while simultaneously agreeing to sell the shares to Omega.

Exh. P–5. The letter also noted that Omega's agreement to purchase the stock was conditioned upon receiving regulatory approval, pointing out that Omega failed to reveal whether it had filed, or intended to file, for such approval. The second page of the letter raised again the question of how a shareholder could tender good title to Omega, asking: "What happens if the Clearfield/Penn Laurel merger goes through? How can you give Omega title to your shares if the shares are either (1) purchased by Clearfield because of your exercise of dissenting shareholder rights or (2) exchanged for Penn Laurel stock?" Exh. P–5.

In fact, Omega had not yet applied to the Pennsylvania Department of Banking for regulatory approval for its purchase of Clearfield's shares. Not until a letter dated August 12, 1999, did Omega's counsel request approval from the Department of Banking to execute the Omega Agreements which had already been signed by holders of approximately 17% of the outstanding stock of Clearfield. Exh. I–A1. Omega also apprised the Department that the Proxy Statement and Prospectus relative to the pending merger transaction merely referred to Omega's May 10 letter of interest and "failed to reflect the fact that Omega Financial Corporation ... offered a price of $65 per share in cash or Omega Common Stock (subject to certain limitations and conditions) for a merger with a subsidiary of Omega Financial Corporation. This price is more than $14 per share higher than the $50.44 offered in common stock of Penn Laurel Financial Corp. (using closing sale prices on July 28, 1999)." *Id.* The letter included the following explanation of Omega's actions:

> The decision by Anonick Financial Corporation, which is acting as an investment advisor to Omega Financial Corporation, to solicit the enclosed agreements from individual shareholders of Clearfield Bank & Trust Company resulted in part from the unwillingness of Penn Laurel Financial Corp. and Clearfield Bank & Trust Company to state the terms of the more favorable offer from Omega Financial Corporation and allow the shareholders of Clearfield Bank & Trust Company to make an informed decision on the competing proposals.

Id.

Clearfield's letter to its shareholders urging them not to execute the Omega Agreement was not its only response to the ongoing efforts of Anonick and Omega. On Wednesday, August 11, 1999, Clearfield filed a four-count complaint against Omega in this court, together with a motion for temporary restraining order ("TRO"). Dkt. nos. 1, 2. The complaint alleges that Omega's May 10 letter of interest constitutes a tender offer which included misstatements and omissions of material fact in violation of § 14(e) of the Securities and Exchange Act of 1934 (hereinafter referred to as "the Act" or "the Williams Act"), 15 U.S.C. § 78n(e). It also asserted that Omega had violated § 112(b) and (g) of the Pennsylvania Banking Code ("the Banking Code") by failing to obtain written approval from the Department of Banking before initiating efforts to acquire more than 10% of Clearfield's stock and by "proposing to purchase the Clearfield stock by means of oral communications and literature (including the Omega Offer) which include misstatements and/or omissions of material fact...." Dkt. no. 1, ¶ 33 (citing 7 P.S. § 112(b) and (g)). Finally, the complaint set forth state law claims alleging tortious interference with Clearfield's relations with its shareholders and with Penn Laurel. Injunctive relief was the sole remedy prayed for in each count.

Clearfield's motion for temporary restraining order sought an injunction ordering Omega to:

(a) refrain from proceeding with any tender offer to Clearfield shareholders seeking the purchase of Clearfield shares, or from offering to purchase Clearfield common stock or otherwise communicating with Clearfield shareholders for the purpose of offering to purchase Clearfield stock, prior to the shareholder vote on the proposed merger between Clearfield and Penn Laurel Financial Corporation, [then] scheduled for September 8, 1999;

(b) withdraw any outstanding offers to purchase shares of Clearfield stock until the shareholder vote on the proposed merger; and

(c) rescind any agreements with Clearfield shareholders to purchase shares of Clearfield stock which involve or are related to the pledge of the Clearfield shareholders to vote against the proposed merger between Clearfield and Penn Laurel and/or to exercise dissenting shareholders right of appraisal.

Dkt. no. 2, ¶ 4. The motion for TRO was denied after argument conducted on Tuesday, August 17, 1999. Dkt. no. 6.

The day before the hearing on the preliminary injunction hearing commenced, Clearfield and Penn Laurel filed with the SEC a document entitled "Supplemental Information to Shareholders." Exh. D–A. The supplement states:

On Monday August 2, 1999, Omega Financial Corporation held a meeting to which were invited over 30 selected shareholders of Clearfield. The attendees represented about 13% of the outstanding shares of Clearfield. At the meeting, an Omega representative handed out a form and asked those in attendance to sign and return the form to Omega. The form is an apparent tender offer for shares of Clearfield common stock. Since the meeting, we understand that Omega has solicited more Clearfield shareholders to execute the form and enter into an agreement with Omega. **For the reasons stated in this supplement, the board of Directors of Clearfield urges its shareholders not to sign the Omega agreement.** The Clearfield Board of Directors sent a letter to its shareholders on August 9, 1999, in response to Omega's attempts to solicit Clearfield shareholders to sign the Omega agreement. A copy of that letter is attached as Exhibit A. If you have not already read the letter, we urge you to take a few minutes to read it now.

Id. The board commented that "the advantages of the Penn Laurel transaction are disclosed in great detail in the proxy statement/prospectus and the Clearfield Board of Directors continues to believe that the creation of a strong community bank will benefit its shareholders, its customers and the community more than the alternative of being acquired by a larger out-of-town institution." *Id.*

Penn Laurel and CSB sought to intervene in the instant proceeding,[3] dkt. no. 10, and that motion was granted prior to the August 24 evidentiary hearing on Clearfield's request for a preliminary injunction. During the hearing, the parties stipulated that the "Pennsylvania Department of Banking has not yet approved any acquisition of Clearfield stock by Omega." Stipulation # 3. Wood, Clearfield's new President and CEO, has acknowledged that regulatory approval from the Pennsylvania Banking Department and the Federal Deposit Insurance Corporation has yet to be granted for the Clearfield–CSB–Penn Laurel merger. Such approval is expected prior to the shareholders' meeting. *See also* exh. P–4 at 59 (application for approval from Pennsylvania Department of Banking filed July 8, 1999).

The preliminary injunction hearing concluded on August 25, and the parties agreed to consolidation of that matter with

3. Two individual shareholders joined in this motion to intervene. The motion was denied as to these shareholders pursuant to Fed. R.Civ.P. 24(a) and (b). Dkt. no. 10.

trial on the merits, pursuant to Fed. R.Civ.P. 65(a)(2).

On August 26, 1999, Omega directed a letter to the Clearfield shareholders who had evinced an interest in selling their shares to Omega by signing the two-page agreement earlier in the month.[4] The Omega letter advised, *inter alia*, that it could not execute any of the two-page agreements until it received approval from the Pennsylvania Department of Banking, and that such approval could take "many months." Shareholders were advised that they were free to withdraw their signed agreements within ten days of the letter if they "were not aware of the necessity of such regulatory approvals or for any other reason." The Omega letter also informed Clearfield shareholders of an eventuality not addressed in the two-page agreement: "if the merger with Penn Laurel becomes effective, the two page agreement would be null and void because you would no longer be able to transfer title to your Clearfield shares to Omega." Exh. D–F.

III. *Clearfield's Claims*

Clearfield contends that the Omega Agreement violates the antifraud provisions of the Williams Act because it is "riddled with misrepresentations and material omissions of fact which would mislead a shareholder" in deciding how to vote on the merger transaction. Dkt. no. 15, at 9. The thrust of Clearfield's argument is that the Omega Agreement is misleading because a shareholder cannot both exercise his dissenter's rights *and* tender his stock to Omega in exchange for the $65 per share price. Clearfield argues that a shareholder's exercise of dissenter's rights requires that he tender his stock to Clearfield after the shareholder meeting, thereby precluding the shareholder from tendering the stock to Omega. Clearfield also asserts that Omega's failure to reference in its two-page agreement that it must obtain regulatory approval before purchasing the Clearfield shares and the time factor involved in obtaining such approval are material omissions.

In addition, Clearfield submits that the Omega Agreement is misleading because: (1) it fails to identify at what point in time the Omega stock would be valued should a merger be negotiated; (2) it does not address what would happen if too many Clearfield shareholders opted to take cash in the event of a merger with Omega; (3) it makes Omega's obligation to perform contingent on financial information which is not current; (4) it does not discuss the possibility that the rejection of the Penn Laurel merger may leave Clearfield without any potential merger partner in the future; and, (5) it does not advise shareholders that they may be subject to penalties for exercising their dissenters' rights in bad faith or in a vexatious manner. Dkt. no. 15, at 9–11.

Penn Laurel and CSB join Clearfield in contending that the Omega Agreement violates § 14(e). They, too, focus upon dissenters' rights and the lack of discussion regarding the need for regulatory approval. The agreement is also misleading, according to Penn Laurel and CSB, because it: (1) asserts that Clearfield will retain its name in the event of a merger; (2) fails to inform shareholders that the receipt of cash would be a taxable event; (3) suggests that Omega's proposal was superior to the planned Clearfield/Penn Laurel transaction; (4) does not identify at what point in time Omega's stock would be valued in the event of a merger; (5) fails to provide the shareholders with a fairness opinion regarding any Clearfield/Omega merger that would be negotiated; (6) does not discuss the source of Omega stock to be used for an exchange in the event of a merger; (7) does not apprise shareholders of their potential liability for "claims of fraud or intentional interference with con-

4. At a case conference conducted in my chambers on September 3, all parties agreed that the August 26, 1999 letter should be made part of the record and marked as exh. D–F.

tract"; (8) fails to disclose Anonick's success fee; and (9) does not provide "[a]ll of the other information required by SEC's Regulations § 240.14d–100." Dkt. no. 17, at 14–21.

Omega denies that its agreement was misleading, and vigorously challenges the applicability of the Williams Act to the instant case. Alternatively, Omega argues that even if its two-page agreement was misleading, its August 26 letter cured any deficiencies so that injunctive relief is not necessary. Moreover, it asserts that scienter is required under § 14(e) and that Clearfield and the intervenors have failed to prove that Omega had the requisite state of mind to warrant injunctive relief.

While the bulk of the parties' arguments address liability under the federal securities laws, Clearfield, Penn Laurel and CSB contend that equitable relief is equally warranted under the Pennsylvania Banking Code. 7 P.S. § 112(b) and (g). They claim that Omega violated the Code by seeking to acquire more than ten percent of outstanding Clearfield shares without first having obtained regulatory approval. For its part, Omega argues that it has not violated the law because it has not signed any of the two-page documents, and because the agreement is part of a merger proposal which is exempt from the Banking Code's regulatory approval requirement. Dkt no. 16, at 24–25.

IV. *Applicability of the Williams Act*

A. *Are "unregulated tender offers" subject to Section 14(e)?*

[1] Omega argues first that, even if this Court concludes that its written offer to shareholders constitutes a tender offer, the Act was not intended to reach "privately negotiated intrastate agreements," dkt. no. 16, at 3, such as the one at issue here. Moreover, Omega points out, there is no Third Circuit authority holding that section 14(e) applies to transactions in unregistered stock.

Omega's attempt to establish a public/private dichotomy in shareholder trading upon which applicability of the Williams Act hinges is unsupported by either caselaw or the plain language of the statute. And even in the absence of Third Circuit precedent, the one circuit to speak directly to this issue has rejected the position espoused here by Omega. In *L.P. Acquisition Co. v. Tyson*, 772 F.2d 201, 208 (6th Cir.1985), the Sixth Circuit reasoned:

> First, the plain language of the statute refers to "*any* tender offer." Second, as the remaining subsections of 15 U.S.C. § 78n demonstrate, Congress clearly knew how to limit the applicability of legislation to a particular class of tender offers when it so intended. Third, the Securities and Exchange Commission, the agency with expertise in the area, has found that "[t]he broad antifraud provisions of Section 14(e) are applicable to any tender offer." Securities Act Release No. 6022 (February 5, 1979). Fourth, the Supreme Court has described 14(e) as "a general antifraud provision," *MITE*, 457 U.S. at 633 n. 8, 102 S.Ct. 2629, and the Third Circuit has found that "unlike the proxy regulations of section 14(a) and the disclosure requirements of 14(d), the anti-fraud proscriptions contained in section 14(e) apply to any class of security." *E.H.I. of Florida, Inc. v. Insurance Co. of North America*, 652 F.2d 310, 315 (3d Cir. 1981).

The Sixth Circuit's analysis is thorough and persuasive. The rather cheeky observation by the authors of a treatise cited by Omega that Congress' "omission in § 14(e) [of a registration requirement] was apparently inadvertent," *see* 5 Louis Loss and Joel Seligman, *Securities Regulation* 2250 n. 399 (3d ed.1990), is too thin a reed upon which to rest a convincing argument.

Although it may be the exception to apply the Williams Act to private transactions of stock in small companies which have a limited number of shareholders,

"the caselaw clearly gives courts the discretion to apply the Act if its protections are needed." *Iavarone v. Raymond Keyes Associates, Inc.*, 733 F.Supp. 727, 733 (S.D.N.Y.1990) (citations omitted). Here, neither the fact that the agreement was privately negotiated nor the fact that it dealt with unregistered stock removes the transaction from the reach of § 14(e).

B. *Is the Omega Agreement a "Tender Offer"?*

The parties agree that if the Omega Agreement does not constitute a "tender offer," the protections of the Williams Act do not apply. The purpose of the Act is clear:

> The Williams Act [(amending the Exchange Act)] ... was the congressional response to the increased use of cash tender offers in corporate acquisitions, a device that had "removed a substantial number of corporate control contests from the reach of existing disclosure requirements of the federal securities laws." The Williams Act filled this regulatory gap.

Edgar v. MITE Corp., 457 U.S. 624, 632, 102 S.Ct. 2629, 73 L.Ed.2d 269 (1982) (citing *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 22, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977)). In *Edgar*, the Supreme Court observed that there was no question that "Congress intended to protect investors" in enacting the Williams Act, *id.* at 633, 102 S.Ct. 2629, which insures " 'that public shareholders who are confronted by a cash tender offer for their stock will not be required to respond without adequate information.' " *Piper*, 430 U.S. at 35, 97 S.Ct. 926 (quoting *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58, 95 S.Ct. 2069, 45 L.Ed.2d 12 (1975)). Yet Congress provided more than just disclosure requirements in the Act. "Besides requiring disclosure and providing specific benefits for tendering shareholders, the Williams Act also contains a broad antifraud prohibition...." *Id.* at 24, 97 S.Ct. 926 (citing 15 U.S.C. § 78n(e)).

[2, 3] While the purpose of the Act is clear, the type of transaction it seeks to regulate does not lend itself to easy definition. "Neither the Williams Act nor the SEC's regulations defines 'tender offer.' " *Lerro v. Quaker Oats Co.*, 84 F.3d 239, 246 (7th Cir.1996). Various courts have referred to this lack of statutory guidance as each has struggled to decide whether or not the transaction confronting it was indeed a "tender offer." *See E.H.I. of Florida, Inc. v. Insurance Co. of North America*, 652 F.2d 310, 315 (3d Cir.1981); *Kahn v. Virginia Retirement System*, 783 F.Supp. 266, 269 (E.D.Va.1992); *In re Gen. Motors Class E Stock Buyout Sec. Litig.*, 694 F.Supp. 1119, 1129 (D.Del. 1988); *Holstein v. UAL Corp.*, 662 F.Supp. 153, 155 (N.D.Ill.1987). To quote Judge Easterbrook, the term "has been frustratingly difficult to encapsulate." *Lerro*, 84 F.3d at 246. One district court established an eight-factor test for determining what constitutes a tender offer. *Wellman v. Dickinson*, 475 F.Supp. 783 (S.D.N.Y. 1979), *aff'd on other grounds*, 682 F.2d 355 (2d Cir.1982). The factors are:

> (1) active and widespread solicitation of public shareholders for the shares of issuer; (2) solicitation made for a substantial percentage of the issuer's stock; (3) offer to purchase made at a premium over the prevailing market price; (4) terms of the offer are firm rather than negotiable; (5) offer contingent on the tender of a fixed number of shares, often subject to a fixed maximum number to be purchased; (6) offer open only a limited period of time; (7) offeree subjected to pressure to sell his stock[; and, (8)] public announcements of a purchasing program concerning the target company precede or accompany rapid accumulation of large amounts of the target company's securities.

475 F.Supp. at 823–24 (citing *Hoover Co. v. Fuqua Industries, Inc.*, No. C79–106 2A, 1979 WL 1244, *4 (N.D.Ohio June 11, 1979), which set out the same test a month earlier). The Second Circuit later refused

to elevate this list to "a mandatory 'litmus test,' " reasoning that

> in any given case a solicitation may constitute a tender offer even though some of the eight factors are absent or, when many factors are present, the solicitation may nevertheless not amount to a tender offer because the missing factors outweigh those present.

Hanson Trust PLC v. SCM Corp., 774 F.2d 47, 57 (2d Cir.1985). The applicability of the Williams Act, the court concluded, should be determined by looking to its statutory purpose, that is, "whether the particular class of persons affected need the protection of the Act." *Id.* (citing *SEC v. Ralston Purina Co.*, 346 U.S. 119, 73 S.Ct. 981, 97 L.Ed. 1494 (1953)). Yet this seems, at first blush, more tautology than test. Accordingly, the *Hanson* court found the eight factors "relevant for purposes of determining whether a given solicitation amounts to a tender offer." 774 F.2d at 57. The court also declared that:

> An offering to those who are shown to be able to fend for themselves is a transaction "not involving any public offering." Similarly, since the purpose of § 14(d) is to protect the ill-informed solicitee, the question of whether a solicitation constitutes a "tender offer" within the meaning of § 14(d) turns on whether, viewing the transaction in the light of the totality of circumstances, there appears to be a likelihood that unless the pre-acquisition filing strictures of that statute are followed there will be a substantial risk that solicitees will lack information needed to make a carefully considered appraisal of the proposal put before them.

Id. (citation and internal quotation marks omitted); *see also Rand v. Anaconda–Ericsson, Inc.*, 794 F.2d 843, 848 (2d Cir. 1986) (finding case "directly controlled" by standard set forth in *Hanson Trust*). Other courts have continued to recognize the *Wellman* eight-factor test in determining whether an outsider's bid for control constitutes a tender offer. *Pin v. Texaco, Inc.* 793 F.2d 1448, 1454 (5th Cir.1986) (taking both tests into account); *Anago Inc. v. Tecnol Medical Products, Inc.*, 792 F.Supp. 514, 516–17 (N.D.Tex.1992) (applying both the eight-factor test and the *Hanson* test); *Weeden v. Continental Health Affiliates, Inc.* 713 F.Supp. 396 (N.D.Ga.1989).

In examining the totality of the circumstances in this case to determine if there has been a tender offer, Clearfield, CSB and Penn Laurel contend that the Omega Agreement made available to the shareholders during the August 2 meeting contains various misrepresentations and omissions. There is no claim that Omega's May 10 letter of interest to Clearfield's board runs afoul of § 14(e).

[4] I begin by addressing the factors set forth in *Wellman*. I consider the first factor, whether there was active and widespread solicitation of public shareholders for the shares of the issuer, to weigh slightly on the side of a tender offer. Omega initially transmitted a confidential letter of interest to Clearfield's board in May 1999. Neither Omega nor its agent, Anonick, were active until Clearfield's filing with the SEC failed to disclose both the fact that the letter of interest received from an "out-of-town bank" was from Omega, headquartered in the borough of State College in contiguous Centre County, and that the proposed price per share was $65.00. This led to the Omega Agreement being drafted and to Anonick's contact with Woolridge. Woolridge was interested in the details and encouraged Anonick to be available to answer questions from other shareholders when he was in Clearfield on August 2, 1999. I find, however, that Anonick needed little encouragement. I do not credit that portion of his testimony which attributes entirely to Woolridge's efforts the attendance of over thirty shareholders at the August 2 meeting. While Anonick's actions were not widespread, they were geared to insure that more than a handful of shareholders were aware of Omega's

interest. His solicitation was not limited to those in attendance, but extended to other Clearfield shareholders who would be provided with the extra copies of the Omega agreement, annual report, proxy and financial statements which Anonick provided. *Cf. Anago*, 792 F.Supp. at 516 (outsider's contact of only four preferred shareholders and approximately ten shareholders out of a total of eighty to ninety shareholders did not establish active or widespread solicitation).

Omega's solicitations resulted in shareholders of slightly more than 20% of Clearfield's stock executing the Omega Agreement and returning it to Omega. This is a substantial percentage of the stock under the second *Wellman* factor, particularly in light of the provision in the merger agreement that the exercise of dissenter's rights by only 9% of the shares would derail the merger. This factor is also suggestive of a tender offer.

There can be little doubt that the $65 share price constituted a premium over Clearfield's book value of $30.00 per share and over its July 28, 1999 market value of $50.44 per share. *See* exh. P–4, at 1; exh. I–A3, at 2; *see also Hanson Trust*, 774 F.2d at 58 (observing that SEC's proposed definition of a premium is that price "is $2.00 per share or 5% above market price").

Nor can there be serious dispute that the $65 share price was firm. The evidence demonstrated that Anonick's negotiations with Woolridge and Mikesell, who did not appear from the evidence to have been authorized to act on behalf of any other shareholders, pertained solely to the contingent nature of the right to receive $65 per share after the conclusion of the shareholder meeting. It does not appear that price—the most important term in the offer—was negotiable. *Iavarone v. Raymond Keyes Assoc., Inc.*, 733 F.Supp. 727, 733 (S.D.N.Y.1990) ("offer price is firm").

The contingency of the tender on a fixed number of shares must also be weighed on the "tender offer" side of the scale. Omega's promise to pay $65 per share was not only contingent on obtaining enough dissenters to "kill the deal," but also on successfully negotiating a merger agreement with Clearfield. Whatever doubt may have existed on this point following Lee's testimony was removed once Omega distributed its August 26 letter to Clearfield shareholders.

The period of time during which the offer was open, the sixth *Wellman* factor, weighs against Omega's bid being deemed a tender offer. Although the offer was open for a "limited time" because it required the shareholder to accept it by the then-scheduled September 8 shareholder meeting, that date was more than a month away. Moreover, the time afforded shareholders to consider Omega's offer was the same period of time afforded to all shareholders to digest the information about the merger which was detailed in the August 2 proxy statement/prospectus. *Cf. SEC v. Carter Hawley Hale Stores, Inc.*, 760 F.2d 945, 951 (9th Cir.1985) (offer was open during the pendency of the competing bid).

There is no evidence before this court that Omega pressured or coerced Clearfield shareholders to sell their stock. While Anonick met with Woolridge and then with a group of shareholders, he did not imply that they must sign the Omega Agreement at that instant or lose the premium being offered. Whatever pressure may have been felt existed only because of the disparity between the cash value of the two transactions. In other words, the only pressures exerted upon shareholders to commit to Omega's Agreement were a function of ordinary market forces. *Hanson Trust*, 774 F.2d at 58 ("sellers were not 'pressured' to sell ... by any conduct that the Williams Act was designed to alleviate, but by the forces of the market place"); *Carter Hawley Hale Stores*, 760 F.2d at 952 (pressure of the marketplace was not the type of pressure the tender offer regulations were designed to prohib-

it). This is not the sort of pressure the Williams Act was designed to prohibit.

The eighth *Wellman* factor is not applicable since there were no public announcements by any party.

This case points up the difficulties of applying the *Wellman–Hanson* test, which essentially amounts to one of loosely guided discretion. Although it seems odd to think of "discretion" when determining whether a proposed transaction falls inside or outside the Williams Act, it is not, upon close examination, as strange as it first appears. When, as here, the almost endless variety and novelty of takeover proposals makes it impracticable to "formulat[e] a rule of decision for the matter in issue[,]" the trial judge must necessarily have some degree of judicial "choice" if he or she is to reach a just result and fulfill the congressional mandate of protecting the shareholder. *See* Ruggero J. Aldisert, *The Judicial Process* 763 (1976) (quoting Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed From Above*, 22 Syracuse L.Rev. 635 (1971)). In essence, this is what the Second Circuit means when it holds that an offer is a tender offer by reference to "whether the particular class of persons affected need the protection of the [Williams] Act." *Hanson Trust*, 774 F.2d at 57. Rather than elevating a tautology to the status of a legal test, this is simply a recognition that, as in the case of obscenity that cannot be defined but is immediately identified when seen, *see Jacobellis v. Ohio*, 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793 (1964) (Stewart, J., concurring), some evaluations can only be made under a "totality of the circumstances" methodology. However intellectually unsatisfying that may be, no court has managed to develop a better alternative, and I can discern none.

Accordingly, in this case it is appropriate to supplement the *Wellman* factors, which preponderate in favor of finding a tender offer, with an examination of the alleged misstatements and omissions at issue. If they are major in character, then investors are more likely to have been misled by them and pressured to make an ill-advised decision, which means that those investors are more likely to "need the protection" of the Williams Act as contemplated by the Second Circuit in *Hanson Trust*, 774 F.2d at 57. On the other hand, if the alleged misrepresentations and omissions were minor, that conclusion would militate against finding a tender offer. Thus, I will also consider the question of materiality; as will be evident from the discussion *infra*, I conclude that Omega's omissions were material. Combining that conclusion with the above *Wellman* analysis, it is evident that Omega's proposal constituted a tender offer.

V. *Did the Omega Agreement Violate Section 14(e) of the Williams Act?*

A. *Elements of a Section 14(e) Claim*

[5] The elements of a § 14(e) claim are not set forth specifically in the caselaw. As will be pointed out below, *see infra* § V(C), § 14(e) was modeled after the antifraud provisions of § 10(b) and Rule 10b–5. *Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 10, 105 S.Ct. 2458, 86 L.Ed.2d 1 (1985). Consistent with the § 10(b) jurisprudence and the language of the statute, I conclude that a plaintiff seeking a permanent injunction must prove that the defendant (1) made misstatements or omissions, (2) of material fact, (3) with scienter, (4) in connection with a tender offer. *See* 15 U.S.C. § 78n(e); *In re Phillips Petroleum Sec. Litig.*, 881 F.2d 1236, 1244 (3d Cir. 1989); *Chris–Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d 341, 362 (2d Cir. 1973). It is plaintiff's burden to prove all of the foregoing by a preponderance of the evidence. *Ronson Corp. v. Liquifin Aktiengesellschaft*, 370 F.Supp. 597, 602 (D.N.J.), *aff'd*, 497 F.2d 394 (3d Cir.1974); *see also Herman & MacLean v. Huddleston*, 459 U.S. 375, 103 S.Ct. 683, 74 L.Ed.2d 548 (1983) (holding preponderance of the evidence standard is applicable in a § 10(b) claim).

B. *Materiality*

Section 14(e) of the Williams Act provides, in relevant part:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request or invitation.

15 U.S.C. § 78n(e). The plain language of this provision proscribes three types of conduct: (1) the making of untrue statements of material fact; (2) the omission of material facts which are necessary to make the statements made not misleading; and (3) engaging in fraudulent, deceptive or manipulative acts or practices. *Id.* After carefully scrutinizing the Omega Agreement in light of the allegations of plaintiff and intervenors, I conclude that the document is devoid of any untrue statements of material fact, and that it does not otherwise constitute a fraudulent, deceptive or manipulative act or practice. What I must consider, then, is whether Omega omitted any material fact from the two-page agreement.

[6] In *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449, 96 S.Ct. 2126, 48 L.Ed.2d 757 (1976), the Supreme Court defined materiality for purposes of the antifraud provisions of the proxy rules promulgated by the SEC under the Securities Exchange Act of 1934. It declared that the

> standard of materiality that we think best comports with the policies of Rule 14a–9 is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.... It does not require proof of a substantial likelihood that disclosure of the omitted fact would have caused the reasonable investor to change his vote. What the standard does contemplate is a showing of a substantial likelihood that, under all the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder. Put another way, there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.

TSC, 426 U.S. at 449, 96 S.Ct. 2126. In *Staffin v. Greenberg*, 672 F.2d 1196 (3d Cir.1982), the Third Circuit adopted the materiality test enunciated in *TSC* "as the governing test for an action based on Section 14(e) of the Act." *Id.* at 1205 n. 10; *see also Flynn v. Bass Bros. Enter., Inc.* 744 F.2d 978, 985 (3d Cir.1984).

[7] Clearfield, CSB and Penn Laurel contend that one of the material omissions in the Omega Agreement relates to the exercise of dissenters' rights. The agreement requires the shareholder to oppose the merger and exercise her dissenter's rights in exchange for receiving $65 per share for her Clearfield stock. To exercise those dissenter's rights, a shareholder must give notice to Clearfield before the shareholder meeting. After the shareholder meeting, Clearfield must notify the dissenter to tender her shares of stock so that Clearfield may redeem them at "fair value." To fully exercise dissenter's rights, as contemplated by the Omega Agreement, the dissenter would have to tender her shares to Clearfield after receiving the redemption notice.

Obviously, then, if a shareholder fully exercises her dissenter's rights, that same shareholder cannot also tender the shares to Omega for $65 per share. Conspicuously absent from the Omega Agreement is any advice to shareholders that they cannot both exercise their dissenters' rights and sell their shares to Omega. As a

result, a Clearfield shareholder might reasonably conclude after reading the Agreement that she will be able to sell her shares to Omega for the $65 premium price as long as she opposes the merger and notifies Clearfield before the shareholder meeting of the exercise of dissenter's rights. Such an impression, as made clear in Omega's August 26 letter, would be plainly wrong.

In an effort to obtain the $65 share price, a shareholder may execute the Omega Agreement, notify Clearfield that she is exercising her dissenter's rights and oppose the merger and yet never obtain the premium price Omega "offered." Such information would unquestionably have significance to a shareholder in deciding how to respond to both Omega's offer and the planned merger which is to be voted on at the shareholder meeting. There can be little doubt that this omission "significantly alter[s] the 'total mix' of information made available[ ]" to the reasonable investor. *TSC Indus.*, 426 U.S. at 449, 96 S.Ct. 2126.

Omega also did not disclose in the August 2 Agreement whether it had applied for the regulatory approval which must be obtained before it can purchase the dissenting shareholder's stock, nor did Omega mention the time required to obtain such approval. According to Omega's August 26 letter, the necessary regulatory approval may take months, and indeed may still be pending at the end of the year. As a result, it is unlikely that Omega will be able to purchase the dissenting shareholders' stock "as expeditiously as its Offer suggests is possible." *Polaroid Corp. v. Disney*, 862 F.2d 987, 1005 (3d Cir.1988). As the Third Circuit concluded in *Polaroid*, a "reasonable shareholder would consider this possibility of delay ... to be important in deciding how to respond to the tender offer." *Id.*

Omega contends that its August 26 letter cured these deficiencies. While that may be true with respect to the issue of regulatory approval, the letter still fails to explain whether a dissenting shareholder will be able to receive the $65 share price if the merger is defeated. Moreover, it concludes with the misleading instruction that "[i]f you believe that Omega's offer is superior, you *must* vote against the merger (or at least not vote for it) and filed [sic] the enclosed Notice of Intention to Demand Payment with Clearfield...." Exh. D–F (emphasis added).

I conclude that the two-page Omega Agreement contained omissions which a reasonable Clearfield shareholder would consider important in deciding how to vote and whether to exercise dissenters' rights in connection with the proposed merger. Those omissions were, therefore, material. Because it appears that there is a substantial likelihood that Clearfield shareholders will be misled by those omissions, I further conclude, as stated *supra*, at 26–27 that those shareholders are "persons affected [who] need the protection of the Act," *Hanson*, 774 F.2d at 57, and that the omissions occurred in connection with a tender offer.

C. *Scienter*

Another question that remains is whether scienter is required in a proceeding for injunctive relief under § 14(e) of the Act. Clearfield contends that it need not prove scienter, relying upon *Polaroid Corp. v. Disney*, 862 F.2d at 1005–06. Dkt. no. 15, at 13. Omega argues that scienter is required and that Clearfield has failed to present any evidence to establish this element. Dkt. no. 16, at 12–13.

The Third Circuit has yet to address whether a plaintiff seeking a permanent injunction under § 14(e) must prove scienter. Clearfield is correct that the Third Circuit did not require proof of scienter when it directed the issuance of a preliminary injunction in *Polaroid*, a case involving a tender offer which contained a material omission. 862 F.2d at 1005–06. In fact, the *Polaroid* opinion does not discuss scienter at all. This does not, however, amount to a *sub silentio* holding by that

court that scienter need not be established to warrant injunctive relief on the merits. Without controlling Third Circuit authority, I must look to the decisions of other courts to resolve this issue.

[8] In determining whether scienter is a necessary element of a § 14(e) claim, I again look to the language of the statute:

> It shall be unlawful for any person to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, or to engage in any fraudulent, deceptive or manipulative acts or practices, in connection with any tender offer....

15 U.S.C. § 78n(e). This language was "modeled on the antifraud provisions of § 10(b) of the Act and Rule 10b–5[.]" [5] *Schreiber v. Burlington Northern, Inc.*, 472 U.S. at 10, 105 S.Ct. 2458, *see also Chris-Craft Indus., Inc. v. Piper Aircraft Corp.*, 480 F.2d at 362 (noting that the "proscription of § 14(e) is virtually identical to that of Rule 10b–5"); *Smallwood v. Pearl Brewing Co.*, 489 F.2d 579, 605 (5th Cir.1974) (joining Second Circuit's conclusion that "the analysis under Section 14(e) and Rule 10b–5 is identical"). It is well-settled that scienter is a necessary element of a claim under § 10(b) and Rule 10b–5. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 96 S.Ct. 1375, 47 L.Ed.2d 668 (1976). For that reason, I conclude that scienter is also a necessary element of an action under § 14(e) and will follow the principles governing scienter applied in a claim under § 10(b) and Rule 10b–5. *See Chris-Craft Indus.*, 480 F.2d at 362; *accord Adams v. Standard Knitting Mills, Inc.*, 623 F.2d 422, 431 (6th Cir.1980) (observing language of Williams Act demonstrates that scienter under 10(b) is an element of 14(e)); *Smallwood*, 489 F.2d at 605; *see also Connecticut Nat'l Bank v. Fluor Corp.*, 808 F.2d 957 (2d Cir.1987) ("well-settled in this Circuit that scienter is a necessary element of a claim for damages under 14(e)"); *Indiana Nat'l Bank v. Mobil Oil Corp.*, 578 F.2d 180, 184 n. 8 (7th Cir.1978) (acknowledging, without determining, that conclusion that scienter is required in § 14(e) claim is reasonable); *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir.1975). *But see Pryor v. United States Steel Corp.*, 591 F.Supp. 942, 955 n. 19 (S.D.N.Y.1984) (recognizing that "analogy drawn between Rule 10b–5 and § 14(e) is, with respect to the issue of scienter, somewhat imperfect" in light of similarity of § 14(e) to § 17(a)(2) which does not require scienter), *aff'd in part and rev'd in part on other grounds*, 794 F.2d 52 (2d Cir.1986).

[9] In *Ernst & Ernst*, 425 U.S. at 199, 96 S.Ct. 1375, the Supreme Court declared that the language of § 10(b) "connotes intentional or willful conduct designed to deceive or defraud investors...." It concluded "that § 10(b) was addressed to practices that involve some element of scienter and cannot be read to impose

5. Section 10(b) provides, in relevant part:
> It shall be unlawful for any person, directly or indirectly, ...
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j(b). Rule 10b–5 provides:
> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud,
> (b) To make any untrue statement of a material fact or to omit to state a fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5.

liability for negligent conduct alone." *Id.* at 201, 96 S.Ct. 1375. Rule 10b–5's scope was "no more expansive" than § 10(b) in the Court's view and it refused "to extend the scope of the statute to negligent conduct." *Id.* at 214, 96 S.Ct. 1375.

Scienter was defined in *Ernst & Ernst* as "a mental state embracing intent to deceive, manipulate or defraud." 425 U.S. at 193 n. 12, 96 S.Ct. 1375. In *In re Phillips Petroleum Sec. Litig.*, 881 F.2d at 1244, the Third Circuit acknowledged the Supreme Court's definition of scienter and reiterated its own previous holding "that recklessness on the part of a defendant meets the scienter requirement of Section 10(b) and Rule 10b–5." [6] "Recklessness, in turn, is defined as 'an extreme departure from the standards of ordinary care ... which presents a danger of misleading ... that is either known to the defendant or is so obvious that the actor must be aware of it.' " *Id.* (quoting *Healey v. Catalyst Recovery, Inc.*, 616 F.2d 641, 649 (3d Cir. 1980)). Although the Private Securities Litigation Reform Act of 1995 established a uniform pleading standard for scienter, *see* 15 U.S.C. § 78u–4, "recklessness ... remains a sufficient basis for liability." *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525, 534–35 (3d Cir.1999).

In this case, both Lee (Omega's CEO) and Anonick were aware that the planned merger could not be consummated if the dissenting shareholders exceeded nine percent of the issued and outstanding stock. After reviewing Clearfield's S–4 in mid-July and finding that it failed to reveal either Omega's identity or the $65 share price, Anonick and Omega personnel drafted an agreement to present to Clearfield shareholders in an effort to "kill the deal." In that effort, they had the assistance of counsel.

Omega's strategy hinged entirely on the successful invocation by Clearfield shareholders of their dissenters' rights. With that focus, the very first provision of the agreement required the shareholder to vote against the proposed merger *and* to exercise the dissenter's right of appraisal. The agreement was silent regarding the procedure to be employed, even though the exercise of dissenters' rights requires adherence to a complex statutory scheme with which the average small investor would be unfamiliar. *See* 7 P.S. §§ 1222, 1607; 15 Pa.C.S.A. §§ 1571–1580.

To be sure, a description of dissenters' rights would have made Omega's offer less attractive because it would have explained that a dissenting shareholder must tender his shares to Clearfield, thereby precluding that shareholder from selling his shares to Omega. It was left to Clearfield to advise its shareholders that the Omega agreement was misleading because of this inconsistency. And in the wake of the August 9 letter from Clearfield's board urging shareholders not to sign the agreement, Omega did nothing to amend or clarify its August 2 references to dissenters' rights. Yet one day after the evidentiary hearing on the request for injunction concluded, Omega advised the shareholders who had executed the agreement that it had learned from its "attorneys ... that if the merger with Penn Laurel becomes effective, the two page agreement would be null and void because you would no longer be able to transfer title to your Clearfield shares to Omega...." Exh. D–F.

Omega's silence following Clearfield's August 9 letter accusing it of misleading Clearfield's shareholders is indefensible, especially in light of its August 26 "clarification." I can only conclude that the complete explanation of dissenter's rights omitted from the August 2 agreement was, if not intentional, at least reckless.

VI. *Pennsylvania Banking Code Claims*

[10] Plaintiff's contention that Omega violated § 112 of the Banking Code need

6. The Supreme Court in *Ernst & Ernst* did not address "the question whether, in some circumstances, reckless behavior is sufficient for civil liability under § 10(b) and Rule 10b–5." 425 U.S. at 193 n. 12, 96 S.Ct. 1375.

detain me only briefly. That section provides, *inter alia*, that no person may acquire or propose to acquire more than ten percent of the shares of a banking institution without prior approval of the Department of Banking. 7 P.S. § 112(b). It further contains an antifraud provision which prohibits misstatements and omissions in connection with any such acquisition. 7 P.S. § 112(g). Private rights of action are authorized under the statute, *Sheridan v. Weinberger*, 767 F.Supp. 92, 93 (M.D.Pa.1991), and a court may issue appropriate injunctive relief, *Heritage Fin. Servs. Corp. v. Commonwealth Bancshares Corp.*, 43 Pa.D. & C.3d 622, 629–30 (C.P. Dauphin Co.1985).

Here, there is no dispute that Omega sought to, and did, acquire tenders for more than ten percent of Clearfield Bank's stock. Nor is there any dispute that Omega did not even seek, much less receive, Department approval for its proposed acquisition until after this litigation was instituted, and that approval has still not been received as of the present time. Thus, no other conclusion can be drawn but that Omega violated § 112.

Seeking to avoid this result, Omega makes several arguments, all of them unavailing. First, it contends that the two-page agreement is nothing more than the *shareholder's* offer to Omega to sell stock for $65 per share, noting that Omega has not executed a single such agreement. This is true, so far as it goes, but the fact remains that, but for Omega's solicitation of the shareholders, there would have been no such agreements circulated at all. Putting the formalities of offer and acceptance under contract law aside, it is still obvious that Omega proposed to acquire more than ten percent of the Clearfield shares.

[11] Second, Omega argues that its proposal to acquire Clearfield shares was pursuant to its plan to effectuate a merger with Clearfield, a merger which itself will require regulatory approval. Thus, it asserts that the $65 proposal is exempt under 7 P.S. § 112(i)(ii) (exempting acquisitions and proposals in the context of a merger that requires Department of Banking approval). This argument confuses Omega's hoped-for outcome—an eventual merger with Clearfield—with Omega's immediate goal—obtaining enough dissenting shareholder votes to torpedo the Penn Laurel merger. A transaction is not a merger merely because its proponent wishes it to be; were that the case, virtually any hostile acquirer could claim the exemption of § 112(i) and the entire legislative purpose of § 112(b)—requiring regulatory approval *before* shares are acquired—would be eviscerated.

Accordingly, I conclude that Omega has violated § 112(b). Because whether it has violated the antifraud provisions of § 112(g) turns on the same analysis applicable to the § 14(e) federal claim, I must also conclude that Omega has also violated § 112(g).

VII. *Injunctive Relief*

A prayer for injunctive relief in a suit under § 14(e) requires that the plaintiff establish not only a violation of the statute, but also "irreparable harm and the other usual prerequisites for injunctive relief." *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 65, 95 S.Ct. 2069, 45 L.Ed.2d 12 (1975). In *Rondeau*, the Supreme Court concluded that injunctive relief in a § 13(d) claim under the Williams Act could not stand in the absence of irreparable harm. The Court also reiterated its earlier holding in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 90 S.Ct. 616, 24 L.Ed.2d 593 (1970), that "the questions of liability and relief are separate in private actions under the securities laws, and that the latter is to be determined according to traditional principles." *Rondeau*, 422 U.S. at 64, 95 S.Ct. 2069.

[12] Having concluded that Clearfield has actually succeeded on the merits of its claims under the Williams Act and the Banking Code, I turn to the question of whether it has also met its burden of showing the prerequisites for injunctive relief. Irreparable harm in this case con-

cerns harm to Clearfield's shareholders. *Polaroid*, 862 F.2d at 1006. In *Polaroid*, the Third Circuit concluded that Polaroid had met its burden of showing irreparable harm, reasoning that

> [t]he theory of the Act is that shareholders are unable to protect their interests fully in making these decisions if the tender offeror fails to provide all material information regarding the offer. Irreparable harm arises because of the difficulty of proving money damages in a suit based upon material misrepresentations by the tender offeror. While Congress has determined that accurate disclosure is important to shareholders, it would often be impossible for shareholders to prove that on the facts of their particular tender offer accurate disclosure would have affected their decision making in a particular way with concomitant quantifiable monetary loss. The inadequacy of a remedy at law and the importance that Congress has attached to accurate disclosure of material information establishes irreparable harm.

Id. I find *Polaroid*'s reasoning directly on point in this case and conclude that Clearfield has established the existence of irreparable harm.

The likelihood of harm to other interested persons by the grant or denial of injunctive relief is not applicable here. Clearfield has raised the interest of its shareholders and there is no evidence that any other party would be significantly harmed by the grant or denial of an injunction, except to the extent that Clearfield, CSB and Penn Laurel, as separate entities, may be harmed by the loss of a unique business opportunity. The interests of management and the competing bidders, however, are of minimal significance in determining the relief to be granted. As the Supreme Court observed in *Edgar v. MITE Corp.*, 457 U.S. at 633, 102 S.Ct. 2629, the Williams Act was enacted to protect investors and "it is also crystal clear that a major aspect of the effort to protect the investor was to avoid favoring either management or the takeover bidder." To that end, the Act embodies a "policy of evenhandedness" consistent with Congress's "conviction that neither side in the contest should be extended additional advantages vis-a-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice." *Id.* at 633–34, 102 S.Ct. 2629 (citations and internal quotation marks omitted).

In determining whether the issuance of an injunction would be in the public interest, the *Polaroid* decision is again instructive. There, the court observed that the "decision that Congress made in passing the Williams Act ... was that notwithstanding any benefits of takeovers, they were not in the public interest if effected through tender offers containing material misrepresentations." 862 F.2d at 1006. Likewise, a takeover effected through a tender offer containing a material nondisclosure is not in the public interest.

I conclude that Clearfield has satisfied its burden of demonstrating that injunctive relief is warranted because the shareholders will be irreparably harmed if such relief is not granted and such relief will not harm other parties or contravene the interest of the public.

[13] In determining what relief should be ordered, I am guided by the Supreme Court's observations in *Edgar v. MITE Corp.* that "Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice." 457 U.S. at 634, 102 S.Ct. 2629. Accordingly, the relief must not only apprise the shareholder of the information which Omega failed to disclose in its offer, but also afford sufficient time before the shareholder meeting so that shareholders may carefully consider the competing proposals. Dissemination of the Summary and Conclusion section of this opinion and a postponement of the shareholder meeting are therefore appropriate. Furthermore, to remove any undue advantage to Omega

from the existence of the executed Agreements, the executed agreements must be rescinded and returned to the signatory shareholders to remove any misconceptions that they will be entitled to receive $65 per share from Omega if they oppose the merger and exercise their dissenter's rights. The parties must not seek any advantage by selectively quoting from this opinion or by otherwise commenting upon or characterizing holdings contained therein in communications with Clearfield shareholders. Finally, Omega must be enjoined, consistent with state law, from acquiring or seeking to acquire more than ten percent of Clearfield's common stock in the absence of approval from the Pennsylvania Department of Banking.

VIII. *Summary and Conclusion*

Clearfield Bank & Trust Company has sued Omega Financial Corporation alleging that it violated federal securities laws, specifically the Williams Act, by making a tender offer to some of Clearfield's shareholders which contained material omissions. The purpose of the Williams Act is to protect investors by furnishing them with the information needed to make a carefully considered appraisal of the tender offer before them. To accomplish this purpose, the Williams Act requires the disclosure of certain basic facts to shareholders to enable them to make an informed decision.

I have concluded that an Agreement distributed by Omega to some shareholders on August 2, 1999 in an effort to purchase Clearfield shares was indeed a tender offer, and that it contained a material omission because it failed to explain that shareholders could not both oppose the merger among Clearfield, CSB Bank and Penn Laurel Financial Corporation by exercising dissenters' rights *and* also sell their stock to Omega for $65 per share. Accordingly, Omega has violated section 14(e) of the Williams Act. To remedy this violation, I am ordering the postponement of the scheduled shareholder meeting, the rescission of all Agreements executed by Clearfield shareholders and their return by Omega, and the distribution to Clearfield's shareholders of this Summary and Conclusion section of my opinion.

Although I have concluded that equitable relief is appropriate because of a material omission in the tender offer for which Omega is responsible, Clearfield's August 9 letter to its shareholders is problematic as well. While helpful in pointing out the omissions contained in Omega's tender offer, it also included the suggestion that shareholders might be assessed certain costs and fees for the "bad faith" or "vexatious" exercise of their right to dissent. Shareholders, however, have the right to vote on the merger and to exercise their dissenters' rights as they deem appropriate, and this court concludes that Clearfield's warning was intended to chill the exercise of those rights.

My resolution of this lawsuit is based on federal law and "[i]n no way should . . . be taken as approval or disapproval of the tender offer, or of the wisdom of acceptance or rejection by the shareholders" of the proposed Clearfield–CSB–Penn Laurel merger transaction. *Ronson Corp. v. Liquifin Aktiengesellschaft*, 497 F.2d 394, 395 (3d Cir.1974). Whether the merger transaction becomes effective is a matter best left to the marketplace and the judgment of Clearfield's shareholders.

An appropriate order follows.

ORDER

AND NOW, this 10th day of September, 1999, consistent with the foregoing Opinion, it is hereby

ORDERED AND DIRECTED that:

1. The Clearfield Bank & Trust shareholder meeting, scheduled for Monday, September 20, 1999, is postponed to Monday, September 27, 1999 or such later date as the Clearfield Bank & Trust board of directors shall establish.

2. All Omega Agreements which have been executed by Clearfield Bank & Trust shareholders are hereby voided. Omega Financial Corporation shall forthwith re-

turn, by first class mail, the original of each executed agreement to the signatory shareholder, together with the caption page of the accompanying Opinion, the Summary and Conclusion (pages 41 and 42), and this Order. All five pages from the opinion and order should be stapled together as a single document. This mailing shall include no other enclosure.

3. Clearfield Bank & Trust shall forthwith provide notice to its shareholders that the shareholder meeting scheduled for Monday, September 20, 1999 has been postponed and advising them of the rescheduled date. The caption page of the accompanying Opinion, the Summary and Conclusion (pages 41 and 42), and this Order shall be stapled together as a single document and shall accompany that notice. Omega Financial Corporation shall be assessed the reasonable costs associated with the provision of this notice and shall pay the invoice for the same within thirty days of receipt. This mailing shall include no other enclosure.

4. Clearfield Bank & Trust and Omega Financial Corporation are enjoined, until 72 hours have elapsed since their respective mailings described in paragraphs 2 and 3, from commenting upon or otherwise characterizing this adjudication in any communication to Clearfield shareholders. This shall not preclude either party from communicating to any person its intention to appeal from this order.

5. Clearfield Bank & Trust shall provide any of its shareholders who request it, either orally or in writing, a photocopy of this Opinion. The costs associated with providing a photocopy of this Opinion to any shareholder so requesting it shall be borne by the party to which the request has been made.

6. Omega Financial Corporation is enjoined from acquiring or proposing to acquire more than ten percent of Clearfield Bank & Trust's common stock in the absence of approval from the Pennsylvania Department of Banking.

UNITED STATES of America

v.

Joseph CRUM.

Civil No. L–97–2108.
Crim. No. L–94–0384.

United States District Court,
D. Maryland.

Aug. 12, 1999.

Prisoner petitioned to vacate his sentence for conspiracy to distribute cocaine. The District Court, Legg, J., held that defendant did not show ineffective assistance of counsel arising out attorney's failure to call witnesses, limited examination of witness or failure to object to hearsay testimony.

Denied.

1. Criminal Law ⇨641.13(1)

To prevail on ineffective assistance of counsel claim, defendant must show: (1) that his trial counsel's legal representation fell below objective standard of reasonableness, and (2) that he was prejudiced by subpar performance of trial counsel. U.S.C.A. Const.Amend. 6.

2. Criminal Law ⇨641.13(6)

Defendant did not show prejudice arising out of his attorney's failure to call two witnesses for purposes of ineffective assistance of counsel claim; testimony of witnesses would have been impeached and there was ample independent evidence to convict defendant. U.S.C.A. Const. Amend. 6.

§ 1983 and § 1981, summary judgment will be granted to the defendants on their claim under § 1988.

D. State Law Claims

The defendants argue that to the extent that the amended complaint alleges claims for intentional infliction of emotional distress in ¶¶ 29(k), 31(f), 33(f), 35(g), 37(f), and 39(e), they are entitled to summary judgment on the plaintiffs' state law claims.

[19] The school district defendants argue that the plaintiffs' state claims are barred by statutory immunity under 42 Pa.C.S. § 8541 *et seq.* Under § 8542(a)(2), local agencies are immune for willful misconduct. Under § 8542(b), local agencies are immune for acts of negligence, except for limited exceptions which are inapplicable here. Thus, the City of Philadelphia and the School District of Philadelphia are immune under Page's allegation of intentional infliction of emotional distress. *See Weissman v. City of Philadelphia*, 99 Pa. Cmwlth. 403, 513 A.2d 571 (1986).

[20] Although state employees are immune from claims of negligence under § 8545, they may be liable for willful misconduct under § 8550. Here, however, the plaintiffs have not alleged or produced evidence of any affirmative or intentional conduct by the individual defendants that caused injury to April Page; the allegations and evidence against the defendants are of their omissions to act. Thus, the plaintiffs' claims for intentional infliction of emotional distress will not survive this motion for summary judgment. *See Collier by Collier v. William Penn School District*, 956 F.Supp. 1209, 1217 (E.D.Pa.1997) (applying Pennsylvania law).

IV. CONCLUSION

Based on the foregoing, I conclude the defendants are entitled to judgment as a matter of law on all of the plaintiffs' claims. Accordingly, the motions will be granted. An appropriate Order follows.

ORDER

AND NOW, this 14th day of April, 1999, upon consideration of the motion of defendants the School District of Philadelphia, Marty Wharton, Harry J. Gafney, and R. Waldman ("the school district defendants") for summary judgment (Document No. 38), the motion of defendants Officer Zulka and the City of Philadelphia for summary judgment (Document No. 39), the response by the plaintiffs April Page, by her parents, Raymond and Georgene Page, and by their own right (Document No. 41), and the reply of the school district defendants (Document No. 42), having found and concluded that the plaintiffs have not established a genuine issue of material fact and that the defendants are entitled to judgment as a matter of law under Federal Rule of Civil Procedure 56, and based on the reasons given in the foregoing Memorandum, it is hereby **ORDERED** that the motions are **GRANTED. JUDGMENT IS ENTERED** in favor of the defendants and against the plaintiffs on all of their claims.

This is a final Order. The clerk is directed to close this file.

LAUREL CAPITAL GROUP, INC., Laurel Savings Bank, Plaintiffs,

v.

BT FINANCIAL CORPORATION, Laurel Bank, Defendant.

No. Civ.A. 97-311J.

United States District Court, W.D. Pennsylvania.

April 15, 1999.

Financial institution using service mark "Laurel Savings Bank" brought

trademark infringement action under Lanham Act against rival institution that used mark "Laurel Bank." Parties moved for summary judgment. The District Court, D. Brooks Smith, J., held that: (1) allegedly infringing service mark was "in commerce," for Lanham Act jurisdictional purposes; (2) complaining mark holder would be deemed to have adopted mark when it became known as "Laurel Savings Association," rather than later date when it changed its name to "Laurel Savings Bank;" (3) although mark "Laurel Bank" was senior in time to "Laurel Savings Bank," senior service mark holder was not owner of mark in metropolitan area where junior mark holder did business and senior holder was just becoming established; and (4) there was likelihood of confusion between marks.

Summary judgment for alleged infringer.

1. Commerce ⇐62.12

In determining whether allegedly infringing trademark has been used "in commerce," as required for Lanham Act coverage, focus is on whether mark was used in interstate commerce, not whether business using mark engaged in interstate commerce. Lanham Trade–Mark Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

2. Commerce ⇐62.12

Financial institution with branches in only one state placed its allegedly infringing trademark "in commerce," as required for Lanham Act to apply; institution maintained internet web site on which trademark was displayed, had some out-of-state customers, and advertised in periodicals having some out-of-state circulation. Lanham Trade–Mark Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

3. Trade Regulation ⇐151

When a trademark is unregistered, the rights of the holder and the alleged infringer are determined according to the common law. Lanham Trade–Mark Act, § 43(a)(1), 15 U.S.C.A. § 1125(a)(1).

4. Trade Regulation ⇐152

Trademark registered under Lanham Act is still subject to defense of prior use of mark in area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

5. Trade Regulation ⇐1, 7

For practical purposes, trademarks, trade names and service marks are subject to the same substantive rules of validity and infringement. Lanham Trade–Mark Act, §§ 43(a), 45, 15 U.S.C.A. § 1125(a), 1127.

6. Trade Regulation ⇐332

To establish a common law trademark infringement claim, a plaintiff must show that it is the owner in the relevant area of a mark that is distinctive and protectable, and that the defendant's actions cause a likelihood of confusion.

7. Trade Regulation ⇐24

An "arbitrary service mark" is one which bears no logical or suggestive relation to the actual characteristics of the service. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

8. Trade Regulation ⇐25

A "suggestive service mark" suggests rather than describes the characteristics of the services which it includes. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

9. Trade Regulation ⇐24, 25

Arbitrary and suggestive service marks are inherently distinctive and entitled to protection without proof of secondary meaning. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

10. Trade Regulation ⚖13

"Descriptive service marks," which describe a characteristic of the service, require proof of secondary meaning for protection. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

11. Trade Regulation ⚖66.1

The "senior user" of a service mark is typically the first to use the mark anywhere in the United States. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

12. Trade Regulation ⚖66.1

In the ordinary case of parties competing under the same service mark in the same market, it is correct to say that first party to appropriate mark prevails. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

13. Trade Regulation ⚖66.1

When senior user of mark enters a remote market, it does so subject to the rights already acquired, in good faith, by another user. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

14. Trade Regulation ⚖67

The good-faith junior user of a mark in a remote area is entitled to relief from use of mark by senior user, if at the critical date of its first use of the mark, the senior user's mark was unknown to customers in the area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

15. Trade Regulation ⚖67

Market penetration, required to be achieved by the senior user of a service mark before rights can be asserted against the junior user in an area, involves consideration of (1) the volume of services, (2) positive and negative growth trends in the area, (3) actual customers in relation to potential customers, and (4) the amount of service advertising conducted in the area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

16. Trade Regulation ⚖67

If a senior service mark user's reputation penetrated an area prior to a junior user's first use of the mark in the area, the senior user prevails. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

17. Trade Regulation ⚖67

Under the "natural zone of expansion" theory, if at the time a junior service mark user first used mark, it did so within senior user's "natural zone of expansion," senior user will prevail in trademark infringement action. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

18. Trade Regulation ⚖350.1

Service mark "Laurel," used in connection with financial services, was arbitrary mark entitled to highest level of copyright protection. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

19. Trade Regulation ⚖67

Junior user's utilization of service mark "Laurel" would be deemed to begin from date when junior user became known as "Laurel Savings Association," rather than later date when name was changed to "Laurel Savings Bank," even though junior user did not become fully qualified to compete with senior user until it became a savings bank. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

20. Trade Regulation ⚖574

Party asserting service mark claim has burden of proving ownership of mark in relevant market area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

21. Trade Regulation ⚖367

Factors useful in determining whether service mark holder has achieved market penetration in remote geographic market,

sufficient to confer superior rights over holder of conflicting mark, include (1) the volume of service, (2) positive and negative growth trends in the area, (3) actual customers in relation to potential customers, and (4) the amount of service advertising conducted in the area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

22. Trade Regulation ⇐585

Senior service mark user, which was financial institution, failed to prove that it and not junior user was owner of mark in six county area comprising metropolitan area where junior user operated, under theory of market penetration allowing senior user ownership rights if it achieved market penetration; at time of adoption of mark by junior user, senior user had de minimis sales volume and negligible number of actual customers in area, and while it had contemplated and begun gradual westward expansion, senior user had not yet opened any branch offices in area, nor had it engaged in advertising sufficient to carry its mark into area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

23. Trade Regulation ⇐367

When a senior service mark user demonstrates that it has established a reputation beyond its own market area, reputation alone, without market penetration or physical presence, may afford it superior trademark rights in the remote market of the junior user. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

24. Trade Regulation ⇐367

Senior service mark user, which was financial institution, failed to prove that it and not junior user was owner of mark in six county area comprising metropolitan area where junior user operated, based upon degree to which its reputation extended into area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

25. Trade Regulation ⇐367

If a senior service mark user has established history of constantly expanding its business, as of the date of the junior user's adoption of the mark, and if distances involved are not great, senior user may be entitled to exclusive service mark rights in a "zone of natural expansion" which includes the junior user's area, even though no actual sales have yet been made in that area by the senior user. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

See publication Words and Phrases for other judicial constructions and definitions.

26. Trade Regulation ⇐367

In determining whether there was zone of natural expansion surrounding area in which service mark user is operating, allowing user to have service mark ownership rights in that area without presence in area, factors to be considered include (1) the geographic distance from the user's actual location to the perimeter of the claimed zone. (2) the nature of the business and the size of the user's zones of market penetration and reputation, (3) the history of the user's expansion and assessment at to when the user could potentially reach the zone he claims, and (4) whether it would take a "great leap forward" for the user to enter the zone, *i.e.*, whether expansion into the claimed zone is the next logical step. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

27. Trade Regulation ⇐67

Senior service mark user, which was financial institution, failed to prove that it and not junior user was owner of mark in six county area comprising metropolitan area where junior user operated, based upon claim that metropolitan area was within senior user's zone of natural expansion; at relevant time, when junior user adopted mark, senior user had not started aggressive acquisition program and had not been acquired by bank holding company having presence in metropolitan area. Lanham Trade–Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

28. Trade Regulation ⇐334.1

The confusion that trademark law seeks to prevent is confusion as to the source of the goods or services. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

29. Trade Regulation ⇐334.1

When the parties deal in competing goods or services, the court need rarely look beyond trade mark or service mark itself to determine if there has been confusion required for infringement purposes. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

30. Trade Regulation ⇐335

Actual confusion between service marks is one of the most reliable indications of the likelihood of confusion, so long as the confusion is causally related to the use of similar marks. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

31. Trade Regulation ⇐336

The likelihood of confusion between trademarks or service marks may be reduced if the customer is reasonably expected to use a high level of care and attention in choosing a product or service. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

32. Trade Regulation ⇐350.1

When the services, marketing channels, and operative names of entities operating under allegedly confusing service marks are identical and the marks are very similar, the factor of customer attention or care in choosing desired provider correspondingly becomes less important in determining if there has been infringement. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

33. Trade Regulation ⇐350.1

There was likelihood of confusion, for service mark infringement purposes, between service mark "Laurel Savings Bank," used by financial institution established in area and "Laurel Bank" service mark used by another financial institution seeking to establish itself in area; manner of display of marks was similar, institutions provided overlapping services, and there was extensive evidence of customer confusion as to which was which. Lanham Trade-Mark Act, § 43(a), 15 U.S.C.A. § 1125(a).

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MEMORANDUM OPINION AND ORDER

D. BROOKS SMITH, District Judge.

Before the court are cross-motions for summary judgment. Plaintiffs Laurel Capital Savings Group, Inc. and Laurel Savings Bank ("Plaintiffs") have requested partial summary judgment on their trademark infringement action under the Lanham Act, 15 U.S.C. § 1125(a). Defendants BT Financial Corporation and Laurel Bank ("Defendants") have filed a competing motion for summary judgment. For the following reasons, I will grant the Plaintiffs' motion for partial summary judgment and deny the Defendants' motion. As explained *infra*, the precise geographic scope of the parties' respective rights in the mark at issue will be addressed subsequently at the remedial stage of this action. Hence, the geographic scope used to resolve the present motions will not be law of the case for purposes of crafting an appropriate remedy.

I. FACTS

A. The Plaintiffs

Plaintiff Laurel Capital Group, a bank holding company, has been the parent

company of plaintiff Laurel Savings Bank since December 1993. Dkt. no. 40, Exh. 1, at 2. At the present time, Laurel Savings Bank is a Pennsylvania state-chartered stock savings bank conducting business at six branch offices clustered along Route 8 in Allegheny County and lower Butler County in Western Pennsylvania. *Id.* at 2–3.[1]

The predecessor to Laurel Savings Bank, known as Laurel Savings Association, was formed in 1981 when Peoples Savings Association merged with Allison Park Savings and Loan Association. *Id.* at 2. In May 1981, a committee consisting of two directors from each of the merged institutions was appointed to choose a name, preferably one associated with Pennsylvania. The committee initially chose "Mountain Laurel" after the state flower, but shortened it simply to "Laurel" and named the new entity "Laurel Savings Association." Dkt. no. 43, Exh. 2, at 4–5. At the time, the committee was unaware of any other banking institutions using the name "Laurel" in any fashion. *Id.* at 7–8. The name was approved by the combined entity's board in mid-December 1981 and used beginning in early January 1982.[2] *Id.* at 6.

Between 1982 and 1995, Laurel Savings Association operated as a state-chartered savings association at the same six branches now operated by the Plaintiffs. Dkt. no. 40, Exh.1, at 3. It offered a variety of banking services to Pittsburgh-area individuals and commercial customers including mortgage loans, installment loans, checking accounts, certificates of deposit, passbook, club and money market accounts, night depository services, U.S. Savings Bond sales and redemptions, travelers' checks, money orders and retirement accounts (IRA, KEOGH, SEP). Dkt. no. 57, Exh. 1, at 4. ATM services were made available to individuals and commercial customers in 1983, credit card merchant charge services to commercial customers in 1984, and credit card and safety deposit boxes to individuals and commercial customers in 1987. *Id.* In addition, as of 1982, Laurel Savings Association branches were authorized to offer commercial real estate lending and, to a limited extent, non-interest bearing demand deposit accounts and interest bearing negotiable order of withdrawal ("NOW") accounts. Dkt. no. 60, Exh. 4, at 1–2.

As a savings association, Laurel Savings was subject to regulation by the Office of Thrift Supervision ("OTS") and required to pay annual OTS assessment charges. Dkt. no. 57, Exh. 1, at 3. In January 1995, in an effort to avoid further OTS charges, Laurel Savings Association converted to a state-chartered stock savings bank, thereby becoming subject instead to regulation by the Federal Deposit Insurance Corporation ("FDIC"). Accordingly, Laurel Savings Association changed its name to Laurel Savings Bank to reflect the change in its charter. *Id.* at 5. The conversion, however, did not alter the institution's range or type of services, or its customer base. *Id.* at 4–5; Dkt. no. 40, Exh. 1, at 2.

Laurel Savings Bank, currently holding over 35,000 customer accounts, primarily serves individuals and businesses proximately located near its six branch offices. Dkt. 40, Exh. 1, at 4, 12–13. Its customers hale mostly from Allegheny and southern Butler Counties. These branch offices, however, do serve individuals who, while residing in the nearby contiguous counties of Armstrong, Beaver, Washington and Westmoreland, find it convenient to bank in the Allegheny southern Butler area.

1. These are the Allison Park, Deer Lakes, Etna, Morningside, and Shaler branches in Allegheny County and the Saxonburg branch in Butler County. *Id.* at 3.

2. Plaintiffs argue that 1981 is the relevant adoption date. It appears, however, that while the naming committee chose "Laurel" in 1981, Laurel Savings Association began actual use of the mark in 1982. Dkt. no. 58, Exh. A, at 3. Accordingly, I will consider 1982 the relevant date.

Id. at 12–13. Laurel Savings Bank uses the color green and a stylized "L" logo in its marketing materials. *See e.g.,* Dkt. no. 42, Exhs. K, M, O.

Over the years, while continuing to operate at the same six branch offices, Laurel Saving Bank's business has grown at a moderate pace. *See* Dkt. no. 40, Exh. 1, at 4. Its current assets exceed $212,000,000, up from $177,729,000 in 1994. *Id.* Laurel Savings Bank has considered acquiring or opening new branch offices in Allegheny and Westmoreland Counties, but has yet to do so. *Id.*

B. The Defendants

Defendant BT Financial Corporation is a bank holding company headquartered in Johnstown, Pennsylvania. Dkt. no. 50, Exh. C, at 2. Defendant Laurel Bank, a wholly owned subsidiary of BT Financial, traces its roots back to the First National Bank of Ebensburg, a commercial bank which opened its first branch office in Cambria County in 1897. *Id.* By 1974, the First National Bank of Ebensburg had grown considerably through new branch offices and acquisitions. *Id.;* Dkt. no. 50, Exh. D, at 9–11. As the Bank grew, however, there was increasing concern that the regionality of the "Ebensburg" name no longer reflected its geographic service area. Dkt. no. 50, Exh. C, at 3. Thus, in 1974, the First National Bank of Ebensburg changed its name to "The Laurel National Bank" and adopted Pennsylvania's state flower, the Mountain Laurel, for use in its marketing endeavors. *Id.* at 3. The name change was extensively advertised in various media, through open house events, and a campaign to give away 10,000 laurel bush seedlings. *Id.*

The Laurel National Bank was acquired by defendant BT Financial Corporation on January 1, 1985. Dkt. no. 50, Exh. C, at 3. It immediately converted to a state charter so as to be subject to the same federal regulator as BT Financial's other commercial subsidiary, the Johnstown Bank and Trust Company. *Id.* The conversion had no impact on Laurel National Bank's range of powers and services, but it did require the Bank to drop "National" from its corporate name. *Id.* Thereafter, it carried on its commercial banking business as "Laurel Bank," a BT Financial affiliate.

Meanwhile, from its headquarters in Johnstown, BT Financial continued to expand westward. In 1991, BT Financial acquired Peoples Federal Savings Bank of New Kensington. Dkt. 43, Exh. 6, at 25. It began to operate Peoples' branches in Tarentum and Natrona Heights in Allegheny County, New Kensington and Lower Burrell in Westmoreland County and Sarver in Butler County as branches of the Johnstown Bank and Trust Company ("JBT"). *Id.* In 1993, BT Financial acquired First South Financial Corporation and began to operate First South's six branches in Allegheny County (Brookline, Brentwood, Pleasant Hills, Mount Oliver, Carson Street in Pittsburgh's South Hills and McCandless Township in Pittsburgh's North Hills) and one in Washington County (Donaldson's Crossroads) as branches of another BT Financial subsidiary, Fayette Bank. *Id.* at 25–26.

On October 10, 1997, BT Financial consolidated its three affiliate commercial banks—Fayette Bank, JBT and Laurel Bank—into one institution. BT Financial proposed to call the consolidated entity "Laurel Bank." Dkt. no. 50, Exh. C, at 3. "Laurel" was chosen to reflect the institution's wide geographic distribution and to capitalize on the goodwill and customer recognition associated with the name. *Id.* As a result of the consolidation, the newly formed Laurel Bank had seventy-two branch offices in twelve counties: Allegheny, Armstrong, Butler, Fayette, Westmoreland, Somerset, Bedford, Blair, Cambria, Indiana, Greene, and Washington.[3]

3. Simultaneously with this consolidation, BT Financial changed the name of its trust company subsidiary from BT Management Trust Company to Laurel Trust Company and the name of its community development company from Moxham Community Development Cor-

Prior to the consolidation, Laurel Bank had operated at twelve branch offices located across three counties—Blair, Cambria and Indiana—variously 70 to 100 miles east of the Pittsburgh metropolitan area.

C. The Litigation

In March 1997, the Plaintiffs learned of defendant BT Financial's plan to merge Fayette Bank, JBT, and Laurel Bank into an institution named "Laurel Bank." Dkt. no. 40, Exh. 1, at 12. Concerned because some of the Fayette Bank and JBT branch offices were located in or near areas already served by Laurel Savings Bank,[4] Plaintiffs notified BT Financial of their prior use of the "Laurel" mark in those areas. *Id.* at 19. In spite of the Plaintiffs' continued assertion in a series of letters of its superior rights in the mark, Dkt. no. 42, Exhs. FF, GG, and HH, defendant BT Financial consummated its October 10, 1997 consolidation and began the process of renaming and advertising the merged institution's new name. Dkt. no. 42, Exhs. II, JJ, KK (print and billboard name change advertisements). The new Laurel Bank put out a small number of advertisements and erected a few billboards in the Pittsburgh area, using the color green and a stylized "L" logo similar to that of Laurel Savings Bank. *See id.*

On November 19, 1997, Plaintiffs filed suit under the Lanham Act, seeking a preliminary and permanent injunction to prevent Defendants from using the "Laurel" mark or any similarly confusing mark in connection with banking services in the Pittsburgh area. Dkt. no. 1. On December 2, 1997, the parties entered a consent decree preliminarily enjoining the Defendants, pending a trial on the merits, from using "Laurel" or any confusingly similar mark or logo in the six-county area of Allegheny, Armstrong, Beaver, Butler, Washington, and Westmoreland Counties ("the six-county area"). Dkt. no. 33, at 2 ("Amended Consent Decree"). Discovery ensued and on June 15, 1998, both parties filed motions for summary judgment along with extensive sealed supporting exhibits. Dkt. nos. 38, 48. I turn now to these competing motions.

II. APPLICABLE LEGAL PRINCIPLES

A. Subject Matter Jurisdiction[5]

1. The Statutory Framework & General Principles

The federal district courts have original jurisdiction of all actions arising under the

poration to Laurel Community Development Corporation. Dkt. no. 50, Exh. C, at 4.

4. For example, BT Financial affiliate's branch offices in the Allegheny Valley area of Pittsburgh were approximately nine miles from Plaintiffs' Russelton branch office and the Fayette Bank branch on Carson Street in the South Side area of Pittsburgh was only five miles from Plaintiffs' Morningside office. Dkt. no. 40, Exh. 1, at 13–14. In addition, Laurel Savings Bank had account customers (approximately 9% of its total accounts) located in many of the same areas as existing JBT and Fayette Bank branch offices. *Id.*

5. This issue was not raised by the parties; nevertheless, "[i]t is axiomatic that federal courts are courts of limited jurisdiction, and as such are under a continuing duty to satisfy themselves of their jurisdiction before proceeding to the merits of any case." *Packard v. Provident Nat'l Bank,* 994 F.2d 1039, 1049 (3d Cir.1993). Thus, I must consider the issue *sua sponte.* To that end, I directed the parties to provide supplemental briefs on this issue, Dkt. no. 67, and specifically "reminded [them] that they cannot confer subject matter jurisdiction by consent. *See California v. LaRue,* 409 U.S. 109, 112 n. 3, 93 S.Ct. 390, 34 L.Ed.2d 342 (1972)." *Id.* Both parties responded, dkt. nos. 68, 69, but defendants' "brief" consisted solely of a letter in which counsel stated that his client had "directed us not to submit a letter brief on the jurisdictional issue but to defer to the Court's judgment with respect to it." Dkt. no. 69. This response did not constitute compliance with my order, and deprived me of meaningful input from one of the two litigating parties. Rather than further delay disposition of the instant motions, I proceed to resolve the jurisdictional issue.

Lanham Act. *See* 15 U.S.C. § 1121. Under the Act,

> "[a]ny person who, on or in connection with any goods or services ... uses in commerce any word, term, [or] name ... which [is] likely to cause confusion ... as to the affiliation, connection or association ... or as to origin, sponsorship, or approval of his or her goods, services or commercial activities ... shall be liable in a civil action by any person who believes that he [ ] is likely to be damaged by such act."

15 U.S.C. § 1125(a)(1).

"Use in commerce" is defined by the Act to mean "the bona fide use of a mark in the ordinary course of trade." 15 U.S.C. § 1127. Specifically, a service mark is used in commerce "when it is used or displayed in the sale or advertising of services and the services are rendered in commerce, or the services are rendered in more than one State...." *Id.*

The Act also defines "commerce" to mean "all commerce which may lawfully be regulated by Congress." 15 U.S.C. § 1127. It is axiomatic that Congress may lawfully regulate, in addition to interstate commerce, purely intrastate activities which have a "substantial effect" on interstate commerce. *See Rickard v. Auto Publisher, Inc.*, 735 F.2d 450, 453 n. 1 (11th Cir.1984) ('in commerce' jurisdictional requirement requires only effect on commerce); *Pure Foods v. Minute Maid Corp.*, 214 F.2d 792, 795 (5th Cir.1954) (Lanham Act extends to activities local in nature which have substantial economic effect on interstate commerce); *Mother Waddles Perpetual Mission, Inc. v. Frazier*, 904 F.Supp. 603, 611 (E.D.Mich.1995) (interstate commerce jurisdictional requirement may be met by showing that the defendant's use, while intrastate, substantially affected interstate business). Moreover, the Supreme Court has long advocated liberal construction of the Lanham Act's "in commerce" requirement, *see Steele v. Bulova Watch Co.*, 344 U.S. 280, 283, 73 S.Ct. 252, 97 L.Ed. 319 (1952), which has been characterized as minimal. *See Berghoff Restaurant Co., Inc. v. Lewis W. Berghoff, Inc.*, 357 F.Supp. 127, 130 (N.D.Ill.1973); *see also* 3 J. Thomas McCarthy, *McCarthy on Trademarks & Unfair Competition* § 25:57 (4th ed.1999) (hereinafter "*McCarthy on Trademarks*") ("It is difficult to conceive of an act of infringement which is not 'in commerce' in the sense of the modern decisions. Thus, it may not be inaccurate to predict that the 'use in commerce' requirement will not be much of an issue in future litigation, barring cases with unusual twists in the facts.").

The Act calls for an assessment of the defendant's "in commerce" use of the mark. *See* 15 U.S.C. § 1125 (any person that "uses in commerce" a mark likely to cause confusion (*i.e.*, defendant) "shall be liable in a civil action to any person who believes that he or she is likely to be damaged by such act" (*i.e.*, plaintiff)); *see also Schroeder v. Lotito*, 577 F.Supp. 708, 715 (D.R.I.1983) (the improper use must be in interstate commerce). The courts, however, have repeatedly found jurisdiction where the defendant's use is solely intrastate, provided the plaintiffs business activities "involve" or "affect" interstate commerce. *See e.g., Falcon Rice Mill v. Community Rice Mill*, 725 F.2d 336, 343 n. 5 (5th Cir.1984); *Coca–Cola Co. v. Stewart*, 621 F.2d 287, 290 (8th Cir.1980) ("substantial effect" is present where "the trademark owner's reputation and good will, built up by use of the mark in interstate commerce, are adversely affected by intrastate infringement"); *Burger King of Florida, Inc. v. Brewer*, 244 F.Supp. 293, 297 (W.D.Tenn.1965) (advertising by plaintiff put the mark in interstate commerce). Only those disputes which are "purely" intrastate fail to implicate the Lanham Act. *See Jellibeans, Inc. v. Skating Clubs, Inc.*, 716 F.2d 833, 838 (11th Cir.1983); *Tax Cap Committee v. Save Our Everglades*, 933 F.Supp. 1077, 1080–81 (S.D.Fla.1996) (no Lanham Act jurisdiction where the mark, used in gathering petition

signatures solely in Florida for political purposes, was not used in commerce).

[1] When assessing the parties' activities, however, it is vital to understand the conceptual difficulty inherent in the wording of the Lanham Act. For the Act to apply, the *mark itself* must be used in interstate commerce; it is insufficient that the parties' *business* is, by its nature, interstate or is one that effects interstate commerce. Very few courts have taken notice of this distinction. It is perhaps best explained in *Licata & Co., Inc. v. Goldberg*, 812 F.Supp. 403 (S.D.N.Y.1993):

> The Lanham Act's reach, while long, does not extend to the full outer limits of the commerce power. Its plain meaning—the Lanham Act utilizes the term "in commerce" rather than "affecting commerce" or the even broader "industry affecting commerce"—reflects a legislative judgment that for the statute to apply, the questioned advertising or statements, and not merely the underlying commercial activity, must be disseminated in commerce—i.e., not be purely local.

Id. at 409; *see also Blazon, Inc. v. DeLuxe Game Corp.*, 268 F.Supp. 416 (S.D.N.Y. 1965) (it is the transportation of the item with the mark on it rather than the general scope of the business which is determinative under the statute). Thus, we cannot base jurisdiction simply on the obvious fact that these parties, both banks, operate in or substantially affect interstate commerce.[6]

[2] What counts, then, are the steps taken by each party to place its mark in interstate commerce. Where the parties advertise beyond state borders or claim patrons residing outside the state, the courts have been very liberal in favor of finding jurisdiction. *See Rickard*, 735 F.2d at 453 n. 1 (buyers responding to the defendant's ads and the sellers which place them are *occasionally* from across state borders); *Jellibeans, Inc.*, 716 F.2d at 838 (patrons from beyond state borders); *Mother Waddles*, 904 F.Supp. at 611 (defendant's radio ads broadcast out of state); *see also* Annotation, *What Constitutes "In Commerce" Within the Meaning of § 32(1) of Lanham Trade-Mark Act (15 USCS § 1114(1)) Giving Right of Action for Infringement of Trademark "In Commerce"*, 15 A.L.R.Fed. 368 (1973 & Supp. 1998) (seemingly intrastate activity is sufficient where there are records of out of state patrons and proof of advertising in newspapers with interstate distribution).

Many of the cases where jurisdiction is deemed appropriate involve national advertising. *See e.g., Kampgrounds*, 415 F.Supp. at 1290–91 (advertising in camping publications with national circulation); *Lobo Enterprises v. Tunnel, Inc.*, 822 F.2d

6. I need not ignore the nature of the parties' underlying business, however. Two cases specifically dealing with service marks are instructive. First, in *Application of Gastown*, 51 C.C.P.A. 876, 326 F.2d 780 (C.C.P.A.1964), the applicant appealed the Trademark Board's refusal to permit federal registration of its service mark for an alleged failure to satisfy the "in commerce" requirement. The applicant's roadside automotive services were confined to Ohio, but its customers, interstate travelers, were engaged in interstate commerce when they used the applicant's services. *Id.* at 781–82. In addition, those services were billed to the customers' out of state addresses. The court found that the mark was used in the sale of services rendered in commerce. *Id.* at 782. Likewise, in *Kampgrounds of Am. v. North Del. A—OK Campground, Inc.*, 415 F.Supp. 1288 (D.Del.1976), the court applied the *Gastown* rationale in analyzing the parties' interstate use of a service mark. According to Judge Stapleton, then sitting as a district judge, defendant campground provided services to a transient population which was itself engaged in interstate commerce. Such activities, combined with interstate advertising and road signs, "constituted sufficient indicia of interstate business to fall within the 'commerce' requirement of the Lanham Act." *Id.* at 1291. Thus, even though banking customers are readily distinguishable from interstate travelers and campers, it is legitimate to point out that activities undertaken by the parties' customers (*i.e.*, paying with "Laurel" embossed checks, ATM or credit cards), which coincide with use of the parties' banking services, culminate in use of the "Laurel" mark in the channels of interstate commerce.

331, 333 (2d Cir.1987) (travel guides and other publications with interstate circulation). I have yet to see, however, any suggestion in the caselaw that the parties must actually intend that their mark travel in interstate channels. Indeed, it appears to be enough if, for instance, their radio or newspaper ads happen to be regularly carried beyond state borders.

With the foregoing principles in mind, I turn to the evidence of interstate use adduced by the Plaintiffs.

2. Application

Defendants have affirmatively used their mark in interstate commerce. First, and perhaps most importantly, they maintain an Internet website which prominently features and promotes defendant Laurel Bank's services in connection with the "Laurel" mark.[7] This website is accessible to customers worldwide. As the District Court for the Southern District of New York recently reasoned:

> Internet users constitute a national, even international, audience, who must use interstate telephone lines to access defendant's website ... The nature of the Internet indicates that establishing a typical home page on the Internet, for access to all users, would satisfy the Lanham Act's "in commerce" requirement.

Planned Parenthood Fed., Inc. v. Bucci, No. 97–629, 1997 WL 133313, *3, 1997 U.S.Dist. LEXIS 3338, *10–12 (S.D.N.Y. Mar. 24, 1997), *aff'd mem.*, 152 F.3d 920 (2d Cir.), *cert. denied*, — U.S. —, 119 S.Ct. 90, 142 L.Ed.2d 71 (1998); *accord Intermatic, Inc. v. Toeppen*, 947 F.Supp. 1227 (N.D.Ill.1996); 2 Jerome Gilson & Anne Gilson Lalond, *Trademark Protection and Practice* § 511[2] (1998) ("because Internet communications transmit instantaneously on a worldwide basis, there is little question that the 'in commerce' requirement [of the Lanham Act] would be met in a typical Internet message"). Accordingly, Defendants' maintenance of a website prominently featuring the "Laurel" mark strongly supports Lanham Act jurisdiction.

Second, there are at least forty Laurel Bank accounts held by customers who reside outside of Pennsylvania. *See* Dkt. No. 68, Exh. A; *Jellibeans Inc.*, 716 F.2d at 838 (district court finding of interstate contact not clearly erroneous where plaintiff drew patrons from out of state); *Rickard*, 735 F.2d at 453 n. 1 (buyers and sellers who used the parties' publishing services occasionally hailed from across state lines); *University of Florida v. KPB, Inc.*, 89 F.3d 773, 776 n. 1 (11th Cir.1996) (jurisdiction proper where 15% of student body from out-of-state). This fact also supports Lanham Act jurisdiction.

Third, Defendants engage in some interstate advertising, although its extent is very limited, and the fact that the Defendants' chosen publications are circulated beyond state borders appears to be merely incidental. *Cf. Lobo Enterprises*, 822 F.2d at 333 ("in commerce" requirement satisfied where service mark was significantly advertised in travel guides); *Kampgrounds*, 415 F.Supp. at 1291 (camping publications with national circulation). The *Pittsburgh Post–Gazette*, for example, is distributed outside of Pennsylvania. *See* Dkt. No. 68, Exh. B. Nonetheless, even small amounts of interstate advertising have been repeatedly cited as strong support for Lanham Act jurisdiction. *See Mother Waddles*, 904 F.Supp. at 611 ("[i]nterstate advertising is sufficient interstate activity for Lanham Act purposes").[8]

Overall, the Defendants' use of the mark in interstate commerce is sufficient to support Lanham Act jurisdiction in this case. That position is further strengthened by

7. Http://www.btfinancial.com/laurel–bank.

8. It bears noting that Defendants have filed five trademark applications, all of which allege use of the "Laurel" mark in interstate commerce. *See Miles Labs., Inc. v. Frolich*, 195 F.Supp. 256, 257 (S.D.Cal.1961), *aff'd*, 296 F.2d 740 (9th Cir.1961).

an examination of the Plaintiffs' use of the mark. Like the Defendants, Plaintiffs boast a significant number of customers who reside out of state. *See* Dkt. no. 68, Exh. D (listing 86 accounts). In addition, they too advertise in the *Pittsburgh Post–Gazette*, which circulates beyond state borders.

Accordingly, these facts provide strong support for a finding that both parties use the mark in commerce in connection with their services. I therefore conclude that this court has subject matter jurisdiction over the case *sub judice*.

B. The Summary Judgment Standard

Summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. It can meet this burden simply by pointing to the absence of evidence to support the nonmovant's case. *Id.* at 325, 106 S.Ct. 2548. The nonmoving party must then go beyond the pleadings and, through other admissible evidence, demonstrate the existence of a genuine issue of material fact. *Id.* at 324, 106 S.Ct. 2548. To make the required evidentiary showing, the nonmoving party must "introduce evidence from which a rational finder of fact could find in [his] favor." *Colburn v. Upper Darby Township*, 946 F.2d 1017, 1020 (3d Cir.1991). The non-moving party is afforded the benefit of all reasonable inferences drawn from the record. *Armbruster v. Unisys Corp.*, 32 F.3d 768, 777 (3d Cir.1994).

C. Basic Trademark Principles

[3, 4] Section 43(a) of the Lanham Act prohibits use of a mark that "is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services or commercial activities." 15 U.S.C. § 1125(a). Neither Plaintiff Laurel Savings Bank nor Defendant Laurel Bank have registered their names as trade or service marks under federal or state law.[9] Registration, however, is not a prerequisite for protection and recovery under the

9. Defendant BT Financial filed for federal registration of the "Laurel Bank" mark on May 13, 1997. Dkt. no. 46, Exh. 33 D. BT Financial related companies have filed applications for "Laurel Line," "Laurel Link," "Laurel and Design" and "Laurel Trust Company." *Id.*, Exhs. A, B, C.

Even if Defendants successfully register the "Laurel" mark, they will still be subject to the prior rights of a common law user in a remote geographic area. This is because trademark registration does not create the underlying right to exclude; trademark ownership and attendant rights are acquired by use in the marketplace. *See 3 McCarthy on Trademarks* § 19:3. "When two parties acquire common law rights in a mark in different areas and the [senior user] registers the mark, then the registered owner's rights can become incontestable. [However,] [t]he other common law owner [*i.e.*, the junior user] does retain exclusive rights in the mark in areas where his use antedated the registration." *Freedom Sav. & Loan Ass'n v. Way*, 583 F.Supp. 544, 553 (M.D.Fla.1984); *see also Natural Footwear Ltd. v. Hart, Schaffner & Marx*, 760 F.2d 1383, 1395 (3d Cir.1985) ("[A] federal registrant is still subject to the defense of a prior user of the mark who has established a market in specific markets notwithstanding the senior user's failure to register."); *V & V Food Prods., Inc. v. Cacique Cheese Co.*, 683 F.Supp. 662, 667 (N.D.Ill. 1988) (federal registrant, even though presumed to have exclusive rights nationwide, is still subject to the common law user's superior rights in areas where that user has established "continuous prior use").

Lanham Act. *See Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768, 112 S.Ct. 2753, 120 L.Ed.2d 615 (1992); *A.J. Canfield Co. v. Honickman*, 808 F.2d 291, 296 (3d Cir.1986). When the mark is unregistered, the parties' rights are determined according to the common law. *See e.g., Dominion Bankshares Corp. v. Devon Holding Co., Inc.*, 690 F.Supp. 338, 344 (E.D.Pa.1988).

[5] Both parties use "Laurel" as a service mark or a trade name. *See First Sav. Bank v. First Bank Sys., Inc.*, 101 F.3d 645, 651 (10th Cir.1996); *Union Nat'l Bank v. Union Nat'l Bank*, 909 F.2d 839, 841 n. 2 (5th Cir.1990) (banks provide services, so the terms at issue appropriately designated "service marks"). A "service mark" is defined in the Lanham Act as "any word, name, symbol, or device, or any combination thereof [ ] used by a person ... to identify and distinguish the services of one person [or entity], ... from the services of others and to indicate the source of the services." *See* 15 U.S.C. § 1127. For practical purposes, trademarks, trade names and service marks "are subject to the same substantive rules of validity and infringement." 1 *McCarthy on Trademarks* § 4:14; *see also Country Floors Inc. v. Gepner*, 930 F.2d 1056, 1064 n. 2 (3d Cir.1991).[10]

[6] Under the common law, trademark rights are acquired through actual use. *See Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 413, 36 S.Ct. 357, 60 L.Ed. 713 (1916). To establish a common law infringement claim, a Plaintiff must show: (1) that it is the owner in the relevant area of a mark that is distinctive and protectible, and (2) that the Defendant's actions cause a likelihood of confusion. *See e.g., Ford Motor Co. v. Summit Motor Products, Inc.*, 930 F.2d 277, 291 (3d Cir.1991).

[7–10] Only certain marks merit protection. Thus, a threshold issue is always the mark's distinctiveness. Trade and service marks are typically classified into categories: arbitrary (or fanciful), suggestive, descriptive and generic. *A.J. Canfield*, 808 F.2d at 296. An arbitrary mark is one which bears "no logical or suggestive relation to the actual characteristics" of the service; a suggestive mark suggests rather than describes the characteristics of the services. *Id.* Arbitrary and suggestive marks are inherently distinctive and entitled to protection without proof of secondary meaning. In contrast, descriptive marks, which describe a characteristic of the service, require proof of secondary meaning for protection.[11] *Id.; see generally* 2 *McCarthy on Trademarks*, Ch. 11, *passim.* Generic marks, which function as the common descriptive name of a service class, are entitled to no protection at all.

[11, 12] Ownership via use of the mark is the next fundamental issue, for which it is necessary to identify, as between the competing users, who is the senior and junior user. *See ACCU Personnel Inc. v. AccuStaff, Inc.*, 846 F.Supp. 1191, 1204 n. 12 (D.Del.1994). The "senior user" is typically the first to use the mark anywhere in the United States. *Id.; see also* 4 *McCarthy on Trademarks* § 26.5. "In the ordinary case of parties competing under the same mark in the same market, it is correct to say that prior appropriation settles the question," *ACCU Personnel*, 846 F.Supp. at 1204–05 (citing *Hanover Star*, 240 U.S. at 415, 36 S.Ct. 357)), and that the trademark rights of the senior user trump those of the junior user. *Id.*

[13] However, where two users operate in geographically remote markets, prior appropriation is legally insignificant. *Id.* at 1205. This is because each user

10. For the sake of simplicity, "mark" or "trademark" will be used throughout this opinion.

11. A mark has attained "secondary meaning" when customers make a mental association between the mark and its unique source (*i.e.*, when the mark and the business become synonymous in the public mind). *See* 2 *McCarthy on Trademarks* § 15.5.

attains rights in the mark in the remote market according to actual use. Thus, a senior user enters a remote market subject to the trademark rights already acquired, in good faith, by another user. *See United Drug Co. v. Theodore Rectanus Co.*, 248 U.S. 90, 39 S.Ct. 48, 63 L.Ed. 141 (1918); *Hanover Star*, 240 U.S. 403, 36 S.Ct. 357, 60 L.Ed. 713 (the *Tea–Rose* case); *see also* Restatement (Third) of the Law of Unfair Competition § 19 (1995). This principle, known as the *Tea–Rose/Rectanus* doctrine, governs territorial rights in unregistered trademarks and permits a junior user to enjoin a senior user's infringing use "in an area where the senior user has no established trade, and hence no reputation and no good will." *Natural Footwear*, 760 F.2d at 1394; *see generally* 4 *McCarthy on Trademarks* Ch. 26, *passim* ("The Territorial Extent of Trademark Rights"). The *Tea–Rose/Rectanus* doctrine applies to infringement actions premised on § 43(a) of the Lanham Act. 4 *McCarthy on Trademarks* § 26.4, at 26–9–10.

[14, 15] Users operate in geographically remote markets if neither one's mark has penetrated the market of the other. *ACCU Personnel*, 846 F.Supp. at 1205. In other words, "the mark [must] mean[ ] one thing in one market, [and] an entirely different thing in another." *Rectanus*, 248 U.S. at 100, 39 S.Ct. 48. The good-faith junior user in a remote area is entitled to relief if, at the critical date of its first use of the mark, the senior user's mark was unknown to customers in the area. *Natural Footwear*, 760 F.2d at 1397. This is a test of market penetration, reflecting the principle that no user can preempt a market before it actually enters it. Market penetration is analyzed under four factors, reworded slightly to fit the context of a service mark: (1) the volume of services; (2) positive and negative growth trends in the area; (3) actual customers in relation to potential customers; and (4) the amount of service advertising conducted in the area. *See id.* at 1398–99.

[16, 17] Even if the senior user has not established market penetration, it may still possess superior rights in the mark in the remote territory via two additional theories. Under the reputation theory, if the senior user's reputation had penetrated the area prior to the junior user's first use of the mark, then the senior user prevails. 4 *McCarthy on Trademarks* § 26:16. This theory is simply an arm of the market penetration test because logically, if a senior user's reputation has penetrated a market before the junior user's use, then the markets are not truly geographically remote. *Id.* Under the "natural zone of expansion" theory if, at the time the junior user first used the mark, it did so in an area within the senior user's "natural zone of expansion," then the senior user prevails. *See e.g., ACCU Personnel*, 846 F.Supp. at 1208. This theory, in addition to having never been expressly adopted or rejected by the Court of Appeals for the Third Circuit, *see id.*, tends to be narrowly interpreted. *See Tally–Ho, Inc. v. Coast Community College Dist.*, 889 F.2d 1018, 1028 (11th Cir.1989); *Popular Bank of Florida v. Banco Popular de Puerto Rico*, 9 F.Supp.2d 1347, 1355–56 (S.D.Fla.1998).

Together, these three theories of market penetration, reputation and natural zone of expansion are known as the "zones of protection;" *see generally* William J. Gross, Comment, *The Territorial Scope of Trademark Rights*, 44 U. Miami L.Rev. 1075 (1990). Defendants' rights are properly assessed under all three. Once the court identifies a situation wherein the junior user actually possesses superior rights in the relevant market area, the final issue is whether the "second comer's" actions cause a likelihood of confusion. While a series of ten factors is typically used to assess the likelihood of confusion, *see Scott Paper Co. v. Scott's Liquid Gold, Inc.*, 589 F.2d 1225, 1229 (3d Cir.1978); *Horizon Financial, F.A. v. Horizon Bancorp*, 2 U.S.P.Q.2d 1696 (E.D.Pa.1987), where the parties deal in competing services, the court need rarely look beyond the mark

itself. *See Interpace Corp. v. Lapp, Inc.*, 721 F.2d 460, 462 (3d Cir.1983).

III. DISCUSSION

A. Preliminary Issues

1. Arbitrary Mark

[18] It is clear that both parties claim rights in an arbitrary mark. "Laurel," used as the dominant portion of both parties' mark, bears no logical or suggestive relationship to the actual characteristics of banking services. *See Dominion Bankshares*, 690 F.Supp. at 345 (service mark "Dominion" is arbitrary mark because it does not tell customers the characteristics, functions, uses or qualities of banking services); *Horizon Financial*, 2 U.S .P.Q.2d at 1702 ("Horizon" is an arbitrary mark because it does not suggest banking services). In choosing "Laurel," both parties intended the obvious tie to Pennsylvania. *See* Dkt. no. 43, Exh. 2, at 5; Dkt. no. 50, Exh. C, at 2. Marks which are geographically descriptive tend to be less distinctive. *See* 2 *McCarthy on Trademarks* § 14.1. "Laurel," however, is not descriptive of geographic location in the same sense as, for example, "Southern" or "Allegheny" and thus I recognize no dilution of distinction. As an arbitrary mark, "Laurel" is entitled to maximum protection without proof of secondary meaning.

2. Senior/Junior User and the Relevant Market

[19] As between these two parties, defendant Laurel Bank is the senior user of the mark. *See ACCU Personnel*, 846 F.Supp. at 1204 n. 12. The Laurel National Bank began to use the mark in 1974, and "Laurel" continued to be the mark's focal point even after "National" was dropped from the corporate name. Thus, defendant Laurel Bank's continuous use of the "Laurel" mark since 1974 predates Laurel Savings Association's use which began in 1982.

Prior appropriation, however, does not resolve this case, which presents instead a classic *Tea–Rose/Rectanus* situation, because the parties have built up customer recognition in an identical mark in two different geographic locations within Pennsylvania.[12] I must determine if there exists a genuine issue of material fact as to whether Laurel Savings Bank or Laurel Bank possesses superior rights to the mark in the relevant market. To do so, I must address two additional and intertwined preliminary questions: 1) whether plaintiff Laurel Savings Bank can trace its rights in "Laurel" back to 1982, or only to 1995 when it dropped "Association" to become Laurel Savings "Bank"; and 2) how to define the relevant market in order to resolve the competing motions.

Although Defendants argue their motion as against both dates, they vigorously contend that plaintiff Laurel Savings Bank's trademark rights, if any, date back only to 1995, and not to 1982 when the newly formed Laurel Savings Association first adopted the "Laurel" mark. The dates are significant because defendant Laurel Bank's market penetration, reputation and natural zone of expansion must be assessed as of the date the junior user first began to use the mark in the relevant market. *See ACCU Personnel*, 846 F.Supp. at 1207.

Defendants argue that the Plaintiffs cannot claim "Laurel" in connection with "banking services" until 1995 when Laurel Savings Association became a state-chartered stock "bank" authorized to offer such services. Claiming to have already penetrated the relevant market by that date, Defendants assert that the Plaintiffs created their own problem by choosing a mark too confusingly similar to that of the estab-

12. The Court of Appeals for the Third Circuit has rejected Justice Holmes' view, taken in *Hanover*, 240 U.S. at 426, 36 S.Ct. 357, that "a trademark [ ] good in one part of the state [ ] is good in all." *See Jacobs v. Iodent Chemical Co.*, 41 F.2d 637 (3d Cir.1930). *See also ACCU Personnel*, 846 F.Supp. at 1205 n. 14.

lished Laurel Bank.[13] *See Jefferson Bankshares Inc. v. Jefferson Savings Bank*, 14 U.S.P.Q.2d 1443 (W.D.Va.1989) (by changing name from "Jefferson Savings and Loan Association" to "Jefferson Savings Bank," defendants accused of creating the confusion with plaintiff "Jefferson National Bank."). For a number of converging reasons, I reject Defendants' highly technical distinction and afford the Plaintiffs credit for Laurel Savings Association's use of the "Laurel" mark beginning in 1982.

Trademark rights flow in conjunction with the use of a mark to identify particular services. *See Nugget Distributors Co-op. v. Mr. Nugget, Inc.*, 776 F.Supp. 1012, 1023 (E.D.Pa.1991). That principle, however, should not be applied to an illogical end. Even if, as a thrift institution, Laurel Savings Association's services were limited prior to the conversion, all three entities—Laurel Savings Association, Laurel Savings Bank and Defendant Laurel Bank—offered, and continue to offer, some overlapping and competing services such as mortgage and installment loans, U.S. Savings Bond sales and redemptions and individual checking accounts. *See* Dkt. no. 57, Exh. 1, at 4. *See also Horizon Financial*, 2 U.S.P.Q.2d at 1699–1700 (savings and loan institutions and commercial banks offer overlapping services). Laurel Savings Association was engaged in the supply of "banking services" as that phrase is commonly understood, and used the mark to identify those services. Commercial banks, including BT Financial affiliates, consider savings and loan institutions (a species of thrift institution) to be in direct competition for such overlapping services. *See* Dkt. no. 43, Exh. 6, at 55–56; Exh. 17, at 23–26.

I recognize that the banking industry has been in flux for a number of years, and a myriad of legal distinctions are frequently invoked to differentiate between financial institutions. *See generally* Frederic S. Mishkin, *The Economics of Money, Banking and Financial Markets* 283–341 (4th ed.1995). It is critical to remember, however, that trademark law has among its purposes the protection of the average customer, one who may lack the business sophistication, or even the time, to make such careful distinctions. *See* 1 *McCarthy on Trademarks* § 2.33. Even if banking customers would ordinarily be expected to exercise discernment in choosing the type of institution that handles their money, *see Horizon Financial*, 2 U.S.P.Q.2d at 1703, and larger commercial customers expected to be more savvy regarding such distinctions, I doubt that most customers understand the difference between a "savings association" and a "bank," particularly where those entities offer overlapping services.

Moreover, while a composite mark must be viewed as a whole, *see* 3 *McCarthy on Trademarks* § 23:41 (*quoting P D Beckwith, Inc. v. Commissioner of Patents*, 252 U.S. 538, 545–46, 40 S.Ct. 414, 64 L.Ed. 705 (1920) ("[t]he commercial impression of a trademark is derived from it as a whole")), it is appropriate to give greater weight to the dominant portion, "for it is that which may make the greatest impression on the ordinary [customer]." 3 *McCarthy on Trademarks* § 23:42; *see also Country Floors*, 930 F.2d at 1065 ("Country," which dominates the competing marks of "Country Floors" and "Country Tiles," is the appropriate focus of analysis). Here, the dominant portion of both parties' mark is "Laurel." Plaintiff Laurel Savings Bank has, in fact, used the shortened version of its name in customer communications and, as a result, submits that

13. Plaintiffs repeatedly suggest that instances of actual confusion which have been documented since Defendants' 1997 consolidation demonstrate that customers acknowledge no differences between savings associations and banks. This argument is flawed, however, since these customers are confusing Laurel *Bank* with Laurel Savings *Bank*, not with Laurel *Savings Association*. Nonetheless, this confusion strengthens the conclusion that, prior to the 1997 consolidation, Laurel Bank and Laurel Savings Bank were operating in geographically remote markets.

its customers tend to use that shortened version. Dkt. no. 40, Exh. 1, at 9; Dkt. 42, Exhs. L, M, Q. Where it is inevitable that the public will shorten the name or mark, the shortened form provides the proper basis for comparison. *See e.g., Blumenfeld Development Corp. v. Carnival Cruise Lines, Inc.*, 669 F.Supp. 1297, 1320 (E.D.Pa.1987) ("Carnival Club" will inevitably be shortened to "Carnival"). Thus, the focus is on "Laurel," not "Association" or "Bank."

This is the only logical approach. "Bank" and "Association" are generic terms, widely used in the industry. Generic terms are unlikely to be the focus of customer attention and are not protected standing alone. *See First Nationwide Bank v. Nationwide Savings and Loan Association*, 682 F.Supp. 965, 976 (E.D.Ark.1988) ("[t]he difference between the generic words 'savings' and 'bank' will not be the focus of purchasers' attention"). Thus, they should not be used as the sole basis for distinction. Accordingly, 1982 provides the relevant date for assessing Plaintiffs' use of the mark and Defendants' market penetration, reputation, and natural zone of expansion.

[20] At this point, it becomes necessary to briefly address the relevant market area and corresponding geographic scope of the parties' respective trademark rights. As part of their prima facie case, Plaintiffs bear the burden of proving that they own the mark in the relevant market area. *See Ford Motor Co.*, 930 F.2d at 291. The competing motions, however, reveal that the parties define that market quite differently.

The consent decree prohibited the Defendants from using "Laurel" or any confusingly similar mark within the six-county area of Allegheny, Armstrong, Beaver, Butler, Washington, and Westmoreland Counties ("the six-county area"). Dkt. no. 33, at 2. In their supporting briefs, Plaintiffs refer interchangeably to the area in which Laurel Savings Bank has achieved market penetration as the "entire Pittsburgh metropolitan area," "the Pittsburgh area" and the "original injunction area" set forth in the consent decree. Dkt. no. 39, at 28; Dkt. no. 60, at 2, 20–21. Plaintiffs have also requested an additional ten-mile buffer zone. Dkt. no. 39, at 28, 43–44. Defendants, confining Laurel Savings Bank's market penetration to the narrow Route 8 corridor surrounding the physical locations of its offices, maintain that the six-county area is overly broad and unduly restrictive of Laurel Bank's growth potential. *See* Dkt. no. 49, at 2.

What the summary judgment submissions truly suggest, however, is that an as yet defined middle ground promises to provide the most appropriate solution. As will be explored in depth, *infra*, while its physical presence is confined to the narrow Route 8 corridor, Laurel Savings Bank's market penetration, by virtue of its marketing efforts and customer placement, is not so circumscribed. On the other hand, defendant Laurel Bank has a demonstrated commitment to westward expansion, penetrating markets at least as far as Westmoreland County prior to the 1997 consolidation. At eight times the size of plaintiff Laurel Savings Bank, Laurel Bank has been and promises to be much more aggressive in its growth strategy.

Having examined each party's submissions, I agree that the six-county area embraced by the consent decree is overly broad but find no genuine issue of material fact regarding the Plaintiffs' claim that Laurel Savings Bank has penetrated some amorphous "Pittsburgh metropolitan area" sufficient to assign it superior rights in the mark. I resolve the competing motions with this in mind, fully aware that I am using a loosely defined "relevant market area" to assess the geographic scope of the parties' respective rights. By establishing through summary judgment that defendant Laurel Bank must yield to the superior trademark rights of Laurel Savings Bank in this loosely defined area, I hope to move the litigation towards final resolution of what I see as the central concern:

whether and to what extent these two banking institutions can co-exist in the far western region of Pennsylvania, specifically the greater Pittsburgh metropolitan area. As noted at the outset, that question is best addressed at the remedial stage, perhaps with the benefit of expert input as to the nature of the market area and the future of the banking industry.[14]

B. The Zones of Protection

As discussed *supra*, the senior user of a mark enters a remote geographic market subject to the trademark rights of a good-faith junior user in that market. *ACCU Personnel*, 846 F.Supp. at 1204–05. To be entitled to priority of use, the junior user must have adopted the mark in good faith. *Id.* at 1209–10. This typically means "without knowledge" of the senior user's existence. *Id.* On this record, there is no genuine issue of material fact as to plaintiff Laurel Savings Bank's good faith adoption of the mark in 1982.[15] Dkt. no. 43, Exh. 2, at 6–8. Laurel Savings Association's failure to identify another banking institution making extensive use of the "Laurel" mark in the same state and in a market less than 100 miles away reflects poorly on its naming committee's research efforts, but, as it adopted the mark without knowledge of Laurel Bank's existence, and with no design inimical to Laurel Bank's interests, its use was in good faith. *See id.; see also* 4 *McCarthy on Trademarks* §§ 26:6–26:12.

The remaining question is whether either party has demonstrated a genuine issue of material fact regarding which of them possesses superior rights in the mark in the relevant market area. For purposes of this inquiry, Plaintiffs' market penetration is measured as of the date that Laurel Bank proposed to use a confusingly similar mark in that area (*viz.*, after the 1997 consolidation). *See Natural Footwear*, 760 F.2d at 1397 (party asserting ownership must make showing of "clear entitlement," that is, market penetration significant enough to pose real likelihood of confusion among customers in that area); *Sweetarts v. Sunline, Inc.*, 380 F.2d 923 (8th Cir.1967) ("trial court should weigh all the factors including plaintiff's dollar sales at the time the defendants entered the market"). Defendant's market penetration, reputation and natural zone of expansion are measured as of the date that Laurel Savings Bank's predecessor, Laurel Savings Association, first used the mark in good faith, 1982. *See Natural Footwear*, 760 F.2d at 1397.

1. Market Penetration

[21, 22] The degree of market penetration necessary to assign a user superior rights in a remote geographic market cannot be precisely defined. Four factors, however, are useful: 1) the volume of service; (2) positive and negative growth trends in the area; (3) actual customers in relation to potential customers; and (4) the amount of service advertising conducted in the area. *See id.* at 1398; *ACCU Personnel*, 846 F.Supp. at 1206. Using these four factors, the summary judgment submissions leave no genuine issue of material fact as to pre-consolidation Laurel Bank's significant inroads west of the three-county area of Blair, Cambria and Indiana, but ultimate failure to penetrate the area being serviced by Laurel Savings Association by 1982.[16]

14. I repeat that the "relevant market area" used herein will not be law of the case for purposes of crafting an appropriate remedy.

15. Laurel Bank has produced evidence that Laurel Savings Association learned of the existence of The Laurel National Bank after June 1982. Dkt. no. 54, Exh. M, at 7. By that time, Plaintiffs' mark had already been adopted and put into use. Although Laurel Savings Association apparently knew of Laurel Bank in 1995 when the former altered its name to Laurel Savings Bank, dkt. no. 54, Exh. N, at 33–34, that fact is irrelevant for purposes of assessing its good faith in 1982.

16. Defendant Laurel Bank is not entitled to claim any market penetration, reputation or good will built up by the pre-consolidation branches of Fayette Bank or JBT. As Laurel

a. Volume of Service in the Area

At its six branch offices, plaintiff Laurel Savings Bank currently offers a wide range of banking services to both individual and commercial customers. Laurel Savings Bank has approximately 35,000 customer accounts. Dkt. no. 40, Exh. 1, at 4. It lists assets as of 1997 at $211,987,000 and savings deposits at $175,019,000. *Id.*

The vast majority of Plaintiffs' customers reside in areas surrounding the six branch offices in Allegheny and Butler Counties. *Id.* at 12; *see also* Dkt. no. 42, Exhs. T, U, V, W, X. Laurel Savings Bank does, however, provide services to customers who live in the contiguous counties of Armstrong, Beaver, Washington, and Westmoreland. As of November 6, 1997, of the total accounts, 149 (savings and loan combined) were held by customers residing in Armstrong County, 84 in Beaver County, 90 in Washington County, and 145 in Westmoreland County. Dkt. no. 42, Exhs. T; Y, Z, AA, BB. These numbers indicate that Laurel Savings Bank has achieved significant market penetration in the relevant market area.

In contrast, Defendant Laurel Bank operated no branch offices or ATMs in the six-county area prior to the 1997 consolidation, much less before 1982. Dkt. 43, Exh. 5, at 1–4. Rather, it operated twelve branch offices in Blair, Cambria and Indiana Counties. Its marketing efforts at the time via newspaper, radio and television, while extensive, were concentrated in those same three counties. Nonetheless, affording the Defendants a favorable interpretation of their submissions, it appears that Laurel Bank had made some inroads into the six-county area by 1982.

Notably, according to its customer records, Laurel Bank had 47 accounts in the six-county area in 1974. By 1981, that number had grown to 265 accounts, although no breakdown of accounts by county is available. Dkt. no. 59, at 4–5; *see* also Dkt. no. 49, Exh. G; Dkt. no. 52, Exh. H; Dkt. no. 55. In connection with these accounts, checks, deposit slips, ATM cards, correspondence and other documents bearing the "Laurel" mark were disseminated in the area.

At least nine of these accounts were commercial loans, two of them made in connection with Mellon Bank of Pittsburgh. Dkt. no. 52, Exh. H. At some unspecified date, the Mellon Bank Datacenter presented Laurel Bank with a plaque commemorating Laurel Bank's "loyalty and contributions over 25 years ... as a most valued partner." Dkt. no. 54, Exh. K. Had this plaque been presented at the latest in 1997, it would still evidence Mellon's familiarity and partnership with Laurel Bank dating back to 1972. Again, documents bearing the "Laurel" mark were disseminated in the area in connection with these activities.

Between 1986 and 1989, after its affiliation with BT Financial, Laurel Bank pursued a commercial lending campaign targeting businesses in the Pittsburgh area of Allegheny County. Dkt. nos. 55, 56. No print, radio or television advertising accompanied this campaign, but Laurel Bank's assistant vice-president made personal visits to about 50 businesses in Allegheny County, generating at least nine commercial loan accounts. Dkt. no. 56, at 1–2. Laurel Bank's commercial lending specialists met with referrals and distributed Laurel Bank business cards, institution information and financial statements. Once the loans were made, the Allegheny County recipient received statements, communications and promotional items bearing the "Laurel" mark. *Id.* at 2–3.

Since 1974, Laurel Bank has had a smattering of shareholders within the six-county area. Doc. no. 43, Exh. 5, at 8. For example, in 1974, there were 19 shareholders in Allegheny County, 1 in Beaver County and 9 in Washington County. *Id.* By 1982, there were 24 shareholders in Allegheny County, 7 in Armstrong County,

Bank was the entity actually using the mark, only its activities are relevant.

2 in Beaver County, 13 in Washington County and 1 in Westmoreland County. *Id.* By 1995, there were 380 shareholders in the six-county area. *Id.* at 9. Shareholders were sent annual and quarterly reports plus other communications bearing the "Laurel" mark. *Id.* at 8.

After 1985, some of the JBT and Fayette Bank ATMs in the relevant market area sported a small sticker identifying Laurel Bank as a BT Financial affiliate. Dkt. no. 42, Exh. EE.

Whether the volume of service is significant "will vary with the [service] and the market." *Charles Jacquin Et Cie, Inc. v. Destileria Serralles, Inc.*, 921 F.2d 467, 473 (3d Cir.1990). Service volume must be more than de minimis to warrant protection. *Natural Footwear*, 760 F.2d at 1400 ("when sales activity does not exceed even a threshold level, a court may properly conclude that market penetration ... simply has not been established"). Merely surpassing the de minimis threshold, however, does not automatically result in protection. *Jacquin*, 921 F.2d at 473.

In arguing that their service volume in the relevant area as of 1982 was not de minimis, Defendants rely upon *Dominion Bankshares.* In that case, the court granted an injunction sought by plaintiff Dominion Bankshares Corporation, a Virginia-based bank with no physical presence in Pennsylvania, prohibiting the Defendants from using, in connection with a proposed commercial bank, the mark "Dominion Bank" in the Delaware Valley and Devon areas of Eastern Pennsylvania. 690 F.Supp. at 340–341. Plaintiff Dominion Bankshares had 1,953 accounts worth approximately $114,000,000 with customers in the Delaware Valley and 13 accounts with customers in Devon. *Id.* at 341. At first glance, these 13 accounts in Devon would appear to establish only de minimis market penetration. Dominion Bankshares, however, had engaged in substantial advertising, much of which penetrated into the areas at issue. *Id.* Moreover, through its Pennsylvania affiliates, also named "Dominion Bank," Dominion Bankshares provided banking services and solicited VISA merchant and individual credit card accounts in the Delaware Valley and Devon. *Id.*

Laurel Bank's 265 accounts in the relevant geographical area are much greater in number than the mere 13 in *Dominion Bankshares.* These accounts would have generated many related documents and thus, exposure of the mark to Pittsburgh-area customers, as well as to the investment, banking and legal communities. Still, unlike Dominion Bankshares, Laurel Bank did not extensively advertise its services in the greater Pittsburgh metropolitan area prior to 1997, nor did it offer banking services through an affiliate under the same mark. Thus, its account holdings, while numerous, are not so voluminous as to suggest that Laurel Bank conducted a significant amount of financial service activity in the relevant area. Laurel Bank's lengthy partnership with Mellon Bank and the commercial loan drive conducted in the mid–1980's suggest some penetration into the Pittsburgh metropolitan area, but are insufficient to transform what really is de minimis service volume into something more significant.

That Laurel Bank had a smattering of shareholders continually exposed to the mark adds little to the analysis. Shareholder communications are not customer solicitations and accordingly are entitled to little weight in an assessment of market penetration. *See ACCU Personnel*, 846 F.Supp. at 1208 (temp agency advertisements to potential employees are not probative of market penetration because they cannot be considered client solicitation or promotion of services). Moreover, the number of shareholders is quite minimal in comparison to the size of the market.

Finally, the ATM fee notice sticker identifying Laurel Bank as an affiliate postdates 1982. At best, these stickers are inconspicuous and fail to enhance Defendants' market penetration.

b. Positive and Negative Growth Trends in the Area

Plaintiff Laurel Savings Bank has experienced a moderate but steady rate of growth. In 1994, it had 32,052 accounts with $157,179,000 worth of savings deposits. By 1997, those numbers had reached 34,990 and $175,019,000, respectively.

Laurel Savings Bank claims to be "continuously exploring and looking at the possibility of acquiring and opening new offices," although no new acquisitions or offices have materialized. Dkt. no. 40, Exh. 1, at 24. In or around 1991, Plaintiffs submitted a bid to purchase an Atlantic Financial branch in Fox Chapel, Allegheny County. In 1996, Plaintiffs investigated the possible purchases of First Home Savings branches in Cranberry Township, Butler County and Natrona Heights, Allegheny County, as well as Bridgeville Savings in the South Hills of Allegheny County. *Id.* In 1997, Plaintiffs considered opening a new branch in Sarver, Butler County to serve a large number of already existing customers holding 6,057 accounts. Despite these plans, Laurel Savings Bank has operated at the same six branch offices as its predecessor since 1982.

Laurel Bank's current growth rate, by virtue of its affiliation with BT Financial, an entity worth over $1 billion, is strong and full of potential. Yet, I must assess its growth rate as of 1982. It appears that Laurel Bank's predecessor, the Laurel National Bank, had affirmatively considered westward expansion in the 1960's and '70's. It had engaged in discussions for possible mergers or acquisitions within Indiana, Westmoreland and Armstrong Counties and in 1970, acquired a bank in Indiana County. *See* Dkt. no. 50, Exh. D. Even so, affording the Defendants the benefit of all reasonable inferences drawn from the record, Laurel Bank had not actually expanded westward from Indiana County by 1982. *See* Dkt. no. 50, Exh. F (map of Laurel Bank branch offices in 1974, 1981, and 1985). Notably, no discussion or plans to acquire or build a branch office in Allegheny County ever occurred before 1985. Dkt. no. 45, Exh. 26, at 29–30. To repeat, the westward expansion of BT Financial's other affiliates, JBT and Fayette Bank, is irrelevant since Laurel Bank did not become an affiliate until 1985, and neither of these affiliates used the "Laurel" mark.

c. Actual and Potential Customers

At the present time, plaintiff Laurel Savings Bank services over 35,000 accounts. Related checks, credit cards, and documents are distributed to individuals and businesses throughout the relevant market area. By 1982, defendant Laurel Bank had 265 accounts, a number which had grown to 502 by 1995. Dkt. no. 59. Neither party has documented the number of potential customers in either the six-county or the greater Pittsburgh metropolitan areas. *See* Dkt. no. 49, at 19 ("the number of potential customers in the six-county area is not known").

d. Service Advertising

Since adopting the mark in 1982, Laurel Savings Association and now plaintiff Laurel Savings Bank have featured "Laurel" in their direct and indirect marketing efforts. Each of the six branch offices has been continuously posted with a large exterior sign bearing either the "Laurel Savings Association" or "Laurel Savings Bank" name. Dkt. no. 40, Exh. 1, at 8–9; Dkt. no. 42, Exh. K (signage photos). Many of these signs also sported the Plaintiffs' stylized "L" logo and green coloring. *Id.*

"Laurel" has appeared in some form on all materials provided to customers, including direct mailing, stationary, savings passbooks, checks, certificates of deposit, bank statements, and loan papers. *Id.* at 9; Dkt. no. 42, Exhs. L, N (promotional literature and customer items from Laurel Savings Association); Exhs. M, O (promotional literature and customer items from Laurel Savings Bank). In addition,

the "Laurel" name and logo has been exposed to individuals, businesses, and charitable organizations dealing with Laurel Savings Bank customers via "Laurel" embossed checks, ATM cards and credit cards. Dkt. no. 40, Exh. 1, at 12–13.

Promotional items, such as pens, calendars, date books, memo pads, key-chains, T-shirts, calculators and clocks, all bearing the "Laurel" mark, have been distributed by both Laurel Savings Association and Laurel Savings Bank through a variety of charitable and civic organizations and events since 1982. Dkt. no. 40, Exh. 1, at 9–11 (listing item and date distributed); Dkt. no. 42, Exh. P (photos of promotional items bearing the "Laurel" mark). Also, over the years, plaintiff Laurel has made charitable donations to a variety of Pittsburgh-area organizations including, to name a few, the Fire Chiefs Association of Allegheny County, Chiefs of Police Association of Allegheny County, Pittsburgh Three Rivers Regatta, and the Builders Association of Greater Pittsburgh. Dkt. no. 40, Exh. 1, at 8; Dkt. no. 41, Exh. H (charitable contribution invoices). These donations have frequently been acknowledged in some printed publication. Dkt. no. 40, Exh. 1, at 8.

In addition to customer and promotional items, both Laurel Savings Association and Laurel Savings Bank have advertised their services in connection with the "Laurel" name since its adoption in a variety of print media, ranging from regional newspapers with a broad readership base to local publications and newsletters distributed by churches, schools, chambers of commerce and civic organizations. Dkt. no. 40, Exh. 1, at 4–7. In particular, Plaintiffs have occasionally advertised under the Laurel mark in regional newspapers including the *Pittsburgh Post–Gazette* (1982–present, circulation primarily the Pittsburgh metropolitan area) and the former *Pittsburgh Press* (1982–93, similar circulation). *Id.* at 5 (also listing *Pittsburgh–Tribune Review* 1996 to present) and the *Pittsburgh Business Times* (1993–94, circulation primarily Allegheny County). Notably, the bulk of Plaintiffs' advertising in regional papers, however, appears to have been confined to legal notices and interest rate listings with occasional feature articles.

Advertising in local publications has included weekly promotions in the North Edition of *The Green Sheet* (1982–1992, Millvale, PA), the *Pennysaver* (1982–1991 in the North Hills, Southern Butler County and the Pittsburgh city center editions), and the *Country Classified* (1982–present, Cabot, Pa., direct mail and in-store distribution). Plaintiffs have occasionally advertised in the *Valley News Dispatch* (1982–present), a fairly large daily serving primarily the areas surrounding Laurel Savings Bank's branches, the *North Hills News Record* (1982–present, North Hills area); the *Butler Eagle* (1982–present, primarily Butler County), *The Bulletin* (1996–97, Pittsburgh neighborhoods of Bloomfield, Friendship, Garfield and East Liberty), and *The Observer* (1996–97, Pittsburgh metropolitan area). Dkt. no. 40, Exh. 1, at 5–6; Dkt. no. 40, Exh. B (samples of local print advertisements 1996–97); Exh. C (local print invoices 1987–95).

Finally, both Laurel Savings Association and Laurel Savings Bank have advertised in special promotional publications distributed by civic organizations, high schools and churches located within the vicinity of Plaintiffs' six branch offices. For example, ads bearing the "Laurel" mark have appeared in Rotary Club and Kiwanis programs, school sports programs for North Allegheny, Shaler Area, Peabody, Knoch and Hampton high schools, and church bulletins distributed by St. Joseph's Catholic Church (Cabot, Pa.), St. Mary's (Glenshaw, Pa.), St. Ursula (Allison Park, Pa.) and St. Raphael (Pittsburgh, Pa.). Dkt. no. 40, Exh. 1, at 7; Dkt. no. 40, Exh. E (samples of civic and school publications and related invoices); Exh. F (samples of church publications and related invoices). Both Laurel Savings Association and Laurel Savings Bank have had listings in the

Allegheny County and Greater Pittsburgh Area Yellow and White Page phone directories. Dkt. no. 40, Exh. 1, at 7.

From 1974 to 1982, Laurel Bank's service advertising was largely confined to Cambria, Indiana and Blair Counties. *See* Dkt. no. 45, Exh. 26, at 36–48. Ads were placed, for example, in the *Johnstown Tribune Democrat* (distribution in all of Cambria and Somerset Counties, part of Bedford, Blair and Indiana Counties); *Indiana Evening Post* (mainly Indiana, with some distribution into Armstrong and Westmoreland Counties); and *Mountaineer Herald* (mostly Cambria County, with parts of Somerset and Indiana Counties). Dkt. no. 43, Exh. 5, at 11–12. Laurel Bank erected billboards in Johnstown and advertised on various radio stations, including WFBG–AM (Altoona), WZGO–FM105.7 (Johnstown), WBXQ–FM 94 (Cresson) and WDAD–AM (Indiana). Dkt. no. 54, Exh. K. In addition, assuming distribution "before 1985" to also encompass distribution before 1982, Laurel Bank distributed customer promotional items such as matchbook covers, note pads, bags, coin banks, and plastic combs, all with the words "Laurel Bank" or the corresponding logo embossed thereon. *Id.*

From the time it acquired Laurel Bank in 1985 to the present, defendant BT Financial has advertised Laurel Bank in the Progress Edition of the *Greensburg Tribune Review* in Westmoreland County and on WJAC–TV, a television station which broadcasts primarily to the Johnstown viewing area, but with sufficient signal strength to penetrate airwaves in the six-county area. Dkt. no. 43, Exh. 5, at 9. Laurel Bank continued to distribute customer promotional items. Dkt. no. 54, Exh. K. BT Financial's other affiliate banks, however, did not typically feature Laurel Bank in their marketing materials beyond identifying it as an affiliate. Dkt. no. 45, Exh. 26, at 69–70.

While it engaged in substantial marketing and promotional efforts in the area of Cambria, Indiana and Blair Counties, pre-consolidation Laurel Bank did not make charitable donations, or sponsor seminars, high schools or sports teams in the relevant market area. Dkt. no. 45, Exh. 26, at 80–85. It placed no telephone listings, radio, television or billboard ads in Allegheny County, or the area surrounding metropolitan Pittsburgh. *Id.* at 43, 46.

e. Additional Factor

In addition to arguments targeted at the traditional four factors for market penetration, each party also cites the other's definition of their respective market as outlined in annual federal Community Reinvestment Act ("CRA") statements. The Community Reinvestment Act, 12 U.S.C. § 2901, *et. seq.* requires lending institutions to advertise and make available mortgages for low and moderate income markets. *See Hicks v. Resolution Trust Corp.*, 970 F.2d 378, 380 (7th Cir.1992). CRA statements are submitted so that the Federal Home Loan Bank Board can evaluate the institution's service.

In its CRAs, as did Laurel Savings Association, plaintiff Laurel Savings Bank has consistently defined its assessment area as that "surrounding our six (6) branch offices, located in Allegheny and Southern Butler Counties." Dkt. no. 42, Exh. CC; Dkt. no. 50, Exh. B. Defendant Laurel Bank's CRAs for 1992 through 1995 define its assessment area as that encompassing Cambria, Indiana and Blair counties. Dkt. no. 45, Exh. 23.

Both parties argue that the other should not be permitted to define its market more broadly than they have represented to the Federal Home Loan Bank Board. Defendants assert that Plaintiffs' CRA Statements reflect a market consistent with Laurel Savings Bank's self-proclaimed "community image" and a strategic plan developed by G & R Investment Consultants for growth in 1995–99, focusing on communities near the narrow Route 8 corridor. *See* Dkt. no. 58, Exh. C. Plaintiffs counter that Laurel Bank executives con-

firmed that the CRA-delineated area was the institution's actual market before 1997. Dkt. 45, Exh. 26, at 59–60.

CRA statements have a limited purpose. They define the institution's market for purposes of low-to-moderate-income loan customers, a subsection of potential business. Both parties' statements certainly reinforce what the other summary judgment evidence tends to support, that both Laurel Savings Bank and Laurel Bank primarily reach customers proximately located near their branch offices. In an assessment of market penetration for purposes of trademark law, however, neither can be bound simply to that area, since recognition of their mark travels via advertising, word of mouth, and remote use through ATMs and telephone service.

f. Conclusion on the Market Penetration Factors

Defendant Laurel Bank has failed to identify a genuine issue of material fact, and in addition, has failed to prove that it, and not Laurel Savings Bank, is the owner of the mark in the relevant market area under the theory of market penetration. As of 1982, the date of Laurel Savings Association's first good faith use, Laurel Bank had de minimis sales volume and a negligible number of actual customers. In addition, while it had contemplated and begun a gradual westward expansion, Laurel Bank had not yet opened any branch offices west of Indiana County, nor had it engaged in advertising sufficient to carry its mark into the greater Pittsburgh metropolitan area.

2. Reputation

[23] Rights in a mark can extend beyond the geographic area of actual sales and customer residences if the user's reputation is carried via word of mouth and advertisements. When a senior user demonstrates that it has established a reputation beyond its own market area, reputation alone, without market penetration or physical presence, may afford it superior trademark rights in the remote market of the junior user. *See Holiday Inns v. B & B Corp.*, 409 F.2d 614 (3d Cir.1969); *see also* Gross, *supra*, at 1085–1087. A user can build up an "identifiable public image" with activities conducted solely within its own market, yet have that image travel to other markets. *Holiday Inns*, 409 F.2d at 615–616. Logically, if the senior user's reputation has extended into the junior user's territory, then the senior user has achieved market penetration sufficient to preclude good faith use by a junior user and it would be improper to characterize their respective markets as remote. *See* 4 *McCarthy on Trademarks* § 26:16.

[24] In an era where customers bank through ATMs, over the telephone and on the Internet, the banking industry is no longer tied to neighborhood branches building up localized reputations and good will. *Cf. Holiday Inns*, 409 F.2d at 617 ("[w]ith the development of today's mobile society . . . there has been a corresponding diminution of older concepts that services are conducted in restricted or local marketing and trading areas"). By virtue of its activities and advertising, Laurel Bank has unquestionably gained a reputation extending beyond the border of its three-county market area and into the six-county area served by the Plaintiffs. Yet, this is clearly not a reputation comparable to the famous, federally registered, or nationwide marks at issue in cases like *Stork Restaurant v. Sahati*, 166 F.2d 348 (9th Cir.1948) (world-famous, nationally advertised "Stork Club" mark), or *Caesars World Inc. v. Caesar's Palace*, 490 F.Supp. 818 (D.N.J.1980) (world famous, nationally advertised hotel mark), upon which Defendants rely.

Laurel Bank has never been the subject of extensive national or statewide advertising. *See* 4 *McCarthy on Trademarks* § 26:17. Moreover, despite the banking industry's technological strides, Laurel Bank's customers are simply not ambulatory in the same sense as hotel and restaurant patrons. *See id.* at 26–25 ("the pur-

chasing buyer class for services such as hotels, motels and restaurants are ambulatory . . . [t]hey may carry the reputation of the mark thousands of miles away from the actual outlet"). For these reasons, I reject the Defendants' attempt to characterize its reputation as having infiltrated the Plaintiffs' market area by 1982 or by 1995 and find no genuine issue of material fact existing as to that theory.

3. Zone of Natural Expansion

Having failed to show that it had achieved market penetration or reputation in the relevant market area by 1982 or by 1995, defendant Laurel Bank may still have superior rights in the "Laurel" mark if, at the time the junior user adopted the mark, it did so in an area within Laurel Bank's "natural zone of expansion." The Court of Appeals for the Third Circuit has never explicitly adopted or rejected this theory, *see ACCU Personnel*, 846 F.Supp. at 1208, however, I will assume that it is valid for purposes of resolving these motions.

[25] The natural zone of expansion theory affords the senior user "breathing space" within which to expand, and it is generally recognized that "if a senior user has constantly expanded its business by the date of the junior user's adoption of the mark, and if distances are not great, it may be that the senior user is entitled to exclusive rights in a zone of natural expansion which includes the junior user's area, even though no actual sales have yet been made in that area by the senior user." *ACCU Personnel* (*quoting* 2 *McCarthy on Trademarks* § 26:08[1], at 26–32 (3d ed.1992)). Courts, however, wary of applying what is a legal fiction, tend to define the area of natural expansion very narrowly. *See Tally–Ho*, 889 F.2d at 1027.

[26] Considerations include: 1) the geographic distance from the senior user's actual location to the perimeter of the claimed zone; 2) the nature of the business and the size of the senior user's zones of market penetration and reputation; 3) the history of the senior user's expansion and assessment at to when the senior user could potentially reach the zone he claims; and 4) whether it would take a "great leap forward" for the senior user to enter the zone (*i.e.*, whether expansion into the claimed zone is the next logical step). *Tally–Ho*, 889 F.2d at 1028 (*citing McCarthy on Trademarks* § 26:9, at 304–305 (2d ed.1984)). *See also Popular Bank*, 9 F.Supp.2d at 1356 ("[g]eographical proximity is a significant factor"). The zone of natural expansion does not necessarily include all areas into which the senior user has actually expanded, since that use may infringe upon the junior user's legitimate, superior use. *Tally–Ho*, 889 F.2d at 1028.

[27] Even when Defendant Laurel Bank's market area is characterized at its most narrow (*i.e.*, the three-county area), the parties still operate within 100 miles of each other within the same state. Thus, there is no substantial geographic distance involved here.

In 1982, although Laurel Bank had begun a creeping westward expansion, it had not yet become an affiliate of BT Financial, an institution with approximately $1 billion worth of assets. Nor, as discussed above, had it reached far beyond the confines of the three-county area by virtue of sales, advertising or reputation. By that time, Laurel National Bank extended only as far west as its branch office in Clymer, Indiana County. Although Laurel National Bank had considered potential acquisitions in Westmoreland and Armstrong Counties, it never followed through with any of these plans. Thus, while it might not have been a leap for Laurel National Bank to expand into the eastern perimeters of Armstrong and even Westmoreland Counties, it would certainly have been a leap to extend into the greater Pittsburgh metropolitan area loosely used here to define the relevant market.[17]

17. Circumstances have certainly changed for Laurel Bank since 1982, having been ac-

C. Likelihood of Confusion

[28–30] As the owner of the "Laurel" mark in the relevant market area, Plaintiff Laurel Savings Bank must also show that the Defendants' conduct will cause a likelihood of confusion. *Ford Motor Co.*, 930 F.2d at 291. *See also A & H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 166 F.3d 197, 205 (3d Cir.1999) ("the [ ] standard for determining trademark infringement under the Lanham Act is the likelihood of confusion[ ]," not "possibility of confusion"). "The confusion that trademark law seeks to prevent is confusion as to the source of the goods." *A & H Sportswear*, 166 F.3d at 202. Where the parties deal in competing goods or services, "the court need rarely look beyond the mark itself." *Id.* (*quoting Interpace*, 721 F.2d at 462). Actual confusion is one of the most reliable indications of the likelihood of confusion, so long as the confusion is causally related to the use of similar marks. *Dominion Bankshares Corp.*, 690 F.Supp. at 347; *Horizon Financial*, 2 U.S.P.Q.2d at 1703; *see also* 3 *McCarthy on Trademarks* § 23:13.

[31, 32] The likelihood of confusion may be reduced if the customer is reasonably expected to use a high level of care and attention in choosing a product or service. *See Versa Products Co. v. Bifold Co.*, 50 F.3d 189, 204 (3d Cir.1995). "Ordinarily, one would expect bank customers to be prudent in seeking out and using the services of a[ ] bank[,]" *Horizon Financial*, 2 U.S.P.Q.2d at 1703, inasmuch as people are typically not cavalier about the safeguarding of their money. However, in cases where "the services, marketing channels, and operative names are identical and the marks are very similar the factor of customer attention or care correspondingly becomes less important." *Id.*

[33] Many considerations converge to suggest that a strong likelihood of confusion exists here. First, both parties use the "Laurel" mark as the dominant portion of their names and as a shorthand reference to their services on documents, promotional materials and advertising. Where the mark is strong and distinctive, it is more likely that customers will be confused. *Versa Products*, 50 F.3d at 203. As outlined above, "Laurel" is a distinctive, arbitrary mark.

Second, the closer the relationship between the parties' services and the more similar their sales contexts, the greater the likelihood of confusion. *Interpace*, 721 F.2d 460. Here, while not all of their services overlap, Laurel Savings Bank and Laurel Bank clearly compete for banking customers among the general public and in the business community. They also tend to employ the same type of advertising and promotional media. In all likelihood, once defendant BT Financial renamed its Pitts-

quired in 1985 by BT Financial, a holding company with a proven track record of aggressive, westward expansion reaching into the relevant market area with its JBT and Fayette Bank affiliates. BT Financial has advertised Laurel Bank in and around Westmoreland County since roughly 1985, via newspaper, TV and billboards. In addition, Laurel Bank has added two branch offices in Indiana County proximate to the Armstrong County border, dkt. no. 50, Exh. F, and has advertised since 1985 in newspapers, such as the *Indiana Evening Gazette*, which reach portions of Armstrong County. Dkt. no. 43, Exh. 5, at 11. Laurel Bank claims that its eventual consolidation with JBT and Fayette Bank, and entry into the relevant market area was a "specifically predictable event in an era of rapid consolidation within the banking industry" for BT Financial affiliates. Dkt. no. 49, at 16.

Were I defining it as of 1997, I would probably conclude that no reasonable fact finder could fail to find that Laurel Bank's natural zone of expansion extends at least to the perimeter of the greater Pittsburgh metropolitan area. In addition to pre-consolidation Laurel Bank's own history of westward expansion, it now has the resources to push 50 miles beyond Armstrong and Westmoreland Counties into the relevant market area. As the area used for purposes of resolving these competing summary judgment motions will not be law of the case, Laurel Bank's altered circumstances and BT Financial's aggressive growth strategy will be considered in crafting an appropriate remedy.

burgh area branches, it would have advertised Laurel Bank in many of the same publications used by the Plaintiffs. Also, for these reasons, the fact that customers are ordinarily careful about banking services is rendered much less important.

Third, because it is permissible to focus simply on "Laurel" as the dominant portion of parties' marks, *see* 3 *McCarthy on Trademarks* § 23:42, it is readily apparent that they are identical and require no protracted analysis of "sound, sight and meaning." *Id.* at § 23:21 (*citing* Restatement (Third) of Unfair Competition § 21(a) (1995)). In addition, both parties use a green coloring scheme and similar stylized "L" logo for marketing purposes. *See Horizon Financial,* 2 U.S.P.Q.2d at 1702 (even though color scheme differed, because both marks featured "Horizon," the appearance, sound and meaning of the marks was strikingly similar).

Most importantly, plaintiff Laurel Savings Bank has documented over 170 incidents of actual confusion since the Defendants' October 1997 consolidation, despite the fact that this litigation prevented Defendants' from changing the signage at existing JBT and Fayette Bank branches and advertising the new name.[18] Even without a directive to document such incidents, defendant Laurel Bank employees have identified at least an additional 21 misdirected inquiries. Dkt. no. 45, Exh. 21. This confusion has taken many forms, including misdirected inquires for account balances, deposit information, tracking numbers, service charges, stop payments, loan payoff options and fund transfers to BT Financial accounts. As such mistakes have been documented at every Laurel Savings Bank branch, it appears that the confusion is widespread. *See* Dkt. no. 44, Exhs. 20–21.

In addition, there have been at least 20 instances where BT Financial affiliate customers have tried to cash in mature CDS or checks drawn on BT Financial affiliate accounts at Plaintiffs' branch offices, 10 instances where BT customers have tried to pay on BT Financial affiliate-issued loans, and over 25 telephone inquiries to Laurel Savings Bank seeking directions to or telephone numbers for BT Financial affiliate branch offices. Dkt. no. 44, Exh. 20 (declarations of Laurel Savings Bank employees). According to the Plaintiffs, both institutions have also received numerous inquiries regarding what customers mistakenly believe to be the parties' affiliation, relationship or merger.[19] *See* Dkt. 44, Exhs. 20, 21.

Instead of opposing Plaintiffs' evidence on this prong of the infringement claim, *see* Dkt. no. 49, at 14 (Defendants assume "Laurel Bank" and "Laurel Savings Bank" are confusingly similar and likely to cause confusion), Defendants argue that the Plaintiffs, by changing Laurel Savings Association to Laurel Savings Bank in 1995, created the confusion of which they complain. Defendants point to *Jefferson Bankshares,* in which the parties were able to manage confusion arising from the simultaneous use of the marks "Jefferson National Bank" and "Jefferson Savings and Loan Association," *see* 1989 WL 222446 at *9, and suggest that the real source of confusion is the combination of "Laurel" with "Bank." That fact pattern, however, does not represent this case. Defendants moved into Laurel Savings Bank's market area after the Plaintiffs changed from "Association" to "Bank."

18. This evidence does not constitute inadmissable hearsay. *See Popular Bank,* 9 F.Supp.2d at 1360–62.

19. Evidence of bad faith on the part of the infringing user can support a greater likelihood of confusion. *See American Home Products, Corp. v. Barr Laboratories,* 834 F.2d 368, 371 (3d Cir.1987). I note in this respect that Defendants had notice of Plaintiffs' use in the Pittsburgh area as early as May 1997 but chose the "Laurel" mark without any investigation of Plaintiffs' business. *See First Nationwide Bank,* 682 F.Supp. at 977 (bad faith may be found where defendants proceeded to use the infringing mark despite knowledge of the plaintiff's objections to their use).

Moreover, "Laurel," as an arbitrary mark, differs in kind from "Jefferson" which the *Jefferson Bankshares* court held to be a weak, descriptive mark when used in Virginia. *Id.* at *8. The actual confusion already documented is not merely "exacerbated by Laurel Bank's use of its name and mark in the six-county area," dkt. no. 58, at 3, it is caused by the Defendants' entry into the relevant geographic market. A reasonable fact finder could not fail to find a likelihood of confusion on this record.[20]

IV. CONCLUSION

For the foregoing reasons, I will grant the Plaintiffs' motion for partial summary judgment on its trademark infringement action under the Lanham Act and deny the Defendants' competing motion. I will address the appropriate remedy for Defendants' infringing use of the "Laurel" mark as a separate phase in this litigation, noting again that the relevant market area used to resolve these motions shall not be law of the case. An appropriate order follows.

ORDER

AND NOW, this _____ day of April 1999, upon consideration of Plaintiffs' motion for partial summary judgment, dkt. no. 38, Defendants' motion for summary judgment, dkt. no. 48, and the parties' arguments relative thereto, it is hereby ORDERED and DIRECTED that:

1. Plaintiffs' motion for partial summary judgment, dkt. no. 38, is GRANTED;

2. Defendants' motion for summary judgment, dkt. no. 48, is DENIED;

3. the relevant market area used herein for purposes of resolving the aforesaid motions shall not constitute the law of the case for purposes of crafting the appropriate remedy;

4. a case management conference to consider, *inter alia*, what further proceedings are appropriate for crafting a remedy for Defendants' infringing use of the mark shall be held on *Tuesday, June 8, 1999, at 10:00 A.M.*, 319 Washington Street, Room 104, Johnstown, Pennsylvania.

20. Likelihood of confusion is typically a fact question, but it can, like any other such question, be resolved on summary judgment if the factual record has been adequately developed. *See CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1527 (1st Cir.1996); *Swisher Mower & Machine Co. Inc v. Haban Manufacturing Inc.*, 931 F.Supp. 645, 653 (W.D.Mo.1996).

Diana JACKSON-SPELLS, Plaintiff,

v.

Ernest P. FRANCIS, Esq., et al., Defendants.

No. Civ. AMD 99-330.

United States District Court, D. Maryland.

March 29, 1999.

Consumer brought action against attorney who represented automotive repair shop in consumer's prior replevin action against shop, alleging violations of Fair Debt Collection Practices Act (FDCPA). Defendant moved to dismiss. The District Court, Davis, J., held that defendant's letters to plaintiff offering to settle replevin litigation were not communications within meaning of FDCPA.

Motion granted.

1. Consumer Protection ⇐10

Fair Debt Collection Practices Act (FDCPA) covers activities of attorneys who undertake debt collection efforts, in-

or more participants or was otherwise extensive, increase [the base offense level] by 3 levels." Quinones does not dispute that the conspiracy in this case involved at least five participants; he argues, however, that he did not play a managerial role. The government had the burden at sentencing of proving by a preponderance of the evidence that an upward adjustment was warranted. *United States v. Ortiz*, 966 F.2d 707, 717 (1st Cir. 1992), *cert. denied*, —— U.S. ——, 113 S.Ct. 1005, 122 L.Ed.2d 154 (1993).

[18] Despite Quinones' assertion that he was merely "a foot soldier" like Martinez and Andino, we think that there was sufficient evidence to sustain the district court's finding. Special Agent Mersky testified that Delgado, the acknowledged ringleader of the conspiracy, introduced Quinones to her as his "partner." Moreover, the district court found that Quinones had exercised supervisory control over Andino at the abortive transaction on May 3. Quinones' action in renegotiating the price of the drugs at the more successful May 6 transaction also suggests a position of authority.

Quinones rightly points out that one can imagine more than one explanation for all of these events, but we think that the view taken by the district court is not implausible. *United States v. Savoie*, 985 F.2d 612, 616 (1st Cir.1993) (sentencing court's choice between two plausible views of the record cannot be clearly erroneous). Additionally, we have said that "[m]anagerial status may attach if there is evidence that a defendant, in committing the crime, exercised control over, or was otherwise responsible for overseeing the activities of, at least one other person." *Id.* The imposition of the sentence enhancement here was not clear error.

[19] Like Andino, Quinones was not present at the May 30, 1991 transaction and thus claims that he should not have been held accountable for the 506 grams of cocaine base involved in that transaction. As we have noted above, there was considerable evidence at trial that Quinones played a prominent role in the conspiracy, making it reasonable to infer that Quinones was well-acquainted with the scope of the group's activities and plans. Quinones does not argue that he had withdrawn from the conspiracy prior to May 30. Accordingly, we uphold the district court's determination that Quinones was accountable for the full amount of cocaine base distributed over the life of the conspiracy.

Appellants' convictions and sentences are *affirmed.*

FURNITURE RENTORS OF AMERICA, INC., Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD, Respondent/Cross-Petitioner.

Nos. 93-3336, 93-3395.

United States Court of Appeals, Third Circuit.

Argued Feb. 28, 1994.

Decided Sept. 27, 1994.

Employer petitioned for review of order of National Labor Relations Board (NLRB) holding that employer violated National Labor Relations Act (NLRA) by withdrawing recognition from union without having reasonable grounds for doubting its majority status, and by failing to notify and bargain with union before subcontracting. NLRB cross-petitioned for enforcement of order. The Court of Appeals, D. Brooks Smith, District Judge, sitting by designation, held that: (1) employer lacked reasonable grounds for doubting union's continued majority status, and thus improperly withdrew recognition from union; (2) union did not waive its right to bargain after certain date by agreeing to reopener which stated that contract would remain in effect until certain date but parties would agree to meet to reopen contract to discuss only wages; and (3) NLRB applied

wrong standard in determining that employer's decision to subcontract delivery work was mandatory subject of bargaining.

NLRB's petition granted in part and denied in part; employer's petition granted; remanded.

1. Labor Relations ⇐224

Employer lacked reasonable grounds for doubting union's continued majority status, and thus improperly withdrew recognition from union; fact that less than a majority of employees had dues checked off did not ipso facto indicate opposition to union representation, and petition upon which only a minority of employees indicated support for union was tainted since it was posted, albeit indirectly, by employer.

2. Labor Relations ⇐223.1

After one year beyond date when National Labor Relations Board (NLRB) certifies union as collective bargaining representative of employees, presumption of union's continued majority status becomes rebuttable; employer may withdraw recognition if it can show that union has lost majority support or that it has a good faith, reasonable doubt of union's continued majority status.

3. Labor Relations ⇐224

Employee turnover alone is not sufficient to establish good faith doubt of union's continued majority status.

4. Labor Relations ⇐224

High number of resignations or low number of dues checkoff authorizations will not without more justify withdrawal of union recognition, although they may be considered when assessing majority support for union.

5. Labor Relations ⇐539

To overcome presumption of majority union support, employer must produce affirmative evidence of dissatisfaction sufficient to ground good faith doubt of continued majority status.

6. Labor Relations ⇐382.1

Employer may only conduct polls to determine whether union's majority status still exists if it possesses substantial, objective evidence to establish that it reasonably doubts union's majority status before conducting poll.

7. Labor Relations ⇐382.1

Employer may not use petition/poll as evidence of good faith doubt of union's majority status, because in order not to engage in unfair labor practices, it must have had such doubt supported by independent evidence before posting petition.

8. Labor Relations ⇐176

Union did not waive its right to bargain after certain date by agreeing to reopener which stated that contract would remain in effect until certain date but that parties would agree to meet to reopen contract to discuss only wages; language meant that prior to expiration of contract on certain date, only wages could be changed, but when contract expired, all terms were subject to bargaining.

9. Labor Relations ⇐176

In context of collective bargaining, waivers of statutorily protected rights must be clearly and unmistakably articulated.

10. Labor Relations ⇐178

National Labor Relations Board (NLRB) applied wrong standard in determining that employer's decision to subcontract delivery work was mandatory subject of bargaining, when Board took simplistic approach that, if employer subcontracted some work to nonunion workers without changing scope and direction of its enterprise, and nonunion workers performed essentially the same work as bargaining unit workers did, bargaining was required; Board would be required on remand to acknowledge that employer's decision was based on concerns about dishonesty of some employees, not on labor costs as traditionally understood, and to weigh benefit of collective bargaining in that situation against employer's interest in taking prompt action; abrogating *Torrington Industries*, 307 NLRB 809. National Labor Relations Act, § 8(a)(5), (d), 29 U.S.C.A. § 158(a)(5), (d).

11. Labor Relations ⇐178

Subcontracting may be mandatory subject of collective bargaining under National Labor Relations Act (NLRA), but is not necessarily so. National Labor Relations Act, § 8(a)(5), (d), 29 U.S.C.A. § 158(a)(5), (d).

12. Labor Relations ⇐671

National Labor Relations Board's (NLRB) decision, to limit scope of case setting forth burden-shifting test for whether employer's decision was subject to mandatory bargaining to relocations of unit work, was essentially policy choice subject to limited judicial review.

13. Labor Relations ⇐671

Decision of National Labor Relations Board (NLRB) which was fundamentally an interpretation and application of Supreme Court precedent was required to be upheld by Court of Appeals if it was reasonably defensible; however, Court could not give it "rubber stamp" approval if it was inconsistent with statutory mandate or frustrated congressional policy underlying National Labor Relations Act (NLRA).

14. Labor Relations ⇐388.1

Focus in determining whether management decision to subcontract work requires bargaining under section of National Labor Relations Act (NLRA) stating that refusal to bargain collectively is unfair labor practice is not employer's decision to subcontract, but whether requiring bargaining over that sort of decision will advance neutral purposes of NLRA. National Labor Relations Act, § 8(a)(5), 29 U.S.C.A. § 158(a)(5).

15. Labor Relations ⇐178

If management decision to subcontract work is prompted by factors that are within union's control and therefore are suitable for resolution within creative bargaining framework, then collective bargaining is mandatory. National Labor Relations Act, § 8(a)(5), 29 U.S.C.A. § 158(a)(5).

Larry J. Rappoport (Argued), Stevens & Lee, Wayne, PA, for petitioner/cross-respondent.

David A. Fleischer, Sr. Atty. (Argued), Charles P. Donnelly, Jerry M. Hunter, Yvonne T. Dixon, Nicholas E. Karatino, Aileen A. Armstrong, N.L.R.B., Washington, DC, for respondent/cross-petitioner.

Before: STAPLETON, and SCIRICA, Circuit Judges and SMITH, District Judge *.

OPINION OF THE COURT

D. BROOKS SMITH, District Judge.

Petitioner Furniture Rentors of America, Inc. ("FRA") appeals from a National Labor Relations Board ("NLRB" or "the Board") order holding that it violated Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(1) and (5) ("NLRA" or "the Act") by withdrawing recognition from its union without having reasonable grounds for doubting its majority status, and by failing to notify and bargain with the union before subcontracting out delivery services. Cross-petitioner NLRB seeks enforcement of its order. We will enforce the Board's order only in part.

I. *Background*

Withdrawal of Recognition

Furniture Rentors of America, Inc. ("FRA"), a Delaware corporation, is a regional renter of residential and office furniture in Virginia, Maryland, and Delaware. The company negotiated its initial collective bargaining agreement ("CBA") with International Brotherhood of Teamsters Union Local Nos. 639 and 730 ("Union") on November 1, 1986. As drafted, the CBA was to expire on October 31, 1989; however, on October 21, 1987, a side-letter agreement was reached which increased wages and extended the CBA until December 31, 1989, and provided that the contract could be reopened "only to discuss wages."

* Honorable D. Brooks Smith, United States District Judge for the Western District of Pennsylvania, sitting by designation.

In October 1988, FRA leased a warehouse in Jessup, Maryland, implementing its decision to move its center of operations from Alexandria, Virginia to a point between Baltimore, Maryland and Washington, D.C., more centrally located within its market. FRA continued to operate from its Alexandria warehouse until late 1989 because its lease there did not expire until the summer of 1990 and its Jessup facility was being renovated. Due to the longer commute from northern Virginia to Jessup, Maryland, FRA lost several Washington area employees and hired new ones from Baltimore, including Calvin Wilson, who was hired as a new warehouse manager.

FRA and the Union began negotiating their next CBA in the autumn of 1989. Petitioner contends that by that time, fewer of FRA's employees than ever before were Union members, as evidenced by dues check-off records. On October 6, 1989, a decertification petition was filed by Frederick Brown, one of the new employees who had been hired by warehouse manager Wilson. Prior to the filing of the petition, Brown had posted a notice in the Alexandria warehouse which asked employees to sign "for the Union" or "not for the Union." Only six employees signed "for the Union." There were also discussions between warehouse manager Wilson and other employees regarding their lack of interest in Union representation and discontent over having to pay Union dues and initiation fees. At a December 7, 1989 bargaining session, FRA Vice-President James Senker ("Senker") questioned the Union's majority status. The Union representatives responded that they did enjoy majority support. On January 17, 1990, Senker sent a letter to the Union withdrawing recognition based on his doubt that the Union represented a majority of FRA employees. The Union failed to respond. A January 20, 1990 bargaining session was cancelled, and the parties did not meet again.

Decision to Subcontract Delivery Services

Senker knew first-hand that FRA had experienced serious problems with employee theft and carelessness. In May and June of 1989, FRA investigated the theft of furniture by Union members at a loss to the company of $10,000. The investigation led to arrests and resignations of employees. Delivery service also was the cause of numerous customer complaints, and FRA experienced problems with furniture packing, delivery of damaged furniture, insurance claims and late deliveries. FRA delivery teams averaged three deliveries per day, compared to the industry standard of four or five deliveries per day. In August 1989, FRA fired three employees who raided a customer's refrigerator while relaxing in his apartment during what was supposed to be a routine delivery.

In mid-February 1990, Senker accepted a proposal by Sullivan Services, a contractor who provides trucking services, to share delivery services on a trial basis. For approximately one week, Sullivan Services made deliveries using a single crew and its own truck. Senker gave the Sullivan Services crew the hardest jobs, monitored their performance, spoke daily with Sullivan Services' President, Kent Sullivan, and visited job sites in order to talk with customers about the Sullivan Services crew's work. Senker did not retain Sullivan Services beyond that trial period.

On February 27, 1990, Senker received a tip that several FRA employees planned to steal furniture early the next morning. With the assistance of the Howard County (Maryland) Police, Senker apprehended a driver, a helper and a supervisor attempting to load furniture onto a delivery truck. The next day, without notifying the Union, Senker retained Sullivan Services to perform FRA's delivery work on an exclusive basis. FRA then terminated four drivers and three helpers, but continued to employ its warehousemen, several of whom were Union supporters. By using Sullivan Services to perform delivery services, FRA's delivery costs increased from $160 to $210 per day.

Union member Alvin Jones, Jr. and the Union filed charges against FRA on March 2, 1990 and March 12, 1990 respectively. On March 28, 1991, the NLRB issued Complaints against FRA in 5—CA—20933 and 5—CA—21038. These Complaints, which were subsequently consolidated for hearing,

alleged that FRA committed unfair labor practices when it posted a petition requesting that its employees indicate their union sympathies, unlawfully withdrew recognition from the Union, and subcontracted its delivery work to Sullivan Services without first notifying and bargaining with the Union.

An Administrative Law Judge ("ALJ") held a hearing from October 1–3, 1991. On May 13, 1992, the ALJ issued a decision that FRA had committed unfair labor practices in violation of Section 8(a)(1) and (5) of the NLRA when it interrogated employees about their union sympathies and withdrew recognition of the Union on January 17, 1990. The ALJ, however, relying upon the NLRB's decision in *Dubuque Packing Company, Inc.*, 303 NLRB 386, 1991 WL 146795 (1991), concluded that FRA's decision to subcontract its delivery work was not a mandatory subject of collective bargaining and that therefore FRA did not violate Section 8(a)(5) of the Act when it decided to subcontract without first bargaining with the Union. The ALJ's decision with respect to mandatory bargaining particularly hinged upon his finding that FRA's decision to subcontract delivery services "did not turn on labor costs in any way." App. 684.

On May 28, 1993, the Board issued a Decision and Order reversing the third part of the ALJ's decision, holding that FRA violated Sections 8(a)(1) and (5) of the Act by failing to provide notice and to bargain with the Union concerning its decisions to subcontract delivery work and to lay off seven employees as a result of that decision. The Board also held that FRA violated Section 8(a)(1) through statements made by warehouse manager Wilson to new employee Alvin Jones, Jr. threatening to fire Wilson because of his association with the Union. FRA petitioned for review of the Board's order and the Board cross-petitioned for enforcement of its order.

II. *Discussion*

Withdrawal of Recognition

[1, 2] FRA argues that its proper withdrawal of recognition from the Union ended any duty to bargain over its decision to subcontract delivery services. Whether petitioner properly withdrew recognition from the Union turns on the factual question whether FRA had reasonable grounds for doubting the Union's continued majority status.[1]

[3] FRA avers that its move from Alexandria, Virginia to Jessup, Maryland caused considerable employee turnover, and by January 17, 1990, the date Senker withdrew recognition, only six of 17 employees, all transferees, were members of the Union. No newly hired employee had executed a dues checkoff or expressed an interest in union representation. Therefore, FRA argues, the composition and attitude of its workforce had changed, supporting Senker's good faith doubt about continued majority status. Employee turnover alone, however, is not sufficient to establish good-faith doubt, *NLRB v. Oil Capital Elec., Inc.*, 5 F.3d 459, 462 (10th Cir.1993), for without objective evidence of dissatisfaction, "there is nothing to rebut the presumption that the [company's] newly hired employees supported the Union in the same ratio as the employees they replaced." *Spillman Co. and Sheet Metal Workers' Int'l Assoc., Local Union No. 24, AFL–CIO*, 311 NLRB 18, 1993 WL 171783. *See also NLRB v. W.A.D. Rentals Ltd.*, 919 F.2d 839, 841–42 (2d Cir.1990) (500 percent employee turnover did not overcome presumption of majority employee support for union where employer was found to be "stalling" to avoid bargaining with the union). Therefore, petitioner must adduce evidence of dissatisfaction with Union representation among its employees.

[4, 5] Petitioner's evidence of FRA employees' dissatisfaction with Union representation consists of the low number of employees who executed the dues checkoff and the petition signed by a majority of employees stating that they were "not for the Union."

1. After one year beyond the date the NLRB certifies a union as the collective-bargaining representative of employees, the presumption of the union's continued majority status becomes rebuttable; the employer may withdraw recognition if it can show that the union has lost majority support or that it has a good faith, reasonable doubt of the union's continued majority status. *NLRB v. Wallkill Valley Gen. Hosp.*, 866 F.2d 632, 636 (3d Cir.1989).

Instantly, only six of 17 or 20–26 [2] employees had executed dues checkoffs at the time petitioner withdrew recognition. A high number of resignations or a low number of dues checkoff authorizations will not without more justify withdrawal of recognition, although they may be considered when assessing majority support for a union. *Bickerstaff Clay Prods. Co. v. NLRB*, 871 F.2d 980, 989 (11th Cir.1989), *cert. denied* 493 U.S. 924, 110 S.Ct. 292, 107 L.Ed.2d 272 (1989). As this court has said, "the issue is 'not how many employees belong to the union or paid dues but rather whether the majority desired union representation for purposes of collective bargaining.' " *NLRB v. Wallkill Valley General Hosp.*, 866 F.2d at 637 (quoting *Retired Persons Pharmacy v. NLRB*, 519 F.2d 486, 491 (2d Cir.1975)). As the ALJ noted, the fact that less than a majority of employees have dues checked off does not *ipso facto* indicate opposition to union representation. *See Colonna's Shipyard*, 293 NLRB 136, 139, 1989 WL 223900 (1989). In order to overcome the presumption of majority union support, the employer must produce affirmative evidence of dissatisfaction sufficient to ground a good faith doubt of continued majority status.

[6, 7] Substantial evidence supports the Board's determination that FRA's petition was tainted because it was posted by FRA, albeit indirectly, rather than spontaneously by the employees themselves. An employer may only conduct polls to determine whether a union's majority status still exists if it "possesses substantial, objective evidence to establish that it reasonably doubts the union's majority status *before* conducting the poll." *Hajoca Corp. v. NLRB*, 872 F.2d 1169, 1173 (3d Cir.1989) (emphasis added). An employer may not use its petition/poll as evidence of its good faith doubt, because in order not to engage in unfair labor practices, it must have had such doubt supported by independent evidence before posting the petition. *Cf. NLRB v. Laverdiere's Enterprises*, 933 F.2d 1045, 1051 (1st Cir.1991) (employee contact with employer regarding union representation lessens finding of taint).

2. Petitioner's brief is not consistent with respect to the number of employees working for FRA on January 17, 1990. *Compare* Petitioner's Brief at 7 (20–26 employees) *with* Petitioner's Brief at 36 (17 employees).

Management Rights Clause

[8] The employer argues that the original CBA contained a broad management rights clause giving FRA the absolute right to subcontract work at any time until December 31, 1989, the date of contract expiration. Furthermore, FRA avers, when the CBA was reopened in October 1987, the parties to the contract agreed that renegotiations on December 31, 1989 would be limited to the discussion of wages only, and that all other contract terms were to continue beyond the expiration date. Therefore, petitioner concludes, FRA's contractual right to subcontract continued beyond December 31, 1989, the Union having waived its right to bargain over subcontracting.

[9] We conclude that when the CBA was reopened in October 1987, the Union did not waive its right to bargain after December 31, 1989 over every contract term except wages. The 1987 reopener language states in pertinent part that, "The contract shall ... remain in effect through December 31, 1989, but the parties will agree to meet to reopen the contract to discuss only wages." This language can most sensibly be read to mean that prior to the expiration of the contract on December 31, 1989, only wages could be changed, but when the contract expired, all terms were subject to bargaining. Although it is possible to derive FRA's construction from the reopener language, we decline to make the inference, for waivers of statutorily protected rights must be clearly and unmistakably articulated. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983). Without such a clear waiver, the management rights clause does not survive the expiration of the CBA. *Control Services, Inc.*, 303 NLRB 481, 484, 1991 WL 122974 (1991), *enforced* 961 F.2d 1568 (1992).

Statutory Duty to Bargain

[10] Finally, FRA argues that the Board employed the wrong legal standard and thus erred when it determined that FRA's deci-

sion to subcontract its delivery work was a mandatory subject of bargaining. Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. §§ 158(a)(5) and 158(d), require employers to bargain in good faith with employee representatives about, *inter alia*, "wages, hours, and other terms and conditions of employment." Relying on its recent decision in *Torrington Industries*, 307 NLRB No. 129, 1992 WL 127799 (1992), the Board held that FRA's decision to subcontract delivery work fell within the range of decisions that require bargaining.

[11] Subcontracting may be a mandatory subject of collective bargaining under the Act, but it is not necessarily so. In *Fibreboard Paper Prods. Corp. v. NLRB*, 379 U.S. 203, 85 S.Ct. 398, 13 L.Ed.2d 233 (1964), the Court determined that an employer violated Section 8(a)(5) of the Act when it contracted out maintenance work in order to reduce labor costs without first bargaining with its maintenance workers' union. The Court noted that the employer subcontracted its maintenance work in order to reduce costs by "reducing the work force, decreasing fringe benefits, and eliminating overtime payments," and stressed that these factors were customarily regarded within the industry as "peculiarly suitable for resolution within the collective bargaining framework." *Id.* at 213–14, 85 S.Ct. at 404–05.

The Supreme Court further defined the requirements for mandatory bargaining over subcontracting when it held, in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 101 S.Ct. 2573, 69 L.Ed.2d 318 (1981), that an employer is not obligated to bargain with the union before closing a part of its business and discharging the employees who worked in that part of the operation. In *First National*, the Court identified three types of management decisions: (1) those with "only an indirect and attenuated impact on the employment relationship"; (2) those that "are almost exclusively 'an aspect of the relationship' between employer and employee," such as "the order of succession of layoffs and recalls ... [and] work rules"; and (3) those "that [have] a direct impact on employment ... but have as [their] focus only the economic profitability of" non-employment-related concerns. *Id.* at 677, 101 S.Ct. at 2580. Because the *First National* employer's decision to terminate one part of its business affected employment but was motivated by considerations unrelated to the employment relationship, it fell into the third category of management decisions. Whether decisions within that category require mandatory collective bargaining, the Court reasoned, depends upon the extent to which "the subject proposed for discussion is amenable to resolution through the bargaining process." *Id.* at 678, 101 S.Ct. at 2580. Accordingly, bargaining over "management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective bargaining-process, outweighs the burden placed on the conduct of the business." *Id.* at 679, 101 S.Ct. at 2581.

The *First National* balancing test was not conceptually novel, and the Court noted that the *Fibreboard* Court performed the same analysis "implicitly." *Id.* The Court in *First National* reached the opposite result from *Fibreboard* because the employer's decision to close part of its business was not driven by labor costs. The Court concluded that because the union had no control over the factors motivating the company's decision to subcontract, collective bargaining would have been futile and was therefore not required.

In *Otis Elevator Co.*, 269 NLRB 891, 1984 WL 36266 (1984), and *Dubuque Packing Co.*, 303 NLRB 386, 1991 WL 146795 (1991), the Board followed the teaching of *Fibreboard* and *First National* by fashioning standards for mandatory bargaining that focused generally on the amenability of the disputed issue to resolution through the collective bargaining process, and specifically on the role of labor costs in the employer's decision. *See Dubuque Packing Co.*, 303 NLRB at 391, 1991 WL 146795; *Otis Elevator Co.*, 269 NLRB at 892, 897, 1984 WL 36266 (Dennis, concurring). The *Dubuque* decision in particular contained a thoughtful discussion of the bargaining obligation imposed by the Act that accurately reflected the framework established by *Fibreboard* and *First National*, *see United Food and Commercial Workers*

Int'l Union, Local No. 150–A v. NLRB, 1 F.3d 24, 32 (D.C.Cir.1993) (NLRB's finding that the *Dubuque* test "accords with precedent is fully defensible"), but its holding was expressly limited to decisions to relocate unit work. *Dubuque Packing Co.*, 303 NLRB at 390 n. 2, 1991 WL 146795.

In the matter *sub judice*, the ALJ applied the *Dubuque* burden-shifting test,[3] concluding that because labor costs did not prompt FRA to subcontract, its decision was not a subject of mandatory bargaining. App. 684–86. Within days after the ALJ issued his opinion, however, the Board issued its decision in *Torrington Industries*, 307 NLRB 809, 1992 WL 127799 (1992), which abandoned the flexible approach of *Dubuque* for a more rigid standard in subcontracting cases. When the ALJ's decision was appealed to the Board, therefore, the panel applied the more recent *Torrington* standard.

In *Torrington*, the employer unilaterally replaced two union truck drivers with non-bargaining unit drivers and independent contractor haulers. The Board rejected the employer's argument that its decision to replace the union truckers was entrepreneurial and did not turn on labor costs, holding that *Dubuque's* burden-shifting analysis is limited to relocation decisions and does not apply to "other types of management decisions that affect employees." *Torrington*, 307 NLRB at 810, 1992 WL 127799. Finding that "all that is involved is the substitution of one group of workers for another to perform the same work at the same plant under the ultimate control of the same employer," *id.* (quoting *Fibreboard*), the Board held that the employer had an obligation to bargain. In so doing, the Board established the following test for subcontracting cases:

> [W]hen the record shows that essentially [*Fibreboard*] subcontracting is involved, there is no need to apply any further tests in order to determine whether the decision is subject to the statutory duty to bargain. The Supreme Court has already determined that it is....

Id. (citation omitted). The *Torrington* Board did not reject outright the employer's argument that *Fibreboard* could be distinguished because labor costs were not a factor in its decision; rather, it chose not to reach that issue, "because the [employer's] reasons had nothing to do with a change in the 'scope and direction' of its business. Those reasons, thus, were not matters of core entrepreneurial concern and outside the scope of bargaining." *Id.* (citation omitted). Unwilling to consider the specific facts of the case, the Board simply determined that FRA had engaged in "*Fibreboard* subcontracting," triggering the mandatory duty to bargain.

Inflexibly applied, the holding in *Torrington* is at odds with the principles of *Fibreboard* and *First National*. Those cases discussed the statutory duty to bargain as a means of obtaining, when appropriate, the benefits presumed to attend the collective bargaining process, *see Fibreboard*, 379 U.S. at 213–14, 85 S.Ct. at 404–05 (bargaining over particular economies potentially derived from subcontracting deemed "peculiarly suitable for resolution within the collective bargaining framework"); *First National*, 452 U.S. at 681, 101 S.Ct. at 2582 (relevant question is "whether requiring bargaining over this sort of decision will advance the neutral purposes of the Act"), not as an end in itself.

[12, 13] The Board's decision in *Torrington* to limit the scope of *Dubuque* to relocations of unit work is essentially a policy choice "subject to limited judicial review." *NLRB v. Local Union No. 103, Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 434 U.S. 335, 350, 98 S.Ct. 651, 660, 54 L.Ed.2d 586 (1978) (citations omitted). However, the Board's virtual *per se* rule that

3. Under the test announced by the Board in *Dubuque*, the General Counsel must initially establish a prima facie case for mandatory bargaining by showing that the employer's decision involved a transfer of unit work unaccompanied by a basic change in the nature of its operation. Then, the burden of production shifts to the employer, who can rebut the prima facie case by showing that its decision involved a change in the direction of the business, or by showing "(1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision...." *Dubuque*, 303 NLRB at 391, 1991 WL 146795.

subcontracting decisions must be the subject of bargaining is fundamentally an interpretation and application of Supreme Court precedent, and while it must be upheld if reasonably defensible, we may not give it "rubber stamp" approval if it is "inconsistent with a statutory mandate or ... frustrate[s] the congressional policy underlying [the NLRA]." *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97, 104 S.Ct. 439, 444, 78 L.Ed.2d 195 (1983) (quoting *NLRB v. Brown*, 380 U.S. 278, 292–92, 85 S.Ct. 980, 988, 13 L.Ed.2d 839 (1965)).

[14, 15] Under the *Torrington* standard, if an employer subcontracts some work to nonunion workers without changing the scope and direction of its enterprise, and the nonunion workers perform essentially the same work as the bargaining unit workers did, the Board labels the employer's action "*Fibreboard* subcontracting" and requires bargaining. But the *Torrington* manner of examining the decision to subcontract only to see whether it is analogous to *Fibreboard's* general factual framework is simplistic and, as this case demonstrates, potentially ham-handed.[4] The focus in determining whether a particular management decision requires bargaining under Section 8(a)(5) is not the employer's decision to subcontract, but whether "requiring bargaining over this sort of decision will advance the neutral purposes of the Act." *First National*, 452 U.S. at 681, 101 S.Ct. at 2582. In order to determine that, it is necessary to look behind the subcontracting decision itself to the reasons motivating the decision. If the employer's decision was prompted by factors that are within the union's control and therefore "suitable for resolution within the collective bargaining framework," *Fibreboard*, 379 U.S. at 214, 85 S.Ct. at 404, then bargaining is mandatory. As the Board recognized in *Dubuque*, 303 NLRB at 392 n. 14, 1991 WL 146795, it is therefore imperative to "evaluate the factors which actually motivated the employer's" decision.

Fibreboard itself counsels against strict categorization according to the form of subcontracting. The *Fibreboard* Court expressly noted that the employer's decision to subcontract turned on its desire to lower "the high cost of its maintenance operation," which, independent contractors had promised, could be reduced by eliminating employees and benefits. *Fibreboard*, 379 U.S. at 213–14, 85 S.Ct. at 404–05. In determining whether a subcontracting case is legally similar to *Fibreboard*, it is important to consider not just the employer's decision to contract work out, and how that decision affects its operations, but whether, as in *Fibreboard*, the employer's decision was driven by labor costs or some other difficulty that can be overcome through collective bargaining. Those courts that have held an employer's decision to subcontract unit work was a mandatory subject of collective bargaining under *Fibreboard* have invariably made this finding. *See e.g., Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 186 (2d Cir.1991), *cert. denied* —— U.S. ——, 112 S.Ct. 168, 116 L.Ed.2d 132 (1991) (employer transferred work in order to "reduce manufacturing costs by $2.6 million, $2 million of which would be directly attributable to cheaper labor.... Obviously, labor costs were the driving force behind the Company's action"); *NLRB v. Plymouth Stamping Div., Eltec Corp.*, 870 F.2d 1112, 1116 (6th Cir.1989), *cert. denied* 493 U.S. 891, 110 S.Ct. 235, 107 L.Ed.2d 186 (1989) (decision to subcontract motivated by failure to successfully negotiate economic concessions); *W.W. Grainger, Inc. v. NLRB*, 860 F.2d 244, 248 (7th Cir.1988) (decision to subcontract delivery services motivated by the desire to reduce the cost of "branch time," or time drivers spent at depots rather than in truck,

4. Although conceptually simple, the *Torrington* approach is not well-fitted to the statutory duty to bargain, which, after all, is not simply a theoretical catchphrase, but implies real give and take negotiations. If during a bargaining session an employer were to broach the subject of contracting work out (whether or not in a manner similar to what the Board calls "*Fibreboard* subcontracting"), the negotiations would necessarily turn to the employer's *reasons* for wanting to contract the work out. The contracting out decision itself, regardless of what form it might take, is just a response to some underlying cost or other challenge that makes doing the work with bargaining unit employees relatively less attractive. Therefore, focusing on the *form* that the employer's decision takes (does it fit into the *Fibreboard* pigeonhole?) is unhelpful, for the form of subcontracting bears little on the bargaining process encouraged by the Act.

and thus was a "direct labor cost"); *NLRB v. Westinghouse Broadcasting and Cable*, 849 F.2d 15, 22 (1st Cir.1988) (decision to subcontract prompted by a directive from employer's parent company to reduce its "body count" by eleven persons).

In this case, the ALJ found that,

> From the time [FRA Vice–President] James Senker started with [petitioner] he noted that [petitioner] had a serious employee theft problem. Indeed two employees, Payton Finch and Terry Walls, were arrested in mid–1989 for larceny from [petitioner]. In addition, service was, in Senker's opinion, horrible and Senker demonstrated part of the basis for this conclusion by producing correspondence from three customers, TravCorps, NV Property and North Park Ave., complaining about Respondent's services. In August 1989 three employees were fired for misconduct during a delivery, i.e., they "hung out" in the customer's residence and ate food which they took from the customer's refrigerator. Senker also observed that because of careless handling of furniture and improper padding of furniture by [petitioner's] delivery crew employees that too much of the furniture [petitioner] rented was being damaged. It was also Senker's opinion that [petitioner's] delivery crews were unreasonably slow in doing their job since they were making an average of three and one-half stops per day rather than four or five which was the industry standard.
>
> The straw that broke the camel's back and motivated Senker to subcontract *all* the delivery work began in late February 1990 when Senker received information from a confidential informant that some of his employees were planning to steal some furniture....
>
> The cost of delivery services by Sullivan Services was more expensive than the cost to [petitioner] of doing the delivery work with its own employees, i.e., $160 per day for one of [petitioner's] crews versus $210 per day for a Sullivan Services Crew....
>
> Labor costs were not a factor in the subcontracting decision. The decision was made because of [FRA Vice–President] Senker's dissatisfaction with the delivery crews, e.g., lower than expected productivity, unacceptable damage to furniture, complaints by customers, and thievery.

App. 685–86. The Board purported to leave these findings unchanged, App. 691, n. 1, but stated that because all of petitioner's stated reasons for subcontracting delivery services "involved employee conduct, an issue which would be of concern to the Union as well as to [petitioner] and an issue over which the Union was in a strong position to take action," App. 692, petitioner's decision to subcontract delivery services was subject to mandatory bargaining.

The ALJ's phrase "lower than expected productivity," standing alone, rings of labor costs, a subject suitable for resolution through collective bargaining. However, the ALJ's decision read as a whole indicates that Senker's principal reason for turning to Sullivan Services was his exasperation over the irresponsibility and dishonesty of some of his delivery employees, not labor costs as traditionally understood. Petitioner argues that labor costs could not possibly have been the basis of its decision since it paid fifty dollars per day more to contract out its delivery services than it paid to employ its own delivery crews. The Board responds by characterizing even "employee work habits and conduct" as "labor costs in the broad sense of the term" because they "affect the employer's costs and thus the profitability of the business." NLRB Brief at 38–39.

Anything employees do, or do not do, that ultimately bears on their employers' economic condition may be designated a "labor cost" in some broad sense, but there is no reason to so expand the term beyond its ordinary meaning as used in *Fibreboard* and *First National*, which contemplates subjects such as wages, fringe benefits, overtime payments, size of workforce and production goals. As the United States Court of Appeals for the Fourth Circuit recognized in *Arrow Automotive Indus., Inc. v. NLRB*, 853 F.2d 223 (4th Cir.1988), employers may make business decisions based on general "economic reasons," which "are not reasons distinct and apart from a desire to decrease labor costs," but that does not mean that labor costs are

somehow implicated by every employer's decision intended to improve the business's bottom line. *Id.* at 228.

Similarly, that an employer's decision is based on factors "involv[ing] employee conduct" does not necessarily imply that labor costs or other concerns amenable to resolution through collective bargaining are central to the decision. The factors that *principally* motivated FRA Vice–President Senker to contract out delivery services were, as found by the ALJ and as supported by the record, FRA's continuing problems with delivery workers' carelessness, misconduct, untrustworthiness and thievery. The Board suggests that "education," or the implementation of "an effective anti-theft program" would serve the same purpose as the wage and benefit concessions discussed in *Fibreboard* and *First National.* We do not read *Fibreboard* and *First National* as requiring employers to automatically bargain with employee representatives over the inviolability of their own property, without regard to the benefit likely to be obtained from that process. Nor are we able to perceive any likelihood of benefit to be derived from subjecting the problem of employee thievery to collective bargaining.

Our purpose in making these observations is not to substitute our judgment for that of the Board's on the possible benefits to be derived from collective bargaining in a situation like the one in this case. We intend only to convey our concern that the Board has not exercised the judgment that *Fibreboard* and *First National* require of it. We believe the Board needs to acknowledge that FRA's decision to subcontract its delivery work was primarily based on factors arguably not as amenable to collective bargaining as direct labor costs. The Board then needs to make a judgment about the likelihood and degree of benefit, if any, to be derived from collective bargaining in a situation of this kind and to weigh that benefit against the employer's considerable interest in taking prompt action.

III. *Conclusion*

We will grant the Board's petition to enforce with respect to those provisions of its order designed to remedy the unfair labor practices related to FRA's withdrawal of recognition. We will deny its petition in all other respects. We will grant FRA's petition for review and remand for further proceedings on the charge that FRA violated sections 8(a)(1) and (5) of the Act by failing to provide notice and bargain with the Union concerning its decisions to subcontract its delivery work and lay off employees.

Fred PIECKNICK; Dorothy Piecknick and Dan Piecknick, trading and doing business as Piecknick Towing

v.

COMMONWEALTH OF PENNSYLVANIA; Pennsylvania State Police; Colonel Glenn Walp, individually and in his capacity as Commander of Pennsylvania State Police; Captain Thomas Berryhill, individually and in his capacity as Commander of Troop S; Sergeant Duane Durham, individually and in his capacity as an officer of Troop S.

Ferdinand W. and Dorothy Piecknick and Dan Piecknick Trading and Doing Business as Piecknick Towing, Appellants.

No. 94–3002.

United States Court of Appeals, Third Circuit.

Argued June 23, 1994.

Decided Sept. 30, 1994.

Towing operator in zone 1 brought § 1983 procedural due process claim against Pennsylvania state police because competitor, who was assigned to zone 2, had been receiving towing assignments in zone 1. The United States District Court for the Western District of Pennsylvania, Donald E. Ziegler, Chief Judge, dismissed action, and operator appealed. The Court of Appeals, Hutchin-

PP & L, supra at 415, quoting *Vinci v. Waste Management, Inc.*, 80 F.3d 1372, 1376 (9th Cir.1996)("The antitrust laws are intended to preserve competition for the benefit of consumers in the market where the competition occurs.") As well, the absence of less expensive rates to choose from is a consequence of the lack of competition itself and does not "flow from that which makes the defendant[s'] acts unlawful". *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., supra.* Indeed, the lack of competition within the City stems from the PUC's regulations and defendants' conduct, therefore, has no bearing on the rates the City must pay to obtain electricity.[13]

Having found that plaintiff has not suffered an antitrust injury and, thus, does not have standing to maintain an antitrust suit against defendants, it follows that Count I, II and III of the complaint should be dismissed. In addition, it is recommended that the Court decline to exercise pendent supplemental jurisdiction over plaintiff's state law claims (Counts III–VIII) pursuant to 28 U.S.C. § 1367(c)(3), as the concerns of judicial economy, convenience and fairness to the parties are not present at this early stage of the proceedings. *See West Mifflin v. Lancaster*, 45 F.3d 780, 788 (3d Cir.1995).[14]

For these reasons, it is recommended that the motions to dismiss filed by defendants Allegheny Power and Duquesne Light (Docket Nos. 10 and 13) be granted.

Within ten (10) days of being served with a copy, any party may serve and file written objections to this Report and Recommendation. Any party opposing the objections shall have seven (7) days from the date of service of objections to respond thereto. Failure to file timely objections may constitute a waiver of any appellate rights.

Nov. 25, 1997.

13. The extent to which competition may be allowed between utilities is a matter within the exclusive direction of the PUC. *Peoples Natural Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 123 Pa.Cmwlth. 481, 496, 554 A.2d 585, 592 (1989). *See* 66 Pa.C.S. § 501(b).

PRECISION PRINTING COMPANY, INC., Plaintiff,

v.

UNISOURCE WORLDWIDE, INC., a Delaware Corporation, Defendant.

Civil Action No. 96–151.

United States District Court, W.D. Pennsylvania.

Jan. 30, 1998.

Paper forms producer sued bulk paper supplier, asserting price discrimination in violation of Robinson-Patman Act, and state law fraud and breach of contract claims. After supplier counterclaimed, parties cross-moved for summary judgment. The District Court, D. Brooks Smith, J., held that: (1) in commerce jurisdictional requirement under Act was satisfied with respect to supplier's sales to other producers; (2) discriminatory pricing had occurred; but (3) supplier chose not to take advantage of functionally available alternatives, so that functional availability doctrine barred discriminatory pricing claim; and (4) producer failed to establish right to recovery on fraud and contract claims.

Plaintiff's motion denied, and defendant's motion granted.

1. Trade Regulation ⇐913

Price discrimination in violation of Robinson-Patman Act through disparate pricing comes in two forms: "primary line discrimination," in which one seller charges discriminatory prices in order to gain advantage over its own competitors, and "secondary line dis-

14. For these same reasons, we have not addressed defendants' alternative arguments in support of their motions to dismiss.

crimination," in which manufacturer or distributor favors certain of its customers at expense of others. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

See publication Words and Phrases for other judicial constructions and definitions.

2. Trade Regulation ⇐913

Stated broadly, prohibition on price discrimination under Robinson-Patman Act provides that seller cannot discriminate in price between purchasers of goods of like grade and quality where substantial competitive injury may result. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

3. Commerce ⇐62.13

To meet commerce requirement for claim of price discrimination in violation of Robinson-Patman Act, plaintiff must show that (1) defendant is engaged in interstate commerce, (2) price discrimination occurred in course of that commerce, and (3) at least one of transactions that plaintiff proffers for comparison to prove discriminatory pricing must have actually moved in commerce, or in other words, have crossed a state line; as practical matter, if third element is satisfied, first two will be as well. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

4. Commerce ⇐62.13

"In commerce" nexus which must be established to support claim of discriminatory pricing in violation of Robinson-Patman Act is a significantly higher burden than that present under commerce clause in general, or Sherman Act in particular, and therefore is properly viewed as both a substantive and jurisdictional prerequisite for imposition of liability. U.S.C.A. Const. Art. 1, § 8, cl. 3; Sherman Act, § 1 et seq., as amended, 15 U.S.C.A. § 1 et seq.; Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

5. Commerce ⇐62.13

Bulk paper supplier, which purchased and sold paper from out-of-state manufacturers through warehouses in several states to customers dispersed among those states, regularly engaged in interstate commerce, as required to support claim against it under Robinson-Patman Act. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

6. Commerce ⇐62.13

Under "stream of commerce doctrine," when manufacturer ships its goods in interstate commerce to wholesaler's warehouse for its general inventory, any otherwise intrastate sales wholesaler then makes to its customers are not considered "in commerce" and do not defeat jurisdiction under provision of Robinson-Patman Act proscribing price discrimination, as stream of commerce is deemed to have been broken. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

See publication Words and Phrases for other judicial constructions and definitions.

7. Commerce ⇐62.13

Sales of goods which have been shipped to wholesaler's warehouse for its general inventory lose their intrastate character for purposes of provision of Robinson-Patman Act proscribing price discrimination by person involved in interstate commerce, notwithstanding an intrastate sale, if (1) goods are purchased by supplier upon order of customer with definite intention that goods are to go at once to customer, (2) goods are purchased by supplier to meet needs of specified customers pursuant to some understanding with customer, even though goods are not to be delivered to customer immediately, or (3) goods are purchased by supplier based upon anticipated needs of specific customers. Clayton Act, § 2(a), as amended by Robinson-Patman Price Discrimination Act, 15 U.S.C.A. § 13(a).

8. Commerce ⇐62.13

Bulk paper supplier's sale of paper to Pennsylvania forms producer from supplier's Pennsylvania warehouse on ad hoc, spot-market basis as producer's needs dictated, were intrastate transactions, and did not satisfy jurisdictional requirement for supplier's claim of discriminatory pricing under Robin-