IN THE SUPREME COURT OF OHIO

AUGLAIZE COUNTY BOARD OF COMMISSIONERS,	:	CASE NO. 2006-1033
Appellant	:	On Appeal from the Auglaize County Court of Appeals,
vs.	:	Third Appellate District
CITY OF ST. MARYS, OHIO,	:	
Appellee.	:	

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MERIT BRIEF OF APPELLANT AUGLAIZE COUNTY BOARD OF COMMISSIONERS

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STATEMENT OF FACTS

A. History Of The St. Marys Landfill And Ohio House Bill 592.

The City of St. Marys established its municipal landfill (the "Landfill" or the "City Site") in the 1960's and has been the Landfill's owner and permit holder at all times since then. (Weadock dep. 61-62, Supp. 256-257.) In 1987, the City entered into a consulting contract with John Hull, P.E., and the engineering consulting firm of Hull and Associates Inc. (collectively "Hull"), to advise the City on matters pertaining to the Landfill. (Brookhart dep. 13, Supp. 130; Ex. 99, Supp. 442-443.) One of the tasks to be performed by Hull was to advise the City on the number and location of ground water monitoring wells that needed to be installed at the Landfill to comply with the 1977 permit from Ohio EPA. (Brookhart Dep. 18-19, Supp. 131-132; Ex. 99, Supp. 442-443.) Hull was also requested to perform calculations regarding the capacity and life expectancy of the Landfill in anticipation of expanding the Landfill. (Brookhart dep. 24, Supp. 133; Ex. 99, Supp. 442-443.)

Ohio Amended Substitute House Bill 592, 142 Ohio Laws, Part III, 4418 - 4578, codified in R.C. Chapters 343 and 3734, became effective on June 24, 1988 and required all counties in the State of Ohio to demonstrate how they were going to handle the disposal of solid waste generated in the county for the next 10 years.[1] The legislation made two major changes to the way in which solid waste was managed and disposed in Ohio. First, all counties were required to organize themselves into single-county or multi-county solid waste management districts. R.C. 3734.52(A). Counties with populations less than 120,000, like Auglaize County, had to become part of a multi-county solid waste management district unless it obtained an exemption from Ohio EPA. R.C. 3734.52(C). Second, Ohio EPA was

[1] A copy of pertinent parts of Am. Sub. H.B. 592 is contained in the Appendix at p. 220.

required to adopt rules requiring landfills to implement "best available technology" ("BAT") for design, construction, and operation. Am. Sub. H.B. 592, 142 Ohio Laws, Part III, 4576, uncodified section 7. Older landfills, like the landfill owned and operated by the City of St. Marys, were placed on a schedule to demonstrate that they complied with the new BAT rules or, if they could not, the landfill had to close. R.C. 3734.05(A)(3), (4) and (6). (Ex. 67, pp. SM607-SM610, Supp. 341-344[2]; Hull dep. 35-37, Supp. 187-189.)

B. The City's Consultant Produces The Agreement.

In the summer of 1988, the City was having meetings and discussions with its environmental consultant, Hull, to explain what effect H.B. 592 was going to have on the Landfill. These general discussions were followed up with detailed conversations between Hull and the City about putting together an agreement with the County, and what the agreement should contain. (Davis dep. vol. I 59, Supp. 152.) The City wanted an agreement with the County in part because it preferred to be in a single county solid waste district rather than in a five or six county district where it might have to compete for waste volume with other landfills. (Brookhart dep. 57-58, Supp. 136-137.) On October 31, 1988, Hull sent a letter to the City outlining the major points that should be addressed in the agreement. (Ex. 70, Supp. 379-383.) This outline also contained the estimated costs for Hull to perform various tasks for the City necessitated by H.B. 592. The first task was for Hull "to draft an agreement between Auglaize County and the City of St. Marys." *Id.*

On December 8, 1988, the City entered into a contract with Hull to provide "various engineering designs, evaluations and studies pertaining to the exemption application to be

[2] All exhibits that were marked and identified during the depositions held in this case were marked as "Exhibit" and given a number. This same Exhibit number was then used in all subsequent depositions. All references in this Brief to "Exhibit" or "Ex." refer to the deposition exhibits, and all exhibits referred to herein are presented in numerical order in the Supplement filed herein.

filed by the County for a single-county solid waste management district," including "to draft an agreement between Auglaize County and the City of St. Marys." (Ex. 71, Supp. 384-388; Hull dep. 142-145, Supp. 200-203.)[3] On December 9, 1988, Hull engaged his own attorney to help draft the Agreement. (Hull dep. 173, 194-195, Supp. 208, 213-214; Ex. 163, Supp. 495-496.) Between December 9, 1988 and the date the Agreement was signed, the City reviewed and commented on at least three drafts of the Agreement. (Hull dep. 175-177, Supp. 210-212; Davis dep. vol. I 100-101, Supp. 155-156; Ex. 74, 75, 164 and 165, Supp. 389-407, 408-425, 497-512 and 513-530.) There are no documents confirming that any preliminary drafts were sent to the County.

The City knew that no one at the County had any landfill experience. (Davis dep. vol. I 60, Supp. 153.) The County Commissioners relied completely on Brookhart[4], Davis[5] and Hull to provide them with complete information concerning the circumstances of the St. Marys Landfill and the requirements of H.B. 592. (Kuffner dep. 50-51, Supp. 245-246.)

On December 22, 1988, the City and the County Commissioners entered into the Agreement. (Ex. 1, Supp. 267-287.) The Auglaize County Auditor did not certify the County had funds available or was in the process of collection to pay the County's obligations under the Agreement. (Schumann dep. 62-63, 65, Supp. 250-251, 252.) Neither the County Prosecutor nor the City Law Director endorsed their approval of the Agreement as to form or content. (Ex. 1, Supp. 267-287.)

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[3] It was not until June 8, 1989, six months after the Agreement was executed, that the Auglaize County Solid Waste Management District ("the District") hired Hull as a consultant for the District on solid waste matters. (Hull dep. 377, Supp. 237; Ex. 233, Supp. 571-575.) Hull had no contract with the District or the County prior to the June 8, 1989 contract. (Hull dep. 389, Supp. 240.)

[4] J. Douglas Brookhart was the City's Director of Public Service and Safety who signed the Agreement on behalf of the City.

[5] Stan Davis was the City's Superintendent of Water, Waste Water and Solid Waste.

In late December 1988, Auglaize County submitted an exemption request to Ohio EPA for approval to form a single county solid waste management district pursuant to R.C. 3734.52(C)(2) . (Ex. 67, Supp. 292-378.) The City supplied the core elements of the exemption request. This included a plan and financial feasibility study/rate study by the City to construct a new 20 acre BAT landfill cell on the undeveloped portion of the City's landfill property.[6] (Ex. 67, pp. SM-00575-00580, Supp. 309-314; Hull dep. 69, Supp. 197; Davis dep. vol. 1, p. 151, Supp. 159.) The City's estimated cost for constructing the new BAT landfill was $4,565,000.00. (Ex. 67, p. SM-00578, Supp. 312; Hull dep. 329, Supp. 233.) The City's financial feasibility study/rate study projected that the City's landfill gate rate i.e., the amount charged by the City to dispose waste at its Landfill, would need to be at least $26.93 per ton to provide disposal capacity for 13 years, and to pay for the costs to construct, operate, and maintain the Landfill, including landfill closure and post-closure costs, which included monitoring. (Ex. 67, p. SM-00580, Supp. 314.) This represented a $19.99 per ton increase above the City's rate of $6.94 that was in effect when the Agreement was signed. *Id.*

The County's exemption request was approved by Ohio EPA on February 17, 1989. This authorized the formation of the Auglaize County Solid Waste Management District ("District").

C. The City's Obligation To Keep The Landfill Open For The Twelve Year Term Of The Agreement.

The term of the Agreement was 12 years. (Ex. 1, ¶2, Supp. 270.) Pursuant to Paragraph 4(a) of the 1988 Agreement, during the twelve-year term, the City was required to *"permit any resident of Auglaize County to dispose of solid waste generated within the County at the solid waste disposal site presently operated by the City ("City Site")."* (Hull

[6] The City's existing landfill did not meet BAT standards. (Hull dep. 55-56, Supp. 192-193.)

dep. 218-220, Supp. 218-220.)[7] Mr. Brookhart understood that all of the City's obligations, as set forth in Paragraphs 4(a) through 4(g), lasted for at least 12 years. (Brookhart dep. 136-138, Supp. 138-140.) Pursuant to Paragraph 4(d), the City was required to "*obtain, as necessary, and maintain all permits and licenses required to* ***ensure continued operation*** *of the City Site and meet the requirements of all relevant statutes and regulations with respect to that operation.*" (Ex. 1, Supp. 267-287 (emphasis added); Hull dep. 220, Supp. 220.)

At the time the Agreement was made, the City understood that H.B. 592 required the Landfill to meet new BAT requirements. (Weadock dep. 69, Supp. 259.) The City knew that parts of the existing landfill were not going to meet BAT technology. (Davis, dep. vol. I 29, Supp. 151.) The City "was well aware of the fact that [it was] going to have to construct new [landfill] cells" in order to comply with the new BAT requirements, or the Landfill would have to close. (Davis dep. vol. I 72, Supp. 154; Hull dep. 147-149, Supp. 205-207.) The City had to show that it could and was committed to upgrade the landfill to meet BAT standards in order to satisfy the requirements for the County to obtain the (C)(2) exemption to form a single county solid waste management district. (Hull dep. 54-59, Supp. 191-196.) Ohio EPA would not have granted the County's exemption request unless the City demonstrated that the landfill facility would be upgraded to BAT. (Hull dep. 58-59, Supp. 195-196.)

D. The City's Obligation To Establish And Allocate A Portion Of Its Landfill Disposal Rate To Pay For Environmental Monitoring.

Under the Agreement, the source of revenues to pay for the environmental monitoring expenses, as well as other future expenses incurred at the Landfill, was to come from the City's disposal rate. (Ex. 1, Agreement, ¶¶8 and 9, Supp. 274-280.) Paragraph 8 required the

[7] The City Site included the entire 100 acres of property owned by the City that could be developed as a landfill. (Davis dep. vol. I 137, Supp. 158.)

City to establish a disposal rate and review it annually. The only rate the City had the ability to establish was the City's gate fees. (Davis dep. vol. I 116, Supp. 157.) Paragraph 9 required the City to allocate and set aside a portion of its disposal rate for the creation of a Fund. A portion of the Fund was to be allocated to pay the costs of environmental monitoring expenses at the Landfill. The City was to perform an annual review of its landfill disposal rate so that the City could periodically adjust its rate in order to accommodate, *inter alia*, increased costs of operating the landfill, the need for potential expansion, current and future expenses for environmental monitoring, and contingent liabilities. (Agreement, ¶¶8(a), 8(c), 9(a), and 9(b), Supp. 275-277.)

1. <u>The "Rate" Referred To In Paragraph 8 Is The City's Disposal Rate.</u>

The City's Director of Public Service and Safety, Michael Weadock, who succeeded Mr. Brookhart, acknowledged the City's Landfill disposal rate is a separate and distinct fee from the disposal fees and generation fees levied by the District's Policy Committee pursuant to R.C. 3734.57(B) and 3734.573(A). (Weadock dep. 65, Supp. 258.)[8] There is nothing in the Agreement that refers to any fees levied by the District. (Weadock dep. 51, Supp. 255.) Hull, the party responsible for drafting the Agreement, agrees the "rate" that was to be reviewed annually by the City and modified as required, is the City's disposal rate. (Hull dep. 205-206, Supp. 216-217.) Mr. Brookhart also agrees that the rate referred to in Paragraph 8 is the City rate. (Brookhart dep. 140, Supp. 141.) Mr. Brookhart acknowledged the purpose of the rate study was to establish rates for landfill operation and to provide money for the Fund described

[8] H.B. 592 authorized the policy committee of a solid waste management district to levy a fee on each ton of solid waste disposed at facilities located within the district. R.C. 3734.57(B). These fees are collected and held in trust by the solid waste disposal facility until they are forwarded to the District. R.C. 3734.57(E). H.B. 592 specified that District fees are "in addition" to the disposal rate charged by the disposal facility. R.C. 3734.57(A).

in Paragraph 9(a), including the cost of environmental monitoring at the City Site. (Brookhart dep. 144-145, Supp. 142-145.)

During the initial few months after the Agreement was executed, and consistent with the City's financial estimates that were attached to the County's exemption request, the City recognized its obligations under Paragraphs 8 and 9 and proceeded to have Hull prepare a rate study that recommended the City's basic disposal rate be raised from $6.94 to $34.95 per ton. (Ex. 76, Supp. 426-438; Hull dep. 284-285, Supp. 229-230.) Hull prepared a document entitled, "St. Marys Landfill Reasons for Rate Increase," which identified thirteen separate items as reasons for an increase in the City rate. Included among Hull's reasons were groundwater monitoring, methane monitoring and post-closure monitoring. (Ex. 116, Supp. 457-459; Hull dep. 234-235, Supp. 221-222.) The City did not approve Hull's recommended rate increase, and decided to increase its disposal fee by only $7 per ton. (Hull dep. 239-242, Supp. 223-226; Ex. 115, Supp. 455-456.) The City later reduced the $7 per ton increase to $2 per ton. (Brookhart dep. 160-161, Supp. 147-148; Davis dep. vol. II 36-37, Supp. 164-165.)

After the County rejected the large rate increase, Hull met with the Policy Committee of the newly formed District in April 1989 and advised the Policy Committee it could adopt a surcharge [i.e. a disposal fee levied under R.C. 3734.57(B)] to pay for preparing the District's solid waste management plan, and for the installation and testing of monitoring wells at the two operating landfills in the District – the City of Wapakoneta's landfill and the City of St. Marys' landfill. (Hull dep. 245-246, Supp. 227-228; Ex. 34, Supp. 288).[9] Hull then sent a letter to the

[9] The Policy Committee is the statutorily-created body that has exclusive power to prepare and adopt the District's solid waste management plan, and to levy solid waste fees to implement the District's plan. R.C. 3734.54(B); R.C. 3734.53(A); R.C. 3734.57(B). The Policy Committee includes one representative each from the county, largest municipality, health department, and townships, and three other at-large members. R.C. 3734.54(B). The City of St. Marys had one representative, Stan Davis, on the Policy Committee as required by Paragraph 6 of the Agreement, which refers to the Policy Committee as the "Board of the SWMD." (Davis dep. vol. II 158, Supp. 184). The Board of County Commissioners of Auglaize County could not be the "Board of the SWMD" referred to in

County Administrator explaining the proposed fee to be levied by the Policy Committee. (Ex. 82, Supp. 439-441). Neither the Policy Committee's minutes of its April 1989 meeting, nor Hull's letter, ties the District's fee to the Agreement. The only parties to the Agreement – the City and the Board of County Commissioners – are separate and distinct from the Policy Committee and the District, which did not exist when the Agreement went into effect. While the County Commissioners serve as the Board of Directors of the District pursuant to R.C. 343.01, the Policy Committee is responsible for drafting and approving the District's Solid Waste Management Plan, which determines what programs will be implemented by the District, how much will be expended in those programs and how the revenues to pay for the programs will be obtained. (R.C. 3734.53(A) and (B).) The Policy Committee and the District were not parties to the Agreement, and were not bound by its provisions.[10] Nevertheless, under R.C. 3734.57(B) and (G)(5), the Policy Committee had independent authority to levy fees to pay for groundwater monitoring at the St. Marys landfill and the Wapakoneta landfill (for which there was no contract).

As the owner and operator of a landfill located in the District, the City was **required by statute** to collect and remit the regulatory fees levied by the District Policy Committee. R.C. 3734.57(E). The District's fees the City collected were the property of the District and not the City. The City's performance of its statutory duty, in collecting fees levied by the District Policy Committee, had nothing to do with and did not equate to performance of the City's obligations under Paragraphs 8 and 9.

Paragraphs 6 and 9 of the Agreement since it was impossible for a representative of the City to serve on the elected Board of County Commissioners. See R.C. 305.01.

[10] The City did not name the Policy Committee as a defendant in this lawsuit.

2. The City Failed To Set Aside A Portion Of Its Disposal Rate For Monitoring.

Once the District Policy Committee began to levy the District's fees to pay for District programs, the City discontinued further performance of its required obligations under Paragraphs 8 and 9. After the March 1989 rate study, the City did not conduct another rate study or formal rate review until mid-1993 when it increased the City's disposal rate by a small amount. (Davis dep. vol. II 56-58, Supp. 166-168; Ex. 203, p. CSM 096, Supp. 535.) Like the 1989 rate increase, the 1993 rate increase did not include funds needed for environmental monitoring at the Landfill as required by Paragraph 8(a), and the City continued to ignore its obligation under Paragraph 9(a) to allocate a portion of the City disposal rate for such monitoring. The City acknowledges that, during the 12-year term, it never allocated or paid any portion of the City's disposal rate to the Fund that was to be used for monitoring expenses at the Landfill. (Weadock dep. 165-166, Supp. 264-265.)

E. The City's Failure To Obtain The BAT Demonstration Permit Required By H.B. 592.

In October 1994, Ohio EPA notified the City that the Landfill's permit application did not comply with the BAT requirements. (Davis dep. vol. II 69-71, Supp. 171-173; Ex. 207, Supp. 546-548.) This meant the City's existing Landfill would have to close within one year after Ohio EPA issued a final order denying the call-in permit. R.C. 3734.05(A)(6). In December 1994, the City and Hull began internally discussing a timetable for closing the Landfill. (Davis dep. vol. I 248-249, Supp. 160-161; Davis dep. vol. II 65-66, Supp. 169-170; Ex. 204, Supp. 536-539.) On September 11, 1995, the Director of Ohio EPA issued Findings and Orders denying the City's BAT demonstration and ordering the existing Landfill to close. (Hull dep. 374, Supp. 236; Weadock dep. 93, Supp. 260; Ex. 125, Supp. 460-465.)

Although the existing Landfill had to close, Ohio EPA advised the City that it could obtain a permit to construct the new BAT landfill proposed by the City (and referred to in the County's exemption request), if the City resubmitted an application that included the new BAT landfill only. (Ex. 206, Supp. 540-545.) The City understood it could develop a new BAT landfill on the City Site. (Davis dep. vol. II 74-75, Supp. 174-175; Hull dep. 321, Supp. 232.) A feasibility study by Hull concluded the proposed BAT landfill was a viable option because the City would be able to meet all of its expenses for both the new facility and the closed facility by charging a gate fee of $20.50 per ton, even if the landfill received only 25,000 tons per year. (Ex. 235, pp. 19-20, 23, Supp. 610-611, 614.) The City decided not to build the new BAT landfill because the City felt it was not economical. (Davis dep. vol. I 249, Supp. 161; Davis dep. vol. II 75, Supp. 175; Hull dep. 320, Supp. 231.)

F. The City Was Aware Its Failure To Provide Landfill Disposal For The Entire Twelve Year Term Of The Agreement Would Constitute Substantial Non-Performance Of Its Obligations Under The Agreement.

At private meetings in 1996 to discuss the timing for closure of the St. Marys Landfill, City officials told Ohio EPA and the Attorney General's office the City should be allowed to extend the Landfill closure date because the 1988 Agreement required the City to provide landfill disposal capacity to the County's residents until 2001. (Ex. 214, Supp. 549-550; Ex. 128, Supp. 472-476.) In one of the meetings, Mr. Weadock stated the Agreement required the City to "provide waste management until 2001." (Weadock dep. 118-119, Supp. 262-263; Davis dep. vol. II 116-117, Supp. 177-178; Ex. 214, Supp. 549-550.) The City was also internally discussing its concerns about breaching the Agreement. (Hull dep. 365-366, Supp. 234-235; Davis dep. vol. II 131-133, Supp. 181-183; Ex. 130, Supp. 487-490.)[11] Pursuant to final

[11] The City did not inform the District about the City's discussions with Ohio EPA regarding closure of the landfill. (Davis dep. vol. II 108, Supp. 176.) Between 1989 and 2001, Stan Davis was the City's representative on the

Findings and Orders issued by the director of Ohio EPA, the City Landfill ceased accepting solid waste on June 1, 1998, approximately two and one-half years before the end of the 12-year term. (Ex. 129, p.4, Supp. 481; Weadock dep. 108, Supp. 261.)

G. The County's Obligations Under The Agreement.

The County, "**pursuant to this Agreement,**" accepted responsibility for environmental monitoring required at the City Landfill, "including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to the closure." (Agreement ¶5(a), Supp. 273.) However, the revenues to pay for the environmental monitoring expenses and certain other future expenses incurred at the Landfill was to come from the City's disposal rate established and collected by the City from users of the Landfill for the disposal of solid waste. (Agreement ¶¶8 and 9, Supp. 275-280.) In the event the City closed the City Site, thereby ending the further collection of the City's disposal fee, the costs for environmental monitoring that exceeded the amount in the Fund that the City had previously set aside from its disposal rate was to be paid by the County pursuant to Paragraph 5(a). (Agreement, ¶9(a), Supp. 276-277.)

Paragraph 2 of the Agreement states: *"[T]he term of this Agreement shall be twelve (12) years commencing on the date the contract is signed by the Parties."* The City admits the Agreement was never modified or amended. (City's Answers to Defendant's First Set of Interrogatories, No. 10, Supp. 90.) The Agreement contains no explicit language that any of the obligations of either the City or the County were to survive the expiration of the

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District's Policy Committee. (Davis dep. vol. II 158, Supp. 184.) John Hull, who was the District's solid waste consultant pursuant to contracts dated June 8, 1989 and November 28, 1995, did not inform the District about the City's discussions with Ohio EPA. (Hull dep. 386-387, Supp. 238-239; Ex. 233, Supp. 571-575; Ex. 234, Supp. 576-587.)

Agreement. The Agreement expired on its own terms at midnight on December 21, 2000. Neither the City nor the County has performed any of their respective contract obligations since the Agreement expired (the City ceased all performance when it closed the City Site on June 1, 1998). The City seeks in excess of $5,000,000 for anticipated monitoring expenses at the closed Landfill until at least 2031. (Amended Complaint, ¶62-63, Supp. 19.)

H. Procedural History.

The City filed its Complaint on May 30, 2002 and its Amended Complaint on March 31, 2003. The City and the County filed Cross-Motions for Partial Summary Judgment on the issue of whether the County's obligation survived the expiration of the Agreement. On May 6, 2004, the trial court denied the County's motion and granted the City's motion, holding the Agreement required the County to pay for 30 years' post-closure monitoring. On December 15, 2004, the parties filed Cross-Motions for Summary Judgment as to all remaining issues in the case. On March 7, 2005, the trial court granted summary judgment in favor of the County and dismissed the City's Complaint, holding the City could not prevail on its claims because the undisputed facts showed the City had failed to substantially perform its obligations under the Agreement. The City perfected its appeal to the Auglaize County Court of Appeals, Third Appellate District and the County Cross-Appealed as to the trial court's May 6, 2004 decision. On April 10, 2006, the Court of Appeals reversed the trial court's March 7, 2005 summary judgment decision in favor of the County and affirmed the trial court's May 6, 2004 partial summary judgment decision in favor of the City. On May 25, 2006, the County filed its Notice of Appeal in the Ohio Supreme Court. This Court on August 23, 2006 issued its decision accepting the County's Proposition of Law Nos. I, II and III, and on October 18, 2006 accepted the County's Proposition of Law No. IV.

ARGUMENT

Proposition of Law No. I: A contract that specifies the period of its duration generally terminates on the expiration of such period, and the mutual obligations of the parties to the contract terminate on that date, unless the parties otherwise expressly provide in the contract.

A. Explicit Survival Language Is Required To Extend A Party's Obligations Beyond The Stated Expiration Date Of A Contract.

"When a contract specifies the period of its duration, it terminates on the expiration of such period." 17A Am. Jur. 2d. (2004), Contracts, Section 530; *see, also Beatty Safway Scaffold, Inc. v. Skrable* (1960), 180 Cal. App.2d 650, 654, 4 Cal. Rptr. 543, 545; *LeFebvre v. Rite-a-Way Indus., Inc.* (D. Kan. June 14, 1993), Case No. 91-1435 MLB, 1993 U.S. Dist. LEXIS 9666, at *6. The obligations of all parties terminate at the end of the stated term, unless the agreement expressly provides that the obligations of a party are to continue after the expiration date. *Yearling Properties, Inc. v. Tedder* (1988), 53 Ohio App. 3d 52, 54, 557 N.E. 2d 1231, 1233 (guarantor was not liable beyond the original term of lease because the lease did not clearly and unambiguously provide for such liability beyond the stated term); *McDonald's Operators Risk Mgmt. Ass'n. v. CoreSource, Inc.* (1999), 307 Ill. App. 3d 187, 192-93, 717 N.E.2d 485, 490 (a substantial obligation intended to survive the specified termination date of the contract should have been contained in explicit language); *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate Palmolive Co.* (D. Kan. 1994), 847 F. Supp. 858, 861 (mutual obligations of parties to a contract terminate on the termination of the contract unless the parties otherwise expressly provide in the contract); *United States v. American Society of Composers, Authors, & Publishers*, (S.D.N.Y. Dec. 21, 1989), Case No. Civ. 13-95, 1989 U.S. Dist. LEXIS 16907, at *33 (stating that "if one of the parties wishes a contract term to remain in effect after the contract ends, the contract must say so explicitly.").

Great importance is placed on the stated expiration date of a contract. It cannot be ignored or overridden except by explicit survival language that leaves no doubt from reading the contract that the stated term of duration is not applicable to a particular obligation. It is with this law in mind that the Agreement between the City and the County must be examined.

B. The Agreement Clearly Sets Forth The Parties' Intent As To Its Duration.

The City's claim, that the County has an existing obligation to pay for environmental monitoring at the Landfill, is based entirely on the 1988 Agreement. The two relevant sections that relate to the duration of the Agreement and the County's monitoring obligation read as follows.

> 2. The term of this Agreement shall be twelve (12) years, commencing on the date the contract is signed by the Parties and renewable at the sole option of the City for a term and under conditions to be negotiated by the Parties.
>
> ***
>
> 5. Pursuant to this Agreement, the County shall:
>
> a. As soon as the monitoring program initiated by the City pursuant to paragraph 4(f), supra, is approved by OEPA, undertake complete responsibility for all environmental monitoring required for the City Site by applicable statutes and regulations, including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to the closure of the site;
> *(emphasis added)*

The Agreement was signed by the Parties on December 22, 1988 and expired by its own terms on December 21, 2000. There is no evidence the City made any attempt to renew the Agreement. The City closed its landfill in June, 1998. (Original Complaint ¶9, Supp 3; Ex 129, Supp. 477-486.) Thus, during the 12-year term, the County actually had monitoring responsibilities, both prior to and subsequent to the closure of the Landfill.

In Paragraph 2, the parties clearly and unambiguously stated their intent that the "Agreement" was to remain in effect for twelve years. "The term 'agreement' would ordinarily refer to every part of the contract. . . ." *Chicago West Pullman Corp. v. Quinn* (Feb. 9, 1999), Lorain App. No. 98CA7048, 1999 Ohio App. LEXIS 377, at *6. There is nothing on the face of the Agreement that indicates that Paragraph 2, limiting the contract's duration to 12 years, was not intended to apply to the entire Agreement. The intent of the parties to a contract is presumed to reside in the language they chose to employ in the contract. *Kelly v. Med. Life Ins. Co.* (1987), 31 Ohio St. 3d 130, 509 N.E.2d 411, paragraph one of the syllabus. When a "contract is clear and unambiguous, 'the court need not concern itself with rules of construction or go beyond the plain language of the agreement to determine the rights and obligations of the parties.'" *Reese v. Fid. & Guar. Ins. Underwriter* (2004), 158 Ohio App.3d 696, 699, 821 N.E.2d 1052, 1054 (quoting *Seringetti Constr. Co. v. Cincinnati* (1988), 51 Ohio App.3d 1, 4, 553 N.E.2d 1371, 1375). This Court has recently stated that "when the language of a written contract is clear, a court may look no further than the writing itself to find the intent of the parties. As a matter of law, a contract is unambiguous if it can be given a definite legal meaning." *Westfield Ins. Co. v. Galatis* (2003), 100 Ohio St.3d 216, 219, 797 N.E. 1256, 1261. The Agreement at issue can be given a definite legal meaning by interpreting it to provide that during the 12-year term, the County had monitoring responsibilities, both prior to and subsequent to the closure of the Landfill.

The City claims that the words "prior to and subsequent to the closure of the site" render the 12-year term inapplicable to the County's monitoring obligations. If the 12-year term does not limit the duration of the County's monitoring responsibilities, then the County would have monitoring responsibilities for as long as the Landfill was operating plus whatever post-closure

period was required, if and when the Landfill ever closed.[12] This is far from being the 12-year agreement expressly established in Paragraph 2. It is inconceivable the County Commissioners in 1988 ever intended to obligate the County to such an open-ended obligation that was not limited in time or a dollar amount, especially when both parties announced and agreed *"The term of this Agreement shall be twelve (12) years."*

Taking the City's interpretation of the Agreement one step further, if the Landfill was still operating at the end of the 12 year term, but the term applied only to the City's obligations, the City would be permitted to stop performing its obligation under Paragraph 4(a) to permit the County's residents to use the Landfill and its obligation under Paragraph 9 to set aside and pay a portion of the City's disposal rate into the monitoring fund. However, the County would have to continue its monitoring responsibilities even though the County would be getting no benefit from the Landfill. It is apparent that if the 12-term has no application to the duration of the County's monitoring responsibilities, then the scenario as outlined above could have become a reality. There is nothing on the face or the overall contents of the Agreement that indicates such a result was intended by the parties.

This case has many similarities with *McDonald's Operators Risk Mgmt. Assn. v. CoreSource, Inc. supra*, where McDonald's claimed that CoreSource was obligated by the terms of the contract to "handle to conclusion" all workers' compensation claims which arose during the term of the agreement. The trial court granted summary judgment in favor of CoreSource, and the appellate court affirmed, stating:

> If the parties were to have agreed that CoreSource would continue to handle claims beyond the expiration of the contract without further payment, that term should have been expressly stated in the agreement. Such a substantial

[12] When the Agreement was signed, there was a commitment that the City would upgrade the Landfill to BAT standards, thereby allowing the City Site to be in operation for decades.

> obligation, intended to survive the specified termination date of the contract, should have been contained in explicit language.

307 Ill. App.3d at 192-93. The fact that there was no explicit language providing for such a significant continuing obligation and the fact that the contract contained an integration clause caused the court to conclude that all of CoreSource's obligations terminated with the expiration of the term.[13] *See id.* at 861.

In *Chicago West Pullman Corp. v. Quinn, supra,* the court affirmed a summary judgment in favor of the defendant employee, holding that the employee did not have any obligation under the reimbursement clause following the termination of an employment contract. The court pointed out that the contingency giving rise to the enforcement of the reimbursement clause could have occurred during the life of the contract. *Id.* at *7.

While this Court has not directly addressed the issue of the necessity for explicit survival language in order to extend a party's contractual obligations beyond the contract's stated term, it has repeatedly held that there can be no implied term relating to a subject that is specifically addressed by the written terms of the contract itself. *Aultman Hosp. Ass'n. v. Community Mut. Ins. Co.* (1989), 46 Ohio St.3d 51, 53, 544 N.E.2d 920, 923; *Hamilton Ins. Srv., Inc. v. Nationwide Ins. Cos.* (1999), 86 Ohio St.3d 270, 274, 714 N.E.2d 898, 901. Since the Agreement's duration was specifically addressed in Paragraph 2, there can be no implied term requiring the County to perform any of its contractual obligations beyond the stated 12-year term. Once the parties agreed that the Agreement was to expire in 12 years, the only way to provide for the continuing obligations of either party beyond the expiration of the contract was to use explicit survival language in reference to such obligations.

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[13] The Agreement herein also contains an integration clause at Paragraph 24. Supp. 283-284.

C. Paragraph 5(a) Does Not Contain Explicit Survival Language.

Paragraph 5(a) does not explicitly state the County's monitoring obligations extend beyond the expiration date of the Agreement. Nor does Paragraph 5(a) contain any express language as to the length of the County's monitoring obligations. The Landfill closed 2-1/2 years before the end of the Agreement with monitoring being performed "prior to and subsequent to closure" within the stated 12-year term. The City argues that "applicable statutes and regulations" qualifies the provision "prior to and subsequent to closure of the City Site," so as to extend the County's monitoring obligation for thirty years following the closure of the Landfill. Nothing in the Agreement suggests the phrase "applicable statutes and regulations" in Paragraph 5(a) was intended to control the **duration** of the County's obligation, rather than merely defining the array of monitoring activities to be performed during the contract term.

Ohio law specifies a minimum monitoring period for closed landfills only. Ohio Admin. Code 3745-27-14.[14] If the Landfill was still open when the 12 year term expired, Ohio EPA's post-closure monitoring requirement would not have applied to the Landfill, and the City would have no basis to claim that the words "applicable statutes and regulations" required the County to continue its monitoring responsibilities at the open Landfill beyond the 12-year term. To accept the City's argument one has to conclude the parties intended the City Site to close before the Agreement ended on December 21, 2000 and also intended the words "applicable statutes and regulations" to dictate the length of the County's monitoring obligations. This was not what the parties intended. While it was possible the City's existing landfill could close before the end of the Agreement, the City and County expected the City Site to remain open beyond the expiration of the Agreement. (Ex. 67, p. SM00575, Supp. 309; Agreement, ¶14.)

[14] Thirty years is the minimum amount of post-closure monitoring. The director of Ohio EPA has the discretion to extend the duration of post-closure monitoring indefinitely. Ohio Admin. Code 3745-27-14(B).

The City's argument regarding the intent of the parties in using the words "applicable statutes and regulations" falls apart when it is applied to the situation of the Landfill being open at the end of the 12-year term. A more reasonable and straightforward interpretation of Paragraph 5(a) is that "applicable statutes and regulations" simply defined the menu of monitoring activities included in Paragraph 5(a), and "prior to and subsequent to closure of the City Site" ensured the County would be responsible for monitoring during the 12-year term irrespective of whether the Landfill was in the operating or closure phase.

If such a significant obligation was intended to survive the expiration of the contract, the Agreement should have explicitly provided for this. It was the City's consultant who drafted the Agreement. If there is any ambiguity in Paragraph 5(a), it must be construed against the City, the party who drafted it. *Graham v. Drydock Coal Co.* (1996), 76 Ohio St.3d 311, 314, 667 N.E.2d 949, 952. It would have been very easy for the City to insert language in Paragraph 5(a) explicitly stating that the County's monitoring obligations extended beyond the 12-year term. For whatever reason, the City chose not to include such language in the Agreement. It is not the function of this Court to rewrite the Agreement so as to make a new contract. *Ullmann v. May* (1947), 147 Ohio St. 468, 475, 72 N.E.2d 63, 67. The courts cannot do for the City what the City should have done for itself. *Id.* at 476.

D. The Court Of Appeal's Interpretation Of Paragraph 5(a).

In deciding the issue regarding the length of the County's monitoring obligation, the Court of Appeals, rather than searching for explicit survival language, appeared to search for language in the Agreement that expressly stated the County's monitoring responsibilities were only in effect during the 12-year term of the Agreement. (Opinion ¶16, Appendix p. 14.) Finding no such language, it concluded that the 12-year term had no application. When a

contract states a definite term of duration, it is not necessary nor is it advisable to state as to each covenant and obligation that it is only enforceable during the stated term of the contract, as the court below implied. In concluding the Agreement required the County to perform monitoring after the Agreement expired, the Court of Appeals focused solely on Paragraph 5(a) and essentially eliminated Paragraph 2 from the Agreement. The court did not give the parties' expressed intent *"[T]he term of this Agreement shall be twelve (12) years,"* the importance the law requires.

This case presents an opportunity for the Supreme Court of Ohio to state a clear rule of contract construction in Ohio that is in accord with the holdings of *Yearling Properties, Inc. v. Tedder, supra; McDonald's Operators Risk Mgmt. Assn. v. CoreSource, Inc., supra*; *All West Pet Supply Co. v. Hill's Pet Prods. Div., Colgate Palmolive Co., supra*; and *United States v. American Society of Composers, Authors, & Publishers, supra.* Such a pronouncement from this Court will assist drafters of future contracts, will help prevent misunderstandings as to the length of contract obligations, and will assist other Ohio courts in deciding cases where the duration of a party's contractual obligations is at issue.

E. Evidence That Is Extrinsic To The Agreement Cannot Make Up For The Lack Of Explicit Survival Language In The Agreement.

In the courts below, the City recognized the fact that there is no explicit survival language in the Agreement and was forced to argue that statements and actions of certain officials and employees of the County, substantially after the execution of the Agreement, demonstrate the County recognized its post-closure monitoring obligations. Extrinsic evidence cannot be used to create an ambiguity. *Smith v. Great Atlantic & Pacific Tea Co., Inc.* (June 29, 1990), Portage App. No. 88-P-2002, 1990 Ohio App. LEXIS 2721, at *10. If there is no ambiguity, then no extrinsic evidence of any type can be considered in interpreting a contract. *Shifrin v. Forest City*

Ent., Inc. (1992), 64 Ohio St.3d 635, 638, 597 N.E.2d 499, 501. Nor can extrinsic evidence make up for the lack of explicit survival language. If there is any need to go outside the four corners of the Agreement to determine the parties' intent as to whether the County's monitoring obligations were to extend beyond the expiration date, then the Agreement lacks the required explicit survival language.

On this subject, the Fourth Circuit stated in *Hirsch-Chemie, Ltd. v. The Johns Hopkins Univer.* (4th Cir. July 20, 1995), No. 94-2010, 1995 U.S. App. LEXIS 18078, at *16 that:

> [T]he fact that the parties by their acts and declarations indicate an intention to treat a written contract as continuing after the time proscribed in it for its termination will not have the effect of continuing such contract, although it may show a subsequent oral agreement on the same terms.

See also O'Brien v. Board of Educ. of Sch. Dist. No. 189, East St. Louis, (1979), 70 Ill. App.3d 604, 608, 388 N.E.2d 1104, 1107; *Can-Am Engineered Prod., Inc. v. International Tools, Ltd.* (E.D. Mich. Apr. 29, 1992), Civil Action No. 91-CV-71641-DT, 1992 U.S. Dist. LEXIS 8675, at *19. Because contracts can only be enforced against a county if they have been approved by the Board of County Commissioners pursuant to R.C. 305.25, any alleged oral agreements or amendments to an existing agreement would also have to be approved by the Board pursuant to R.C. 305.25. In this case, the City has admitted that the Agreement was never amended or modified. *See* p. 11, *supra.*

It is important for this Court to announce through this case that when a contract sets forth a definite term for its duration, all of the mutual obligations of the parties to that contract terminate at the end of the stated term, unless the contract contains explicit language providing that a specified obligation is to survive the expiration of the contract. For survival language to be "express" or "explicit" it cannot be susceptible of more that one reasonable interpretation, and it

cannot leave any doubt or question in the reader's mind that a particular contractual obligation is intended by the parties to survive the expiration of the contract. The alleged survival language in Paragraph 5(a) does not meet this test. The Court of Appeals' decision should be reversed and judgment should be entered in favor of the County dismissing the City's claim that the County has monitoring obligations after the expiration of the stated 12-year term of the Agreement.

> **Proposition of Law No. II: A public contract cannot not be interpreted according to the practical construction placed upon the contract by the successors of those who made it, or by other public officers or consultants, in a manner that varies from the express language contained in the contract.**

A. The Rule Of Practical Construction Was Incorrectly Applied By The Appellate Court.

1. The Provisions Of Paragraphs 8 And 9 Are Not Ambiguous.

The Court of Appeals found that there was no definition of *"rate"* in the Agreement and the words "a rate for the disposal of solid waste" were ambiguous because "there is more than one interpretation as to what constitutes the 'rate.'" (Opinion ¶¶ 19 and 20, Appendix pp. 16 and 17.) The court then used extrinsic evidence relating to the parties' purported course of performance to rewrite the Agreement and give it an interpretation which is unreasonable based upon the contract's express language. Concluding the term *"rate"* in Paragraph 8 was intended to include both the City's gate rate and the fees levied by the District, the court found that the City, by collecting the fee levied by the District, "fulfilled all its obligations under the agreement pertaining to establishing a rate and setting aside portions that rate for environmental monitoring." (Opinion ¶ 29, Appendix p. 23).[15]

[15] The Court of Appeals did not take into account the fact the City, as the Landfill's owner and operator, was statutorily required to collect the fees levied by the District and remit them to the District within a month. R.C. 3734.57(E). If, as the Court of Appeals concluded, the City fulfilled all of its obligations under Paragraphs 8 and 9 simply by collecting and remitting the fee levied by the District, then the City incurred no obligation under those provisions of the Agreement that it did not already have by statute.

On the role of the court in determining whether contract language is ambiguous, this Court stated in *Cincinnati v. Gas Light & Coke Co* (1895), 53 Ohio St. 278, 284, 41 N.E. 239, 241:

> In determining the rights of parties under a written contract, it is not the duty of a court to seek for, or create doubts or ambiguities, but rather to avoid them, and construe and enforce the contract according to its evident meaning, giving force to every word.

Paragraph 8 of the Agreement provides, in part:

> 8. Upon commencement of this Agreement, the City shall establish a rate for the disposal of solid waste at the City Site as follows:
>
> > a. the rate shall be set by the City using an objective third party acceptable to the Parties hereto, who shall conduct a rate study that shall take into account operating costs, the potential need for expansion, the need to create a reasonable index (e.g., an index composed of the Consumer Price Index and other appropriate indicators) that can be used to calculate periodic adjustments to the rate, the requirements of the Fund established pursuant to Paragraph 9, infra, and other relevant factors deemed necessary by the objective third party conducting the rate study;
> >
> > ***
> >
> > c. the rate shall be reviewed annually by the City and may be modified pursuant to the index established during the rate study referenced in Paragraph 8(a), supra. (*Emphasis added.*)

(Ex. 1, Supp. 267-287.)

The language in Paragraph 8 leaves no doubt as to what is meant by the term *"rate."* The Agreement provides (i) the City shall establish a rate for the disposal of waste at the Landfill, (ii) the rate shall be set by the City and (iii) the rate shall be reviewed annually by the City. The only *"rate"* for the disposal of solid waste that the City had authority to establish and set was the "City's gate fees." (Davis dep. Vol. I 116, supp. 157.) Michael Weadock, the City's Director of Public Service and Safety, acknowledged that the City's

landfill disposal rate [gate fee] is a separate and distinct fee from the disposal fees and generation fees that were subsequently levied by the District. (Weadock dep. 65, Supp. 258.) When the Agreement was executed, the City was already charging a rate ($6.94 per ton) for the disposal of solid wastes at the Landfill. (Ex 67, SM-00580, Supp. 314) The District was not even in existence at the time the Agreement was signed, and the County has never had any authority to establish or collect fees for the disposal of solid waste at the City-owned Landfill.

In rewriting the Agreement so that the term *"rate"* included the fees levied by the District, the court completely ignored the language in Paragraph 8(a) that refers to *"rate"* in the singular and identifies the *"rate"* as the rate established and set by the City. The court also ignored Paragraph 4(g), which requires the City to "collect all fees associated with the operation of the solid waste disposal facility." (*emphasis added*). The language in Paragraph 4(g) mirrors the language in R.C. 3734.57 that requires the owner or operator of a solid waste disposal facility to collect the fees levied by Ohio EPA and solid waste management districts. Thus, when referring to fees that are charged in addition to the City's disposal rate, including fees levied by the District and Ohio EPA, the Agreement uses the term "fees," while the Agreement uses the term "rate" in reference to the City's proprietary user charge.[16]

In addition, Paragraph 9(e) of the Agreement provides that if no SWMD is established, then a three person board selected by the parties shall administer the Fund unless the City elected to terminate the Agreement. Thus, if the District was not established and the City

[16] The distinction between proprietary rates and charges and regulatory fees is standard for publicly-owned landfills. *Compare* R.C. 343.08, authorizing county-owned landfills to collect rates and charges for use of the landfill to pay for facility operation and maintenance (a classic enterprise fund), *with* R.C. 3734.57 authorizing the State, solid waste districts and local political subdivisions to levy regulatory fees to obtain revenues used to pay for operating the government. Accordingly, the term "rate" did not require a separate definition in the Agreement in order to understand what it meant. *See Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm* (1995), 73 Ohio St.3d 107, 108, 652 N.E.2d 684, 686 (the mere absence of a definition of a term in a contract does not make the term ambiguous if its meaning can be discerned from its plain and ordinary meaning).

continued the Agreement, the obligations of the parties under Paragraphs 8 and 9 would not have changed other than a different entity would administer the Fund. Without the District, there could be no District surcharge, but the City would still have to establish the *"rate,"* conduct a rate study and allocate a portion of the *"rate"* for the Fund. When the express terms of the Agreement are considered as a whole, as the law requires, the use of extrinsic evidence to interpret the term *"rate"* in Paragraph 8(a) to include the fees levied by the District is unreasonable. The *"rate"* clearly is the City's proprietary user rate only, and does not include fees levied by the State, the District, or other politcal subdivisons.

The Court of Appeals also found Paragraphs 8 and 9 to be ambiguous as to how the rate is to be charged. (Opinion ¶20, Appendix p. 17.) In fact, there is no ambiguity as to how the rate is to be charged. Since the City was already charging a rate on a per ton basis for the disposal of solid waste at its Landfill, there is no reason to think that this same method would not continue. (Dep. Ex 67, Supp. 292-378.) While the amount of the *"rate"* would necessarily have to increase to take into account the various expenditures identified in Paragraph 8(a),[17] the City's method of setting, charging and collecting the *"rate"* would remain the same. Since the City was to retain operation and management rights pursuant to Paragraph 4(c), and was required to collect all fees at the Landfill pursuant to Paragraph 4(g), the City was the only party who could collect the proprietary user "*rate"* that the City alone was required to establish and set.

Finally, the appellate court found the Agreement to be ambiguous because it does not indicate how the Fund would be created, which party is to establish the Fund, or what portion of the *"rate"* is to be set aside into the Fund. (Opinion ¶ 20, Appendix p. 17). Once

[17] This was confirmed by the March 1989 Rate Study that Hull prepared for the City recommending an increase in the rate from $6.94 to $34.95. (Ex. 76, Supp. 426-438)

collected, the City was the only party in a position to allocate a portion of that *"rate"* for the creation and maintenance of the Fund, using the rate study for guidance in determining the amount of funds to be paid to the District for the monitoring fund. (Agreement ¶ 9(a).) Although the Agreement does not specifically designate which party is to "establish the Fund," it is clear that all of the "rate" collected by the City necessarily remained in the City's possession until it paid over a portion of the *"rate"* allocated to the Fund in accordance with Paragraphs 8 and 9. Paragraph 9(d) provides the Fund shall to be administered by the Board of the SWMD (the District Policy Committee). The Fund could not be established unless and until the City paid the allocated *"rate"* to the entity that was to adminster the Fund pursuant to Paragraph 9(d), the District Policy Committee. The District Policy Committee would not have a Fund to administer if the City did not have the obligation to set aside and pay over to the District the allocated portion of the *"rate"* that the City collected.

There is no basis for the Court of Appeals' conclusion that there was no provision in the contract requiring the City to determine the amount to be set aside in the Fund, or requiring the City to set aside a portion of the disposal rate into the Fund. The City collected the *"rate,"* and the rate study was intended to tell the City how much needed to be allocated for monitoring. The undisputed evidence showed that the City did not set the *"rate"* in accordance with the rate study, and the City never payed any portion of the *"rate"* into the Fund during the 12-year term of the Agreement. Because the City failed to set aside any portion of the City's disposal rate for environmental monitoring at any time during the 12-year term of the Agreement, the City failed to substantially perform the Agreement, and has no cause of action against the County.

2. <u>The Court Of Appeals Improperly Used The Parties' Purported Course Of Performance To Rewrite The Agreement.</u>

The appellate court used it findings of ambiguity as the basis for admitting and relying upon extensive extrinsic evidence to not only re-define the term *"rate,"* but also to determine the parties' respective obligations under Paragraphs 8 and 9. Extrinsic evidence can only be admitted to help interpret a contract if the court has first determined that the contract is ambiguous. *Shifrin v. Forest City Ent., Inc., supra,* syllabus. Ambiguity is determined from the language of the document itself, not the conduct of the parties. *Smith v. The Great Atlantic & Pacific Tea Co.* (June 29, 1990), Portage App. No. 88-P-2002, 1990 Ohio App. LEXIS 2721, at *9-10; *see also, Mark-It Place Foods, Inc. v. New Plan Excel Realty Trust, Inc.* (2004), 156 Ohio App.3d 65, 85, 804 N.E.2d 979, 994. A court's legal determination as to whether a contract is ambiguous must be made from a review of the language of the contract, free from any extrinsic evidence. If there is no ambiguity in a contract, then no extrinsic evidence of any type can be considered in interpreting the contract. *Shifrin v. Forest City Ent., Inc., supra*, 64 Ohio St.3d at 638.

As such, the parties' course of performance should not be substituted for the express terms of a contract. *Cincinnati v. Gas Light and Coke Co., supra,* 53 Ohio St. at 288. It can only used in connection with an ambiguous contract to assist the court in understanding the original intent of the parties when they entered into the contract. *Id.* Furthermore, where the terms of a contract are clear and unambiguous, a court cannot create a new contract by finding an intent not expressed in the language employed by the parties. *Shifrin v. Forest City Ent., Inc., supra*, 64 Ohio St. 3d at 638.

In this instance, the Court of Appeals did just that – it created a "new contract," although the Agreement is not ambiguous. The court looked to what it deemed to be a course of

performance by the parties, specifically the District Policy Committee's use of a portion of the fees levied by the District to pay for monitoring at the Landfill and concluded the *"rate"* identified in Paragraph 8(a) was intended to include both the gate fee charged by the City and the separate fee levied by District Policy Committee. The court made this conclusion although: (1) the terms "District fee" and "District surcharge" are not even mentioned in the Agreement; (2) the District fees were set by the District Policy Committee, not the City; and (3) neither the District nor the District Policy Committee was a party to the Agreement.

This Court limited the application of the rule of practical construction when it stated:

> But the reason of the [practical construction] rule ceases, when the acts or conduct are not those of the parties who made the contract, and are not presumed to know in their own minds what was in fact meant by the words used. The acts and conduct of the parties following after the parties who made the contract, must in the nature of the case be only their own construction of the words used, and not an acting out of the understanding of the words by the parties who used them. The same is true of public officers. They may put their own construction upon the words used, but in so doing they are not acting out the mental understanding of the sense in which the words were used by those who made the contract or written instrument.

Cincinnati v. Gas Light & Coke Co., 53 Ohio St. at 287.

The documents the City seeks to use to establish the alleged practical construction of the parties are not documents that are authored by and necessarily do not reflect the joint understanding of the three commissioners who signed the Agreement in 1988. The fact that officials or employees of the City or the County may have been under the impression that District fees were being collected pursuant to the Agreement (but were actually collected pursuant to R.C. 3734.57(E)), or mistakenly thought the District or the County had post-closure monitoring obligations at the Landfill that survived the Agrement, cannot be used to rewrite the Agreement and vary its express language. If the Court of Appeals had properly applied the rule of practical construction according to the admonitions pronounced by this Court, it would have found that the

parties' purported course of performance was neither the performance of this Agreement nor the performace of the parties who originally entered into the Agreement. Instead, it was performance by subseqent officials and employees whose actions were not consistant with the express terms of the Agreement. As such, it cannot be used to discover the original intent of the parties or to contradict the express terms of the Agreement. This case is similar to *Cincinnati v. Gas Light & Coke Co.*, where the course of dealing relied upon to establish a practical construction was much more ambiguous than the contract itself.

The City seeks to excuse its own failure to perform and through the use of extrinsic evidence construct a contract that is substantially different from the written Agreement that was entered into by the City and the County in December 1988. The City's attempt to construct an entirely different contract should be rejected because Paragraphs 8 and 9 are unambiguous. Further, even if this Court concludes that those provisions are ambiguous, the extrinsic evidence submitted by the City cannot be considered because it does not represent the interpretation of the Agreement by the County Commissioners who executed the Agreement in 1988. Accordingly, the City's purported extrinsic evidence has no legal bearing in interpreting the Agreement.

B. The City Did Not Fulfill Its Contractual Obligations By Collecting the District Fees.

The City's performance of its statutory duty, in collecting the District fees, did not equate to the City's performance of its obligations under Paragraphs 8 and 9. While the City implies that it was the City's money that was paid to the County for groundwater monitoring, this is untrue. The fees levied by the District Policy Committee pursuant to R.C. 3734.57(B) and collected by the City were always the property of the District. They were collected by the City as a trustee for the District, and kept in a separate and distinct fund to the credit of the District. R.C. 3734.57(E) and (G).

As the owner and operator of the Landfill, the City basically is running a proprietary business. In this capacity, the City charges the Landfill's customers a disposal rate, the proceeds of which the City places into a municipal enterprise fund to pay for operating and maintaining the Landfill. The District Policy Committee, on the other hand, levies District fees as a tax, rather than a charge for services, to be used exclusively to pay for District planning and programs under R.C. 3734.57(G). *American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist.* (6th Cir. 1999), 166 F.3d 835, 839. The District Policy Committee's approval to use a portion of its revenue to pay for monitoring at the Landfill provides no legitimate basis for the appellate court to rewrite the Agreement and shift the City's obligations to the County.

The appellate court erroneously held Paragraph 8(a) showed the parties intended the City's collection of the fees levied by the District to constitute full performance of the City's obligation to establish and set aside a portion of the City's "rate." (Opinion, ¶23). Paragraph 8(b) provided the City's "rate may reflect that residents of the City who are not residents of the City may be charged a surcharge to reflect the investment made by the City in the City Site." The surcharge referenced in Paragraph 8(a) legally could not have been the fee levied by the District under R.C. 3734.57(B). There is nothing in R.C. 3734.57 or elsewhere allowing the District to differentiate between City residents and County residents with respect to setting the amount of the District's fees, and there is no evidence the District ever levied a greater fee on County residents than City residents. Only the City set its proprietary user rate for non-residents one dollar and twenty-five cents ($1.25) per ton more than the rate the City charged for disposal to City residents. (Ex. 203, Supp. 531.) Here again, the appellate court mistakenly conflated the City's proprietary user rate for disposal with the fee levied by the District under R.C. 3734.57(B).

The Court of Appeals compounded its error when it found the fees levied by the District were established pursuant to the 1989 rate study and were established to cover the costs of post-closure monitoring. (Opinion ¶ 27, Appendix p. 21) The 1989 rate study makes no mention of any District fees. It only speaks to increasing the existing City gate fee. (Ex. 76, Supp. 426-438) Neither the Policy Committee minutes of the meetings where the fees to be levied by the District under R.C. 3734.57(B) were discussed and approved nor Hull's letter explaining the District's fees make any reference to the Agreement or to post-closure monitoring. (Ex. 34, Supp. 288; Ex. 35, Supp. 289-291; Ex. 82, Supp. 439-441)

The court also failed to make the distinction between the County and the District and confused the role of the District Policy Committee with the Board of County Commissioners. The District is a separate entity from the County established pursuant to R.C. 3734.52. The Board of the SWMD charged with administering the Fund was not the Board of County Commissioners, it was the District's Policy Committee established pursuant to R.C. 3734.54(B) and made up of representatives of the County, municipalities, townships, the health department and three at large members. *See* fn. 9, *supra.*

The appellate court's errors in finding an ambiguity where none exists, incorrectly applying the rule of practical construction, and misunderstanding the undisputed facts resulted in the creation of a new agreement that is contrary to the express language in the Agreement. This "new agreement" improperly shifted contractual obligations from the City to the County, and was contrary to the expressed intent of the parties as evidenced by the language chosen by the parties when the Agreement was executed. Once the City signed the Agreement and undertook the responsibility and duty for performing the obligations required of it pursuant to the Agreement's terms, the City could not be relieved of its obligations merely by its non-

performance. If the City had wanted to be relieved of its obligations under Paragraphs 8 and 9, the City should have requested that the Agreement be modified and amended. This, the City did not do.

> **<u>Proposition of Law No. III</u>: A county's continued performance of a contract after the other party substantially fails to perform its mutual obligations to the county does not waive the county's right to assert the other party's failure to perform as a defense against a claim for breach of contract.**

A plaintiff who is suing for breach of contract cannot recover unless it proves that it substantially performed the contract according to its terms. *Petersburg Fire Brick & Tile Co. v. American Clay Machinery Co.* (1914), 89 Ohio St. 365, 106 N.E. 33, paragraph one of the syllabus; *Thomas v. Matthews* (1916), 94 Ohio St. 32, 51, 113 N.E. 669, 674. Substantial performance of a contract means that mere nominal, trifling, or technical departures are not sufficient to break a contract, and that slight departures, omissions and inadvertences should be disregarded. *John P. Timmerman Co. v. Hare*, 3d Dist. No. 1-03-14, 2003-Ohio-4622, at ¶13 (citing *Ashley v. Henahan* (1897), 56 Ohio St. 559, 47 N.E. 573). A party has not substantially performed when the omissions complained of are material to the essential duties promised. *Cad Cam, Inc. v. Adept Mfg. Corp.* (June 25, 1999), Montgomery App. No. 17687, 1999 Ohio App. LEXIS 2914, at *3. When the facts on this issue are undisputed, whether they constitute substantial performance is a question of law for the court. *Luntz v. Stern* (1939), 135 Ohio St. 225, 20 N.E.2d 241, paragraph five of the syllabus.

It is undisputed that: (1) the City never paid any portion of the City's disposal rate to the District for monitoring. (Weadock dep. 165-166, Supp. 264-265); and (2) the City closed the Landfill in June 1998 – 2-1/2 years before the expiration of the Agreement -- without opening a new BAT landfill to provide disposal capacity to the County's residents. These were two

separate and distinct failures by the City to substantially perform its essential obligations to the County, and each constitutes a separate legal defense that defeats the City's claims against the County. The Court of Appeals below only addressed the City's failure to establish its Landfill disposal rate and allocate a portion of that rate for the Fund. As to this failure by the City, the Court of Appeals commited legal error by finding the County waived the City's breach and thereby obligated itself to continue performing the Agreement. (Opinion ¶31, Appendix pp. 23-24). The appellate court never addressed the City's subsequent failure to perform its obligation under Paragraph 4 to provide disposal capacity to the County's residents for the entire term of the Agreement.

A. The County Did Not Waive The City's Failure To Establish And Set Allocate A Portion Of Its Landfill Disposal Rate For The Fund.

The only alleged obligation of the County at issue in this case concerns post-closure environmental monitoring subsequent to the expiration of the Agreement. The final clause of Paragraph 9(a) sets forth the County's financial responsibility with respect to post-closure environmental monitoring as follows:

> [P]rovided, however, that to the extent that the costs of environmental monitoring subsequent to the closure of the City Site exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs pursuant to paragraph 5(a), *supra*;

This provision, by its terms, is made contingent on there being insufficient funds set aside in the Fund established under Paragraphs 8 and 9 to meet the costs for monitoring the Landfill subsequent to closure. Therefore, the City's obligation under Paragraphs 8 and 9 to establish and periodically adjust the City's landfill disposal rate by an amount necessary to accumulate money in the Fund to meet current and future costs of environmental monitoring was a condition precedent to the County's obligation to bear the costs of post-closure monitoring under the final

clause of Paragraph 9(a). *See Platt Pacific, Inc. v. Andelson* (1993), 6 Cal. 4th 307, 24 Cal. Rptr.2d 597, 862 P.2d 158, 162 ("[A] condition precedent is 'either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.'").

It is the County's position that its monitoring obligations, including any post-closure monitoring obligation, existed only during the 12-year term. The significance of the City's failure to adequately allocate a portion of its disposal rate for environmental monitoring is greatly amplified when it is claimed that the County has an obligation to pay for 30 years of post-closure monitoring at the Landfill. The City rejected recommendations from Hull to increase its landfill disposal rate by an amount sufficient to meet the anticipated costs of future environmental monitoring, and it never set aside any portion of its landfill disposal rate to fund the Fund. (Weadock dep. 165-166, Supp. 264-265). Therefore, the City failed to perform the condition precedent to the County's obligation to bear the costs of post-closure monitoring under the final clause of Paragraph 9(a). The City's failure to perform the condition precedent discharged the County from any obligation under Paragraph 9(a) to pay for the costs of environmental monitoring subsequent to closure of the City Landfill. *See Telxon Corp. v. Smart Media of Del., Inc.* (Summit App. 2005), 2005-Ohio-4931, at ¶53 (citing Restatement of the Law 2d, Contracts (1981), Section 225).

In the case *sub judice*, the Courts of Appeals held that by continuing to perform under the contract for twelve years, the County waived the City's failure to perform the condition precedent to the County's obligation under Paragraph 9(a). (Opinion ¶31, Appendix pp. 23-24.) The court's opinion overlooks an important limitation on the waiver of conditions. Where a party's waiver of the non-occurrence of a condition materially affects the value received by the

waiving party, or the burden or risk assumed by the party, then the waiver is not binding. Restatement of the Law 2d, Contracts (1981), Section 84, comment c. Thus, only conditions which are "thought of as procedural or technical, or to instances in which the non-occurrence of a condition is comparatively minor" are subject to being waived. *Id.*, comment d. Examples of minor conditions that may be waived are those relating to the time and manner of the return performance, or the giving of notice or supplying of proofs. *Id.* The treatises on contract law concur with the *Restatement*'s restrictions against the waiver of material conditions as follows:

> The concept of waiver – including both ordinary and election waiver – has been responsible for substantial erosion of the rule of strict compliance generally applicable to conditions. To keep this erosion in check, the concept of waiver is restricted to conditions that are relatively minor. An owner who has made an option contract to sell his land on condition that he is paid $100,000 cannot waive this condition. Nor can an obligor waive a condition that is material to the likelihood of having to render his own performance.

2 Farnsworth, Contracts (2d Ed. 1998), 430, Section 8.5; *accord* 8 A. Corbin Contracts (Perillo rev. 1999) 522, Section 40.2. Research has not revealed Ohio case law that has specifically adopted the rule enunciated by Farnsworth, Corbin, and Section 84 of the Restatement of the Law 2d, Contracts (1981). Courts in other jurisdictions, however, have embraced the rule. *Union Mut. Life Ins. Co. v. Chrysler Corp.* (1st Cir. 1986), 793 F.2d 1, 14; *Champaign Nat'l Bank v. Landers Seed Co.* (1988), 165 Ill. App. 3d 1090, 1096, 519 N.E.2d 957, 961; *Burness v. Bruce* (1989), 97 Ore. App. 298, 301, 776 P.2d 32, 34; *Gregory v. Baer* (4th Cir. 1945), 149 F.2d 411, 415.

The City's duty to establish its landfill disposal rate in an amount sufficient to accumulate money in the Fund to meet the Landfill's future monitoring costs pursuant to Paragraphs 8 and 9 of the Agreement, was a material condition to the County's obligation under Paragraph 9(a) to bear the costs of post-closure environmental monitoring "to the

extent" those costs "exceeded the amount set aside" in the Fund. If the City had complied with the condition, it would have minimized or substantially reduced the County's obligation to bear the excess costs if, and only if, the Fund was inadequate to pay for post-closure monitoring. The City's obligation under Paragraphs 8 and 9 of the Agreement, which directly affects the risk that the County would have to pay for post-closure monitoring under Paragraph 9(a), is precisely the type of material condition that is not subject to being waived by the County pursuant to Section 84 of the Restatement.

B. The City's Failure To Provide Disposal Capacity During The Twelve Year Term Of The Agreement.

The City failed to perform its obligations to the County a second time when the City closed the Landfill in June 1998 without opening a new BAT landfill to provide disposal capacity for the County's residents. Under Paragraphs 4(a), (d) and (e) of the Agreement, the City was required during the 12 year term of the Agreement to permit residents of Auglaize County to dispose solid waste at the City Site; obtain and maintain all permits and licenses required to ensure continued operation of the City Site; and accomplish improvements to the City Site to obtain and retain the District's C-2 exemption. The City closed the Landfill in June 1998 – two-and-one-half years before the end of the Agreement. The only reason the City did not construct the new BAT landfill is because the City did not want to spend the money for the project. (Davis dep., vol. 2, 75, Supp. 175; Hull dep., 320, Supp. 231.)

The City's acceptance of solid waste generated by the County's residents for the entire term of the Agreement was central to the purpose of the Agreement because it was necessary to obtaining Ohio EPA's approval to form the single county solid waste management district under R.C. 3734.52(C)(2). The importance of the City's promise to provide disposal capacity

for at least twelve years is underscored by Paragraph 13, which states that the City's promise was intended to induce and obtain the County's reliance in making the Agreement.

By providing landfill capacity for only nine years out of a twelve year covenant, the City did not substantially perform the Agreement as a matter of law. When viewed together with the City's failure to establish and set aside a position of its landfill disposal rate into the Fund, it is apparent that after June 1998 the City not only substantially failed to perform the Agreement, the City ceased to perform **any** of its obligations under the Agreement. The City committed a complete and total breach of the Agreement which continued through the expiration of the Agreement in December 2000.

In private meetings between the City and Ohio EPA to negotiate the closure of the Landfill, the City represented that closing the Landfill in 1998 without providing new disposal capacity would constitute a total breach on its part that would allow the County to rescind the Agreement. (Ex. 128, Supp. 472-76; Ex. 214, Supp. 549-50). Despite its total breach of the Agreement, the City argues the County should be required to pay for post-closure monitoring of the Landfill because the County "waived" the City's total breach by the District continuing to pay for Landfill monitoring until December 2000.

The City's waiver argument as to this total breach is governed by the rules concerning election of remedies. The general rule is that upon the breach of a contract, the non-breaching party has the right either to: (1) treat the contract as rescinded and recover the costs of reasonable reliance; (2) keep the contract alive for the benefit of both parties; or, (3) treat the repudiation as putting an end to the contract for all purposes and sue for recovery. *See The Cleveland Co. v. Standard Amusement Co.* (1921), 103 Ohio St. 382, 387-88, 133 N.E. 615.

The District's payment of Landfill monitoring expenses until December 2000 did not constitute an election by the County to waive the City's breach and continue the Agreement. The District's payments were made pursuant to the District's 1996 solid waste management plan prepared by the Policy Committee and its consultant, Hull and Associates. The District was not a party to the Agreement and had no obligation to pay anything to the City under the Agreement. There is nothing in the Agreement that specifically refers to fees levied by the District, or entitles the City to funding from the District for environmental monitoring. Thus, the payment of monitoring expenses by the District in no way implied an intention by the County to continue performing the Agreement despite the City's breach, nor did such payments prejudice the City.

Second, even assuming *arguendo* the District's payments after June 1998 implicitly manifested the County's intention to continue the Agreement in effect despite the City's total breach, the County would not be barred from subsequently choosing to treat the Agreement as terminated unless the City had materially changed its position in reliance on the County's continued performance. Restatement of the Law 2d, Contracts (1981), Section 378, comment a; 5A A.Corbin, Contracts (1964), 495 Section 1220; *Fredrickson v. Nye* (1924), 110 Ohio St. 459, 144 N.E. 299, syllabus, paragraph two.

The *Fredrickson* case involved a sale of property in which the plaintiff-sellers initially filed suit in Seneca County seeking damages for fraud in connection with the contract for sale, and subsequently dismissed that suit and commenced a new action in Hancock County seeking equitable relief in the form of rescission and a constructive trust. *Fredrickson, supra,* at 464-66. The former action was in the nature of affirming the contract of sale, while the latter was to nullify the contract. *Id.* at 467. In considering whether plaintiffs' initial election to affirm the

contract and seek damages constituted an irrevocable waiver of the right to change positions and seek the alternative remedy of rescission, the *Fredrickson* Court held:

> In order that an election of one remedial right shall be a bar to the pursuit of another, the same must be inconsistent and the election made with knowledge and intention and purpose to elect. The mere bringing of a suit is not determinative off the right, but the party making the election must have receive some benefit under the same, or have caused detriment to the other party, or pursued his remedy to final judgment.

Id., syllabus, paragraph two; 5A A.Corbin, Contracts, *supra* (stating that "the conclusiveness of an election depends on the existence of facts sufficient to create an estoppel").

There is no evidence the County expressly waived the City's total breach, or that the County received any consideration or benefit from the City because of the District's continued payment of Landfill monitoring costs after the City's breach in June 1998. The City's decision to close the Landfill in June 1998 without developing any new landfill capacity was not based on any statements or actions by the County. The City was not somehow misled by silence or inaction into thinking it was not in total breach of the Agreement. The City's representations to Ohio EPA show the City knew that closing the Landfill before the expiration of the Agreement without providing new disposal capacity would constitute a breach that would discharge the County from further performance, but it did not matter. The City simply decided it did not want to spend the money to create new landfill space. There is no evidence the City detrimentally changed its position because of the District's continued payment for monitoring between June 1998 and December 2000.

In sum, the City never conferred any benefit on the County after it closed the Landfill, or detrimentally relied on the District's payment for monitoring until December 2000. Accordingly, there are no facts creating an estoppel against the County from electing to treat the City's premature closure of the Landfill in June 1998 as a total breach of the Agreement by the

City. The Court of Appeals erred in finding the City "properly performed" the Agreement, and should have concluded the City committed a total breach in 1998 which the County may assert as a complete defense against the City's claims.

C. Claims Of Waiver, Modification And Practical Construction Must Be Weighed In Light Of The Terms Of The Agreement And The Fact They Are Being Made Against A County.

Because the Agreement imposes obligations on a county to make substantial ependitures of public funds, public policy dictates that great caution must be exercised in applying the doctrines of practical construction and waiver to construe such obligations agaisnt the county. The facts relied upon to support an alleged practical construction or waiver of contract terms are explained equally well as evidencing the parties' abandonment or modification of the contract.

> But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party. See Uniform Commercial Code § 2-208. Or there may be simply a mistake which should be corrected.

Restatement Second of Contracts (1981), Section 202, comment g. Similarly, this Court held in *White Co. v. Canton Transp. Co.* (1936), 131 Ohio St. 190, 2 N.E.2d 501 that:

> Courts move slowly and carefully when the claim is made that a party has waived the terms of a written contract and agreed to different terms by parole, as it in fact, if not in law, amounts to a modification of the original contract. * * *
>
> When such waiver, if in fact there was a waiver, comes after a breach of the original contract by the party claiming the benefit of the waiver, it should receive not only careful but serious consideration at the hands of the courts, as such an arrangement is diametrically opposed to sound business principles.

Id., paragraphs two and three of the syllabus. Consistent with these authorities, the trial court below correctly determined that:

> The court finds from the evidence that although both parties agree the language of the Agreement is "clear and unambiguous," during the term of the

> Agreement the parties often acted with disregard to the terms and conditions of the Agreement being either unaware of the terms or conscientiously disregarding them.

(Summary Judgment entry, Appendix p. 30.) The evidence in this case is consistent with the explanation that after the District was formed, the City and County figured out another way to implement the Landfill's monitoring program, namely, the District Policy Committee's approval to use District fees to pay for the City's monitoring costs, which made the Agreement superfluous.

In reversing the trial court, the Court of Appeals opted to conform the Agreement as much as possible to the subsequent actions of the City, County and District. The court used practical construction and waiver to effectively rule that the City, County and District modified the provisions of Paragraphs 8 and 9 to merge the District's fees into the City's disposal rate, and to eliminate the City's obligation to provide disposal capacity for the entire term of the Agreement. The Court of Appeals created an implied modification of the Agreement, even though the City admits the Agreement was never amended or modified. It is unreasonable to believe the County Commissioners would ever agree to a modification that was so unfavorable to the County, and exposes the County's treasury and the District's funds to the risk of paying for any and all monitoring required for the 1960's-era Landfill from 1988 until the end of time.

In addition, a county may only modify or amend a contract through a written instrument approved by the board of commissioners as a regular or special meeting. R.C. 305.25; *Drillex, Inc. v. Lake Cty. Bd. of Commrs.* (2001), 145 Ohio App. 3d 384, 388, 763 N.E. 2d 204, 207. The purpose for R.C. 305.25 is to protect a county from being obligated by contracts allegedly made by county officials and employees without the formal approval of the board of commissioners. This protection is equally necessary to prevent claims based upon an alleged modifiction, waiver or a

course of performance that differs from the express terms of an existing and properly adopted contract. Otherwise it would be too easy to circumvent the requierments of R.C. 305.25 and the protection intended by the General Assembly would be lost. The terms of the "new agreement" created by the Court of Appeals were never approved by the Board of Commissioners pursuant to R.C. 305.25. The City's attempt to construct an entirely different contract based on extrinsic evidence must be rejected.

> **Proposition of Law No. IV: A county's obligation to pay a municipality pursuant to a contract made pursuant to R.C. 307.15 is void if the county auditor does not certify the availability of funds pursuant to R.C. 5705.41(D) and no statutory exception to certification applies, or if the contract does not contain the provisions required by R.C. 307.16.**

Even if the City is correct in asserting the obligations of Paragraphs 8 and 9 of the Agreement were to be paid by the County, the City still cannot prevail because the County Auditor never certified the availability of County or District funds to meet the County's obligations under the Agreement as required by R.C. 5705.41(D)(1). (Schumann dep., pp. 62-63, 65, Supp. 250-252.) Another reason the City cannot prevail is because a contract made pursuant to R.C. 307.15, as was the Agreement herein, is required by R.C. 307.16 to specify the amount of money to be paid by the County or a method for determining that amount, which the Agreement fails to do.

A. The County Is Not Liable For Contractual Obligations To Spend Money That Are Not Certified By The County Auditor Pursuant To R.C. 5705.41(D).

Pursuant to R.C. 5705.41(D)(1), a county contract that requires the expenditure of money is **void** unless the county auditor has certified that adequate funds are available to meet the county's obligation. *City of Lancaster v. Miller* (1898), 58 Ohio St. 558, 51 N.E. 52, paragraphs two and three of the syllabus. In the courts below, the City raised two principal

arguments as to why the Agreement was not subject to the requirement to obtain the County Auditor's certification of available funds: (1) no certificate is required because the 1988 Agreement is a continuing contract; and (2) contracts between political subdivisions are exempt from having to obtain a fiscal officer's certification. The City's contentions are without merit.

1. The Agreement Is Not A Continuing Contract.

A continuing contract that runs beyond the termination of the fiscal year in which it was made may be certified for the amount required to meet the obligation of the contract maturing during the fiscal year it was made. R.C. 5705.41(D)(1) and R.C. 5705.44. The amount of the obligation under a continuing contract that is unfulfilled at the end of a fiscal year, "and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a **fixed charge.**" R.C. 5705.44 (emphasis added). Because the Agreement carried over into fiscal years subsequent to 1988 when the Agreement was executed, the City contends the Agreement was a "continuing contract" that did not require the County Auditor to certify up front the entire amount to be paid by the County.

The City's position is contrary to the accepted understanding of what constitutes a "continuing contract" under R.C. 5705.41(D)(1). For nearly 50 years, the Ohio Attorney General has consistently opined that a "continuing contract" is a contract that is either: (1) specifically designated as a continuing contract by a statute; or (2) a divisible contract that lasts for more than one year. 1987 Ohio Atty. Gen. Ops. No. 87-069 (citing 1958 Ohio Att'y Gen. Ops. No. 1604). A divisible contract is one in which: (1) performance of each party is divided into two or more parts; (2) the number of parts due from each party is the same; and (3) the performance of each

part by one party is the agreed exchange for the corresponding part by the other party. *Id.* The words "contracts or leases that run beyond the termination of the fiscal year in which they are made" as used in R.C. 5705.44 refers to a contract that is a "continuing contract" under R.C. 5705.41(D)(1). *Id.* Examples of continuing contracts that provide for periodic performances over a space of time include contracts for salaries, rents, insurance payments, and utilities. 1999 Ohio Atty. Gen. Ops. No. 99-049. Each of these examples involves obligations that, if carried over to a subsequent fiscal year, would require an amount of money to be paid that may be stated as a fixed charge or per unit cost, so the specific amount of funds required to meet the following year's expense can be certified as required by R.C. 5705.44.

The Agreement between the City and County is not a continuing contract under R.C. 5705.41(D)(1) because the Agreement is neither designated as a continuing contract by statute, nor is it a divisible contract. The statute the City and the County relied upon as authority for making the Agreement, R.C. 307.15, does not designate contracts entered into under that statute as continuing contracts.[18] The performances promised by the City (to provide disposal capacity and set aside part of its disposal rate into the Fund), and by the County (to assume responsibility for environmental monitoring), are not divided into the same number of parts that correspond to each other. The City construes the Agreement as an unlimited indemnity contract pursuant to which the County is required to pay the City an undefined and unlimited amount for all post-closure environmental monitoring that is required at the Landfill, for however long the monitoring may be required. Such an obligation is not a continuing contract for purposes of R.C. 5705.44, and is not within the County's power to make. *See* 1999 Ohio Atty. Gen. Ops. No. 99-049. The expenses for monitoring the Landfill fluctuate substantially from year-to-year.

[18] *Compare* R.C. 307.15 *with* R.C. 307.04, which expressly states "the board of county commissioners may award contracts for supplying [any county] building with light, heat, or power for any period of time not exceeding ten years. Sections 5705.41 and 5705.44 of the Revised Code shall not apply to any such contracts."

(Amended Complaint, ¶¶ 61-62, 83, Supp. 36, 42.) Consequently, the amount of the County's alleged financial obligation cannot be reduced to a "fixed charge" that can be certified annually as a continuing contract.

Because the Agreement is not a continuing contract that can be certified annually, and is not subject to any of the other statutory exceptions to the requirement for the County Auditor's certification, the Agreement is subject to the regular operation of R.C. 5705.41(D)(1). This requires "the entire amount due under such a contract must be certified as available when the contract is entered into, even though such amount may not be due until the following fiscal year." 1987 Ohio Atty. Gen. Ops. No. 87-069. Compliance with the certification requirement is mandatory, and no obligation to pay money is enforceable against a county absent strict compliance. *State v. Kuhner & King* (1923), 107 Ohio St. 406, 413-14, 140 N.E. 344, 346; *Lathrop Co. v. City of Toledo* (1966), 5 Ohio St.2d 165, 172, 214 N.E.2d 408, 412. Therefore, the City cannot enforce the alleged monetary obligations against the County because the County Auditor never certified the availability of County funds to meet the obligations of the Agreement.

2. <u>There Is No Exception From R.C. 5705.41(D(1) For Express Contracts Between Political Subdivisions.</u>

The General Assembly has not provided an exception for contracts between two political subdivisions, and thus no such exception can be recognized. *Swetland v. Miles* (1920), 101 Ohio St. 501, 506, 130 N.E. 22, 23 (courts cannot create exceptions in addition to those explicitly provided by the General Assembly). The City nonetheless has advanced the argument that contracts between political subdivisions are exempt from R.C. 5705.41(D)(1) based on the court's opinion in *Board of Commrs. of Jefferson Cty. v. Board of Twp. Trustees of Island Creek Twp. of Jefferson Cty.* (1981), 3 Ohio App.3d 336, 445 N.E.2d 664. In that case, the county

provided fire hydrant service to the township. *Id.* at 337. The service was initially provided pursuant to a contract between the county and township, but the contract expired and was not renewed. *Id.* The court determined that despite the lack of an express contract, Ohio's statutes pertaining to public utilities prohibited the county from terminating its fire hydrant service to the township, even if the township refused to pay for the service. *Id.* at 338. Under these circumstances, the court concluded the township was liable to the county for the continuing fire hydrant service under the equitable doctrine of quasi-contract, and this obligation was not subject to the requirement for a fiscal officer's certificate. *Id.*

The court in *Jefferson County* did not hold that express contracts between political subdivisions are not subject to R.C. 5705.41(D)(1). Such a holding would have been directly contrary to Ohio Supreme Court precedent adhering to the literal language of R.C. 5705.41(D)(1), which applies the certification requirement to "any contract ... involving the expenditure of money." *See Pincelli v. Ohio Bridge Corp.* (1966), 5 Ohio St.2d 41, 45, 213 N.E.2d 356, 360 (stating that R.C. 5705.41 "declares void every contract ... unless there is an attached certificate"). Nor did the court in *Jefferson County* hold that one political subdivision can be liable to another under a theory of quasi-contract when the failure to obtain an auditor's certificate makes their express contract void. Such a holding would have been directly contrary to the Supreme Court's rulings in *Lancaster, supra*, and *Buchanan Bridge Co. v. Campbell* (1899), 60 Ohio St. 406, 425-26, 54 N.E. 372, 375-76 that a plaintiff may not use implied contract, *quantum meruit*, or estoppel, to circumvent a failure to obtain a fiscal officer's certificate.

Put into its proper context, the *Jefferson County* decision holds that in **the absence** of an express contract, a subdivision that is receiving public utility services from another

subdivision may be held liable on a quasi-contract theory notwithstanding the lack of an auditor's certificate, if the other subdivision legally cannot terminate its services. This is a very narrow holding that is not applicable to this case. Here, the City's claims are based on the written contract between the City and the County. A party may not rely on a theory of quasi-contract when the parties' obligations arise out of an express contract. *Buchanan Bridge*, *supra*, at 426 ("where there is a subsisting express contract the recovery must be had thereon, and an action cannot be had in such case upon an implied contract'). Further, unlike the plaintiff in *Jefferson County*, *supra*, the City stopped providing landfill disposal services to Auglaize County in 1998. There is no Ohio statute that requires the City to continue providing services to the County in the absence of an express contract. These distinctions preclude applying the *Jefferson County* case to the facts of this case.

The court in *City of Cincinnati v. Board of Educ.* (1933), 30 Ohio N.P. (n.s.) 595, 600-02 held the mere fact that both parties are public bodies does not excuse the need to obtain a fiscal officer's certificate. More recently, in 2005 Ohio Atty. Gen. Ops. No. 2005-007, the Attorney General stated the requirement of a fiscal officer's certificate under R.C. 5705.41(D) "is applicable also to contracts with public entities unless specific statutes provide to the contrary." Because there is no statutory exception from certification based simply on whether the contract is between two political subdivisions, it must be concluded the City cannot enforce the alleged financial obligations of the County under the Agreement which the County Auditor never certified.

B. <u>The Agreement Is Void For Failure To Comply With R.C. 307.16.</u>

Paragraph 15 of the Agreement provides that R.C. 307.15 supplied the authority for the City and County to enter into the Agreement. R.C. 307.16 requires that:

> "Every contract entered into under sections 307.14 to 307.19, shall provide, either in specific terms or by prescribing a method for determining the amounts, for any payments to be made by the contracting subdivision into the county treasury, or by the county to the municipal corporation, in consideration of the performance of the agreement."

Ohio EPA's regulations requiring landfill monitoring apply to the owner or operator of the facility, which in this case was always the City. Ohio Admin. Code 3745-27-10 and 3745-27-14. The Agreement had the potential to shift some of the cost of monitoring the City landfill to the County during the term of the Agreement. The City expected the County to indemnify the City for the cost of complying with the City's landfill monitoring obligations under Ohio EPA regulations.

There is no provision in the Agreement that specifies the amount of funds to be paid by the County to meet the City's landfill monitoring obligation, or prescribes a method for determining those amounts. No one can examine the provisions of the Agreement and determine how much the County may be required to pay and when it will have to pay it. Because R.C. 307.16 makes such a provision mandatory in order to enter into a contract under R.C. 307.15, the absence of such a provision in the Agreement renders it void. *See Shampton v. City of Springboro* (2003), 98 Ohio St.3d 457, 460, 786 N.E.2d 883, 886 (stating that "Many times this court has held that no recovery can be had on a contract that is entered into contrary to one or more of the legislated requirements.").

CONCLUSION

The decision of the appellate court should be reversed because it failed to recognize and apply the law of contracts that requires the presence of explicit survival language in order to extend a party's contractual obligations beyond the expiration of the contract when such contract states a definite term of duration. All of the mutual obligations of the parties ended on December

21, 2000, when the Agreement expired. The City's claims against the County for the payment of monitoring expenses incurred after the termination of the Agreement should be dismissed and judgment should be entered in favor of the County.

The Court of Appeals incorrectly concluded that paragraphs 8 and 9 of the Agreement were ambiguous and improperly relied on extrinsic evidence to re-write the Agreement. Finally, the appellate court failed to address the issue regarding the necessity of the County Auditor's certification. The failure of the County Auditor to certify the availability of funds pursuant to R.C. 5705.41(D) renders the Agreement void and prevents the City from recovering against the County on the contract or in *quantum meruit.*

If this Court does not award judgment in favor of the County on Propositions of Law No. I and IV, then it should reverse the Court of Appeals on Proposition of Law Nos. II and III and reinstate the judgment of the trial court, which awarded summary judgment in favor of the County because the City failed to establish that it substantially performed its obligations under the Agreement.

Respectfully submitted,

By: _____
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PROOF OF SERVICE

I certify that a copy of this Brief of Appellant Auglaize County Board of Commissioners in Support of Jurisdiction was sent by First Class U.S. Mail to counsel for Appellee, Bruce L. Ingram, Esq. and Philip F. Downey, Esq., Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. Box 1008 Columbus, Ohio 43216-1008 on November 27th, 2006.

Counsel for Appellant Auglaize County
Board of Commissioners

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APPENDIX

IN THE SUPREME COURT OF OHIO

AUGLAIZE COUNTY BOARD OF COMMISSIONERS,	:	CASE NO. 06-1033
Appellant	:	On Appeal from the Auglaize County Court of Appeals,
vs.	:	Third Appellate District
CITY OF ST. MARYS, OHIO,	:	Court of Appeals Case Nos. 02 2005 0017
Appellee.	:	

NOTICE OF APPEAL OF APPELLANT AUGLAIZE COUNTY BOARD OF COMMISSIONERS

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FILED
MAY 25 2006
MARCIA J MENGEL, CLERK
SUPREME COURT OF OHIO

Notice of Appeal of Appellant
Auglaize County Board of Commissioners

Appellant Auglaize County Board of Commissioners hereby gives notice of appeal to the Supreme Court of Ohio from the judgment of the Auglaize County Court of Appeals, Third Appellate District, entered in Court of Appeals case No. 02 2005 0017 on April 10, 2006.

This case raises questions of public or great general interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was sent by ordinary U.S. mail to counsel for Appellee City of St. Marys, Ohio, Bruce L. Ingram, Esq. and Philip F. Downey, Esq., Vorys, Sater, Seymour and Pease, LLP, 52 East Gay Street, P.O. Box 1008 Columbus, Ohio 43216-1008 and Kraig E. Noble, Esq., Law Director, City of St. Marys, Noble, Montague & Moul, 130 East Spring Street, St. Marys, OH 45885 on May 24, 2006.

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IN THE COURT OF APPEALS OF THE THIRD APPELLATE JUDICIAL DISTRICT OF OHIO

AUGLAIZE COUNTY

CITY OF ST. MARYS, OHIO	CASE NUMBER 2-05-17
PLAINTIFF-APPELLANT CROSS-APPELLEE	JOURNAL
v.	ENTRY
AUGLAIZE CO. BOARD OF COMMISSIONERS	
DEFENDANT-APPELLEE CROSS-APPELLANT	

For the reasons stated in the opinion of this Court rendered herein, it is the judgment and order of this Court that the judgment of the trial court is affirmed in part and reversed in part with costs to be divided equally between the parties for which judgment is rendered and this cause is remanded to that court for further proceedings consistent with the opinion and judgment of this Court.

It is further ordered that the Clerk of this Court certify a copy of this judgment to that court as the mandate prescribed by Appellate Rule 27 or by any other provision of law, and also furnish a copy of any opinion filed concurrently

AUGLAIZE COUNTY
COURT OF APPEALS

AP 10 2006

SUE ELLEN KOHLER
CLERK

herewith directly to the trial judge and parties of record.

JUDGES

DATED: April 10, 2006

COURT OF APPEALS
THIRD APPELLATE DISTRICT
AUGLAIZE COUNTY

CITY OF ST. MARYS, OHIO

PLAINTIFF-APPELLANT
CROSS-APPELLEE

v.

AUGLAIZE CO. BOARD OF COMMISSIONERS

DEFENDANT-APPELLEE
CROSS-APPELLANT

CASE NUMBER 2-05-17

OPINION

CHARACTER OF PROCEEDINGS: Civil Appeal and Cross Appeal from Common Pleas Court.

JUDGMENT: Judgment affirmed in part and reversed in part and cause remanded.

DATE OF JUDGMENT ENTRY: April 10, 2006.

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AP 10 2006
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Shaw, J.

{¶1} Plaintiff-appellant, the City of St. Marys ("St. Marys") appeals the judgment of the Court of Common Pleas, Auglaize County, Ohio granting summary judgment in favor of defendant-appellee, Auglaize County Board of Commissioners ("County"). The trial court determined that the City had breached a contract agreement with the County regarding the operation of the St. Marys Landfill ("Landfill"), permitting the County to stop performing its obligations under the contract. The County also cross-appeals, claiming that the trial court erred in initially granting partial summary judgment in favor of St. Marys on the issue of the length of the County's environmental monitoring obligations after the closure of the Landfill.

{¶2} The dispute in this case arose from an agreement entered into between St. Marys and the County in 1988. The agreement was reached after the Ohio General Assembly passed H.B. 592, codified in R.C. Chapters 343 and 3734, under which the County was required to establish a "Solid Waste Management District" ("SWMD") to oversee the disposal of solid waste in the county, or to join in with several other counties in establishing a SWMD. Further, because the County had a population of less than 120,000 the County was required to obtain a "C–2 exemption" from the Ohio EPA in order to establish its own SWMD. In order to obtain that exemption, the County had to demonstrate that it had a "firm agreement" with a licensed landfill that had sufficient capacity to dispose of 10 years worth of county-generated solid waste.

{¶3} H.B. 592 also required the Ohio EPA to adopt new standards within one year governing engineering design, construction, and operation of solid waste landfills "that incorporate the best available technology with respect to such facilities." The parties recognized that the Landfill had to meet these new "best available technology" standards to fulfill the requirements for obtaining a C–2 exemption. Additionally, the City would need to expand the size of the Landfill in order to be able to dispose of 10 years worth of solid waste. The estimated cost of meeting this requirement was over 4.5 million dollars.

{¶4} The County desired to create its own SWMD, and therefore entered into negotiations with St. Marys to dispose of county-generated solid waste at the Landfill. The parties thereafter entered into an agreement for a twelve year term. Under the agreement, St. Marys permitted the residents of Auglaize County to dispose of solid waste generated within the county at the Landfill. The city also agreed to "meet the requirements of all relevant statutes and regulations with respect to [the operation of the Landfill]," and to "accomplish such improvements to the [Landfill] as are necessary to obtain and retain the C–2 exemption." Furthermore, St. Marys agreed to establish an initial environmental monitoring program as required by the Ohio EPA.

{¶5} The County agreed to monitor the Landfill to ensure it met with all Ohio EPA rules and regulations. Specifically, the agreement provided:

> **[T]he County shall:**
>
> **a. As soon as the monitoring program initiated by the City * * * is approved by the [Ohio EPA], undertake complete responsibility for all the environmental monitoring required for the [Landfill] by applicable statutes and regulations, including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, *both prior to and subsequent to closure of the site.***

Additionally, the County agreed to take all steps necessary to ensure continued Ohio EPA approval of the environmental monitoring program at the Landfill.

{¶6} Two additional provisions in the agreement are also relevant for purposes of this appeal. First, Paragraph 8 of the agreement provides that St.

Marys will "establish a rate for the disposal of solid waste" at the Landfill, and review that rate annually. Second, Paragraph 9 of the agreement states that the parties "agree that a portion of the rate established pursuant to Paragraph 8(a), supra, shall be set aside for the creation and maintenance of a fund." That paragraph also provides for the administration of the "Fund."

{¶7} Additionally, the establishment of a single-county SWMD was contemplated by the parties in the agreement, and the agreement expressly states that the County shall make a good faith effort to obtain an exemption allowing for the creation of a single-county SWMD. In 1988, the County submitted an application for a C–2 exemption to the Director of the Ohio EPA, asking the Director to rely upon the County's agreement with St. Marys; the application indicates that the Landfill met or that improvements would be made in order to meet all of the necessary requirements for obtaining the C-2 exemption. The Ohio EPA approved the application and permitted Auglaize County to establish a single-county SWMD. Thereafter, the County established the Auglaize County Solid Waste Management District ("the District").

{¶8} The parties operated under this agreement for ten years. Then, in June 1998 St. Marys closed the Landfill. The County continued to pay for the costs of environmental monitoring pursuant to the agreement for the next two years. Then, in December 2000 the County informed St. Marys that it would no

longer perform the environmental monitoring function come January 1, 2001, asserting that the agreement with the city only lasted for twelve years and the County had fulfilled its monitoring obligation as of the end of the 2000 calendar year.

{¶9} Thereafter, St. Marys filed suit against the County Board of Commissioners seeking to enforce its rights under the agreement. The parties filed cross-motions for partial summary judgment; St. Marys sought partial summary judgment on the issue of the County's obligation to pay for the costs of the entire thirty year post-closure monitoring period. The trial court issued a judgment entry denying the County's motion for partial summary judgment and granting St. Marys partial summary judgment, concluding that "the clear and unambiguous terms of the Agreement require the [County] to pay for all post-closure environmental monitoring costs at the St. Marys landfill for the entire 30-year post-closure monitoring period * * *."

{¶10} The parties then filed cross-motions for summary judgment on the remaining issues in the case. In its March 7, 2005 judgment entry the trial court granted the County's motion for summary judgment, finding that St. Marys had breached the terms of the agreement by failing to establish a disposal rate pursuant to Paragraph 8 of the agreement and failing to set aside portions of that rate into a "Fund" to pay for environmental monitoring costs pursuant to Paragraph 9. The

trial court then concluded that St. Marys' breach of the contract excused further performance of the County's obligations to pay for the costs of environmental monitoring at the Landfill. Accordingly, the trial court granted summary judgment in favor of the County and dismissed all of St. Marys' remaining claims.

{¶11} St. Marys now appeals, asserting two assignments of error:

> **The trial court erred in granting the motion of [the] Auglaize County Board of Commissioners for summary judgment.**
>
> **The trial court erred in denying the motion of [the] City of St. Marys for summary judgment.**

Additionally, the County had cross-appealed, asserting one assignment of error:

> **The trial court erred in denying the Motion of [the County] for Partial Summary Judgment and granting the Motion of [the City of St. Marys] for Partial Summary Judgment.**

I. Length of the Monitoring Obligation

{¶12} The first issue raised by the parties addresses the trial court's ruling under the first set of cross-partial summary judgment motions on the issue of the length of the County's monitoring obligations. The trial court granted partial summary judgment in favor of St. Marys on this issue, holding that there was no genuine issue of material fact that the County had agreed to pay the costs of environmental monitoring for the entire thirty-year post-closure period. In its cross-appeal, the County argues that the trial court erred in granting summary judgment on this issue in favor of St. Marys.

{¶13} The standard of review for a grant of summary judgment is de novo. *Lorain Natl. Bank v. Saratoga Apts.* (1989), 61 Ohio App.3d 127, 129. Thus, a grant of summary judgment will be affirmed only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). In addition, summary judgment is not proper unless reasonable minds can come to but one conclusion and that conclusion is adverse to the non-moving party. Id.; see *Zivish v. Mentor Soccer Club, Inc.* (1998), 82 Ohio St.3d 367, 369–70. Summary judgment should be granted with caution, with a court construing all evidence and deciding any doubt in favor of the nonmoving party. *Murphy v. Reynoldsburg* (1992), 65 Ohio St.3d 345, 360.

{¶14} The issue under these assignments of error is whether the agreement required the County to pay for post-closure environmental monitoring costs for the entire thirty-year statutory period or for the length of the agreement, which was twelve years. Thus, we are required to interpret the contract to determine whether the provisions extend the County's obligation to pay for post-closure monitoring costs beyond the term of the contract.

{¶15} "Common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.*, (1978) 53 Ohio St.2d 241, 245-

246, 374 N.E.2d 146 (citations omitted). As previously mentioned, Paragraph 5 of the contract provides that the County will "undertake responsibility for all environmental monitoring required for the [Landfill] by *applicable statutes and regulations * * * both prior to and subsequent to the closure of the site.*" Therefore, the County agreed to perform the monitoring obligation for the entire post-closure period required by the applicable statutes and regulations, in this case thirty years. Moreover, the County agreed to take "complete" responsibility for "all" of the environmental monitoring required. Under their plain and ordinary meaning, those words mean that the County took responsibility for the entire amount of the costs for the statutory term.

{¶16} Accordingly, we agree with the trial court that under the clear and unambiguous language of the agreement, the County agreed to pay the costs of environmental monitoring for the entire thirty-year post-closure period. That obligation was not limited to the twelve-year length of the contract. Based on this conclusion, the County's assignment of error is overruled. The judgment of the trial court granting summary judgment on the issue of the length of the County's environmental monitoring obligation under the agreement is affirmed.

II. Performance under the Agreement

{¶17} Following the trial court's grant of partial summary judgment on the length of the monitoring obligation, the parties filed a second set of cross-

summary judgment motions. In its motion, the County argued that St. Marys had materially breached the agreement in several ways. The trial court accepted this argument, finding that St. Marys breached the contract by failing to conduct annual rate studies and by failing to set aside portions of the disposal rate into a "Fund" to be used to pay the costs of environmental monitoring. In its first assignment of error, St. Marys argues that the trial court erred in granting summary judgment in favor of the County on the ground that St. Marys breached the agreement.

{¶18} As previously mentioned, the standard of review for a grant of summary judgment is de novo. *Lorain Natl. Bank*, 61 Ohio App.3d at 129. Thus, a grant of summary judgment will be affirmed only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C).

{¶19} The central issue in this assignment of error surrounds the trial court's interpretation of paragraphs eight and nine of the agreement, which required St. Marys to establish a rate and a Fund for paying environmental monitoring costs. Specifically, Paragraph 8 provides:

> **Upon Commencement of this Agreement, [St. Marys] shall establish a rate for the disposal of solid waste at the [Landfill] as follows:**
>
> **a. [T]he rate shall be set by the City using an objective third party acceptable to the Parties hereto, who**

> **shall conduct a rate study that shall take into account operating costs, the potential need for expansion, the need to create a reasonable index * * * that can be used to calculate periodic adjustments to the rate, the requirements of the Fund established pursuant to Paragraph 9, infra, and other relevant factors deemed necessary by the objective third party conducting the rate study;**
>
> **b. [T]he rate may reflect that residents of the County who are not residents of the City may be charged a surcharge to reflect the investments made by the City in the [Landfill];**
>
> **c. [T]he rate shall be reviewed annually by the City and may be modified pursuant to the index established during the rate study referenced in Paragraph 8(a), supra.**

There is no definition of "rate" in the agreement, or a provision stating whether the rate is to be charged by the city, the county, or both. The provision only specifies that St. Marys is to make the ultimate determination what the rate is and that the city must do so with the help of an independent third party. Additionally, Paragraph 9 of the agreement provides:

> **9. The Parties agree that a portion of the rate established pursuant to Paragraph 8(a), supra, shall be set aside for the creation and maintenance of a fund, which shall be used and administered as follows:**
>
> **a. [A] portion of the Fund shall be allocated to pay the costs of environmental monitoring of the [Landfill] * * * both prior to and subsequent to the closure of the [Landfill], to the extent that such environmental monitoring is required by the applicable statutes and regulations; the portion of the Fund to be set aside and accumulated for such monitoring**

> **purposes shall be established by the rate study to be conducted pursuant to Paragraph 8, supra, and may be periodically adjusted in accordance with the index established by that study; provided, however, that *to the extent that the costs of environmental monitoring subsequent to the closure of the [Landfill] exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs pursuant to Paragraph 5(a), supra*[.] (Emphasis added).**

There is no provision in the agreement indicating which party is to establish this fund; however, Paragraph 9(d) states that "the fund shall be administered by the Board of the SWMD * * *."

{¶20} Accordingly, these two provisions of the contract are exceedingly ambiguous as to the obligations of the parties, specifically, how the rate is to be charged and how the "Fund" is to be created. A contract term is ambiguous if it is susceptible to more than one reasonable interpretation. *U.S. Fidelity and Guaranty Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 716 N.E.2d 1201; *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 2003-Ohio-5849, ¶11-12. The term requiring St. Marys to establish a "rate for the disposal of solid waste" is ambiguous because there is more than one interpretation as to what constitutes the "rate." The term requiring the parties to establish the Fund is ambiguous because it does not specify which party has the obligation of establishing that Fund or which portion of the "rate" is to be set aside into the Fund.

{¶21} When the provisions of a contract are ambiguous, courts look to the performance by the parties as an indication of their interpretation of the agreement. See *State ex rel. Burgess & Niple v. Linzell* (1950), 153 Ohio St.545, syllabus. In *Linzell*, the Supreme Court of Ohio held:

> **Where * * * words used in a contract are reasonably susceptible to more than one interpretation and the parties to such contract have by their acts and conduct in the performance of the contract over a reasonable period of time mutually adopted one of those interpretations, the interpretation so adopted will be given those words.**

Id. Thus, the practical construction given to the terms of a contract by the parties will assist the court in giving meaning to ambiguous terms. *Consolidated Mgmt., Inc. v. Handee Marts* (1996), 109 Ohio App.3d 185, 191 (citations omitted). Therefore, because the terms in Paragraphs 8 and 9 of the agreement are ambiguous, we will look to how the parties performed under the agreement.

{¶22} After the agreement was reached, the parties agreed that John Hull of Hull & Associates would serve as an objective third party to conduct a rate study as required in the contract; Hull had previously worked with St. Marys as an environmental consultant, and later served as a consultant for the County as well. Hull conducted a rate study in 1989, and initially made several recommendations to the parties. Hull initially recommended that St. Marys increase its "gate fee" by $7.00 per ton in order to pay for various expenses necessary to obtain the C-2 exemption. In recommending this rate increase, Hull took into consideration the

need for immediate groundwater monitoring as well as the environmental monitoring costs for the required thirty-year post-closure period.

{¶23} However, the agreement also contemplated "a surcharge to reflect the investment made by the City in the [Landfill];" H.B. 592 also permitted the SWMD to establish a surcharge. Hull recommended to the Board of the SWMD that they establish a "district surcharge" of $5.24 per ton—a surcharge permitted by these provisions—to cover the costs of incorporating the "best available technology" requirements necessary to obtain a C-2 exemption. However, Hull also noted that this surcharge also took into consideration the costs of environmental monitoring. Then, Hull suggested, "Prior to the initial district surcharge implementation [the Landfill] should adjust [its] gate fee so that monitoring fees, etc., are not included in both the gate fee and the surcharge." Following this recommendation, the district established a surcharge at the rate of $5.24 per ton, and St. Marys did not increase its gate fee by the previously recommended $7.00 per ton.

{¶24} Accordingly, the parties jointly established fees and surcharges following the recommendation of Hull, the "independent third party" agreed to by the parties. Hull's recommendation took into consideration operating costs, the potential need for expansion, and the need to set aside funding to pay for future environmental monitoring costs. Furthermore, the parties adjusted these rates

periodically over the course of the next twelve years. At no time during the period the parties performed under the contract did the County object to this method of financing the monitoring costs at the Landfill. Therefore, based on the course of performance by the parties, we find that the "rate for the disposal of solid waste" included both the "gate fees" charged by the city and the separate "district surcharge."

{¶25} In Paragraph 9, the agreement requires that a portion of that rate must be set aside for the creation of a Fund to pay the costs of post-closure environmental monitoring. The portion to be set aside was to be established pursuant to the rate study conducted by Hull. The agreement does not specify which party was required to establish the Fund; however, it does indicate that "the Fund shall be administered by the Board of the SWMD established pursuant to C-2 exemption * * *." The record makes clear that the County was in control of the Board of the SWMD, as it was single-county SWMD and the County Commissioners served as the Board of the SWMD. Therefore, the task of establishing and maintaining the Fund fell to the County.

{¶26} The trial court found, however, that it was the city's responsibility to determine the amount to be set aside into the Fund, and it was the city's responsibility to set aside a portion of the disposal rate into the Fund. However, we see no provision in the contract requiring St. Marys to make this determination.

The agreement says only that the disposal rate must take into account the needs of maintaining the monitoring Fund. The agreement does not specify an exact amount to be set aside; that amount must be determined by the rate study.

{¶27} As previously discussed, the course of performance by the parties demonstrates that they mutually established gate fees and surcharges sufficient to pay the costs of environmental monitoring according to the rate study conducted by Hull. The record makes clear that St. Marys paid significant amounts to the County over the course of the twelve years following the agreement; what remains unclear is how the County allocated these monies. A 1994 Annual Report indicates that St. Marys paid over to the County $32,529.45 in 1989, over $200,000 in 1990, $170,000 in 1991, and over $200,000 in 1992. These fees reflect the district surcharges established pursuant to the rate study in 1989, a surcharge established in part to cover the costs of post-closure environmental monitoring. The County never objected to this method of setting aside monies to pay for post-closure monitoring. Accordingly, the course of performance by the parties over twelve years gives meaning to the provisions of the contract, and indicates that funds were set aside from the total disposal rate for post-closure monitoring.

{¶28} Moreover, later actions by the County indicated that money had been set aside for post-closure environmental monitoring in accordance with Paragraph

9 of the agreement. After the initial disposal rate was set, the County began charging "disposal fees" and later "generation fees." The County Commissioners indicated that these fees were to create revenues to cover the post-closure monitoring period. The County indicated as much to the Ohio EPA when it submitted updated solid waste disposal plans in 1992 and 1996. Moreover, the 1996 plan states that the SWMD had established a fund to pay for post-closure monitoring and had set aside monies into this fund each year.[1] This correlates to the County's responsibility to manage the Fund pursuant to Paragraph 9(d).

{¶29} Therefore, the performance of the parties over the course of the twelve year period following the agreement demonstrates that the parties agreed to an initial fee structure which incorporated the need to pay for post-closure monitoring, and that portions of the revenues generated by these fees were given to the County for purposes of establishing and maintaining this fund. Accordingly, the performance of the parties during this period gives meaning to the terms of the agreement; the evidence in the record demonstrates that St. Marys fulfilled all of its obligations under the agreement pertaining to establishing a rate and setting asides portions of that rate for environmental monitoring.

{¶30} Moreover, nothing in the agreement makes the County's obligations with respect to paying the costs of post-closure monitoring contingent on St.

[1] Although the County indicated to the Ohio EPA that a fund had been established, there is no evidence in the record demonstrating whether the fund was actually established.

Marys' performance. A condition precedent "calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend." *Mumaw v. Western & Southern Life Ins. Co.* (1917), 97 Ohio St. 1, 119 N.E. 132. Under the contract, the County agreed to "undertake complete responsibility for all environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to closure of the [Landfill]." The only condition precedent on that obligation was St. Marys obtaining approval by the Ohio EPA of an initial monitoring program, an obligation which was clearly performed. Nothing in the contract makes the County's obligation to pay the costs of environmental monitoring contingent on establishing the disposal rate under Paragraph 8 or establishing the Fund pursuant to Paragraph 9.

{¶31} Finally, even if we were to conclude that establishing the Fund and setting aside monies into that fund were a condition precedent to the County's obligation to pay the costs of post-closure environmental monitoring, the County has waived performance of the condition. "[I]t is a basic principle of contract law that a party to a contract who would benefit from a condition precedent to its performance may waive that condition." *Sweeney v. Grange Mut. Cas. Co.* (2001), 146 Ohio App.3d 380, 385, 766 N.E.2d 212. A condition precedent may be waived by the conduct and performance of the party asserting the condition. See

Ohio Farmers Ins. Co. v. Cochran (1922), 104 Ohio St. 427, ¶3 of the syllabus, 135 N.E. 537. The parties performed under the contract for twelve years; any condition precedent was waived due to this extended performance, and the County cannot now assert the failure of the condition as excusing its performance obligations.

{¶32} Accordingly, we find that reasonable minds could only conclude that St. Marys properly performed under the contract, and therefore the trial court erred in granting summary judgment in favor of the County. Based on the foregoing, St. Marys' first assignment of error is sustained, and the judgment of the trial court is reversed on that issue.

{¶33} Moreover, due to our conclusion that St. Marys properly performed under the contract, and due to the previous conclusion that the County was obligated to continue paying the environmental monitoring costs after the contract expired in 2000, there is no genuine issue of material fact that remains and St. Marys is entitled to judgment as a matter of law. The uncontroverted evidence in the record indicates that the County stopped performing its monitoring obligations in December 2000; the County admitted as much when it informed St. Marys that it would no longer perform these functions. Thus, the County was in breach of its obligations under the agreement when it stopped paying the monitoring costs, and no genuine issue of material fact remains regarding this issue. Accordingly, the

trial court erred in failing to grant St. Marys' second motion for summary judgment because reasonable minds can only conclude that the County breached its obligations under the agreement. St. Marys' second assignment of error is sustained.

III. Conclusion

{¶34} Based on the foregoing analysis, we find that the trial court was correct in granting St. Marys' motion for partial summary judgment on the length of the County's monitoring obligations. Therefore, the trial court's initial judgment entry granting that motion is affirmed. However, because the County was obligated to monitor the Landfill for the full thirty-year post-closure period, the County was in breach of its obligations under the agreement and summary judgment should have been granted in favor of St. Marys on the remaining issues. Accordingly, the judgment of the trial court granting summary judgment in favor of the County and denying St. Marys' second motion for summary judgment is

reversed, and the case is remanded to the trial court for issuance of summary judgment in favor of St. Marys.

Judgment affirmed in part and reversed in part.

BRYANT, P.J., and ROGERS, J., concur.
r

AUGLAIZE COUNTY
COMMON PLEAS COURT
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SUE ELLEN KOHLER
CLERK OF COURTS

IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO

CITY OF ST. MARYS, OHIO,
Plaintiff,

vs.

AUGLAIZE COUNTY BOARD
OF COMMISSIONERS,
Defendant,

CASE NO. 2002 CV 0129
SUMMARY JUDGMENT

This matter came on upon the Motion of Defendant Auglaize County Commissioners for Summary Judgment, Plaintiff's Motion for Partial Summary Judgment, the Memoranda of the parties, and the evidence.

Civ. R. 56(C) provides that, "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and stipulations of fact, if any, timely filed in the action, 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. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only there from, that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

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This action involves the claims by the Plaintiff, City of St. Marys ("Plaintiff or "City") against the Auglaize County Board of Commissioners ("Board" or "Defendant") arising out of a written Agreement they executed on December 22, 1988 (the "Agreement"). In summary, the Agreement allowed the residents of Auglaize County to dispose of solid waste generated within Auglaize County at the solid waste disposal site (landfill) operated by the City of St. Marys. Both the City and the County agree that the language in the Agreement is clear and unambiguous and the Agreement was not modified or amended.

The City had established and begun operating the landfill in the 1960's, and the landfill was in operation for twenty years prior to the Agreement between the City and the County.

Pursuant to the Agreement the City was to retain operation rights, management rights and ownership of the site, obtain and maintain all permits and licenses required to ensure continuous operation of the site, and to meet the requirements of all relevant statutes and regulations with respect to the operation. The Agreement further provided that the City would accomplish such improvements to the site as were necessary to obtain and retain the C-2 exemption granted by Ohio EPA, and to establish the initial environmental monitoring program for the Site required by OEPA, and applicable statutes and regulations. The Agreement further provided that the City would collect all fees associated with the operation of the solid waste disposal facility.

The County, upon OPEA approval of the monitoring program initiated by the City, would undertake complete responsibility for all environmental monitoring including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to closure of the site.

Paragraph 8 of the Agreement required the City to establish a disposal rate, and Paragraph 9 required that a portion of that rate be allocated and set aside for the creation of a Fund, a portion of which was to be allocated to pay the costs of environmental monitoring expenses at the City landfill both prior to and subsequent to the closure of the site to the extent that such environmental monitoring was required by the applicable statutes and regulations. The City was to perform an annual study using an objective third party acceptable to the Parties of its rates for landfill disposal so that the City could periodically adjust its rate in order to accommodate increased costs of operating the landfill, the need for potential expansion, and current and future expenses for environmental monitoring. Paragraph 8 (c) provided that the rate shall be reviewed annually by the City and may be modified pursuant to an index established during the rate study referenced in Paragraph 8 (a). The Agreement further provided, "that to the extent that the costs of environmental monitoring subsequent to the closure of the City Site exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs pursuant to Paragraph 5 (a)."

Pursuant to the Agreement the Fund was to be administered by the Board of the SWMD. In the event the City closed the landfill for any reason during the term of the Agreement (which is precisely what occurred) the County would be required to pay the costs of environmental monitoring to the extent that these costs exceeded the amount of the City's landfill disposal charges that were set aside in the Fund for environmental monitoring.

The court finds from the evidence that although both parties agree the language of the Agreement is "clear and unambiguous," during the term of the Agreement the parties often acted with disregard to the terms and conditions of the Agreement being either unaware of the terms or consciously disregarding them.

The Parties operated under this agreement until 1998. At that time the City closed the landfill in June 1998, two-and-one-half years before the expiration of the Agreement.

There is no evidence before the court that at the time the landfill was closed the County opposed the closing. In fact, the County continued to pay all costs for environmental monitoring until December 31, 2000, at which time it ceased payments of the environmental monitoring costs contending that the

County was only obligated to pay said costs under the terms of the Agreement for 12 years. It was not until the County ceased payments of the environmental monitoring costs and the City filed this lawsuit that any disagreement as to the validity, operation or interpretation of the Agreement was expressed by either party.

The central issue in this case is whether or not the County is responsible for all post-closure monitoring costs for the landfill with a potential future liability of several million dollars.

This Court in a Partial Summary Judgment dated May 4, 2004, found that Agreement requires the Defendant to pay for all post-closure environmental monitoring costs at the St. Marys landfill for the entire 30-year post-closure monitoring period or as required by applicable statutes and regulations.

Pursuant to Paragraph 9(a) of the Agreement the county is obligated to pay the post-closure environmental costs to the extent that the costs of environmental monitoring subsequent to the closure of the City Site exceed the amounts set aside in the Fund pursuant to Paragraph 9(a).

The defendant's first argument in support of its Motion for Summary Judgment is that:

"The City Committed a Material Breach of the Agreement When It Failed to Conduct Annual Rate Studies and Allocate a Portion of the City Rate for Environmental Monitoring At The City Landfill, As Required by Paragraphs 8 and 9 of the Agreement."

The Court finds as a matter of law that the County's environmental monitoring obligations under Paragraphs 5(a) and 9(a) of the Agreement are dependent upon the City performing its obligations under Paragraphs 8 and 9.

In its Judgment Entry dated May 6, 2004, this court interpreted Paragraphs 8 and 9 as follows:

> "Paragraph 8 of the Agreement required the City to establish a disposal rate, and Paragraph 9 required the City to allocate and set aside a portion of that disposal fee for the creation of a Fund, a portion of which was to be allocated to pay the cost of environmental monitoring expenses at the City landfill both prior to and subsequent to the closure of the site to the extent that such environmental monitoring was required by applicable statutes and regulations."

Under the clear and unambiguous language of Paragraph 8(a) it was the City that had responsibility to establish a disposal rate sufficient to meet the requirements of Paragraph 9(a). It was the City that had responsibility for determining the amount of funds to be set aside to pay current and future environmental monitoring expenses at the City Landfill required by Paragraph 9(a). It was the City that had responsibility for determining the amount of the allocation of the City's disposal fee to be placed in the Fund for environmental monitoring expenses.

The City never allocated and set aside any portion of the City's disposal fee for the creation of the Fund.

While Paragraph 5(a) provided that the County shall undertake complete responsibility for all environmental monitoring required for the City Site, the unambiguous language in Paragraphs 8 and 9 shows that it was the intent of the parties that the costs for environmental monitoring at the City Landfill was to be paid from the collection of the City's landfill disposal rate during the term of the Agreement. The City had the obligation to perform a rate study annually to make sure that the City's disposal rate would provide enough funds to pay the anticipated environmental monitoring costs both prior to and subsequent to the closure of the City Landfill.

The County's financial obligations for environmental monitoring costs arose only to the extent that the cost of environmental monitoring subsequent to the closure of the City Landfill exceeded the amount set aside by the City. After having failed to conduct annual rate studies and having failed to set aside and pay over any portion of the City's disposal fee for environmental monitoring costs, the City now seeks to hold the County liable for all environmental monitoring costs incurred at the City site for at least 30 years after the closure of the City Landfill. If the City would have fully performed its contractual obligations, the obligation which the City now seeks to impose on the County would be

minimal.

Although the City clearly understood its obligation to set aside funds for environmental monitoring in March, 1989, it failed to follow through with an appropriate rate increase to cover the environmental monitoring costs and failed to deposit any portion of its disposal rates into the Fund for environmental monitoring. Exactly why the City chose not to set aside funds for environmental monitoring is unclear. There was never any written modification or amendment of the Agreement which relieved the City from its obligations in this regard.

The evidence shows that in April and May, 1989, the City's environmental consultant, John Hull, who attended meetings of the District's Policy Committee and later served as the environmental consultant for the District as well, recommended that the District enact a district surcharge of approximately $5 per ton for waste disposed of at the City Landfill and at the Wapakoneta Landfill. Mr. Hull recommended that the proceeds from the District surcharge be used for the installation and monitoring of groundwater monitoring wells at both the City of Wapakoneta Landfill and the St. Marys landfill.

The suggestion to use the District surcharge to pay for groundwater monitoring at the two landfills was not based on any contractual obligation since neither the District nor the County had any contract with the City of Wapakoneta to pay for environmental monitoring, and the District did not have any contract

with the City of St. Marys. The fact that the District began to set aside funds to pay for monitoring expenses at the Wapakoneta Landfill and the St. Marys Landfill, the two operating landfills within the District, did not relieve the City of its obligations under the Agreement to set aside funds for environmental monitoring. If the City wished to be relieved from its obligations, it should have requested an amendment to the Agreement. This was never done.

The District was not a party to the Agreement, and the Agreement makes no reference to a District surcharge or the District having responsibility to pay for monitoring expenses at the City Landfill. The fact that the District, separate and apart from the Agreement, paid for some of the monitoring expenses at the City Landfill did not preclude or relieve the City from performing its obligations to conduct its own rate studies and deposit sufficient funds for the anticipated monitoring expenses.

The undisputed facts show that the City breached its obligations under Paragraphs 8 and 9 by failing to set aside any portion of the City's disposal rate at any time during the 12-year term of the Agreement. Such a substantial breach of the Agreement precludes the City from recovering any amounts claimed to be owed to it by the County under the Agreement. The general rule in Ohio is that where a party has partially but not substantially performed, and the failure to perform is not excused, no recovery can be had on the contract or in *quantum meruit*. *W Wagner & G. Wagner Co., L.P.A. v. Block* (1995), 107 Ohio App. 3d 603, 608; *Miller* v. *Bealer* (1992), 80 Ohio App. 3d 180. 183.

The City claims in its Amended Complaint that the County should be required to pay for environmental monitoring after the City Landfill closed. The clear and unambiguous language in the Agreement provides that the County's obligation in this regard arose after the City was required to perform its obligations in conducting annual rate studies and setting aside portions of the City disposal fee for environmental monitoring. The County's obligation in Paragraph 9(a) to pay for environmental monitoring subsequent to the closure of the City Landfill to the extent that the costs exceed the amounts set aside by the City is clearly dependent upon the City's fulfillment of its obligation to set aside sufficient funds during the 12-year term of the Agreement. The County's performance was to occur sequentially after the City's performance.

In agreeing to be responsible for environmental monitoring costs subsequent to the closure of the City Landfill to the extent such costs exceed the amounts set aside in the Fund, the County was entitled to rely on the City's promise that it would conduct annual rate studies and set aside sufficient funds to pay for anticipated environmental monitoring expenses both prior to and subsequent to the closure of the City Landfill. The City had the responsibility and the ability to make sure that sufficient funds were set aside for future monitoring expenses, but the City failed to fulfill this responsibility.

The City's promise to conduct annual rate studies to determine the amount

of funds needed for future environmental monitoring and its promise to allocate and set aside such funds is just as important, if not more so, than the County's promise to pay for environmental monitoring costs subsequent to the closure of the City Landfill to the extent that such costs exceeded the amount which the City promised to set aside.

Before a party's performance under a contract can be excused, there must be a legal excuse for the nonperformance. *Garofalo v. Chicago Title Ins. Co.* (1995), 104 Ohio App. 3d 95, 108. There was no legal excuse for the City's failure to conduct annual rate studies and set aside funds during the 12-year term for current and future environmental monitoring expenses at the City Landfill. Because of the City's clear failure to substantially perform its contractual obligations, the court can determine as a matter of law that the City cannot recover against the County on the contract or in *quantum meruit.*

In further support of this decision the court adopts the Plaintiff's position that, "The requirements of R.C. 5705.41 do not apply where, as here, the obligations under the contract at issue may be met with specific, allocated funds as opposed to general funds of the county.

In its Answer to the Amended Complaint and in its Memorandum in Support of its Motion for Summary Judgment the Defendant argues that pursuant to R.C. 5705.41(D) the Agreement is void because the Auglaize County Auditor

did not certify the availability of funds to meet the county's financial obligations under the 1988 Agreement.

Plaintiff in its Memorandum in Support of Motion for Summary Judgment argues that, "Two statutory exemptions from R.C. 5705.41 apply to this Agreement between the County and St. Marys." The Plaintiff further argues that R.C. 5705.41 has no effect in this case as there are two specific statutory exemptions found in the express language of R.C. 5705.41 and a related statute, R.C. 5705.44. Plaintiff points out that these exemptions provide that R.C. 5705.41's requirements of a certification at the time the contract is entered into does not apply to continuing contracts that run beyond the termination of the fiscal year in which it was made, and they do not apply to contracts that are funded from the earnings of a public utility.

The court agrees with the Plaintiff's position regarding the application of the exemption from the requirements of R.C. 5705.41. Clearly the Agreement was to run beyond the fiscal year of 1988, the year in which the Agreement was made. Further, the Agreement provides that the cost of environmental monitoring expenses at the City landfill both prior to and subsequent to the closure of the site the contract was to be paid from a Fund derived from a portion of the disposal fee established by the City. As noted above, the City failed to establish the Fund, to conduct annual rate studies, or to set aside sufficient funds to pay for anticipated environmental monitoring expenses.

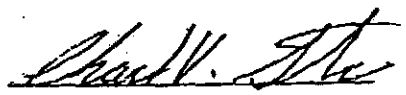
R.C. 5705.44 provides that when payments for a contract are to be made from the earnings of a public utility and when the contract is made without a certification, "...no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable, except out of such earnings." In this case, as a result of the City's failure to establish and adequately fund the "Fund" required by the Agreement, there are no earnings from which the City can claim or demand recovery.

The court finding that there are no genuine issue as to any material fact and that reasonable minds can come to but one conclusion and that conclusion is adverse to the Plaintiff, the Plaintiff being entitled to have the evidence or stipulation construed most strongly in its favor, hereby finds as a matter of law for the Defendant and grants Summary Judgment to the Defendant for the reasons state herein.

The court, therefore, orders that the Plaintiff's Complaint be dismissed with costs to Plaintiff.

So Ordered.

Dated: March 2, 2005



Charles D. Steele, Judge

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Attorneys for Plaintiff

Attorneys for Defendant

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AUGLAIZE COUNTY
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IN THE COURT OF COMMON PLEAS OF AUGLAIZE COUNTY, OHIO

CITY OF ST. MARYS, OHIO,
Plaintiff,

vs.

AUGLAIZE COUNTY BOARD
OF COMMISSIONERS,
Defendant,

CASE NO. 2002 CV 0129
JUDGMENT ENTRY

This matter came on upon the Motion of Defendant Auglaize County Commissioners for Partial Summary Judgment and Plaintiff's Cross-Motion for Partial Summary Judgment. The Court had specifically asked the parties to present their motions with reference to the Parol Evidence Rule to determine whether or not the Parol Evidence Rule is applicable in this case and to determine whether the Court can rule on the motions for partial summary judgment within the parameters of the Parol Evidence Rule.

Civ. R. 56(C) provides that, "Summary judgment shall be rendered forthwith if the pleading, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence in the pending case and stipulations of fact, if any, timely filed in the action, 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. A summary judgment shall not be rendered unless it appears from such evidence or stipulation and only there from, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against

whom the motion for summary judgment is made, such party being entitled to have the evidence or stipulation construed most strongly in his favor.

This action involves the claims by the Plaintiff, City of St. Marys ("Plaintiff or "City") against the Auglaize County Board of Commissioners ("Board" or "Defendant") arising out of the written Agreement they executed on December 22, 1988 (the "Agreement").

Relying on Paragraph 5 of the Agreement which provides that,

"Pursuant to this Agreement, the County shall:

a. as soon as the monitoring program is approved by the OPEA, undertake complete responsibility for all environmental monitoring required for the City Site by applicable statutes and regulations, including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to closure of the site."

It is the City's position that the Agreement required the County to pay any and all environmental monitoring expenses incurred by the City's landfill during the 12-year term of the Agreement and for 30 years following the closure of the City landfill. In effect, the City argues that the County agreed to guarantee and indemnify the City against all future costs for environmental monitoring at the City's landfill. The Plaintiff seeks

summary judgment in its favor on the issue of the County's obligation to pay for all environmental monitoring at the St. Marys Landfill.

It is the County's position that the Agreement provides in Paragraph 2, "[T]he term of this Agreement shall be twelve (12) years," and that the Agreement lacks any explicit language stating that any of the County's obligations survived the termination of the Agreement on December 21, 2000. The County seeks summary judgment dismissing of all claims of the Plaintiff based on the 1988 Agreement.

Pursuant to the Agreement the City was to provided solid waste disposal capacity at the City's landfill for all solid waste generated by the County's residents during the 12-year term of the Agreement. The City retained all operational and management rights for the landfill. The City was required to maintain all permits and licenses required to ensure continued operation of the landfill, and was responsible for complying with the requirements of "all relevant statutes and regulations" applicable to the landfill's operation.

The County accepted complete responsibility for environmental monitoring required at the landfill, "including the operation of such environmental monitoring and any capital expenditures necessary to accomplish the monitoring, both prior to and subsequent to the closure of the City landfill."

The City closed the landfill in June 1998, two-and-one-half years before the expiration of the Agreement, a possibility contemplated in the Agreement.

Paragraph 8 of the Agreement required the City to establish a disposal rate, and Paragraph 9 required the City to allocate and set aside a portion of that disposal fee for the creation of a Fund, a portion of which was to be allocated to pay the costs of environmental monitoring expenses at the City landfill both prior to and subsequent to the closure of the site to the extent that such environmental monitoring was required by the applicable statutes and regulations.

The City was to perform an annual study of its rates for landfill disposal so that the City could periodically adjust its rate in order to accommodate increased costs of operating the landfill, the need for potential expansion, and current and future expenses for environmental monitoring. The Agreement further provided, "that to the extent that the costs of environmental monitoring subsequent to the closure of the City Site exceed the amounts set aside pursuant to this subparagraph, the County shall bear those costs pursuant to Paragraph 5 (a), supra."

In the event the City closed the landfill during the term of the Agreement, the County would be required to pay the costs of environmental monitoring to the extent that these costs exceeded the amount of the City's landfill disposal charges that were set aside in the Fund for environmental monitoring. If the Agreement was terminated for any reason prior to the stated expiration date, the

monies in the Fund allocated for environmental monitoring were to be distributed between the County and the City, based upon the number and size and capacity of solid waste disposal sites operated by each during the Agreement.

The Agreement incorporated by reference a C-2 Exemption to be obtained by the County pursuant to H.B. 592. The County received the C-2 Exemption from the Ohio EPA on February 17, 1989. ?

Both the City and the County agree that the language in the Agreement is clear and unambiguous and the Agreement was not modified or amended. The crux of the lawsuit is the interpretation of the language of the Agreement as it pertains to the length of time of the County's responsibility for post-closure environmental monitoring.

When parties have deliberately put their engagement into writing in terms that evidence a legal obligation without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the entire engagement of the parties, and the extent and manner of their undertaking, have been reduced to writing. In other words, the parol agreement is merged in the written agreement and all parol testimony of prior or contemporaneous conversations or declarations tending to substitute a new and different contract for the one evidenced by the writing is incompetent in the absence of fraud, mistake, or other

invalidating cause. By prohibiting evidence of parol agreements, the Parol Evidence Rule seeks to insure the stability, predictability, and enforceability of finalized written instruments.

It is not the purpose of the Parol Evidence Rule to forbid extrinsic evidence in general, but only evidence that is intended to supersede and destroy the clear intention set forth in the written instrument. (*South Union, Ltd. v. George Parker & Associates*, 29 Ohio App. 3d 197).

The Court agrees with the parties that the words and intent of the Agreement are clear and unambiguous. Parol evidence is neither permitted nor needed in this case to interpret the meaning of the Agreement. Although the Plaintiff submitted several exhibits as part of an affidavit for consideration by the Court that could be considered to be parol evidence, with the exception of those items related to the C-2 Exemption which was incorporated into the Agreement, said exhibits were not needed to interpret the clear and unambiguous meaning of the Agreement and were not considered by the court.

The clear intention of the Agreement was for the City to provide the County waste disposal capacity for a period of twelve years. The County agreed to, "...undertake **complete responsibility for all environmental monitoring** (emphasis added) required for the City Site by applicable statutes and regulations, including the operation of such environmental monitoring and any

capital expenditures necessary to accomplish the monitoring, **both prior to and subsequent to closure of the site** (emphasis added)."

The County agues that this responsibility was limited by the twelve-year term of the Agreement, and that it had no responsibility for environmental monitoring after the twelve-year term of the Agreement. The Court does not agree.

In harmonizing apparently conflicting clauses of a contract they must be construed so as to give effect to the intention of the parties as gathered from the whole instrument, and where the object to be accomplished is declared in the instrument, the clause which contributes most essentially to that object will control. If possible, every provision in a contract should be held to have been inserted for some purpose and to perform some office, and an attempt must be made to harmonize, if possible, all the provisions of the contract. Anything in an Agreement which in any way conflicts with the chief purpose therein must give way to the clause which makes the major intent effective. ((*Ford Motor Co. v John L. Frazier & Sons Co.* 8 O App 2d 158)

All contracts should receive a reasonable construction in order to carry out the presumed intention of the parties as expressed by the language used. (*West v Citizens Ins. Co.*, 27 OS 1). Instruments are not to be construed so as to arrive at absurd or impossible results. (*Cincinnati v Cameron*, 33 OS 336). If the meaning is doubtful so that the contract is susceptible of two constructions, the

interpretation which makes a rational and probable agreement must be preferred. (*Salemi v Duffy Constr. Corp.*, 31 O Ops 2d 482).

In the present case the landfill site was closed two and one-half years prior to the termination of the Agreement, a possibility contemplated in the Agreement. If, however, the landfill site had remained open for the entire twelve-year term of the Agreement, and as the County argues the County had no post-closure monitoring responsibility after the twelve-year term, the County would have had no responsibility for environmental monitoring "subsequent to the closure of the site." In that case, Paragraph (5) (a) of the Agreement would have no meaning. Clearly, the intent of the Agreement was otherwise. If one construction of a doubtful condition would make that condition meaningless, and it is possible to give it another construction that would give it meaning and purpose, the latter construction must obtain. (*Farmers Nt. Bank v Delaware Ins. Co.*, 83 OS 309).

Further, the Agreement at issue in this case incorporated by reference the County's C-2 exemption. In the County's Exemption Request of December 1988, the County acknowledged post-closure costs at that time assumed to be for 10 years. (Exemption Request, ORC 3734.52 (C)(2), Auglaize County, Section III). The Court was unable to ascertain from the record how or when the post-closure monitoring period became thirty years, however, the County has undertaken in the Agreement, "complete responsibility for all environmental monitoring required

for the City Site by **applicable statutes and regulations....**" (emphasis added). If, in fact, the applicable statutes and regulations require a 30-year post-closure monitoring period, then that is the period of complete responsibility undertaken by the County pursuant to the Agreement.

The Court, therefore, finding there are no genuine issues of material fact, and construing the evidence most strongly in favor of the Defendant, hereby finds as a matter of law in favor of the Plaintiff that the clear and unambiguous terms of the Agreement require the Defendant to pay for all post-closure environmental monitoring costs at the St. Marys landfill for the entire 30-year post-closure monitoring period or as required by applicable statutes and regulations and grants Partial Summary Judgment in favor of the Plaintiff on that issue.

The Court further finds the Defendant's Motion for Partial Summary judgment not well taken and therefore overrules the same.

So Ordered.

Dated: May 4, 2004

Charles D. Steele, Judge

VOL 162 PAGE 610

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Attorneys for Plaintiff

Attorneys for Defendant

CLERK TO FURNISH COPY TO COUNSEL OF RECORD AND UNREPRESENTED PARTIES

VOL 162 PAGE 611

Service: Get by LEXSEE®
Citation: 1999 ohio app. lexis 2914

*1999 Ohio App. LEXIS 2914, **

CAD CAM, INC., Plaintiff-Appellee v. ADEPT MANUFACTURING CORP., Defendant-Appellant

C.A. CASE No. 17687

COURT OF APPEALS OF OHIO, SECOND APPELLATE DISTRICT, MONTGOMERY COUNTY

1999 Ohio App. LEXIS 2914

June 25, 1999, Rendered

PRIOR HISTORY: **[*1]** T.C. CASE NO. 97-8031.

DISPOSITION: Affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed a judgment for Plaintiff rendered by the trial court on defendant's claim for breach of contract.

OVERVIEW: Plaintiff and defendant entered into a contract. Defendant failed to make any payments to plaintiff. Plaintiff commenced a collection action. Defendant answered and alleged a material breach of contract by plaintiff that operated to relieve defendant of any duty to pay plaintiff for its services. The magistrate found that plaintiff had substantially performed its obligations under the contract and granted plaintiff a judgment against defendant. Defendant objected, but the trial court overruled the objection and adopted the magistrate's decision as its order. Defendant challenged and the court affirmed. The court held that determinations of the issues raised on appeal required findings concerning the parties' intentions and expectations, and whether the services provided satisfied essential duties. Because these issues presented mixed questions of law and fact, the trial court was in a better position to determine whether a breach had occurred. The court declined to substitute its judgment for that of the trial court.

OUTCOME: The court affirmed the judgment because the trial court was in a better position to determine, based on findings of intent and expectation as well as satisfaction of essential duties, whether a breach had occurred.

CORE TERMS: man-hours, breach of contract, substantial performance, material breach, contract price, failed to pay, expended, omissions, machine, remodel, holes

LexisNexis(R) Headnotes ◆ Hide Headnotes

Contracts Law > Breach > Causes of Action > General Overview

Contracts Law > Performance > Substantial Performance

HN1 A party that breaches a contract is not entitled to collect damages from a non-breaching party. Neither does mere partial performance entitle the breaching party to collect, unless the performance it renders substantially satisfies its contract obligations. A party fails to substantially perform when its omissions are material to the essential duties it promises to perform. More Like This Headnote |

Shepardize: Restrict By Headnote

COUNSEL: John T. Ducker, Dayton, Ohio, Attorney for Plaintiff-Appellee.

Richard L. Carr, Jr., Dayton, Ohio, Attorney for Defendant-Appellant.

JUDGES: GRADY, P.J. WOLFF, J. and YOUNG, J., concur.

OPINION BY: GRADY

OPINION: OPINION

GRADY, P.J.

Defendant, Adept Manufacturing Corp. ("Adept"), appeals from a judgment for Plaintiff, Cad Cam, Inc. ("Cad Cam"), on Adept's claim for breach of contract.

Adept is a tool company. It was engaged by Alcoa Corporation to remodel a machine used to drill holes in automobile bumpers, automating the process by which the location of the holes is selected.

Cad Cam provides design and consulting services. Cad Cam and Adept entered an oral contract whereby Cad Cam agreed to provide such services for the work that Adept would perform on Alcoa's machine. Adept agreed to pay Cad Cam $ 15,000 for its services.

The design plans that Cad Cam delivered to Adept were, in Adept's view, incomplete in relation to Adept's needs. As a result, according to Adept, it was required to perform 150 hours of services to cure the defects and omissions.

Cad Cam agreed to reduce its invoice price by $ 4,150, the value of the additional **[*2]** man-hours that Adept was required to expend. This lowered the contract price from $ 15,000 to $ 10,850. However, Adept failed to pay Cad Cam any monies at all on the job. Adept also failed to pay two unrelated invoices totaling $ 5,700.

Cad Cam commenced the underlying action against Adept to collect the amounts it claims it is owed. Adept answered, alleging a material breach of contract that operated to relieve Adept of any duty to pay Cad Cam for its services.

The case was referred to a magistrate, who found that Cad Cam had substantially performed its obligations under the contract, and granted Cad Cam a judgment against Adept in the amount of $ 9,750 for services that Cad Cam performed. Adept objected to the magistrate's application of the substantial performance doctrine to reject its breach of contract defense. The trial court overruled the objection and adopted the decision as its own order. Adept filed a timely notice of appeal.

Adept argues on appeal that the trial court erred in applying the "substantial performance" exception to reject Adept's breach of contract claim.

HN1↑A party that breaches a contract is not entitled to collect damages from a non-breaching party. **[*3]** *Sites v. Moore* (1992), 79 Ohio App. 3d 694, 607 N.E.2d 1114. Neither does mere partial performance entitle the breaching party to collect, unless the performance it rendered substantially satisfied its contract obligations. *Miller v. Bealer* (1992), 80 Ohio App. 3d 180, 608 N.E.2d 1133. A party fails to substantially perform when its omissions are material to the essential duties it promised to perform.

The contract into which Cad Cam and Adept entered was oral, not written. Further, it appears to have contemplated some degree of collaboration between them in achieving its object, which was to allow Adept to remodel the machine as Alcoa Corporation wished. The trial court could reasonably find, on the record before it, that Cad Cam had performed its essential duties under the contract. The fact that Adept expected a more complete service does not undermine the correctness of that judgment.

The trial court awarded Adept a set-off from the contract price in the amount of the value of the services it contributed to perform the duties that Cad Cam failed to perform. Adept does not question the amount, which is calculated on an hourly rate. Rather, Adept argues that the extent of **[*4]** that contribution, 150 man-hours out of a total of

690 that Adept expended on the job, necessarily demonstrates a material breach by Cad Cam. We do not agree.

The additional man-hours that Adept expended, about 22% of the total man-hours for the job, is not trifling. However, the real issue is whether Cad Cam's failure to provide the services involved was a material breach of the contract into which the parties had entered. Determination of that issue requires findings concerning their intentions and reasonable expectations, and whether the services that Cad Cam provided satisfied its essential duties. Those issues present mixed questions of law and fact.

The trial court and its magistrate, who heard and saw the witnesses, are in a far better position than is this appellate court to determine whether a breach occurred in this case, and whether Adept substantially performed its obligations under the contract. Reversal on the basis argued would require us to substitute our judgment for the judgment of the trial court in too many of those respects, which we must decline to do.

The assignment of error is overruled. The judgment of the trial court will be affirmed.

WOLFF, **[*5]** J. and YOUNG, J., concur.

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Citation: 1992 U.S. Dist. LEXIS 8675

*1992 U.S. Dist. LEXIS 8675, **

CAN-AM ENGINEERED PRODUCTS, INC., Plaintiff, v. INTERNATIONAL TOOLS LTD./ITL INDUSTRIES LTD. and VENTRA GROUP, INC., Defendants.

Civil Action No. 91-CV-71641-DT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

1992 U.S. Dist. LEXIS 8675

April 29, 1992, Decided
April 29, 1992, Filed

CASE SUMMARY

PROCEDURAL POSTURE: Defendant manufacturer brought a motion for summary judgment in plaintiff seller's complaint alleging a breach of contract and interference with the seller's contractual relationship with its at-will employee.

OVERVIEW: The seller brought an action against the manufacturer seeking additional commissions after the manufacturer allegedly terminated its contract with the seller and hired the seller's at-will employee. The manufacturer brought a motion for summary judgment claiming that its memorandum of agreement, which governed the parties' relationship, had expired and was not renewed. The court granted the motion for summary judgment because it found that: 1) the memorandum was evidence of a valid contract that bound the parties; 2) the seller had accepted the terms and benefits of the agreement by performance and silence; 3) the memorandum memorialized the parties' discussions and there was no requirement that it was intended to be signed by the seller; 4) the procuring clause doctrine did not apply because the memorandum unambiguously provided an expiration date as a natural termination of the contract and a non-performance clause for premature termination; 5) the seller's equitable claims for commissions payable after the termination of the contract were superseded by express contractual language; and 6) there was no evidence of intentional interference with the seller's at-will employee.

OUTCOME: The court granted the manufacturer's motion for summary judgment and dismissed the seller's complaint for breach of contract and intentional interference with the seller's contractual relations.

CORE TERMS: memorandum, termination, terminate, promissory estoppel, summary judgment, addendum, procuring, written contract, unjust enrichment, post-termination, notice, special commission, expiration date, written notice, negotiated, premature, expire, summary judgment motion, deposition testimony, oral contract, multi-year, definite, sentence, duration, offeree, admits, movant, contractual relationship, termination provision, breach of contract

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

HN1 Summary judgment is proper if the pleadings, depositions, answer 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). More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN2 The plain language of Fed. R. Civ. P. 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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. More Like This Headnote

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Evidence

HN3 The party moving for summary judgment must meet the initial burden of showing the absence of a genuine issue of material fact as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case. The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must present affirmative evidence in order to defeat a properly supported motion for summary judgment. The trial court does not have the duty to search the entire record to establish that it is bereft of a genuine issue of material fact. The respondent must do more than simply show that there is some metaphysical doubt as to the material facts. Further, where the record taken as a whole could not lead a rational trier of fact to find for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN4 When the provisions of a contract are clear and unambiguous, the legal effect and construction of the contract are matters of law and are thus appropriately decided by the court. More Like This Headnote

Contracts Law > Formation > Acceptance > General Overview

HN5 Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer. Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise. Acceptance by a promise requires that the offeree complete every act essential to the making of the promise. More Like This Headnote

Contracts Law > Formation > Acceptance > General Overview

Contracts Law > Formation > Offers > General Overview

HN6 Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept. More Like This Headnote

Business & Corporate Law > Agency Relationships > Duties & Liabilities > Compensation

HN7 In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan, if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. More Like This Headnote

Contracts Law > Types of Contracts > Express Contracts

Contracts Law > Types of Contracts > Implied-in-Law Contracts

HN8 The doctrine of unjust enrichment is inapplicable when the parties are bound by an express contract. The essential elements of an unjust enrichment claim are: (1) receipt by defendant of a benefit from plaintiff, (2) which benefit it is inequitable that defendant retain. However, a claim for unjust enrichment cannot stand when the parties are bound by a written contract covering the subject matter of the quasi-contractual claim. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Consideration > Enforcement of Promises > Forbearance

Contracts Law > Consideration > Promissory Estoppel

HN9 The elements of equitable or promissory estoppel are: (1) a promise; (2) that the promisor should reasonably have expected to induce definite action by promisee; (3) which in fact produced reliance or forbearance; and (4) under such circumstances that the promise must be enforced to avoid injustice. The doctrine of promissory estoppel finds consideration even absent a bargain because the detriment of the promisee is a consequence of the promisor's promise, but does not induce the making of the promise. However, where there is express consideration, the doctrine of promissory estoppel becomes superfluous. A court need not rely on promissory estoppel when the express terms of a written contract cover the subject of the contract allegedly founded on promissory estoppel. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Breach > General Overview

Torts > Business Torts > Commercial Interference > Contracts > General Overview

HN10 The elements of an interference with business relationship claim are: (1) existence of a contract; (2) a breach of this contract; and (3) instigation of the breach by the alleged tortfeasor without justification. To be actionable, the interference must be intentional. Moreover, interference for the purpose of competition is insufficient. More Like This Headnote

JUDGES: **[*1]** ROSEN

OPINION BY: GERALD E. ROSEN

OPINION: OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

AT A SESSION of said Court held in the Federal Building, Detroit, Michigan on APR 29 1992 4-29-92

PRESENT: HONORABLE GERALD E. ROSEN United States District Judge

INTRODUCTION

This matter is before the Court on Defendant Ventra Group, Inc.'s ("Ventra") n1 December 23, 1992 Motion for Summary Judgment. Ventra claims that there is no genuine issue of fact as to Plaintiff's several claims, including breach of contract and interference with contractual relations. Plaintiff responds that material issues of fact remain, rendering summary judgment inappropriate at this stage of the litigation. Jurisdiction before this Court is based on the diversity of the parties.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 According to Defendants, Defendant ITL merged with Defendant Ventra in 1988 to form one corporation and the successor corporation retained the Ventra name. Therefore, for ease of reference, this Opinion will refer to Defendants simply as "Ventra."

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*2]**

FACTS

As of June 22, 1981, Plaintiff Can-Am ("Can-Am") sold plastic parts manufactured by the Reflex Division ("Reflex") of Ventra (which, at the time, was International Tools Limited "ITL")). The June 1981 nonexclusive agreement ("Agreement") between Can-Am and Ventra provided for the payment of a five percent commission on all sales of Ventra parts arranged through Can-Am. The Agreement was to expire after five years and permitted termination by either party upon six months written notice. n2 If Ventra elected to terminate the Agreement, full commission payments were to be paid during the notice period and fifty percent of the commission payments were to be paid during the six months following termination. n3

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n2 The Agreement provides:

> 6. The agreement will be for a period of five (5) years with a termination of six (6) months written notice by either party.

n3 The Agreement provides:

> 7. In the event that Reflex desires to terminate the arrangement full commission will be paid during the six month period of notice and thereafter 50% of the commission for the following six months.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*3]**

In February 1982, Can-Am and Ventra executed an addendum ("Addendum") to their Agreement. The Addendum modified the commission payments set forth in the Agreement only as to multi-year agreements, extended agreements, or agreements of less than one year. n4

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n4 It provides in relevant part:

> 10. In the event that current or future purchase order agreements are obtained on a multi-year or an extended basis, or, less than a one year term, the time figures in paragraph seven (7) shall be adjusted by the following method:
>
> > 1) The first half (1/2) of the remaining term of said agreements from the time of termination notice shall be paid at full commission.
> >
> > 2) The second half (1/2) of the remaining term of said agreements from the time of termination notice shall be paid at 50% of the commission.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In April 1984, Ventra sent to Can-Am a memorandum ("Memorandum") allegedly memorializing an agreement reached between the parties. The Memorandum begins, "It is our understanding that the following are the terms **[*4]** and conditions of the arrangements negotiated between I.T.L. Industries Limited and Can-Am Engineered Products, Inc. (Can-Am) over the past several weeks." The Memorandum is signed by Robert E. Deane ("Deane"), president and chief executive officer of ITL, and Kenneth P. Hedgewick ("Hedgewick"), vice-president of marketing for ITL. The Memorandum is directed to Barry Miller ("Miller"), an officer of Can-Am, but is not signed by any Can-Am representative. n5 The relevant portions of the Memorandum provide:

> (1) Term of Agreement
>
> The term of the agreement for the Tools Division will be for five (5) years commencing May 1, 1984 and ending April 30, 1989. At the same time as entering into the agreement with the Tools Division, the current Reflex Division commission agreement will be extended for a period of five (5) years from May 1,

1984 through April 30, 1989.

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n5 There is disagreement between the parties as to whether the Memorandum was drafted in the presence of Miller and Michael Bunnell ("Bunnell"), another Can-Am officer. December 20, 1991 declarations by Hedgewick and Deane say that Miller and Bunnell were present. However, the January 11, 1992 deposition testimony of both men indicates that they are unsure whether Miller and Bunnell were present. For purposes of the instant motion, the Court will assume that Can-Am's representatives were not present when Ventra drafted the Memorandum. Adickes v. S.H. Kress & Co., 90 S.Ct. 1598, 1608 (1970)(noting that material must be viewed in light most favorable to opposing party).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*5]**

* * *

(4) Non-Performance Clause

In the event that Can-Am fail [sic] to perform to expectations, I.T.L. reserves the right to terminate the above agreement either in whole or in part.

(5) Termination Clause

In the event that I.T.L. terminates the above agreement, Can-Am will be paid commissions at the full rate for a period of six (6) months and at one-half (1/2) the rate for a further six (6) months.

(Emphasis added.) The Memorandum concludes: "I trust this summarizes the discussions that have been agreed upon."

Despite the fact that a Can-Am representative did not sign the Memorandum, Ventra claims that subsequent communications by Can-Am demonstrate Can-Am's acknowledgement and acceptance of the Memorandum. In a proposed second addendum to the Agreement, submitted to Ventra in June 1988, Miller writes:

Whereas, the parties entered into a Manufacturer's Representative Agreement on June 22, 1981, . . .

Whereas, this Agreement was first amended by letter agreement dated April 24, 1984, acknowledged by Robert E. Deane, President and Chief Executive Officer and Kenneth P. Hedgewick, Vice-President, Marketing of "I.T.L."; and . . .

[*6]
(Emphasis added.)

In addition to referring to the Memorandum, this proposed second addendum also includes provisions which would extend indefinitely the payment of post-termination commissions. Paragraph two provides that Can-Am would be paid commissions "on all sales applicable to 1991 and 1992 model years, even in the event I.T.L. terminates" the Agreement. Paragraph three provides that ITL may only terminate the Agreement with twelve months written notice to Can-Am. It adds that in the event of termination, Can-Am is to be paid commissions for the life of the product Can-Am is selling at the time. Ventra never accepted this proposed second amendment.

Apparently, Can-Am continued to press for an extension of the Agreement beyond its April 30, 1989 expiration. In an August 1988 proposal, Miller requested that Can-Am's

> current contract be reviewed and extended to compensate for any new business which extends past our expiration date of April, 1989.

Ventra never agreed to this request.

After Ventra's merger with ITL, Can-Am sent a proposal to Ventra outlining proposed commission rates and schedules. The proposal adds:

> This agreement is to be in effect for **[*7]** five years and renewable based on satisfactory performance by Can-Am. In the event Ventra does not renew Can-Am's contract for good cause, at the end of five years, Ventra will pay Can-Am 50% of the commission rate previously earned, for the life of the Can-Am landed business.

> If Ventra does not choose to accept this proposal, then this proposal is nullified and will have no bearing on our present ITL Agreement.

Ventra rejected this proposal.

With the exception of the Addendum and the Memorandum, no further written revision of the Agreement was ever consummated. See Declarations of Hedgewick and Deane.

On April 30, 1989, in accordance with the terms of the Memorandum, the relationship between Ventra and Can-Am expired and ended. At this point, Ventra ceased paying commissions to Can-Am.

STANDARDS GOVERNING MOTIONS FOR SUMMARY JUDGMENT

*HN1*Summary judgment is proper "'if the pleadings, depositions, answer 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).

Three 1986 Supreme **[*8]** Court cases -- Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 106 S.Ct. 1348 (1986); Anderson v. Liberty Lobby, Inc., 106 S.Ct. 2505 (1986); and Celotex Corp. v. Catrett, 106 S.Ct. 2548 (1986) -- ushered in a "new era" in the standards of review for a summary judgment motion. These cases, in the aggregate, lower the movant's burden on a summary judgment motion. n6 According to the Celotex Court:

> In our view, HN2 the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, 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.

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n6 "Taken together the three cases signal to the lower courts that summary judgment can be relied upon more so than in the past to weed out frivolous lawsuits and avoid wasteful trials." 10A C. Wright, A. Miller, M. Kane, Federal Practice & Procedure, § 2727, at 29 (1991 Supp.).

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[*9]

Celotex, 106 S.Ct. at 2552.

After reviewing the above trilogy, the Sixth Circuit established a series of principles to be applied to motions for summary judgment. The relevant principles can be summarized as follows:

> * HN3 The movant must meet the initial burden of showing "the absence of a genuine issue of material fact" as to an essential element of the non-movant's case. This burden may be met by pointing out to the court that the respondent, having had sufficient opportunity for discovery, has no evidence to support an essential element of his or her case.
>
> * The respondent cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must "present affirmative evidence in order to defeat a properly supported motion for summary judgment."
>
> * The trial court no longer has the duty to search the entire record to establish that it is bereft of a genuine issue of material fact.
>
> * The trial court has more discretion than in the "old era" in evaluating the respondent's evidence. The respondent must "do more than simply show that there is some metaphysical doubt as to the material facts." Further, "[w] here **[*10]** the record taken as a whole could not lead a rational trier of fact to find" for the respondent, the motion should be granted. The trial court has at least some discretion to determine whether the respondent's claim is plausible.

Street v. J. C. Bradford & Co., 886 F.2d 1472, 1479-80 (6th Cir. 1989). The Court will apply the above principles to the following discussion.

DISCUSSION

The central question in this dispute is whether Ventra owes Can-Am "life of the part" commission payments. To answer this, the Court must address two issues: (1) whether the Memorandum is a valid contract between the parties; (2) if so, whether Ventra was able to cease payment of commissions to Can-Am upon the termination of this contract. The Court will address each issue seriatim.

I. MEMORANDUM

The parties disagree as to the validity and the status of the Memorandum. HN4 When the provisions of a contract are clear and unambiguous, the legal effect and construction of the contract are matters of law and are thus appropriately decided by the Court. Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635, 650 (5th Cir. 1991); Local 703 v. Kennicott Bros. Co., 725 F.2d 1088 (7th Cir. 1984); **[*11]** Local No. 4 v. Associated Gen. Contractors of Minnesota, 711 F.2d 90 (8th Cir. 1983). See generally 10A Wright, Miller & Kane, Federal Practice and Procedure § 2730.1 (2d ed. 1983). Therefore, the Court will examine the Memorandum to determine whether it is binding on the parties and, if so, whether it requires that Ventra make commission payments to Can-Am after it expires.

A. Validity

Can-Am asserts that the Memorandum was not accepted by Can-Am and is not binding on the parties. n7 Ventra counters that the Memorandum represents a valid and binding agreement. The Court agrees with Ventra.

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n7 However, Can-Am later implicitly admits the validity of the Memorandum. Specifically, it argues that the terms of the Memorandum apply to Ventra's Tools Division, but not to its Reflex Division. Response at 8. In so arguing, Can-Am necessarily admits the validity of the Memorandum and simply disputes the scope of its coverage.

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The evidence indicates that the Memorandum was an offer **[*12]** by Ventra which was accepted by Can-Am through performance and silence. n8 Can-Am has failed to demonstrate that it objected to the terms of the Memorandum. Rather, it appears to have fully performed its portion of the contract and received corresponding benefits.

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n8 Section 50 of the Restatement (Second) of Contracts provides, in part:

§ 50. Acceptance of Offer Defined; Acceptance by Performance; Acceptance by

Promise

(1) HN5 Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

(Emphasis added.)

Section 69 provides:

(1) HN6 Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

* * *

(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.

(Emphasis added.)

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The fact that Can-Am did not sign the Memorandum is not significant as there is no indication that it was intended to be signed by Can-Am. n9 The first sentence reads: "It is our understanding that the following are the terms and conditions of the arrangements between I.T.L. Industries Limited and Can-Am Engineered Products, Inc. (Can-Am) over the past several weeks." The concluding sentence reads: "I trust that this summarizes the discussions that have been agreed upon." In tandem, these sentences indicate that the Memorandum was a memorialization of prior discussions and, as such, required only acknowledgement and acquiescence or objection.

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n9 The Memorandum contains no space for a Can-Am signature.

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Additionally, as noted, in subsequent communications with Ventra, Can-Am explicitly refers to the Memorandum as an agreement. In a proposed second addendum Miller writes:

> Whereas, this Agreement was first amended by letter agreement dated April 24, 1984, acknowledged by Robert E. Deane, President and Chief **[*14]** Executive Officer and Kenneth P. Hedgewick, Vice-President, Marketing of "I.T.L."; and . . .

(Emphasis added.) And in his August 1988 proposal he asks that the "current contract be reviewed and extended to compensate for any new business which extends past our expiration date of April, 1989." These communications serve as express admissions by Can-Am that it considered its relationship with Ventra to be governed by the terms of the Memorandum.

In response, Can-Am argues that the terms of the Memorandum applied only to the relationship between Can-Am and the Tools Division of Ventra and that the relationship between Can-Am and the Reflex Division of Ventra was still controlled by the terms of the 1981 Agreement, as supplemented by the 1982 Addendum. Can-Am admits that the Memorandum refers to the Reflex Division, but claims that it does so only as to the extension of the length of the relationship and that all other aspects of the relationship were governed by the previously negotiated terms.

Next, Can-Am argues that the termination provision of the Agreement, which it claims controls in this instance, is ambiguous. This provision reads: "The agreement will be for a period **[*15]** of five (5) years with a termination of six (6) months written notice by either party." Can-Am asserts that this sentence could mean that: (1) the Agreement will expire in five years but that either party could terminate it earlier with six months notice; or (2) the Agreement will end in five years only upon six months written notice. In support, Can-Am refers to deposition testimony of Ventra representative Hedgewick saying that this provision of the agreement could be read two ways. Hedgewick Dep. at 33. As the termination of the Agreement provision is ambiguous, says Can-Am, summary judgment is inappropriate. n10

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n10 As an alternative argument, Can-Am claims that the parties' relationship, if not controlled by the Agreement and Addendum, is controlled by a "life of the part" oral agreement. Response at 6. In support, it refers to a rather ambiguous passage of Miller's affidavit:

> That I talked with the defendant's Mr. Argue and Mr. Leonardo to reach an agreement that Can-Am would receive commissions for the life of the part (for so long as the part is bought) and I was told by Mr. Argue and Mr. Leonardo that just go ahead an get the business (i.e., multi-year contracts) and we would be paid. That in reliance upon these statements, plaintiff procured new multi-year contract business and expected to be paid for the life of the part.

Can-Am also refers to Miller's deposition testimony in which he claims that Mr. Argue, the ex-president of ITL, and Mr. Leonardo, the chairman of the board of ITL, told him not to worry about an extension to the Agreement and that they were "working on it." Miller Dep. at 83-

84, 116-17.

The Court finds that the evidence of an oral contract adduced by Can-Am is clearly insufficient to demonstrate that a valid contract was formed. For this reason, the Court will not address Can-Am's oral contract claim in the body of this Opinion. A review of the evidence indicates that the assurances of Mr. Argue and Mr. Leonardo were, at best, equivocal. Miller admits that they never promised him a "life of the part" contract but simply told him not to worry about it, that they were working on it, or that he should go out and get business. These claims are patently insufficient proof of a "life of the part" agreement between Can-Am and Ventra. In fact, if anything, they support Ventra's position that it never did and never intended to consummate a "life of the part" agreement with Can-Am.

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Can-Am's arguement fails for several reasons. First, it is founded on the proposition that the Memorandum, apart from one provision, does not apply to the Reflex Division. This is contradicted by the express language of the Memorandum itself, which says:

> It is our understanding that the following are the terms and conditions of the arrangements negotiated between I.T.L. Industries Limited and Can-Am Engineered Products, Inc. (Can-Am) over the past several weeks.
>
> These arrangements encompass dealings between Can-Am products in both the Reflex and Tools Division.

(Emphasis added.) During a colloquy with Can-Am's attorney, Hedgewick said that the Memorandum was directed at both the Tools and Reflex Divisions:

> Q. Referring to Exhibit 10 again, was this agreement primarily directed towards the Tools Division since it has on the top of it ITL Industries Limited?
>
> A. I think it was directed for both divisions, both the Tools and the Reflex Division.

Hedgewick Dep. at 21. Finally, in a colloquy with Ventra's attorney, Hedgewick specifically said that the termination provision of the Memorandum applied to the Reflex Division:

> Q. But does the termination **[*17]** clause in Exhibit 10 apply to the Reflex Plastic agreement?
>
> A. Yes, it would apply. Yes, it would apply -- yes.

Hedgewick Dep. at 54. Thus, there is substantial evidence that the Memorandum applied equally to the Tools and the Reflex Divisions. n11

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n11 The evidence on which Can-Am relies consists of responses by Hedgewick and Deane to questions posed by Can-Am's counsel during deposition. For example, Hedgewick answered the following question in the affirmative:

> Q. Would it be a fair statement that this letter dated April 24, '84, from yourself and Deane, Exhibit 10, was essentially to establish written understanding with Can-Am regarding the ITL Industries Limited Tools Division and also to extend the previous agreement through April of '89?

However, this proves little. The Memorandum did indeed set terms for the Tools Division and extend the Reflex Division expiration date. This is undisputed. The pertinent question, however, is to whom the terms of the Memorandum applied. On this question, Hedgewick answers that they applied to both the Reflex and Tools Divisions. See infra.

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Therefore, the Court finds that the Memorandum, on its face, was intended to apply equally to the Tools and Reflex Divisions. Thus, Can-Am's argument necessarily crumbles. If the terms of the Memorandum apply, there is no need to interpret the Agreement. However, the Court notes that that were it to interpet the Agreement, the result would be the same. That is, it would find that the Agreement does not provide for post-termination commission payments.

The termination provision of the Agreement could have been better phrased. However, the Court believes that it terminates the relationship naturally in five years and that, otherwise, either party may terminate the contract prematurely with six months notice. In this case, special commission rates would apply.

This is the only sensible reading. If the Agreement could be terminated only upon six months notice, there would have been no reason to insert a time period. The Agreement would effectively have been of an indefinite duration. Had the parties desired an indefinite contract, they could have negotiated one. The addition of a five year time span for the Agreement, however, clearly indicates that they intended to create **[*19]** a definite contract, despite the awkward phrasing.

Therefore, the Court rejects Can-Am's argument that the terms of the Memorandum do not control this dispute. Having found the Memorandum to be controlling, it must now interpret the relevant terms to determine whether they provide for post-termination commission payments. n12

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n12 The Court adds that there is no ambiguity in the Memorandum which would necessitate explication by parol evidence. General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038, 1041 (6th Cir. 1990)(noting that parol evidence may not be admitted to contradict or vary the terms of a writing).

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B. Interpretation

Ventra asserts that, by its terms, the Memorandum provides for an expiration date of April 30, 1989, after which Ventra has no duty to pay commissions to Can-Am. Ventra adds that it was required to pay Can-Am post-termination commissions only in the case of premature termination of the relationship.

According to the Memorandum, the "Term of Agreement" **[*20]** is through April 30, 1989. The "Non-Performance Clause" of the Memorandum reads: "In the event that Can-Am fail [sic] to perform to expectations, I.T.L. reserves the right to terminate the above agreement either in whole or in part." The succeeding "Termination Clause" reads: "In the event that I.T.L. terminates the above agreement, Can-Am will be paid commissions at the full rate for a period of six (6) months and at one-half (1/2) the rate for a further six (6) months."

The plain language of the Memorandum, therefore, indicates that the expiration of the contract and the termination of the contract are two distinct operations. Under the language of the Memorandum, the relationship between the parties is to expire naturally on April 30, 1989. There is no provision for payment of commissions after the expiration of the contract. However, if, during the period of the contract, Ventra wishes to terminate the contract, it may do so provided that it continue to pay Can-Am full commissions for six months and one-half commissions for the succeeding six months. Therefore, the expiration date establishes the natural termination of the contract and the "Non-Performance Clause" **[*21]** establishes the premature termination of the contract. The special commission provision applies only in the case of premature termination. n13

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n13 In essence, Can-Am wishes the Court to interpret the Memorndum as providing for special commission payments after the contractual relationship expires. There is, however, no indication that Ventra intended to continue paying commission payments after the relationship had ended. In addition to the failure to specify such an intention in the Memorandum itself, the simple fact that the parties specifically provided for a special commission scheme in the event of a premature termination, strongly suggests that no such special scheme was to apply in the case of normal termination.

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II. EQUITABLE CLAIMS

Having thus determined that (a) the terms of the Memorandum control the instant dispute and (b) that these terms plainly impose on Ventra no obligation to pay commissions after April 30, 1989, the Court will now address Can-Am's equitable claims. Can-Am claims that **[*22]** the Court should award it damages under the doctrines of procuring cause, unjust enrichment/quantum meruit, and estoppel.

A. Procuring Cause

The doctrine of "procuring cause" was set forth in a Michigan Supreme Court decision, Reed v. Kurdziel, 89 N.W.2d 479 (Mich. 1958). There, the court said:

HN7

In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause.

Id. at 483 (citations omitted)(emphasis added). In that case, the court affirmed a lower court finding in favor of plaintiff. Plaintiff had entered into an exclusive oral contract with defendants, "without limitation as to time," which provided that plaintiff "was to receive commissions on not only the original sale submitted by him but on all reorders." The court found that plaintiff **[*23]** was entitled to commissions on all orders for which he was the procuring cause.

Unfortunately for Can-Am, the procuring cause doctrine is inapplicable to the facts of the instant case. The crucial distinction between this case and Reed is the existence here of a contract with a definite duration. If a contract is for an indefinite duration, the principal could benefit from the agents representation and then arbitrarily terminate the relationship to avoid paying commissions. The Reed court apparently believed that the defendants had done just this. Id. at 484.

However, when the parties have a contract with a definite duration, as is the case here, there is little danger of abuse by the principal. Both parties know the date on which the contract is to end. Therefore, both parties know that commissions will not be paid after that point. The parties may choose to extend their contract (as Can-Am attempted to do in this case) or they may let the contract lapse. In any event, the agent has foreknowledge as to the time limit after which he will no longer receive a benefit for his service. Of course, if the contract is prematurely terminated, he will **[*24]** lack this knowledge. But this is precisely the reason that the special commission terms apply in the event of a premature termination.

In this case, the parties agreed to a contract with a definite time period. This indicates that it was their intention that Can-Am receive commission payments only for its representation within the period of the contract. In applying the procuring cause doctrine, a court must be sensitive to the intentions of the contracting parties. Kingsley Assoc., Inc. v. Del-Met, Inc., 918 F.2d 1277, 1282 (6th Cir. 1990). The parties in this case, both businesses, engaged in an arms length transaction. Had they decided to adopt a "life of the part" agreement, they could have attempted to do so. However, they did not. As the parties clearly intended that Can-Am was to receive commission payments only for that representation effectuated during the contract period, the procuring cause is inapplicable.

B. Unjust Enrichment

Can-Am's unjust enrichment claim fails because HN8 the doctrine of unjust enrichment is inapplicable when the parties are bound by an express contract. The essential elements of an unjust enrichment claim are: **[*25]** (1) receipt by defendant of a benefit from plaintiff, (2) which benefit it is inequitable that defendant retain. B & M Die Co. v. Ford Motor Co., 421 N.W.2d 620, 622 (Mich.App. 1988). However, a claim for unjust enrichment cannot stand when the parties are bound by a written contract covering the subject matter of the quasi-contractual claim. Cloverdale Equipment Co. v. Simon Aerials, Inc., 869 F.2d 934, 939 (6th

Cir. 1989); Cascade Elec. Co. v. Rice, 245 N.W.2d 774, 776 (Mich.App. 1976). The subject of the unjust enrichment claim is the payment of post-termination commissions; however, the Memorandum provides for post-termination commission payments only in the situation in which the contract is prematurely terminated by one party. Therefore, as the quasi-contractual claim is superseded by the express contractual language, the unjust enrichment claim must fail.

C. Promissory Estoppel

Finally, Can-Am's promissory estoppel claim fails because Can-Am did nothing more than it promised to do in its written contract with Ventra. HN9 The elements of equitable or promissory estoppel are: (1) a promise; (2) that the **[*26]** promisor should reasonably have expected to induce definite action by promisee; (3) which in fact produced reliance or forbearance; and (4) under such circumstances that the promise must be enforced to avoid injustice. Clark v. Coats & Suits Unlimited, 352 N.W.2d 349, 354 (Mich.App. 1984). The doctrine of promissory estoppel essentially finds consideration even absent a bargain -- the detriment of the promisee is a consequence of the promisor's promise, but does not induce the making of the promise. Calamari and Perillo, Contracts § 99 (1970).

However, where there is express consideration, the doctrine of promissory estoppel becomes superfluous. In other words, a court need not rely on promissory estoppel when the express terms of a written contract cover the subject of the contract allegedly founded on promissory estoppel. In General Aviation, Inc. v. Cessna Aircraft Co., 915 F.2d 1038 (6th Cir. 1990), General Aviation claimed that Cessna's oral promises to treat it fairly and equally caused it to rely on this promise to its detriment. The Sixth Circuit denied recovery because the performance allegedly undertaken in reliance on the **[*27]** oral contract was the same performance required by the parties' written contract. Beginning with a quotation from the district court opinion, it said:

> "[W]here . . . the performance which is said to satisfy the detrimental reliance requirement of the promissory estoppel theory is the same performance which represents consideration for the written contract, the doctrine of promissory estoppel is not applicable." . . .
>
> In other words, General Aviation agreed to forego its future dealings with Beech Aircraft in order to enter into a written contract, which, by its own terms, was a full and complete expression of the parties' intentions. General Aviation knew exactly what it was getting into because each and every term was spelled out in black and white in the contract. "Promissory estoppel is not a doctrine designed to give a party to a negotiated commercial bargain a second bite at the apple in the event it fails to prove breach of contract."

Id. at 1042 (citations omitted).

Can-Am's estoppel claim is based on its reliance on Ventra's promise to compensate it for representation of Ventra's products. However, this is exactly the activity covered by **[*28]** the written contract between Can-Am and Ventra. In essence, Can-Am is attempting to achieve through an equitable doctrine what it was unable to achieve through contract negotiation. This is not the purpose of the promissory estoppel doctrine.

III. INTERFERENCE WITH CONTRACT CLAIM

Can-Am's final count is interference by Ventra with an advantageous business and contractual relationship. Apparently, Kathleen Scarbrough ("Scarbrough"), an at-will employee, left Can-Am in April 1989 and transferred to Ventra. Scarbrough had worked for Can-Am first as a typist/receptionist and then as Miller's secretary. She had signed an agreement not to compete with Can-Am and promised not to disclose confidential information retained during her employment.

*HN10*The elements of an interference with business relationship claim are: (1) existence of a contract; (2) a breach of this contract; and (3) instigation of the breach by the alleged tortfeasor without justification. Woody v. Tamer, 405 N.W.2d 213, 217 (Mich.App. 1987). To be actionable, the interference must be intentional. Getman v. Mathews, 335 N.W.2d 671, 672 (Mich.app. 1983). Moreover, **[*29]** interference for the purpose of competition is insufficient. Trepel v. Pontiac Osteopathic Hospital, 354 N.W.2d 341, 347 (Mich.App. 1984).

In this case, Can-Am has adduced no evidence that Ventra intentionally interfered with Scarborough's contract with Can-Am. n14 Further, according to Ventra, Bunnell, an officer of Can-Am, testified that he did not know whether Can-Am instigated Scarbrough's resignation from Can-Am. In deposition testimony, he states:

> Q. You do not know one way or another whether Kit Scarbrough went to Ventra and asked for a job or whether Ventra first approached Kit Scarbrough do you?

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n14 Can-Am does not address this issue in its response to Ventra's summary judgment motion.

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> A. As a fact, direct fact, no.
>
> Q. Do you know it as an indirect fact, whatever that it?
>
> A. I can't answer that question without any real knowledge.

Bunnell Dep. at 138. On the issue of Ventra's knowledge of Scarbrough's signing of a noncompetition agreement, Miller said: **[*30]**

> Q. Do you know whether Ventra knew of the existence of a signed agreement by Kit Scarbrough prior to employing Kit Scarbrough?
>
> A. I really don't know. We had discussed non-compete agreements with Ken Hedgewick and other people at points in time. We discussed them with numerous people.

Q. But do you know whether Ventra knew that Kit Scarbrough had signed such agreement?

A. I really couldn't tell you.

Miller Dep. at 153.

Can-Am has failed to satisfy its burden. It has adduced no evidence that Ventra has intentionally interfered with Can-Am's contract with Scarbrough.

CONCLUSION

Can-Am's relationship with Ventra is governed by the clear terms of the Memorandum. Apparently, Can-Am wished to extend this relationship, but Ventra did not. Having failed to achieve the contract that it desired in contract negotiations, Can-Am appears to be using the Court to achieve its end. The Court refuses to interfere with the contractual relationship of the parties. Having found no breach of contract, the Court rejects Can-Am's contractual and equitable remedies and grants Ventra's summary judgment motion.

NOW, THEREFORE;

IT IS HEREBY ORDERED that Defendants' **[*31]** Motion for Summary Judgment be GRANTED and Plaintiff's Complaint be DISMISSED WITH PREJUDICE.

Gerald E. Rosen
U.S. District Court Judge

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Citation: 1999 ohio app. lexis 377

*1999 Ohio App. LEXIS 377, **

CHICAGO WEST PULLMAN CORP., Appellant v. ROBERT W. QUINN, Appellee

C.A. NO. 98CA007048

COURT OF APPEALS OF OHIO, NINTH APPELLATE DISTRICT, LORAIN COUNTY

1999 Ohio App. LEXIS 377

February 9, 1999, Decided

PRIOR HISTORY: **[*1]** APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS. COUNTY OF LORAIN, OHIO. CASE NO. 96CV116016.

DISPOSITION: Judgment affirmed.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff former employer appealed a decision from the Lorain County Court of Common Pleas (Ohio), which awarded summary judgment to defendant former employee in plaintiff's breach of contract action to recover certain advances provided to defendant under an employment contract for payment of attorney's fees incurred in unrelated litigation.

OVERVIEW: The court affirmed grant of summary judgment to defendant former employee in plaintiff former employer's breach of contract action to recover advances provided to defendant under an employment contract for payment of attorney's fees incurred in unrelated litigation. There was no issue of fact to be determined because the interpretation of the parties' clear and unambiguous employment contract was a matter of law, and defendant was entitled to judgment as a matter of law because the reimbursement clause of the employment contract did not survive termination of the contract. Contrary to plaintiff's contention, the employment contract was not ambiguous. The termination provision allowed for cancellation of the agreement by either party with prior notice. The court concluded that the term "agreement" referred to every part of the employment contract, including the reimbursement clause. Further, manifest absurdity did not result where the reimbursement provision was not rendered ineffective by the termination provision. Therefore, the trial court did not err by failing to allow plaintiff's introduction of parol evidence of the parties' intent not expressed in the employment contract.

OUTCOME: The court affirmed grant of summary judgment to defendant former employee in plaintiff former employer's breach of contract action to recover advances made under the parties' employment contract because no issue of fact remained where interpretation of the clear and unambiguous employment contract was a matter of law, and defendant was entitled to judgment as a matter of law where the reimbursement requirement did not survive termination.

CORE TERMS: termination, reimbursement, termination provision, summary judgment, matter of law, terminated, unambiguous, survive, absurdity, manifest, entitled to judgment, specifically stated, reimburse, terminate, clear and distinct, issue of fact, new contract, journal entry, specifically provided, final disposition, written contract, plain language, parole,

indemnification, contradicted, reconfirmed, acquisition, consultant, clarifying, summarize

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Civil Procedure > Summary Judgment > Appellate Review > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN1 In reviewing a trial court's entry of summary judgment, an appellate court applies the same standard used by the trial court. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. More Like This Headnote

Civil Procedure > Summary Judgment > Standards > General Overview

Contracts Law > Contract Interpretation > General Overview

HN2 If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN3 Common words appearing in a written instrument are given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN4 Where the terms in an existing contract are clear and unambiguous, a court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: ERIC H. ZAGRANS and JOSHUA M. MARKS, Attorneys at Law, Elyria, Ohio, for Appellant.

ANTHONY J. O'MALLEY and BRUCE P. BATISTA, Attorneys at Law, Cleveland, Ohio, for Appellee.

JUDGES: JOHN W. REECE, DICKINSON, J., CONCURS, CARR, J. DISSENTS, SAYING:.

OPINION: DECISION AND JOURNAL ENTRY

Dated: February 9, 1999

This cause was heard upon the record in the trial court. Each error assigned has been reviewed and the following disposition is made:

Per Curiam.

Plaintiff Chicago West Pullman Corp. has appealed from an order that granted summary judgment to defendant Robert W. Quinn in this breach of contract case. Plaintiff has argued

that the trial court incorrectly granted defendant summary judgment because he was not entitled to judgment as a matter of law. This Court affirms the order of the trial court because there were no genuine issues of material fact and defendant was entitled to judgment as a matter of law.

I.

During the mid-1980s, Quinn worked for plaintiff as a consultant identifying business acquisition opportunities. In **[*2]** 1987, Quinn identified Cardinal Federal Savings and Loan ("Cardinal Federal") as a potential acquisition target.

Sometime during 1987, the Federal Savings and Loan Insurance Corporation ("FSLIC") offered Quinn a position with Cardinal Federal to attempt to rescue Cardinal Federal from its deteriorating financial condition. Quinn accepted the offer in late 1987 and was hired as Chairman of the Board and Chief Executive Officer of Cardinal Federal.

In 1988, under circumstances that are not entirely clear, Quinn's employment with Cardinal Federal was terminated. Shortly thereafter, Quinn, Cardinal Federal, and the FSLIC all became embroiled in litigation relating to Quinn's termination ("the Cardinal Federal litigation").

In 1989, during the pendency of the Cardinal Federal litigation, Quinn and plaintiff began negotiating the contract of employment that is at issue in this case. On May 22, 1989, Quinn sent plaintiff a letter summarizing the negotiations as of that date. Plaintiff responded in a letter dated June 1, 1989, stating in part:

Relative to our mutual understanding with regard to Cardinal Federal, we have agreed presently to pay $ 50,000.00 directly to one of your counsel **[*3]** in payment of statements rendered to you for legal services relating to the law suit brought by FSLIC. We have agreed to ultimately pay up to $ 100,000.00 in this context and you have further agreed that if there is a final disposition which awards cash to you, we would be reimbursed, at least to the extent of such an award, up to the full amount of our advances.

***

Finally, you have raised the need to address termination. I propose that either party may terminate the agreement with thirty (30) days prior notice at any time during the term of this agreement, in which event you would be entitled to a payment of $ 5,000 per month for the remaining portion of the original term, but not to exceed $ 35,000. In the event you elect to terminate, you would agree to continue to be available on a limited basis relative to any projects which are active at that time and which in our opinion require your participation.

On June 21, 1989, plaintiff sent Quinn another letter supplementing the June 1 letter. This letter specifically stated that "it is our understanding that the three of us have reconfirmed all of the other provisions of the June 1, 1989 letter, which is attached hereto." **[*4]** The June 21 letter was signed as "ACCEPTED" by Quinn on June 27, 1989.

Pursuant to the provisions of the June 1 letter, plaintiff eventually paid a total of $ 99,000 for Quinn's attorneys' fees relating to the Cardinal Federal litigation. Quinn subsequently terminated the contract in 1990 pursuant to the termination provision set forth in the June 1 letter.

In 1993, Quinn settled the Cardinal Federal litigation for $ 300,000 cash and a $ 450,000 line of credit. Quinn, however, refused to reimburse plaintiff for the $ 99,000 in attorneys' fees. As a result, plaintiff filed suit against Quinn. Quinn answered and moved for summary judgment, arguing that the reimbursement clause had terminated in 1990 because nothing in

the contract specifically stated that it would survive termination. The trial court granted Quinn summary judgment, concluding that,

as a matter of law, the contract entered into by the parties is unambiguous and contains the entire agreement between the parties. Thus, the Parole [sic] Evidence Rule prohibits contradicting the terms of the written contract with prior written or oral evidence. *** Further, intentions not expressed in the written contract may not **[*5]** be shown by parole [*sic*] evidence. *** Thus, the entire contract between the parties terminated on February 23, 1990, and Defendant is not obligated to re-pay to [plaintiff] the $ 99,000.

(Citations omitted.) Plaintiff has appealed from this judgment.

II.

HN1 "In reviewing a trial court's entry of summary judgment, an appellate court applies the same standard used by the trial court." *McConville v. Jackson Comfort Sys., Inc.* (1994), 95 Ohio App. 3d 297, 301, 642 N.E.2d 416. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). HN2 "If a contract is clear and unambiguous, then its interpretation is a matter of law and there is no issue of fact to be determined." *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc.* (1984), 15 Ohio St. 3d 321, 322, 474 N.E.2d 271.

In this case, plaintiff has argued that the contract was ambiguous concerning the issue of whether the reimbursement provision survived the termination of the contract. Therefore, plaintiff has asserted, the trial court improperly refused to consider parol evidence that would have precluded **[*6]** summary judgment by raising an issue of fact concerning the parties' true intentions.

According to plaintiff, the termination provision is ambiguous because it does not contain any language specifically stating that it applies to the reimbursement clause. HN3 "Common words appearing in a written instrument[, however,] will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St. 2d 241, 374 N.E.2d 146, paragraph two of the syllabus. The termination provision provided that upon thirty days notice either party could terminate "the agreement." The term "agreement" would ordinarily refer to every part of the contract, including the reimbursement clause.

Plaintiff has also argued that, if the termination provision is interpreted to include the reimbursement clause, manifest absurdity will result. Because the reimbursement clause specifically provided that Quinn's obligation to reimburse plaintiff only arose upon "final disposition" of the Cardinal Federal litigation, according to plaintiff, the plain language of the reimbursement **[*7]** clause required it to continue in effect beyond the termination of the contract in direct contravention of the termination provision. There is not, however, a conflict between these provisions. Because the Cardinal Federal litigation could have been settled prior to the termination of the contract, the reimbursement provision was not rendered ineffective by the termination provision; plaintiff could have enforced the reimbursement clause if the Cardinal Federal litigation had been resolved prior to the termination of the contract. Therefore, there is no manifest absurdity from the interplay between the termination provision and the reimbursement clause.

HN4 "Where the terms in an existing contract are clear and unambiguous, [a] court cannot in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Alexander, supra,* at 246. The contract in this case is clear and unambiguous, and is devoid of any indication that the parties intended for the reimbursement

clause to survive the termination of the contract. The parties understood how to make an obligation survive the termination of the contract--the termination provision specifically **[*8]** provided that Quinn would remain available for consultation on a limited basis even after termination. Nevertheless, the parties failed to include a similar survival clause relating to reimbursement. This Court cannot create a new contract by including such a provision after the fact.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the County of Lorain, Court of Common Pleas, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E).

Costs taxed to appellant.

Exceptions.

JOHN W. REECE

FOR THE COURT

DICKINSON, J.

CONCURS

CARR, J.

DISSENTS

DISSENT BY: CARR

DISSENT:

CARR, J.

DISSENTS, SAYING:

I respectfully dissent.

There were three separate writings produced by the parties pertaining to the contents of the contract. The **[*9]** first is a letter dated May 22, 1989, from Quinn to plaintiff. This letter states:

I spoke to Andrea today and she suggested I summarize [our] new arrangements in a letter for your file *** .

During our telephone conversation last Monday, May 15 you and John and I agreed to resolve all prior open issues of both oral understandings and draft agreements between us and that I would serve as a consultant to [plaintiff].

The letter then goes on to set forth the terms of the agreement between the parties, including job duties, compensation, a provision whereby plaintiff would indemnify Quinn in one lawsuit, and the provision at issue herein whereby plaintiff would pay Quinn's attorneys' fees in relation to the Cardinal Federal litigation. Additionally, the letter addressed the duration of the contract and proposed a termination procedure. The proposed termination provision specifically stated that "early termination would not effect legal expense indemnities relating to the CFSB contract dispute."

The second letter was from plaintiff to Quinn. It was dated June 1, 1989, and stated:

I have reviewed your letter of May 22 attempting to summarize our conversation of the previous **[*10]** week. As there may have been a few items about which we are not in agreement, I thought I would drop you a note clarifying our position relative to each of these items.

The June 1 letter went on to address some of the terms of the agreement set forth originally by Quinn in the May 22 letter, including the issues of attorneys' fees and termination.

On June 21, 1989, plaintiff sent Quinn another letter, which was signed "ACCEPTED" by Quinn. The June 21 letter stated:

This supplements my letter of June 1, 1989 following the conference call among you, Roger and me this week past. We hereby modify that earlier letter relative to our refusal to indemnify you with respect to any potential litigation originated by Mr. Gannon. ***

It is our understanding that the three of us have reconfirmed all of the other provisions of the June 1, 1989 letter, which is attached hereto.

Neither party disputes the effectiveness of the June 21 and June 1 letters. The June 21 letter is signed by both parties and expressly incorporates the provisions of the June 1 letter. Instead, the dispute is whether the reimbursement clause contained in the attorneys' fees provision can survive the termination of **[*11]** the contract.

It is well established in Ohio that "several writings, though made at different times, may be construed together, for the purpose of ascertaining the terms of a contract." Thayer v. Luce (1871), 22 Ohio St. 62, paragraph one of the syllabus. "If some only of such writings be so signed, reference must be specifically made therein to those which are not so signed; but if each of the writings be so signed, such reference to the others need not be made, if, by inspection and comparison, it appear that they severally relate to or form part of the same transaction." *Id.* at paragraph two of the syllabus. In this case, the June 1 letter specifically refers to the May 22 letter and was signed by Quinn. As such, the May 22 letter should be incorporated into the contract.

Because the June 1 letter specifically states that it is only clarifying the unacceptable portions of the May 22 letter, the plain language of the contract dictates that any provisions of the May 22 letter that are not directly contradicted by the June 1 letter are agreed upon by the parties and expressly incorporated into the June 1 letter. Additionally,

when a written agreement consists of **[*12]** more than one distinct writing or contract, the different provisions of all the parts should be given due weight in ascertaining the intended meaning of any portion of the same; but if the language is clear and distinct, and the plain and obvious meaning of the words is consistent with the whole instrument, such meaning must be taken as the intended meaning of the parties, unless other parts of the agreement not only admit of, but require, a different construction.

Railroad Co. v. Railway Co. (1886), 44 Ohio St. 287, 7 N.E. 139, paragraph two of the

syllabus. The provision in the May 22 letter whereby termination is said to have no effect on the Cardinal Federal indemnification provision is clear and distinct and is not directly contradicted by any other part of the contract. In fact, as so aptly argued by the appellee herein, the June letters never address this issue. Therefore, the provision in the May 22 letter whereby termination is said to have no effect on the Cardinal Federal indemnification provision should be taken as the intended meaning of the parties and included in the contract. As such, the termination of the contract should not have terminated Quinn's obligation to reimburse **[*13]** plaintiff.

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Citation: 1995 U.S. App. LEXIS 18078

*1995 U.S. App. LEXIS 18078, *; 36 U.S.P.Q.2D (BNA) 1395*

HIRSCH-CHEMIE LIMITED, Plaintiff-Appellant, and HIRSCH-SCIONICS LIMITED; HIRSCH CINEMEDIC CORPORATION, Plaintiffs, v. THE JOHNS HOPKINS UNIVERSITY, Defendant-Appellee.

No. 94-2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

1995 U.S. App. LEXIS 18078; 36 U.S.P.Q.2D (BNA) 1395

March 9, 1995, Argued
July 20, 1995, Decided

NOTICE: [*1] RULES OF THE FOURTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 61 F.3d 900, 1995 U.S. App. LEXIS 26535.

PRIOR HISTORY: Appeal from the United States District Court for the District of Maryland, at Baltimore. William M. Nickerson, District Judge. (CA-90-1041-WN).

DISPOSITION: AFFIRMED, AS MODIFIED

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff biotechnology corporation (corporation) brought an action against defendant research university (university), contending that it wrongfully terminated two contracts. The university counterclaimed for royalties due under one contract and for costs associated with the maintenance of certain equipment. The United States District Court for the District of Maryland entered judgment for the university and the corporation appealed.

OVERVIEW: Under the first contract, the corporation gave the university money to develop a product, for which the corporation had the right of first refusal to obtain an exclusive license. The university gave a license to a third party. Such was proper, because the contract had already expired by its own terms. Although the parties entered into license negotiations, no agreement was ever reached on a material term concerning the corporation's production and sales goals for marketing the product. Although the negotiations extended past the set termination date, such did not extend the contract. Under the second contract, the corporation agreed to pay royalties for a license to develop and market an existing product. The university properly terminated the contract after the second royalty payment was not paid. Such was proper, because the royalties became due despite the fact the government approval was not obtained. Indeed, the corporation, as licensee, had the obligation to obtain such approval, and was not prevented from doing so by the university's failure to provide a prototype or commercially marketable product. The rate of prejudgment interest awarded on the maintenance claim was error.

OUTCOME: The court affirmed, as modified.

CORE TERMS: license, invention, summary judgment, license agreement, counterclaim, royalty payment, prototype, royalty, prejudgment interest, licensed, breached, oral agreement, terminated, terminate, genuine issue, usage, award of prejudgment interest, matter of law, terminating, marketable, default, expired, unambiguous, breach of contract, effective date, mutual consent, commercially, marketing, notified, excused

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Summary Judgment > Appellate Review > Standards of Review

Civil Procedure > Summary Judgment > Burdens of Production & Proof > Movants

Civil Procedure > Summary Judgment > Standards > General Overview

HN1 The appellate court reviews grants of summary judgment de novo, applying the same standards as applied by the district court. Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. The burden of establishing the nonexistence of a "genuine" issue is on the moving party, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. The non-moving party is entitled to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, and the most favorable of possible alternative inferences from it drawn in his behalf. However, a bare allegation or a mere scintilla of evidence is not sufficient to create an issue of fact. More Like This Headnote

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN2 Under Maryland law, as generally, where the language of a contract is clear and unambiguous, the construction of the contract is a matter of law for the court, and it must be presumed that the parties meant what they expressed. Moreover, the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Formation

HN3 Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations. More Like This Headnote

Contracts Law > Performance > Discharges & Terminations

Contracts Law > Types of Contracts > Oral Agreements

Governments > Legislation > Expirations, Repeals & Suspensions

HN4 The fact that the parties by their acts and declarations indicate an intention to treat a written contract as continuing after the time prescribed in it for its termination will not have the effect of continuing such contract, although it may show a subsequent oral agreement on the same terms. More Like This Headnote

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN5 A usage, to be admissible, must be proved to be known to the parties, and to be so general and well established that knowledge and adoption of it may be presumed. Knowledge of a trade usage will be imputed to persons in the same trade. And, where a usage exists in reference to a particular trade or business, the contracts of parties engaged in that business must be presumed to be cognizant of the usage, unless it is expressly excluded. More Like This Headnote

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN6 While the subjective intent of the parties at the time the agreement was executed may be the subject of a dispute, that dispute does not concern any material fact. Further, where the language of an agreement is unambiguous, the subjective intentions of the parties become irrelevant. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > General Overview

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN7 Under Maryland law, a trial judge may, within its discretion award prejudgment interest to place the injured party in a breach of contract case in the same position it would have occupied had the defendant not broken its promise. More Like This Headnote

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN8 Prejudgment interest is not allowed on unliquidated claims. If the contract requires payment of a sum certain on a date certain, prejudgment interest typically is allowed as a matter of right. The award of prejudgment interest is a matter for the discretion of the finder of fact for contracts that fall somewhere in between these two extremes. More Like This Headnote

Civil Procedure > Judicial Officers > Judges > Discretion

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN9 The fact that one contracting party disputes either the existence of a contract or the amount due under it does not render the award of prejudgment interest in the discretion of the trial judge inappropriate. More Like This Headnote

Civil Procedure > Pleading & Practice > Pleadings > Counterclaims > General Overview

Civil Procedure > Remedies > Judgment Interest > Postjudgment Interest

Civil Procedure > Remedies > Judgment Interest > Prejudgment Interest

HN10 Prejudgment should be awarded at the general legal rate applied in the absence of statute (six percent per annum). However, the amount of prejudgment interest so calculated becomes part of the judgment upon which post-judgment interest is now allowable at ten percent per annum. More Like This Headnote

COUNSEL: ARGUED: Michael Robert Diamond, O'TOOLE, ROTHWELL, NASSAU & STEINBACH, Washington, D.C., for Appellants.

Frederick G. Savage, THE JOHNS HOPKINS UNIVERSITY, Baltimore, Maryland, for Appellee.

ON BRIEF: Jeffrey B. O'Toole, O'TOOLE, ROTHWELL, NASSAU & STEINBACH, Washington, D.C., for Appellants.

Eileen S. Goldgeier, THE JOHNS HOPKINS UNIVERSITY, Baltimore, Maryland, for Appellee.

JUDGES: Before HALL and NIEMEYER, Circuit Judges, and PHILLIPS, Senior Circuit Judge. Senior Judge Phillips wrote the opinion, in which in which Judge Hall and Judge Niemeyer joined.

OPINION BY: PHILLIPS

OPINION:

OPINION

PHILLIPS, Senior Circuit Judge:

In this diversity case, Hirsch-Chemie Limited and its subsidiaries, Hirsch-Scionics Limited and Hirsch Cinemedic Corporation, (collectively, "Hirsch") appeal from orders granting summary judgment in favor **[*2]** of The Johns Hopkins University ("Johns Hopkins") on Hirsch's two breach of contract claims and on one of Johns Hopkins's two counterclaims, and granting prejudgment interest to Johns Hopkins on its second counterclaim after a bench trial. With one modification respecting the rate of prejudgment interest to be recovered on the second counterclaim, we affirm.

I

Hirsch-Chemie Limited and its subsidiaries are all Virginia corporations engaged in biotechnology-related businesses. Johns Hopkins is a major research university in the state of Maryland. In 1983, Hirsch and Johns Hopkins entered into two contracts. Under the first, the Joint Development Agreement ("J.D.A."), Hirsch provided Johns Hopkins with approximately one million dollars in cash and equipment to further certain cancer research. In return for its investment, Hirsch obtained a "first option to acquire a worldwide royalty-bearing license . . . to make, have made, use and sell" products and inventions developed through the research. J.D.A. P 4.2. By its terms, the J.D.A. was to expire three years from its effective date (July 27, 1983) "unless sooner terminated or extended by mutual consent" or unless a license was granted, **[*3]** in which case the J.D.A. would continue in effect for the duration of the license. Id. P 6.4. Any license granted was to be in effect for at least eleven years. Id.P 4.7. The J.D.A. could also be terminated by either party for a material breach of its terms by the other. Id. P 6.5.

Johns Hopkins developed a product from the research and, in conformity with its contract obligations, notified Hirsch by letter dated October 30, 1985. Hirsch responded by letter dated November 22, 1985, that it wished to exercise its option and enter a licensing agreement. The parties dispute whether a license was ever created. On January 14, 1987, approximately three years and five months after the effective date of the J.D.A. (five months after the natural expiration date of the J.D.A.), Johns Hopkins notified Hirsch that it believed Hirsch had breached the J.D.A. by failing to submit production and sales goals necessary for the granting of a license agreement for that product. On April 16, 1987, after giving Hirsch time to cure its default, Johns Hopkins purported to terminate the J.D.A. and subsequently entered non-exclusive license agreements with at least three other licensees.

The second [*4] agreement between the parties, the License Agreement ("L.A."), gave Hirsch the exclusive right to develop and market products based upon a certain invention that Johns Hopkins had patented. Within thirty days of the effective date of the L.A. (August 18, 1983), Johns Hopkins was to turn over to Hirsch "all technical information and know-how" related to the invention that it had in its possession, "including prototypes." L.A. P 4.3. In return, Hirsch was to advance to Johns Hopkins approximately thirty thousand dollars. Hirsch also obligated itself to pay royalties to Johns Hopkins upon commercial sales of any products that it developed from the information given to it by Johns Hopkins and subsequently licensed and marketed. L.A. PP 1.2, 3.2. If no commercial sales took place within three years of the effective date of the L.A., Hirsch agreed to pay minimum annual royalties from the end of the third year. Id.PP 3.2, 3.3. Each royalty payment was due within thirty days after the end of the royalty year. Id. P 3.2.

Hirsch never licensed any products based on the invention or made any commercial sales covered by the L.A. On September 18, 1986, the first minimum royalty payment [*5] of fifteen thousand dollars became due; Hirsch made the payment on June 24, 1987. On September 18, 1987, the second royalty payment of thirty thousand dollars became due, but Hirsch never paid it. On November 4, 1987, Johns Hopkins terminated the L.A. on the ground that Hirsch had failed to make the required royalty payment after giving Hirsch notice and time to cure its default pursuant as required by the J.D.A. Id. PP 5.3 and 5.4.

On April 12, 1990, Hirsch sued Johns Hopkins for breach of contract based on the allegedly wrongful termination of the two agreements. Johns Hopkins filed two counterclaims against Hirsch, one for the second royalty payment due under the L.A. and one for breach of contract based on failure to pay maintenance costs of certain items of loaned equipment pursuant to an oral agreement between the parties.

Johns Hopkins moved for summary judgment on Hirsch's claims. The district court granted Johns Hopkins's motion, holding that Johns Hopkins was justified in terminating both contracts. As to the J.D.A., it held that summary judgment in favor of Johns Hopkins was appropriate because "Johns Hopkins terminated the J.D.A. according to its terms" and therefore [*6] had not breached the contract. J.A. 213. It held that "the three year natural life of the [J.D.A.] had passed" and that, even if the parties had mutually agreed to extend the J.D.A. (which it doubted), Hirsch had breached the J.D.A. by failing to provide an essential term of the license, the "production and sales goals" for the marketing of the invention, and thus Johns Hopkins had properly terminated the J.D.A. for Hirsch's breach. Id. at 213-14.

The district court also held that Johns Hopkins terminated the L.A. according to its terms. It explained that it was Hirsch's responsibility to obtain any necessary government approval for sales, that Hirsch neither sought nor obtained government approval nor made any sales, that Hirsch owed but failed to pay the second minimum royalty payment, and that Johns Hopkins was therefore justified in terminating the agreement due to Hirsch's breach. Id. at 214-15. The district court rejected Hirsch's argument that it was excused from its obligation to seek government approval because Johns Hopkins did not provide it with a prototype of the invention. Id. at 216. The district court concluded that Johns Hopkins had not breached the [*7] L.A. while Hirsch had, and that, as a matter of law, Johns Hopkins was therefore justified in terminating the L.A.

Johns Hopkins then moved for partial summary judgment on its counterclaim for the unpaid royalty installment and Hirsch moved for partial summary judgment on the counterclaim for maintenance costs. The district court granted Johns Hopkins's motion, awarding it $ 30,000, but denied Hirsch's motion on the ground that there were genuine issues of material fact regarding the alleged oral agreement for Hirsch to maintain the equipment. After a bench trial on the counterclaim for maintenance costs, a magistrate judge entered judgment in

favor of Johns Hopkins, awarding it $ 16,704 plus prejudgment interest.

Hirsch now appeals from the summary judgments in Johns Hopkins's favor and from the magistrate judge's award of prejudgment interest on the maintenance costs counterclaim.

II

HN1 We review grants of summary judgment de novo, applying the same standards as applied by the district court. Felty v. Graves-Humphreys Co., 818 F.2d 1126, 1127-28 (4th Cir. 1987). "Summary judgment is appropriate only when there is no genuine issue of material fact and the moving party is entitled **[*8]** to judgment as a matter of law." Miller v. Leathers, 913 F.2d 1085, 1087 (4th Cir. 1990) (citing Fed. R. Civ. P. 56(c)), cert. denied, 498 U.S. 1109 (1991). The burden of establishing the nonexistence of a "genuine" issue is on the moving party, and any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255-56, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Adickes v. S.H. Kress & Co., 398 U.S. 144, 157, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970). The non-moving party is entitled "to have the credibility of his evidence as forecast assumed, his version of all that is in dispute accepted, all internal conflicts in it resolved favorably to him, [and] the most favorable of possible alternative inferences from it drawn in his behalf." Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979). However, a bare allegation or a mere scintilla of evidence is not sufficient to create an issue of fact. Anderson, 477 U.S. at 252. III

Hirsch argues first that its claim regarding Johns Hopkins's breach of the J.D.A. should not have been disposed of by summary judgment because genuine issues existed as to at least three material facts, namely: **[*9]** (1) whether and when a license was created; (2) whether and how long the parties extended the J.D.A.; and (3) whether Hirsch failed to use "best efforts" to market the allegedly licensed product. We disagree and therefore affirm the district court's grant of summary judgment.

Maryland contract law governs the construction of the J.D.A. J.D.A. P 8.9. HN2 Under Maryland law, as generally, where the language of a contract "is clear and unambiguous, the construction of the contract is a matter of law for the court," Della Ratta, Inc. v. American Better Community Developers, Inc., 38 Md. App. 119, 380 A.2d 627, 633-34 (Md. Ct. Spec. App. 1977), "and it must be presumed that the parties meant what they expressed," Orkin v. Jacobson, 274 Md. 124, 332 A.2d 901, 904 (Md. 1975). Moreover, "the written language embodying the terms of an agreement will govern the rights and liabilities of the parties, irrespective of the intent of the parties at the time they entered into the contract." Slice v. Carozza Properties, Inc., 215 Md. 357, 137 A.2d 687, 693 (Md. 1958).

The terms governing the duration of the J.D.A. are clear and unambiguous. The J.D.A. was to expire on July 26, 1986, so long as it was not extended by one of several **[*10]** means. It could have been extended by mutual consent of the parties. J.D.A. P 6.4. If a license were created, the J.D.A. would have been extended for the duration of the license. Id. In addition, once Johns Hopkins developed a product that could be licensed, Hirsch had 180 days to exercise its option to obtain an exclusive license, Id. P 4.2; if Johns Hopkins notified Hirsch that it had developed a product within 180 days of the expiration of the J.D.A., the J.D.A. would have been extended as necessary to allow Hirsch its allotted 180 days to exercise its option to obtain a license, the creation of which would have itself extended the J.D.A. even longer.

None of these eventualities occurred, and the J.D.A. consequently expired on July 26, 1986, three years after its execution. Johns Hop kins notified Hirsch Chemie that it had developed a product for which it had the option to obtain an exclusive license on October 30, 1985, more than 180 days before the natural expiration date of the J.D.A., July 26, 1986. Therefore, the 180-day option period did not extend the J.D.A.

Neither was the J.D.A. extended by the creation of a license. Hirsch argues that the J.D.A. itself created **[*11]** a license or, in the alternative, that a license was created by an exchange of letters between agents of the two parties. We disagree. The J.D.A. did not contain all the essential terms of a license, but instead contemplated the creation of future licenses. Paragraph 8.4 states that the J.D.A. "shall not be construed to grant any license from . . . Johns Hopkins to Hirsch except as expressly provided herein." Paragraph 4.2 expressly provides that Johns Hopkins grants Hirsch an option to acquire licenses as opposed to actually granting a license itself. Other paragraphs refer to licenses to be granted in the future and terms to be specified later. E.g., J.D.A. PP 4.7, 6.3, 6.4. We therefore conclude that, by its unambiguous terms, the J.D.A. did not convey a license to Hirsch, but merely granted it the first right to negotiate for an exclusive license on all products developed by Johns Hopkins during certain research.

The parties did negotiate and attempt to create a license agreement but were unsuccessful in that endeavor. An agent of Johns Hopkins wrote to Hirsch on October 30, 1985, notifying Hirsch that it had developed a product for licensing and that, if Hirsch wished to **[*12]** exercise its option to acquire a license, it should respond in writing and then Johns Hopkins would draft a proposed license agreement. J.A. 41. Hirsch agents responded twice, once by letter dated November 22, 1985, and once by letter dated February 25, 1986, stating that Hirsch did indeed desire to exercise its option. J.A. 42, 165. These letters referred to the draft license agreement, noting that its consummation would be "subject to approval by all parties involved." J.A. 42. An agent of Johns Hopkins wrote another letter on September 5, 1986, in which it assigned a license number to the item in question and discussed the matter of Hirsch's paying the costs of patenting the invention. J.A. 190. Hirsch argues that the initial exchange of letters constitutes a binding offer and acceptance of a license. Hirsch also contends that the September letter, and Hirsch's subsequent payment of the patenting costs, is proof that a license existed, noting specifi cally that Hirsch was obliged to pay patent costs only for licensed products according to J.D.A. P 4.5. Hirsch contends that the written license agreement anticipated by the parties would only have memorialized their already-existent **[*13]** contract and would have been a mere formality.

We disagree with these contentions. The parties were simply in the process of negotiating the terms of a license agreement. They clearly anticipated consummating the license only after the material terms, as formulated in a draft written license agreement, were agreed upon. No such agreement ever materialized, apparently due largely to the inability of the parties to agree upon one material term of the license, production and sales goals for marketing the invention. n1 The September 5, 1986, letter itself noted that the same term was still unsettled, leaving the license agreement incomplete; this statement negates any inference to be drawn from that letter that the granting of a license number and payment of patent fees were anything more than good faith gestures along the way to the ultimate agreement. J.A. 190. Apparently, the parties never finalized a written license agreement despite repeated requests by Johns Hopkins for Hirsch to provide production and sales goals for approval and despite Hirsch's implicit acknowledgment that producing proposed goals was its responsibility by asking for more time to produce them. J.A. 104, 106, **[*14]** 191.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 J.D.A. P 6.3 provides that "future license agreements for licensed products will specify production and sales goals to be mutually agreed upon."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The controlling principle of contract formation here is that expressed in the Restatement (Second) of Contracts § 27 (1979):

> HN3
> Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

(emphasis added). The undisputed circumstances here establish as a matter of law that the parties were merely engaging in preliminary negotiations and meant to form a binding license agreement only with the execution of a written license agreement. We therefore conclude that the parties never extended the J.D.A. by creating a license.

Finally, the J.D.A. was not extended by the mutual consent of the parties to or beyond **[*15]** April 16, 1987, the date upon which Johns Hopkins purported to terminate the J.D.A, and therefore its three year term expired on July 26, 1986. The J.D.A. never was extended in writing, as is required by J.D.A. P 8.10, which states that "no modification or amendment to this Agreement shall be effective unless agreed to in writing, executed by both parties." The record indicates that there may have been an oral agreement to extend the J.D.A., but only for one month, at Hirsch's request, for the limited purpose of allowing Hirsch more time to develop a production and sales plan. J.A. 101-02, 104. This one-month extension also expired without finalization of a license agreement. Id.

Hirsch argues that the behavior of the parties implies that they mutually agreed to an extension of the J.D.A., noting that Johns Hopkins did not try to terminate the J.D.A. on July 26, 1986, that the parties continued to negotiate towards a license agreement for several months after the natural expiration date of the J.D.A., and that Johns Hopkins eventually wrote two letters in which it purported to terminate the J.D.A. on April 16, 1987, implying that it believed the J.D.A. was still in force at that **[*16]** time. J.A. 104-06. We disagree that such an inference properly could be drawn from the parties' behavior.

At most, such activity may be evidence of a subsequent oral agreement with the same terms as the original agreement. The controlling principle here is that expressed, for example, in 17A C.J.S. Contracts § 449, at 561 (1963): HN4"the fact that the parties by their acts and declarations indicate an intention to treat a written contract as continuing after the time prescribed in it for its termination will not have the effect of continuing such contract, although it may show a subsequent oral agreement on the same terms." Hirsch did not argue or offer proof that the parties made a subsequent express oral agreement on the same terms as the J.D.A. Therefore, because the unambiguous terms of the J.D.A. mandate that it expired on July 26, 1986, or August 26, 1986, at the latest, without any provision for its automatic extension, any activity by the parties indicating that they believed the J.D.A. to continue in effect after that time was ineffective to extend the J.D.A.

Moreover, even if the parties had somehow extended the J.D.A. by implicit mutual consent, the claim was properly **[*17]** dismissed via summary judgment. Paragraph 6.1 provides that Hirsch "will devote its best efforts to establishing and expanding a market for the various [licensed] products manufactured pursuant hereto." Hirsch argues that the "best efforts" requirement applies only to actual marketing efforts and not to the requirement in paragraph 6.3 that it "specify production and sales goals." In addition, it contends that it did make significant efforts to market the invention and that there is a genuine issue as to whether those efforts met the best efforts requirement. However, Hirsch could not very well establish

and expand a market for Johns Hopkins's invention without setting production and sales goals, gaining Johns Hopkins's approval of those goals, and obtaining a license to make and sell the products. Having failed to take those steps, it therefore failed to use its best efforts to market the invention and Johns Hopkins would have been justified in terminating the J.D.A. for cause had it not already expired. See J.D.A.P 6.3 ("Future license agreements for licensed products will specify production and sales goals to be mutually agreed upon and . . . failure of Hirsch and its licensees **[*18]** to meet these goals could result in termination of the license or conversion to nonexclusive."); P 6.5 ("Either party may terminate this Agreement if the other party shall breach any material provision of this Agreement and such breach shall continue unremedied for a period of ninety (90) days after written notice of such breach is sent to the breaching party.").

In sum, we hold that there is no genuine issue of material fact warranting a trial regarding Hirsch's claim that Johns Hopkins breached the J.D.A. The J.D.A. expired on July 26, 1986, or on August 26, 1986, at the latest, and Johns Hopkins could not therefore have breached it at a later date. Additionally, even if the J.D.A. was extended by implicit mutual consent, Johns Hopkins was justified in terminating it for cause on grounds of Hirsch's material breach and did so according to its terms by giving Hirsch the required notice and opportunity to cure its default.

IV

We likewise conclude that the district court properly granted summary judgment dismissing Hirsch's claim that Johns Hopkins breached the L.A. and granting Johns Hopkins's motion for summary judgment on its counterclaim for royalties due under the L.A. Hirsch **[*19]** argues that genuine issues existed as to several material facts, including (1) when royalties became due, if ever; (2) whose responsibility it was to obtain government approval of products to be sold; and (3) whether Hirsch's failure to obtain government approval was excused by Johns Hopkins's failure to develop its invention to the point of commercial marketability or by Johns Hopkins's failure to give Hirsch a prototype of its invention. We disagree, and therefore affirm the district court's grants of summary judgment of both the claim and the counterclaim.

Maryland contract law also governs the construction of the L.A. L.A. P 6.3. The L.A. provided that, if no commercial sales of the invention occurred within the first three years after the effective date of the L.A., minimum royalty payments would become due beginning at the end of the third year. L.A. PP 3.2, 3.3. Delay of payment would only be excused if the first sale was postponed "by reason of a delay in receiving the required governmental approval for such sale." Id. P 3.3. If Hirsch failed to pay the minimum royalties when due, Johns Hopkins had the option of terminating the contract. L.A. P 5.4. Hirsch contends that, **[*20]** because no government approval was ever obtained, no royalty payment was ever due, and that, because no royalty was due, Johns Hopkins breached the L.A. by purporting to terminate it without justification. Hirsch also maintains that it was not responsible for seeking and obtaining government approval and, in the alternative, was prevented from obtaining government approval by Johns Hopkins's failure to provide a prototype of the invention and a commercially marketable product that could be approved, or that there is at least a genuine issue as to these facts.

We disagree. First, we agree with the district court that under the L.A.'s provisions, Hirsch was responsible, as a matter of law, for obtaining government approval. Although the L.A. does not explicitly state this, the contract as a whole plainly so contemplates. In the agreement's preamble, Hirsch declares that it "wishes to obtain rights to the above-noted invention, and technical information and knowhow in support of its development and sales efforts in this area." Paragraph 2.1 then provides that Hirsch receives "the rights to make, have made, use, have used, sell, and have sold the Licensed Products" developed from Johns **[*21]** Hopkins's invention. These provisions and others clarify that Hirsch is responsible for developing, making, marketing and selling licensed products based upon the

invention. Included in these obligations would naturally fall the obligation to seek necessary government approval for any sale of any product developed by Hirsch. Hirsch never proffered any evidence to contradict the plain implication of these provisions save for an affidavit of one of its officers stating that Hirsch subjectively believed the responsibility to be Johns Hopkins's. J.A. 193. That of course could not suffice to put the intended meaning of this matter in issue.

Neither did Hirsch sufficiently counter Johns Hopkins's plain showing that the custom in the industry is for the licensee, not the licensor, to obtain government approval for sales. See J.A. 136, 143. Relying on the rule that HN5"a usage, to be admissible, must be proved to be known to the parties, and to be so general and well established that knowledge and adoption of it may be presumed," Jarrett v. J. Staum & Sons Co., 138 Md. 217, 113 A. 720, 721 (Md. 1921), Hirsch proffered that it had no actual knowledge, but "knowledge of a trade usage will be imputed **[*22]** to persons in the same trade." Wathen v. Pearce, 175 Md. 651, 3 A.2d 486, 492 (Md. 1939). And, where a usage exists in reference to a particular trade or business, the contracts of parties engaged in that business "must be presumed to be cognizant of the usage," unless it is expressly excluded. Appleman v. Fisher, 34 Md. 540, 554-55 (1871). Here, it is indisputable on the summary judgment record that Hirsch is a biotechnology company, J.A. 63, engaged in the business of marketing medical technology, contracting for a license to market an invention under the L.A., and attempting to contract for a license to market a product under the J.D.A. There is no suggestion that the parties expressly excluded this trade usage from implicit inclusion in the L.A. Construing the instrument as a whole and in light of this trade usage, we therefore conclude that there is no genuine issue of material fact on this point and that as a matter of law Hirsch, as licensee under the L.A., bore the responsibility for obtaining government approval for any products it developed from Johns Hopkins's invention. Second, we agree with the district court that Hirsch was not prevented from obtaining government approval **[*23]** by Johns Hopkins's failure to provide a prototype of its invention. Paragraph 4.3 of the L.A. provides:

> 4.3 Within thirty (30) days after execution of this Agreement, [Johns Hopkins] shall furnish to [Hirsch] . . . all technical information and know-how, including prototypes, which it has in its possession and which relate to the [invention].

(emphasis added). The district court held that Johns Hopkins had complied with this paragraph by turning over any information in its possession. It also held that Johns Hopkins did not have to turn over a prototype because it had none in its possession except a very primitive device unusable to Hirsch and because paragraph 4.3 did not require it to create one. We agree. Johns Hopkins offered proof that (1) the only existing prototype was primitive and unusable to Hirsch; (2) it could only be operated in a hospital with the special power lines and x-ray shields available there, so Hirsch always brought interested buyers to the hospital for demonstrations; (3) the invention's inventor was the only person able to operate the primitive prototype; (4) an agent of Hirsch admitted that no prototype existed at the time the L.A. **[*24]** was signed; and (5) an agent of Hirsch admitted in a 1987 meeting that the inventor had done everything and delivered everything requested by Hirsch. J.A. 139, 142. Hirsch never offered evidence to contradict Johns Hopkins's offered proof. We therefore conclude that Hirsch has failed to make a showing sufficient to raise a genuine issue as to whether Johns Hopkins was obliged to supply a prototype of its invention and whether Hirsch can be excused from seeking government approval by any failure to do so.

Third, Hirsch was not prevented from obtaining government approval by Johns Hopkins's failure to provide a commercially marketable product. Hirsch did not bargain for a commercially marketable product. In the preamble to the L.A., Johns Hopkins merely warranted that it was "the owner of an invention relating to on-line treatment monitoring for

radiation teletherapy" and made no representations regarding its stage of development. All Hirsch contracted for under the clear terms of the contract was a license for the invention as it existed as of August 1983; no provision of the L.A. required Johns Hopkins to improve or further develop the invention. Moreover, several provisions state **[*25]** that Hirsch itself would develop the invention into marketable products. L.A. preamble,P 2.1. Hirsch proffered some evidence of its subjective expectation that Johns Hopkins's invention would be commercially marketable without further development by Hirsch, but it is irrelevant. Faulkner v. American Casualty Co., 85 Md. App. 595, 584 A.2d 734, 739 (Md. Ct. Spec. App.) HN6 ("While the subjective intent of the parties at the time the agreement was executed may be the subject of a dispute, that dispute does not concern any material fact . . . . Further, where the language of an agreement is unambiguous, the subjective intentions of the parties become irrelevant."), cert. denied, 323 Md. 1, 590 A.2d 158 (Md. 1991).

Because the terms of the L.A. clearly did not require Johns Hopkins to provide a commercially marketable invention, no genuine issue exists as to whether Hirsch is excused from its obligation to obtain government approval by the non-marketability of Johns Hopkins's invention.

Finally, there is no genuine issue regarding when, if ever, the royalties became due. Hirsch argues that, because government approval was not, and could not be, obtained, no royalties ever became due. n2 However, because **[*26]** Hirsch never sought or obtained government approval, there was no delay in receiving government approval that could operate to delay the due date of the first royalty payment under paragraph 3.3. There is therefore no doubt that the first royalty payment of $ 15,000 became due on September 18, 1986, and the second royalty payment of $ 30,000 became due on September 18, 1987. L.A. PP 3.2, 3.3. Hirsch paid the first, albeit late, but did not pay the second.

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n2 Johns Hopkins argues that Hirsch raises this argument for the first time on appeal and that this Court should therefore not address the issue. It is true that Hirsch did not raise the issue in its memorandum opposing summary judgment on Johns Hopkins's counterclaim. J.A. 230-32. However, Hirsch did raise this precise argument in its memorandum opposing Johns Hopkins's motion for summary judgment on Hirsch's claims, J.A. 181-183, and we therefore will address the issue on appeal.

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Johns Hopkins's right to terminate the contract for nonpayment of royalties **[*27]** is governed by L.A. PP 5.3 and 5.4. These paragraphs provide:

> 5.3 Upon breach or default of any of the terms and conditions of this Agreement, the defaulting party shall be given notice of such default in writing and a period of thirty (30) days after receipt of such notice to correct the breach or default.
>
> 5.4 In the event that the minimum annual royalties required under Section 3.2 hereinabove are not paid,[Johns Hopkins] may, at its option, terminate this Agreement or convert the exclusive license granted under Section 2.1 hereinabove to a non-exclusive license.

Because Hirsch withheld the second royalty payment without justification, Johns Hopkins properly terminated the L.A. Because Johns Hopkins gave Hirsch the required 30 days notice and otherwise complied with the requirements of the L.A., it did not breach the L.A. In contrast, Hirsch did breach the L.A. by withholding the second royalty payment.

We therefore affirm the district court's grant of summary judgment in favor of Johns Hopkins both on Hirsch's breach of contract claim and Johns Hopkins's counterclaim for the unpaid royalty.

V

Finally, we address Hirsch's challenge to the award of prejudgment **[*28]** interest on the award for Johns Hopkins's second counterclaim. Although prejudgment interest was not discussed at trial, Johns Hopkins requested it during the preparation of the order awarding it maintenance costs for various items of equipment, and the magistrate judge awarded it without explanation. J.A. 243-44. *HN7*Under Maryland law, a trial judge may, within its discretion "award prejudgment interest to place the injured party in a breach of contract case in the same position [it] would have occupied had the defendant not broken its promise." Knowles v. Mutual Life Ins. Co. of New York, 788 F.2d 1038, 1041 (4th Cir.), cert. denied, 479 U.S. 948 (1986). See also Bituminous Constr., Inc. v. Rucker Enters., Inc., 816 F.2d 965, 969 (4th Cir. 1987); Crystal v. West & Callahan, Inc., 328 Md. 318, 614 A.2d 560, 572 (Md. 1992).

We conclude that the award of prejudgment interest in this case was a proper exercise of discretion. n3 The amount due was a "fixed and definite sum." See Bituminous Constr., Inc. , 816 F.2d at 969. Johns Hopkins notified Hirsch of the amount owed in writing on November 19, 1984, and again on February 19, 1985, using such phrases as "as per our verbal agreement." **[*29]** J.A. 286-87, 296. Hirsch apparently promised to reimburse the amount as of January 1985. Hirsch's nonpayment of that sum denied Johns Hopkins its use for more than nine years. Therefore, it was proper for the magistrate judge to award prejudgment interest from January 1, 1985, to the date of the order, June 3, 1994.

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n3 *HN8*"Prejudgment interest is not allowed on unliquidated claims . . . . If the contract requires payment of a sum certain on a date certain, . . . prejudgment interest typically is allowed as a matter of right." Crystal, 614 A.2d at 572. The award of prejudgment interest is a matter for the discretion of the finder of fact for contracts that fall somewhere in between these two extremes. Id., at 573. Because we find that the award in this case was an appropriate exercise of discretion, we do not reach the issue whether prejudgment interest was also allowable as a matter of right.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

Hirsch objects to the award of prejudgment interest on the grounds that, "while the amount allegedly due under **[*30]** the alleged oral agreement was ascertainable prior to the Court's judgment, whether it was actually owed was not determined until the decision of the Court." Appellants' Br., 27. Hirsch also argues that the magistrate judge abused her discretion by awarding prejudgment interest in her order without stating the reason. Hirsch's arguments

are unavailing. HN9 The fact that one contracting party disputes either the existence of a contract or the amount due under it does not render the award of prejudgment interest in the discretion of the trial judge inappropriate. If prejudgment interest were held inappropriate in any case in which the defendant disputed his obligation to pay an amount under an alleged contract, the exception would subsume the rule.

Lastly, we conclude, however, that the magistrate judge erred in ordering that the prejudgment interest be calculated at the postjudgment rate of ten percent per annum. Crystal , 614 A.2d at 572. It HN10 should be awarded at the general legal rate applied in the absence of statute (six percent per annum). Id. (citing Md. Const. art. III, § 57). We note, however, that the amount of prejudgment interest so calculated becomes part of the judgment [*31] upon which post-judgment interest is now allowable at ten percent per annum. I.W. Berman Properties v. Porter Bros., Inc., 276 Md. 1, 344 A.2d 65, 79 (Md. 1975); Md. Code Ann. [Cts. & Jud. Proc.] § 11-107(a) (1995). The judgment in favor of Johns Hopkins on its counterclaim for maintenance costs should, therefore, be modified accordingly.

AFFIRMED, AS MODIFIED

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Service: Get by LEXSEE®
Citation: 1993 U.S. Dist. LEXIS 9666

*1993 U.S. Dist. LEXIS 9666, **

GLEN E. LeFEBVRE and NANCY C. LeFebvre, individuals, Plaintiffs, v. RITE-A-WAY INDUSTRIES, INC., d/b/a FIRST INTERSTATE INNS, a Nebraska Corporation, and JERRY MARTIN, an individual, Defendants.

CIVIL ACTION No. 91-1435-MLB

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

1993 U.S. Dist. LEXIS 9666

June 14, 1993, Decided
June 14, 1993, Filed

DISPOSITION: [*1] IT IS THEREFORE ORDERED that defendants' motion (Docs. 55) for partial summary judgment are granted as to LeFebvres' claims of breach of contract, retaliation under state law, intentional or negligent infliction of emotional distress, and for punitive damages, but is denied as to LeFebvres' claim of retaliation under the FLSA.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiff employees filed an action in the United States District Court for the District of Kansas against defendants, an employer and its manager, and claimed they were unlawfully discharged. The employees stated claims for breach of contract, retaliatory discharge under the Fair Labor Standards Act (FLSA), and emotional distress. The employer and manager sought partial summary judgment pursuant to Fed. R. Civ. P. 56.

OVERVIEW: The employees worked for the employer under an annual contract which was renewed once but not renewed a second time. The reason the manager gave for non-renewal was that he knew the employees were unhappy working under the contract and would eventually have left for that reason. On those facts, the court found no breach of contract as the contract was clear on its face and had only yearly terms, after which time non-renewal was an option. Thus, parol evidence was not allowed when ruling on the breach of contract claim. The emotional distress or "outrage" claims were not supported due to a lack of outrageous conduct, but the court found the retaliatory discharge claim under the FLSA survived the motion for summary judgment. This was because in order to rule on the retaliatory discharge claim a reason for non-renewal had to be found. That required making rulings of credibility, which the court left for the jury. Punitive damage claims were dismissed because it was clear the action complained of was not one that occurred with evil motives. Summary judgment was granted as to all claims except the retaliatory discharge claim under the FLSA, and that claim alone was left for trial.

OUTCOME: The court granted the motion for summary judgment filed by the employer and its manager as to the employees' claims of breach of contract, retaliation under state law, intentional or negligent infliction of emotional distress, and for punitive damages. The court denied the motion as to retaliatory discharge under the FLSA because that issue required credibility determinations.

CORE TERMS: retaliation, punitive damages, summary judgment, contractor, state law, breach of contract, outrage, conversation, outrageous, emotional distress, duration,

threshold, infliction of emotional distress, key employees, terminated, expired, admit, renew, severe emotional distress, causal connection, written contract, prima facie case, cause of action, adverse action, oral contract, matter of law, intentionally, unambiguous, unofficial, exempt

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Summary Judgment > Standards > Appropriateness

Civil Procedure > Summary Judgment > Standards > Legal Entitlement

Civil Procedure > Summary Judgment > Standards > Materiality

HN1 Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. More Like This Headnote

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

HN2 Where parties carry on negotiations and subsequently enter into an agreement in writing with respect to the subject matter, all prior and contemporaneous negotiations are deemed to be merged into the written agreement which constitutes the contract between the parties. Where the agreement is complete, unambiguous, and free from uncertainty, parol or extrinsic evidence tending to vary or substitute a new and different agreement from the one evidenced by the writing is inadmissible. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Duration of Employment > Fixed Term

HN3 The general rule is that a contract which specifies the period of its duration terminates on the expiration of such period. More Like This Headnote

Contracts Law > Contract Interpretation > Good Faith & Fair Dealing

HN4 Every contract imposes a duty of good faith and fair dealing. More Like This Headnote

Criminal Law & Procedure > Accusatory Instruments > General Overview

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Collective Bargaining & Labor Relations > Unfair Labor Practices > Interference With Protected Activities

HN5 Under the Fair Labor Standards Act (the Act), particularly 29 U.S.C.S. § 215(a)(3) it is unlawful for any person to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. A discharge is discriminatory under § 215(a)(3) when the immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights. The section also protects conduct based on a good faith, although

unproven, belief that the employer's conduct is illegal. The Act also applies to the unofficial assertion of rights through complaints at work. In order to make out a prima facie case of retaliation under § 215(a)(3), the claimant must show that (1) they were engaged in protected activity; (2) adverse action was taken by the employer against the employee; and (3) a causal connection between such activity and the employer's action. More Like This Headnote

Governments > Legislation > Statutory Remedies & Rights

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > Wrongful Termination

HN6 An employer's failure to renew an employment contract constitutes an adverse action by the employer and is cognizable under the Fair Labor Standards Act. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Summary Judgment > Motions for Summary Judgment > General Overview

Labor & Employment Law > Employment Relationships > General Overview

Labor & Employment Law > Wrongful Termination > Defenses > General Overview

HN7 The plaintiff who successfully establishes a prima facie case of retaliation does not automatically survive a summary judgment motion, as the defendant has an opportunity to articulate a legitimate nondiscriminatory reason for their decision not to renew the employment contract. More Like This Headnote

Torts > Damages > Compensatory Damages > Pain & Suffering > Emotional & Mental Distress > General Overview

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

Torts > Negligence > Actions > Negligent Infliction of Emotional Distress > General Overview

HN8 Kansas law recognizes that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another may be liable for such emotional distress based upon what has come to be referred to as the tort of outrage. A plaintiff claiming outrage must meet two threshold requirements: (1) the defendant's conduct must reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) the plaintiff's emotional distress must be so extreme and severe that no reasonable person should be expected to endure it. Mere insults, threats or annoyances do not rise to the level of outrage. The required threshold for an outrage claim is necessarily high to separate meritorious claims from those based on trivialities or hyperbole. More Like This Headnote

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN9 For conduct to be "extreme and outrageous", it must be so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Contracts Law > Breach > General Overview

Contracts Law > Remedies > Punitive Damages

HN10 Punitive damages cannot be awarded for a breach of contract. More Like This Headnote

Civil Procedure > Remedies > Damages > Punitive Damages

Labor & Employment Law > Discrimination > Retaliation > Remedies > Damages

Torts > Damages > Punitive Damages > Conduct Supporting Awards

HN11 Assuming that the relief afforded a plaintiff pursuing a retaliation claim under 29 U.S.C.S. § 215(a)(3) includes punitive damages, in order to establish such a claim the plaintiff must show the defendants' conduct is outrageous, or motivated by evil motives or a reckless indifference to the rights of others. More Like This Headnote

COUNSEL: For GLENN E LEFEBVRE, NANCY C LEFEBVRE, plaintiffs: Randall J. Price, The Rycon Building, 532 North Broadway, Wichita, KS 67214, 316-267-4878.

For RITE-A-WAY INDUSTRIES INC, a Nebraska corporation dba First Interstate Inns, JERRY MARTIN, an individual, defendants: Ross A. Hollander, Martin, Churchill, Overman, Hill & Cole, Chartered, 500 North Market, Wichita, KS 67214, 316-263-3200, Terry T Wiens, 3015 N.W. 59th Street, Oklahoma City, OK 73112, 405-848-8812.

JUDGES: Belot

OPINION BY: MONTI L. BELOT

OPINION: MEMORANDUM AND ORDER

This case comes before the court on defendants' motion for partial summary judgment, pursuant to Fed. R. Civ. P. 56. (Doc. 55)

LeFebvres signed an agreement on June 16, 1989, to manage and operate the Interstate Inn in Oakley, Kansas. The Inn is owned by defendant Rite-A-Way Industries, Inc. (hereinafter Rite-A-Way). The agreement, by its terms, expired **[*2]** on June 16, 1990. The parties executed a second agreement on June 16, 1990, with terms identical to the first agreement. The second agreement was to expire on June 16, 1991. On or about May 28, 1991, Jerry Martin, Rite-A-Way's general manager, informed LeFebvres that Rite-A-Way would not renew the management agreement for a third year because of LeFebvres' unhappiness and Rite-A-Way's concern that LeFebvres would not be able to do a good job. At LeFebvres' request, Martin allowed LeFebvres to resign effective June 30, 1991.

Both agreements under which the LeFebvres operated the motel described their employment status as that of independent contractors. n1 The LeFebvres unilaterally concluded they were employees during the first contract year. Nancy LeFebvre investigated her employment status by contacting an accountant, the Department of Labor, and the Internal Revenue Service. Neither Glen nor Nancy LeFebvre informed Martin or any other Rite-A-Way representative of these contacts. Nancy LeFebvre had one conversation with Martin about their concerns over their employment status at some time during the second contract period. According to Martin, the conversation was "along **[*3]** [the] lines" of LeFebvres pursuing their claim for wages and unpaid compensation under the FLSA.

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 The issue of whether the LeFebvres were independent contractors is not before the court. Instead, the defendants have conceded, for the purposes of this motion, that the LeFebvres were employees. Therefore, the court's discussion and resolution of the issues regarding the FLSA will proceed as if an employer-employee relationship existed.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

LeFebvres filed this lawsuit in October, 1991. They alleged violations of the Fair Labor Standards Act (FLSA), breach of contract, retaliatory discharge, and intentional or negligent infliction of emotional distress. They also seek recovery of punitive damages.

STANDARDS FOR SUMMARY JUDGMENT

*HN1*Summary judgment is appropriate when the moving party can demonstrate that there is no genuine issue of material fact and is entitled to judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Fed. R. Civ. P. 56(c).

DISCUSSION **[*4]**

A. FLSA Civil Penalties

LeFebvres concede they lack standing to assert claims for civil penalties under the FLSA. n2 Accordingly, this claim is dismissed.

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n2 LeFebvres have also asserted claims pursuant to the FLSA for unpaid wages, overtime compensation, prejudgment interest, attorney's fees and costs. These claims are not implicated in this motion.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

B. Breach of Contract

LeFebvres claim they were terminated from their positions of employment with defendants in breach of express oral and implied provisions of their employment contracts. LeFebvres contend they had a reasonable expectation of continuing employment of unlimited duration. In the alternative, they argue that even if the oral representations made by Martin are not considered, the contract by its terms required the defendants to make a finding that LeFebvres had failed to operate the property in an acceptable manner before terminating their employment. The defendants respond that any oral assurances given to LeFebvres are superseded by the written **[*5]** agreement. They further contend that the contract expired by its own terms and therefore no breach occurred.

The court finds as a matter of law that LeFebvres cannot assert a breach of contract claim against Jerry Martin. LeFebvres contend they were employed by Rite-A-Way. There is no allegation in LeFebvres' complaint that Jerry Martin is the alter ego of Rite-A-Way. In the

absence of such an allegation, Jerry Martin was not a party to the contract and therefore could not have breached the contract.

The rules concerning the admissibility of parol evidence to modify the terms of a written contract were restated in Konijnendijk v. Deyoe, 727 F. Supp. 1392 (D. Kan. 1989):

> The rule is well established that HN2 where parties carry on negotiations and subsequently enter into an agreement in writing with respect to the subject matter, all prior and contemporaneous negotiations are deemed to be merged into the written agreement which constitutes the contract between the parties. Where the agreement is complete, unambiguous, and free from uncertainty, parol or extrinsic evidence tending to vary or substitute a new and different agreement from the one evidenced [*6] by the writing is inadmissible.

Id. at 1397 (quoting Steel v. Eagle, 207 Kan. 146, 149, 483 P.2d 1063 (1971)).

The agreement n3 at issue states in pertinent part:

> TERMS: The terms of this agreement shall be for one year or until terminated by the IC (independent contractor) upon thirty (30) days written notice; if the IC fails to operate the property in an acceptable manner RAW (Rite-A-Way) may terminate on notice, beginning with the date shown above.

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n3 The first agreement is identical with the exception of different dates.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

The court finds the agreement unambiguous. It provides for a specific term of employment covering the period from June 16, 1990, until June 16, 1991. HN3 The general rule is that a contract which specifies the period of its duration terminates on the expiration of such period. Bartlett & Co., Grain v. Curry, 1 Kan. App. 2d 242, 247, 563 P.2d 1096 (1977). Nothing [*7] in the agreement can reasonably be construed as conferring an expectation of automatic renewals. See Weinzirl v. Wells Group, Inc., 234 Kan. 1016, 1019, 677 P.2d 1004 (1984). The oral representations n4 upon which LeFebvres rely were made prior to the execution of the first agreement. Under the parol evidence rule, the oral representations cannot serve as the basis for a breach of contract claim. Cf. Campbell v. Board of Regents of State of Kan., 770 F. Supp. 1479, 1491 (D. Kan. 1991) (plaintiff's contract of employment expressly stated that her appointment terminated on June 17, 1988, and carried with it no expectation of continued employment).

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n4 LeFebvres alleges Jerry Martin told them that Rite-A-Way was looking for "long-term managers."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

LeFebvres' reliance on Lessley v. Hardage, 240 Kan. 73, 727 P.2d 440 (1986), is misplaced. In Lessley, Sam Hardage, a Wichita real estate developer, **[*8]** contacted Lessley, who had previously been employed or connected with various real estate development and consulting firms, about the possibility of working for his company. The parties eventually agreed Lessley would be paid an annual salary of $ 55,000, receive executive fringe benefits, including life and health insurance, and receive a salary review after six months. Lessley claimed Hardage promised additional benefits, namely, a plan by which Lessley and other key employees would share in company projects. It was undisputed that Hardage promised to set aside 10% of retained equity for key employees. The parties' dispute centered on key employees' participation in cash income, where there was no retained income. Hardage contended his plan to share with key employees did not extend to projects where he received only cash and kept no interest in the project.

The court held that the oral contract between Lessley and Hardage was sufficiently definite to create an obligation on Hardage's part to pay percentages of retained equity interest and cash to the key employees. Id. at 82.

Lessley is distinguishable from the case at bar **[*9]** because Lessley had an oral contract and was an employee at will. The oral contract was ambiguous as to an aspect of Lessley's compensation. The court was required to consider the surrounding circumstances that lead up to Lessley's employment relationship with Hardage to ascertain Lessley's cash share of company profits. In contrast, LeFebvres had an unambiguous written contract that explicitly set forth its duration. There is no occasion to inquire into any oral representations made by Rite-A-Way; in fact, the parol evidence rule precludes such an inquiry. See Konijnendijk, 727 F. Supp. at 1398.

The court also rejects LeFebvres' alternative argument that the written contract by its terms required Rite-A-Way to find that LeFebvres failed to operate the property in an acceptable manner before terminating the agreement. The language upon which LeFebvres rely is the second clause of the second paragraph of the agreement. The second clause is separated from the first clause by a semicolon. The court believes the two clauses operate independently. The first clause sets out the duration of the agreement, while the second clause specifies a condition **[*10]** whereby Rite-A-Way is authorized to terminate the agreement before the expiration of the stated term. This construction gives effect to both clauses. See Arnold v. S.J.L. of Kansas Corp., 249 Kan. 746, 749, 822 P.2d 64 (1991) (Citation omitted) (court must interpret a contract in a manner that gives effect to all of its terms). LeFebvres' proffered construction of the agreement would contravene the term specifying its duration.

The question of Rite-A-Way's good faith under the contract is not implicated in this case. The court agrees that *HN4*every contract imposes a duty of good faith and fair dealing. Daniels v. Army National Bank, 249 Kan. 654, 658, 822 P.2d 39 (1991) ("Parties shall not 'intentionally and purposefully do anything to prevent the other party from carrying out his part of the agreement, or do anything which will have the effect of destroying or injuring the right of the other to receive the fruits of the contract.'"). Nothing of this sort occurred in this case. The duty of good faith and fair dealing cannot be asserted to override express terms of an agreement. The agreement **[*11]** in this case clearly sets forth its duration, and any oral or implied understandings to the contrary are of no consequence. The court finds the agreement expired by its own terms.

The defendants' motion for summary judgment on LeFebvres' breach of contract claim is granted.

C. Retaliation

1. FLSA Retaliation

The defendants move for summary judgment on LeFebvres' claim of retaliation for asserting their rights under the FLSA. HN5 29 U.S.C. § 215(a)(3) makes it unlawful for any person

> to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee. . . .

A discharge is discriminatory under § 215(a)(3) when the "immediate cause or motivating factor of a discharge is the employee's assertion of statutory rights." Love v. Re/Max of America, 738 F.2d 383, 387 (10th Cir. 1984) (Citations omitted). The section also protects conduct based on a good **[*12]** faith, although unproven, belief that the employer's conduct is illegal. Id. (Citation omitted). The Act also applies to the unofficial assertion of rights through complaints at work. Id.

In order to make out a prima facie case of retaliation under § 215(a)(3), LeFebvres must show that (1) they were engaged in protected activity; (2) adverse action was taken by the employer against the employee; and (3) a causal connection between such activity and the employer's action. See id. at 385.

LeFebvres' claim is properly characterized as an unofficial assertion of rights through complaints at work. Although LeFebvres contacted the Department of Labor, the Internal Revenue Service, and an accountant concerning their rights, they admit they never informed Jerry Martin of these contacts. The defendants' absence of knowledge of these contacts rules out the possibility of a causal connection between these contacts and defendants' later adverse action. The sole basis of LeFebvres' claim of retaliation, then, is Nancy LeFebvre's conversation with Jerry Martin.

Martin testified he had a conversation with Nancy LeFebvre about LeFebvres pursuing a **[*13]** claim for wages and unpaid compensation under the FLSA at some unknown time. While Nancy LeFebvre does not remember the exact date of the conversation, she testified it probably took place at some time during the second contract year. During this conversation, the LeFebvres' status as either employees or independent contractors was discussed. Martin allegedly told Nancy LeFebvre that other persons had attempted to characterize themselves as employees and failed. It is undisputed that LeFebvres' contract was not renewed. While the causal connection between LeFebvres' and Martin's conversation and the subsequent non-renewal is arguably tenuous (compare the conduct in Love v. Remax, supra) the court, viewing this testimony in the light most favorable to LeFebvres, finds that a prima facie case of retaliation under § 215(a)(3) is established.

In their reply brief, the defendants argue that the LeFebvres state no cause of action under § 215(a)(3) because their employment was not terminated, but expired according to the terms of the agreement. The court disagrees. A person working under a contract for a fixed period

of time does not surrender his or her statutory rights [*14] under the FLSA. One of those rights is to be protected from retaliation for the unofficial assertion of their rights through complaints at work. While LeFebvres had no contractual right to continued employment with Rite-A-Way after June 16, 1991, HN6 the defendants' failure to renew their contract constitutes an adverse action by the employer and is cognizable under the FLSA. See DeVoe v. Medi-Dyn, Inc., 782 F. Supp. 546, 555 (D. Kan. 1992).

HN7 The plaintiff who successfully establishes a prima facie case of retaliation does not automatically survive a summary judgment motion. See MacDonald v. Eastern Wyoming Mental Health Center, 941 F.2d 1115, 1121 (10th Cir. 1991). At this stage, the defendants must articulate a legitimate nondiscriminatory reason for their decision not to renew the LeFebvres' contract.

Jerry Martin testified in his deposition that he personally made the decision not to renew LeFebvres' contract. The only reasons he offered for his decision were that LeFebvres were not happy and were going to be leaving anyway. Acceptance of this explanation would require the court to judge the credibility of Martin [*15] and LeFebvre, something the court cannot do when considering a motion for summary judgment. Thus, the court finds that the defendants have not rebutted the LeFebvres' prima facie showing and that a disputed issue of material fact exists with respect to the defendants' motivations for not renewing the agreement. The defendants' motion for summary judgment on the LeFebvres' retaliation under § 215(a)(3) is denied. n5

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n5 The jury will decide the FSLA retaliation claim only if it first determines that LeFebvres were employees and not independent contractors. See 29 U.S.C. § 215(a)(3).

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

2. State Law Retaliation

LeFebvres also contend they state a claim for retaliation under the anti-retaliation provisions of the Kansas Minimum Wage and Maximum Hours Law, K.S.A. 44-1201 et. seq. LeFebvres acknowledge that if the defendants are subject to the FLSA, they have no cause of action under state law. However, they contend that if the court determines the defendants are not subject [*16] to the FLSA because plaintiffs were independent contractors, a cause of action nevertheless exists under K.S.A. 44-1210(B). The defendants respond that state law does not apply to them because either LeFebvres are independent contractors or the defendants are covered by the FLSA and thus exempt from the state law.

K.S.A. 44-1202(d) specifically exempts from the definition of "employer" any employer who is subject to the provisions of the FLSA. The defendants admit they are employers as defined by the FLSA. Thus, the provisions of K.S.A. 44-1210(b), which proscribe retaliation by an employer, do not apply to them.

LeFebvres contend that because employers covered by the FLSA are exempt from the state law, a defendant who pleads that the FLSA does not apply is automatically covered by the state law. They cite no authority for this proposition and clearly it is without merit. If the jury determines that an independent contractor relationship existed between the parties, then the LeFebvres have no claim under either the FLSA or K.S.A. 44-1201 et seq. Independent contractors cannot be employees and the persons with whom they contract cannot be their employers. On the other [*17] hand, if the jury determines that an employer-employee relationship existed, then LeFebvres' claim lies exclusively under the FLSA.

The defendants' motion for summary judgment on LeFebvres' retaliation claim under state law is granted.

D. Outrage

LeFebvres allege the defendants' actions intentionally or negligently inflicted severe emotional distress upon them. HN8 Kansas law recognizes that one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another may be liable for such emotional distress based upon what has come to be referred to as the tort of outrage. Moore v. State Bank of Burden, 240 Kan. 382, 388, 729 P.2d 1205 (1986) (Citation omitted). n6 A plaintiff claiming outrage must meet two threshold requirements: (1) the defendant's conduct must reasonably be regarded as so extreme and outrageous as to permit recovery; and (2) the plaintiff's emotional distress must be so extreme and severe that no reasonable person should be expected to endure it. Id. Mere insults, threats or annoyances do not rise to the level of outrage. Rupp v. Purolator Courier Corp., 790 F. Supp. 1069, 1073 (D. Kan. 1992). **[*18]** The required threshold for an outrage claim is necessarily high to separate meritorious claims from those based on trivialities or hyperbole. Id.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n6 Mere negligence will not suffice to make out a claim for infliction of emotional distress. LeFebvres' claim of negligent infliction of emotional distress is thus barred as a matter of law. In any event, LeFebvres cannot satisfy the threshold requirements for an outrage claim.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In the case at bar, LeFebvres admit they did not seek medical or psychological treatment or other therapy for their alleged emotional distress. They also admit they did not require any prescribed medication for emotional distress nor suffer any physical injury due to emotional distress. (Doc. 56, Uncontroverted Fact #18) Nancy LeFebvre identified the following manifestations of the LeFebvres' emotional distress:

(a) an inability to sleep;

(b) an intolerance to being characterized as independent contractors such that the mere mention of the words causes them to "go beserk";

(c) an inability **[*19]** to think about their former relationship with defendants without being driven "crazy";

(d) being "upset" every time she thinks about the lawsuit. (Doc. 56, Uncontroverted Fact #17)

It is patently apparent that LeFebvres can satisfy neither of the threshold requirements. HN9 For conduct to be "extreme and outrageous", it must be "so outrageous in character, and so extreme in degree, as to go beyond the bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Roberts v. Saylor, 230 Kan. 289, 293, 637 P.2d 1175 (1981). The uncontroverted fact that neither Glen nor Nancy LeFebvre sought medical treatment nor required medication for their condition casts great doubt on the existence of severe emotional distress. LeFebvres' claim of outrageousness boils down to their dissatisfaction with their relationship with the defendants and primarily the termination of the relationship. LeFebvres signed two contracts that clearly set forth the terms of their

employment relationship with the defendants. They were not coerced into signing the agreements. The unhappiness over one's employment situation described **[*20]** by LeFebvres, even if true, is not the type of action society would deem outrageous. Cf. Gomez v. Hug, 7 Kan. App. 2d 603, 645 P.2d 916 (1982) (continuing stream of racist and vulgar language uttered by defendant deemed actionable). LeFebvres' unhappiness and anger over an employment dispute is a regular incident of everyday life and is something that ordinary persons are expected to endure. See Fletcher v. Wesley Medical Center, 585 F. Supp. 1260, 1262 (D. Kan. 1984).

The defendants' motion for summary judgment on LeFebvres' claim of intentional or negligent infliction of emotional distress is granted.

E. Punitive Damages

The defendants seek to strike LeFebvres' claim for punitive damages. Since HN10 punitive damages cannot be awarded for a breach of contract, Farrell v. General Motors Corp., 249 Kan. 231, 247, 815 P.2d 538 (1991), the only possible basis of a punitive damages claim is the FLSA retaliation claim. n7 The defendants contend the recovery under the FLSA is exclusive and does not include punitive damages.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n7 LeFebvres contend their punitive damages claim is governed by K.S.A. 60-3702, which sets forth the standard a plaintiff must satisfy to recover punitive damages. In light of our rulings dismissing LeFebvres' outrage claims, their sole remaining tort claim arises under federal law. The court must therefore apply federal common law to determine the punitive damages issue.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*21]**

In Travis v. Gary Community Mental Health Center, 921 F.2d 108 (7th Cir. 1990), cert. denied 112 S. Ct. 60 (1991), the court addressed whether punitive damages were available under the FLSA. The court noted that Congress amended the remedial section of the Act by adding the following language: "Any employer who violates the provisions of section 15(a)(3) of this Act [29 U.S.C. § 215(a)(3)] shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 15(a)(3), including without limitation employment, reinstatement or promotion and the payment of wages lost and an additional equal amount as liquidated damages." Id. at 111 (Citation omitted). The court noted that "legal" relief is commonly understood to encompass punitive damages. Id. The court was unable to find, nor have we found, any case interpreting this question. The court also found the legislative history unhelpful. Id. at 111-12.

The court will assume, but not decide, HN11 that the relief afforded a plaintiff pursuing **[*22]** a retaliation claim under § 215(a)(3) includes punitive damages. In order to establish such a claim, LeFebvres must show the defendants' conduct was outrageous, or motivated by evil motives or a reckless indifference to the rights of others. See Smith v. Wade, 461 U.S. 30, 46 (1983) (standards for punitive damage awards under 42 U.S.C. § 1983). None of the conduct alleged by LeFebvres satisfies this threshold. The court has already ruled that the defendants' conduct was not outrageous. There is no evidence that either defendant acted with evil motives. LeFebvres' basic complaints are that their work situation violated the FLSA and that they were dissatisfied with their hours and pay. Jerry Martin testified that he is generally unaware of the provisions of the FLSA. While his ignorance of the FLSA does not insulate the defendants from liability for a retaliation claim, it is not evidence of reckless indifference to LeFebvres' rights. Nor is his failure to accede to

LeFebvres' complaints or demands about their employment. Finally, the LeFebvres' reactions, no matter how extreme or bizarre, to the defendants' **[*23]** actions do not show that the defendants' actions were reckless.

The defendants' motion for summary judgment on LeFebvres' claim for punitive damages is granted.

IT IS THEREFORE ORDERED that defendants' motion (Docs. 55) for partial summary judgment are granted as to LeFebvres' claims of breach of contract, retaliation under state law, intentional or negligent infliction of emotional distress, and for punitive damages, but is denied as to LeFebvres' claim of retaliation under the FLSA.

At Wichita, Kansas, this 14th day of June, 1993.

Monti L. Belot, United States District Judge

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*1990 Ohio App. LEXIS 2721, **

DEAN E. SMITH, Plaintiff-Appellee, v. THE GREAT ATLANTIC & PACIFIC TEA CO., INC., et al., Defendants-Appellants

Case No. 88-P-2002

Court of Appeals of Ohio, Eleventh Appellate District, Portage County

1990 Ohio App. LEXIS 2721

June 29, 1990

PRIOR HISTORY: [*1]

CHARACTER OF PROCEEDINGS: Civil Appeal from the Portage County Court of Common Pleas Case No. 87 CV 0098.

DISPOSITION: JUDGMENT: Modified, and affirmed as modified.

CASE SUMMARY

PROCEDURAL POSTURE: Appellants, a lessee and a sublessee, sought review of a judgment from the Portage County Court of Common Pleas (Ohio), which found that the sublessee had no more than a month to month tenancy. The trial court ordered the lessee to pay appellee lessor unpaid rent in the lessor's declaratory judgment action to determine the rights and duties of the parties under a lease agreement.

OVERVIEW: The lessor's predecessor in interest entered into a lease agreement with the lessee. With the permission required under the lease agreement, the lessee sublet the premises, and the sublease was later assigned to the sublessee. The lease agreement was amended, raising the minimum monthly rent. After appellants became in default for nonpayment of rent, the lessee sent the lessor a check for the rent at the rate in the original contract, rather than the increased amount under the amendment. The trial court held that the sublessee had a month to month tenancy and that the lessor was entitled to the amended rent amount. Appellants sought review. The court held that the trial court erred in holding that, under the terms of the lease, the lessor's consent was a prerequisite to the sublease and the trial court erred in considering the parties' course of conduct because the lease agreement was unambiguous. The lessee did not breach the terms of the original lease. However, the lessor was entitled to a fair share of the proceeds of the sublease because he allowed the sublessee to remain on the premises after the term of the lease based on the lessee's promises to execute a new sublease.

OUTCOME: The court modified the trial court's judgment to reflect that the lessor's consent was not a prerequisite to sublease the premises and that the sublessee was not a month-to-month tenant. The lessor was entitled to receive the same rent awarded by the trial court under the terms of the sublease agreement. As modified, the judgment was affirmed.

CORE TERMS: lease, sublease, original lease, assignment of error, lessee, tenant, course of conduct, declaratory judgment action, monetary relief, month-to-month, assigned, tenancy,

sublet, rent, defendant-appellant, prerequisite, breached, prime, renew, written consent, option to renew, lease agreement, subletting, five-year, modified, leased, rental, subsequent conduct, leased property, ambiguous

LexisNexis(R) Headnotes ♦ Hide Headnotes

Real Property Law > Landlord & Tenant > Lease Agreements > Commercial Leases > General Overview

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases

HN1 Assignments and subleases are distinct concepts under the law. The distinction between an assignment and a sublease lies in the extent to which the original lessee has parted with his interest. An assignment of a leasehold is a transaction whereby a lessee transfers his entire interest in the leased premises for the unexpired term. If a lessee makes a transfer of the leased property for less than the balance of the term he has made a sublease of the leased property. Further, the lessee must part with all of his reversionary interest in the property to create an assignment. The determining factor, therefore, is whether the lessee has given up all of his interest in the lease or just part of it. More Like This Headnote

Real Property Law > Landlord & Tenant > Lease Agreements > Subleases

HN2 In Ohio, the making of a sublease is not a breach of a lease that prevents assignments. More Like This Headnote

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN3 A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning. More Like This Headnote

Civil Procedure > Declaratory Judgment Actions > State Judgments > General Overview

HN4 In order to obtain monetary relief in a declaratory judgment action, the prayer for relief must contain either an express request for a money judgment or one which may be construed as such. More Like This Headnote | *Shepardize:* Restrict By Headnote

COUNSEL: ATTY. BRUCE H. WILSON, Akron, Ohio, (For Plaintiff-Appellee).

ATTY. JEFFREY S. GRAY, ATTY. KATHRYN W. PASCOVER, Cleveland, Ohio, (For Defendant-Appellant, The Great Atlantic & Pacific Tea Company, Inc.).

ATTY. LEONARD D. SCHIAVONE, Youngstown, Ohio, (For Defendant-Appellant, Center Super Market, Inc.).

JUDGES: Judith A. Christley, P.J., concur. Joseph E. Mahoney, J., Donald R. Ford, J., concur.

OPINION BY: MAHONEY

OPINION: OPINION

On August 12, 1965, summit Development Company ("SDC"), entered into a lease of real property, located at 9670 East Center Street in Windham, Ohio, with the Great Atlantic & Pacific Tea Company ("A&P"), appellant herein. Under the terms of the lease, as amended in October 1965 and June 1966, SDC leased commercial premises to A&P beginning on July 1, 1966 and continuing or ten years. In addition, A&P had the option to extend the lease for four successive five-year terms after the expiration of the initial term. The base rent was $ 900 per month, but A&P also had to pay a certain percentage **[*2]** of gross sales, up to a total of $ 2,000 per month. The monthly rate applied to all of the option periods as well as the prime lease.

The lease was drafted by A&P and approved by SDC. However, at SDC's request, a clause was included limiting the ability of A&P to assign the lease without the consent of SDC. paragraph 31 of the lease provides:

"This lease shall not be assigned for any purpose without the written consent of the Lessor first hand."

In addition, Paragraph 29 of the lease provides:

"This lease contains all the agreements and conditions made between the parties hereto and may not be modified orally or in any other manner than by an agreement in writing signed by all the parties hereto or their respective successors in interest."

Nothing in the lease limited the ability of A&P to sublease the premises.

In June 1976, A&P exercised its first option to renew the lease for the period beginning July 1, 1976 and ending June 30, 1981.

A&P entered into an agreement in 1979 to sublet the premises to the Tamarkin Company ("Tamarkin") from June 28, 1979 until February 28, 1981. Tamarkin was also given an option to renew the sublease for three five-year terms provided **[*3]** they notified A&P of their intent to do so. A&P requested and received permission from SDC to enter into this sublease agreement. This permission was evidenced by an amendment to the lease agreement entered into in October 1979. The amendment provided, in pertinent part:

"* * *

"10. * * * (E) The consent herein granted shall not be deemed to be a consent for a subsequent assignment or a sublease.

"11. The Parties agree that the primary inducement and consideration for the execution of this Amendment to Lease is the execution of said Sublease Agreement * * * for the balance of Lessee's tenancy as created by the Prime Lease and Lessor's consent thereto. If the said Sublessee shall cease to be a subtenant Lessor and Lessee agree in that event, and at that time, ipso facto, this Amendment shall be deemed null and void and of no further force and effect, with the Prime Lease in its present form remaining as the basis of the tenancy between Lessor and Lessee."

Under this new agreement, the minimum monthly rent went from $ 900 to $ 1,200. In addition, the same percentage of gross sales as under the original lease would have to be paid but with no maximum cap.

In November, **[*4]** 1980, appellee, Dean E. Smith ("Smith"), purchased the property from

SDC, including the lease as amended.

In July, 1982, Tamarkin assigned its interests under the sublease to appellant, Center Super Market, Inc. ("CSM"). This agreement was executed by Tamarkin and CSM and was consented to by Smith. Once again the base rent was raised. Smith's consent was conditioned upon, inter alia, the parties' agreement:

"* * * that no further assignment of said Sublease or Subletting of the premises, or any part thereof, shall be made without [Smith's] written consent."

Under this agreement, CSM's sublease was to expire on February 28, 1986.

On February 28, 1986, following negotiations, Smith granted A&P a thirty-day extension of the existing lease.

On March 1, 1986, A&P and CSM tentatively reached an agreement to sublet the premises for the period March 1, 1986 through February 27, 1991. The monthly rental under the agreement was $ 3,000. It was Smith's belief that A&P was negotiating a new sublease with CSM and that, once an agreement was reached, he would negotiate with A&P regarding his share of the rents. He expected to receive approximately $ 2,600 per month. Consistent **[*5]** with this understanding, in late March 1986 A&P sent Smith a draft of the proposed sublease agreement between A&P and CSM which was marked "PRELIMINARY DRAFT."

By letter dated March 21, 1986, A&P proposed that Smith buy out A&P's interest under the lease for $ 24,000. Smith continued to inquire about the lease between A&P and CSM but was not informed of the status of that agreement.

In June 1986 Smith notified A&P and CSM that they were in default for nonpayment of rent in that no rent had been paid since February. In July 1986, A&P sent smith $ 3,600, representing $ 900 per month for March, April, May and June. A&P indicated that the money represented payment in full of the rent due pursuant to the terms of the original lease dated August 12, 1965. They asserted that the Amendment to Lease Agreement executed in October 1979 had expired which, according to its own terms, left the original lease as the controlling document. Smith cashed the four rental checks of $ 900 each.

On August 1, 1986, Smith gave CSM a three-day notice to vacate the premises, claiming that over $ 22,000 in back rent and miscellaneous payments were due. On August 6, 1986, A&P sent Smith a check for $ 8,725.40 **[*6]** and indicated that it represented payment in full for all past arrearages. Smith stopped the eviction proceedings.

On November 19, 1986, A&P informed Smith of their sublease with CSM and offered to sell their rights under said agreement for $ 41,090. It was then that Smith first learned of the sublease which had been executed in September. Further, A&P asserted that the sublease had no effect on Smith's lease with A&P.

On November 29, 1986, Smith sent A&P a notification that the lease would be cancelled effective December 1, 1986. Smith stated that the primary omission was A&P's failure to obtain Smith's written authorization to sublease the premises to CSM, which violated Paragraph 31 of the original 1965 lease.

A&P continued to send $ 900 rental checks to Smith, and he continued to cash them.

On January 22, 1987, Smith filed a declaratory judgment action in the Portage County Common Pleas Court seeking a declaration of the rights, duties and obligations of each of the parties under the original lease executed in 1965 as interpreted by the parties' prior course

of conduct. Smith also sought to have the lease declared void.

The case went to trial and on May 11, 1988, the trial **[*7]** court made findings of fact and conclusions of law. The court concluded, among other things, that:

"* * *

"Based upon the language of paragraph 31 of the prime lease, which was drafted by A&P, and the course of conduct between A&P and the owners from 1965 to the present; the Court concludes as a matter of law that the owner's consent must be obtained before any tenant may be substituted for A&P, and it does not matter whether that tenant is considered to be A&P's subtenant or assignee. Thus the current tenant, [CSM], has no more than a month to month tenancy which [Smith] can terminate upon the giving of a proper notice."

On June 10, 1988, the court entered final judgment in accordance with its findings of fact and conclusions of law. The court ordered A&P to pay Smith $ 2,600 per month for the period February 26, 1986 until February 28, 1991. Appellants A&P and CSM timely filed notices of appeal and assigned the following as error:

"1. The trial court erred to the prejudice of defendant-appellant A&P in its conclusion that under the terms of the lease the owner's consent must be obtained before any tenant may be substituted for A&P.

"2. The trial court erred **[*8]** to the prejudice of defendant-appellant A&P in concluding that the appellant breached the terms of the lease and that the sublease of CSM was a mere month-to-month tenancy.

"3. The trial court erred to the prejudice of defendant-appellant A&P by permitting appellee to testify, over objection, to matters not relevant to appellant's right to sublease the property in March, 1986.

"4. The trial court erred to the prejudice of defendant-appellant A&P by granting monetary relief to plaintiff-appellee in a declaratory judgment action."

The assignments of error are set forth by appellant, A&P, and adopted by appellant, CSM, with the exception of the fourth assigned error which has no bearing on them.

In their first assignment of error, appellants assert that it was error for the trial court to conclude that under the terms of the lease the owner's consent was a prerequisite to an assignment or a sublease.

The original lease executed August 12, 1965 clearly provides that consent is necessary for an assignment. Paragraph 31 states, "This lease shall not be assigned for any purpose without the written consent of the Lessor first hand." The lease makes no mention of consent being **[*9]** necessary to sublease.

*HN1*Assignments and subleases are distinct concepts under the law. The differences are succinctly discussed in Joseph Brothers Co. v. F. W. Woolworth Co. (N.D. Ohio 1985), 641 F. Supp. 822:

"* * *

"It is fundamental that the distinction between an assignment and a sublease lies in the extent to which the original lessee has parted with his interest. * * * An assignment of a leasehold is a transaction whereby a lessee transfers his entire interest in the leased premises for the unexpired term. * * * If a lessee makes a transfer of the leased property for

less than the balance of the term he has made a sublease of the leased property. * * * Further, the lessee must part with all of his reversionary interest in the property to create an assignment. * * *" Id. at 824. (Citations omitted.)

The determining factor, therefore, is whether the lessee has given up all of his interest in the lease or Just part of it.

It is equally clear HN2 in Ohio that the making of a sublease is not a breach of a lease that prevents assignments. Cross v. Commercial Real Estate Co. (1914), 16 Ohio N.P. (n.s.) 97.

In the present case, appellee argues that the **[*10]** language of Paragraph 31 is ambiguous, based on the subsequent conduct of the parties; and, therefore, the subsequent conduct of the parties should be interpreted by the court to determine what the parties actually intended. This is circular logic. Ambiguity is determined from the language of the document itself. The language in the original lease is clear on its face, so it is not necessary to look beyond the lease to determine the parties' intentions. As the Ohio Supreme Court stated in Kelly v. Medical Life Ins. Co. (1987), 31 Ohio St. 3d 130:

"* * * HN3 A court will resort to extrinsic evidence in its effort to give effect to the parties' intentions only where the language is unclear or ambiguous, or where the circumstances surrounding the agreement invest the language of the contract with a special meaning. * * *" Id. at 132. (Emphasis added.)

The trial court concluded that, based on Paragraph 31 and the course of conduct between A&P and the owners from 1965 until the present, express consent by the owner was a prerequisite to A&P assigning or subletting their interests in the leased premises. The trial court erred in considering the course of conduct of the **[*11]** parties in light of the fact that Paragraph 31 was clear on its face. Even if the course of conduct were considered, the evidence in the present case that on one occasion, in 1979, the owner's consent was requested by A&P to sublet the premises can hardly constitute a course of conduct which warrants altering the clear language used in the lease.

For the foregoing reasons, the trial court erred in concluding that, under the terms of the original lease, the owner's consent was a prerequisite to a sublease.

Appellants' first assignment of error is well taken.

In their second assignment of error, appellants claim the lower court erred in concluding that A&P breached the terms of the lease and that the sublease of CSM was a mere month-to-month tenancy.

For the reasons given in the discussion concerning the first assignment of error, it is clear that A&P had the authority to sublet the premises without the consent of Smith. However, a review of the events that occurred indicates that A&P failed to sublet the premises to CSM in accordance with the original lease. To begin with, A&P failed to exercise its option to renew the lease within the allotted time. Next, A&P tried to use the promise **[*12]** of a new sublease as a way to delay its decision whether to renew the lease. Finally, without ever renewing its lease with Smith, A&P tried to force Smith into buying out its rights under the sublease at a price that was drastically higher than had been discussed in prior negotiations.

The trial court was correct in finding that Smith gave A&P a thirty-day extension to renew the lease on February 28, 1986 in exchange for A&P's commitment to procure a more favorable sublease with CSM from which Smith could expect to receive approximately $ 2,600 per month. It is our opinion that Smith's extension constituted consideration adequate to effectively amend the terms of the original lease agreement. Letters sent between Smith and A&P from February through August of 1986 indicate the intentions of both parties to provide

Smith a higher monthly income once a sublease with CSM could be executed.

It is clear that Smith allowed CSM to remain on the premises after March 1986, despite the fact that A&P had not exercised its option to renew, based on the promises of A&P to execute a favorable new sublease with CSM. Therefore, once A&P executed the new sublease with CSM, Smith was entitled to a **[*13]** fair share of the proceeds.

Smith testified at trial that in telephone conversations he had with representatives of A&P during March 1986, he was told that A&P could probably get $ 3,000 in a new sublease with CSM and that he would receive a flat rate of perhaps $ 2,600 per month. As it turned out, A&P did, in fact, sign a sublease with CSM at a rate of $ 3,000 per month. However, A&P continued to pay Smith $ 900 per month in accordance with the terms of the original lease.

The trial court determined that Smith was entitled to $ 2,600 per month and, additionally, the other covenants as to maintenance and taxes contained in the 1965 original lease would remain in effect. This was based on its conclusion that A&P breached the terms of the original lease by subletting the premises to CSM without Smith's consent. The trial court concluded that CSM was a month-to-month tenant.

For the reasons set forth in our discussion of the first assignment of error, A&P did not breach the terms of the original lease. However, it is our opinion that, under the 1986 amendment to the lease, Smith is entitled to $ 2,600 per month, which is the same dollar figure reached by the trial court but with **[*14]** different reasoning. Further, A&P's sublease with CSM is valid and will continue for its duration, and CSM is not a month-to-month tenant. Therefore, appellant's second assignment of error is well taken.

In their third assignment of error, appellants claim the trial court erred by permitting the appellee to testify to matters not relevant to A&P's right to sublease the property in March, 1986.

Appellants argue that appellee's complaint for a declaratory Judgment only alleged that Paragraph 31 of the original lease had been violated in that A&P did not obtain consent before executing the sublease with CSM in 1986. They assert, therefore, that the trial court should not have permitted the admission of exhibits and testimony relating to events which happened after the expiration of the then existing term of the lease on February 28, 1986 as they were irrelevant.

In appellee's complaint, he alleged that A&P's actions constituted a breach of the lease agreement and, therefore, A&P and CSM had no right to continue occupying the premises. Appellee specifically asked the trial court to declare the lease void as well as determine the rights, duties and obligations of each of the parties **[*15]** in accordance with the terms of the original lease.

It is clear that, in order to determine whether A&P breached the terms of the lease, the trial court had to first determine whether the terms of the original lease were still applicable in light of the subsequent amendments or whether the lease expired on its own because of A&P's failure to renew. Without answers to these questions, it would have been impossible to determine the rights of the parties in accordance with the terms of the original lease. Events that occurred subsequent to February 28, 1986 had a direct bearing on whether the lease was renewed and on the parties' rights under any new agreement. Therefore, the trial court properly admitted evidence of the parties' conduct subsequent to February 28, 1986.

Appellants' third assignment of error is overruled.

In its fourth assignment of error, appellant, A&P, claims the trial court erred in granting monetary relief to the appellee in a declaratory judgment action. HN4 In order to obtain

monetary relief in a declaratory judgment action, the prayer for relief must contain either an express request for a money judgment or one which may be construed as such. Jeppe v. Blue [*16] Cross (1980), 67 Ohio App. 2d 87.

In the present case, it is clear that appellee did not expressly request monetary relief in his complaint for a declaratory judgment. However, appellee argues that a primary obligation under any lease is the payment of rent. Therefore, in a declaratory judgment action that sought to determine the rights, duties, and obligations of the parties under the lease, it was within the court's discretion to award monetary relief. Appellee's argument is sound. To require appellee to take further action to enforce the trial court's determination of the rights, duties, and obligations of the parties under the lease would only serve to burden the courts further.

Appellants' fourth assignment of error is without merit.

Since we have determined that the first and second assignments are well taken, the judgment of the trial court is modified to reflect that the appellee's consent (Smith) is not a prerequisite to sublease the premises. Further, appellant, CSM, is not a month-to-month tenant as held by the trial court but, rather, CSM's sublease is valid for the duration of the five-year term which commenced March 1, 1986. Appellee is entitled to receive $ 2,600 [*17] per month as rent under the terms of this agreement.

Therefore, for the reasons stated herein, the judgment of the trial court is modified and affirmed as modified.

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Service: Get by LEXSEE®
Citation: 1989 U.S. Dist. Lexis 16907

*1989 U.S. Dist. LEXIS 16907, **

UNITED STATES OF AMERICA, Plaintiff, v. AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, Defendants. IN THE MATTER OF THE APPLICATION OF SALEM MEDIA OF CALIFORNIA, INC., et al., Applicants. For Licenses for Their Radio Broadcasting Stations

No. Civ. 13-95 (WCC)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

1989 U.S. Dist. LEXIS 16907

December 21, 1989

SUBSEQUENT HISTORY:
[*1]
Adopting Order of June 6, 1990, Reported at 1990 U.S. Dist. LEXIS 6890.

PRIOR HISTORY:

Adopting Magistrate's Document of December 21, 1989, Reported at

CASE SUMMARY

PROCEDURAL POSTURE: Defendant society brought a motion to dismiss applications by plaintiff government on behalf of applicant stations for a determination of reasonable license fees for the use of the music in the copyright repertoire of the society.

OVERVIEW: The stations entered into license agreements with the society for the use of the music in the copyright repertoire of the society. Applications were brought by the government on behalf of the stations to have the agreements rescinded and to substitute a court determination of reasonable fees on the ground that the stations signed the license agreements because of the society's misrepresentations regarding the availability of other alternatives. The society brought a motion to dismiss the applications. The court ruled that a contract induced by fraud or misrepresentation was voidable and subject to rescission, and that to sustain such a claim a plaintiff must show that the defendant made a false statement of material fact upon which the plaintiff reasonably relied to his detriment in entering into the agreement. Further, the court held that a misrepresentation claim was not sustained unless the recipient's reliance on the statement was reasonable or justifiable. The court granted in part and denied in part the motion, concluding that the stations did not provide sufficient evidence of any actionable misrepresentation to create a genuine issue of material fact.

OUTCOME: The motion to dismiss the applications was granted in part and denied in part.

CORE TERMS: station, license, terminated, radio, license agreement, misrepresentation, waiver provision, termination, extension agreement, retroactive, summary judgment, federal law, state law, negotiation, music, commencing, licensee, interim, recipient, ambiguity, survive, legal position, consent decree, rate-setting, preexisting, licensing, negotiate, waived, sworn, general counsel

LexisNexis(R) Headnotes ♦ Hide Headnotes

Civil Procedure > Summary Judgment > Burdens of Production & Proof > General Overview

Civil Procedure > Summary Judgment > Standards > General Overview

HN1 Under Fed. R. Civ. P. 56(c), a court may enter summary judgment only if it finds that there is no genuine issue as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. The movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. The burden then shifts to the party opposing the motion to produce sufficient evidence to support a claim that a genuine factual issue exists. In determining whether a genuine issue exists, the court must resolve all ambiguities and draw all reasonable inferences in favor of the party opposing the motion. However, the opponent may not rest on rote allegations, but must set forth specific facts showing that there is a genuine issue for trial. Thus, the mere existence of some metaphysical doubt concerning the facts will not defeat summary judgment, nor will speculation or conjecture as to the true nature of the facts. More Like This Headnote

Civil Procedure > Summary Judgment > Evidence

Civil Procedure > Summary Judgment > Standards > Materiality

HN2 The applicable substantive law will identify which facts are material. If the dispute about a material fact is genuine, that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party, summary judgment is inappropriate. However, if the evidence, even when viewed in the non-movant's favor, is legally insufficient to support a verdict for that party, summary judgment may be granted. More Like This Headnote

Civil Procedure > Federal & State Interrelationships > Choice of Law > General Overview

HN3 Controversies governed by federal law do not inevitably require resort to uniform federal rules. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy dependent upon a variety of considerations always relevant the nature of the specific governmental interests and to the effects upon them of applying state law. Primary considerations are whether there is a need for a nationally uniform body of federal law, whether application of state law would frustrate federal policy or functions, and the impact that a uniform federal role might have on existing relationships under state law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN4 A contract induced by fraud or misrepresentation is voidable and subject to rescission. To sustain such a claim, a plaintiff must show that the defendant made a false statement of material fact upon which the plaintiff reasonably relied to his detriment in entering into the agreement. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN5 A misrepresentation is actionable only if it involves a false assertion of fact. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN6 A mere expression of opinion ordinarily does not constitute a misrepresentation and cannot properly be relied on by the recipient. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN7 In some circumstances, a statement concerning an individual's state of mind may be viewed as containing an assertion of fact. If a party makes an assertion as to his opinion or intention, it may be a misrepresentation if his mental state is other than he asserts it to be, or if the facts known to him are incompatible with that opinion. An opinion may generally only be so viewed, however, if it is reasonable to do so and only with respect to facts not disclosed and not otherwise known to the recipient. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN8 Statements reflecting a party's legal position, or his view of the legal import of a particular document or set of facts, are not properly treated as statements of fact. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN9 Ordinarily, a misrepresentation claim will not be sustained unless the recipient's reliance on the statement was reasonable or justifiable. More Like This Headnote

Contracts Law > Defenses > Fraud & Misrepresentation > General Overview

HN10 Reliance on another party's misrepresentation is not reasonable if the misled party had access to the facts and could have ascertained the truth of the matter. From this general proposition it follows that reliance on another party's representation as to matters of law is generally not justified. As between the two parties to a contract, the recipient is ordinarily expected to draw his own conclusions or to seek his own independent legal advice. Reliance on another party's representations is particularly unreasonable when claimed by knowledgeable or sophisticated persons with some experience in the matters at hand, especially with respect to statements made by an adversarial party. More Like This Headnote

Contracts Law > Performance > Discharges & Terminations

Labor & Employment Law > Employment Relationships > Employment Contracts > Conditions & Terms > Trade Secrets & Unfair Competition > Noncompetition & Nondisclosure Agreements

HN11 Ordinarily, contract provisions do not continue to bind the parties after the contract has been terminated. Consequently, if one of the parties wishes a contract term to remain in effect after the contract ends, the contract must say so explicitly. Thus, for example, in an employment setting, if the employee's rights are to be limited after he ceases to work for the employer, the employment contract must contain an explicit non-competition clause or other post-employment restraint detailing the nature and duration of the restriction on his activities. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

HN12 A contract should be read in a manner that will give independent meaning to each of its terms and not reduce them to mere surplusage. More Like This Headnote

Contracts Law > Contract Interpretation > General Overview

Contracts Law > Defenses > Ambiguity & Mistake > General Overview

Contracts Law > Formation > Ambiguity & Mistake > General Overview

HN13 Any ambiguity is to be construed against the drafter, particularly when the drafter has greater bargaining power or uses a standard form. More Like This Headnote

JUDGES: Michael H. Dolinger, United States Magistrate.

OPINION BY: DOLINGER

OPINION: Salem Media and numerous other commercial radio stations ("the applicants") have applied to this Court pursuant to Article IX(A) of the Amended Final Judgment for a determination of reasonable license fees for the use of the music in the copyright repertoire of the American Society of Composers, Authors and Publishers ("ASCAP"). (See United States v. ASCAP, 1950-51 Trade Cas. (CCH) para. 62,595 (S.D.N.Y. 1950).) ASCAP has moved to dismiss the applications of 152 of the applicants.

For the reasons that follow, I recommend that this motion be granted in part and denied in part.

Background

In 1982, a number of commercial radio stations instituted an Article IX(A) rate-setting proceeding entitled In the Matter of the Application of WGN of California, Inc., et al. ("WGN"). The application was made on behalf of approximately 2000 radio stations, which were represented by the so-called "All-Industry Committee."

While the WGN proceeding was pending, many radio stations whose **[*2]** existing licenses were due to expire entered into license extension agreements with ASCAP. (See, e.g., Exh. C to Affidavit of Bernard Korman, Esq., sworn to January 13, 1989.) In substance, these agreements maintained the status quo but provided for future retroactive adjustment of the stations' license fees in accordance with the outcome of the WGN proceeding. These agreements also contained a provision stating that the licensee waived its right to apply either to ASCAP or to the Court for terms other than as determined in the WGN action. The agreements provided that they could be terminated at any time by either party upon three months' notice.

After lengthy negotiations, ASCAP and the All-Industry Committee reached a rate agreement, which was approved by this Court in August 1986. The settlement agreement established blanket and per-program licensing fees for the period January 1, 1983 through December 31, 1990. Following approval of this agreement, ASCAP offered comparable licenses to other radio stations that had applied for licenses. Most of the applicants in the current proceeding signed licenses incorporating the WGN terms, including the termination date of **[*3]** December 31, 1990. Others, however, continued to operate under the extension agreements until those agreements were terminated by ASCAP in June 1988.

The current proceeding was commenced on June 30, 1988. The application, which has been amended a number of times, now appears to embrace 205 commercial radio stations. n1 It

seeks a determination of reasonable fees for "the periods commencing November 1, 1982, for some of the Applicants [sic] stations and January 1, 1983, for others" (First Amended Application at 1), but it does not specify which stations are applying for each period.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 See Appendix to this Report, which lists the applicant stations by current status based upon the representations of counsel reflected in a letter to the Court from Allan Blumstein, Esq., dated December 20, 1989.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

ASCAP's Motion

After filing their initial request for relief, Salem Media et al. filed a series of three amended applications, each reflecting new additions to and withdrawals from the list of applicant stations. **[*4]** Following the filing of the second amended application, which embraced 210 stations, ASCAP moved to dismiss the application with respect to 169 stations, all of which it contended were barred from seeking relief here either because they are now licensed for the period commencing in November 1982 or January 1983 or because they allegedly gave up their right to seek court relief under the consent decree when they entered into license extension agreements with ASCAP while the WGN proceeding was pending.

After the initial filing of its motion, ASCAP withdrew its demand for dismissal with respect to eight of the stations and twenty other stations withdrew from this proceeding. Subsequently the applicants filed a Third Amended Application, which added sixteen applicant stations. Of these sixteen, ASCAP consented to the inclusion of five as current applicants but seeks dismissal of the other eleven as now being licensed. (See Aug. 10, 1989 letter to the Court from Allan Blumstein, Esq.) As a result of these developments, as well as modifications of the list of stations to reflect their correct status, ASCAP's motion to dismiss is now addressed to 144 stations.

ASCAP's motion divides **[*5]** the contested radio stations into two groups. The larger group consists of 139 stations that signed licenses in the form approved in the WGN proceeding. Although these stations were not parties to that proceeding, at its termination they were offered, and accepted, license agreements embodying the WGN terms for the period January 1, 1986 through December 31, 1990.

ASCAP asserts that since these stations have entered into license agreements for the relevant period; they cannot seek a redetermination of fees in this Court. In response, the stations argue that they did not sign the agreements voluntarily, but rather because they were told by ASCAP that they had no alternative. Claiming that they were misled by ASCAP, they seek to have the agreements rescinded and to substitute a court determination of reasonable fees.

The second group consists of five stations that are alleged by ASCAP to have waived their right to seek a court-determined license fee when they signed extension agreements, because those agreements contained language stating that the licensee thereby waived its right to seek an independent rate. Although ASCAP terminated these extension agreements in June 1988 **[*6]** -- as the agreements permitted it to do -- it asserts that the waiver provision continues to bar the licensees from applying to the court for a determination of fees for any period covered by the WGN agreement. The applicants argue that the waiver

provision lapsed when the extension agreement was terminated, and that they are therefore free to seek a court determination of fees for the period following the termination.

ANALYSIS

A. The Nature of the Motion

ASCAP's notice of motion did not cite a specific rule under which it was being made and simply requested dismissal of the application. However, since both the motion and the opposition papers were accompanied by affidavits and other extrinsic evidence, the motion is most appropriately viewed as one for summary judgment. See generally Falls Riverway Realty v. Niagara Falls, 754 F.2d 49, 53-54 (2d Cir. 1985). Consistent with the requirements of Rule 56 as interpreted by the Second Circuit, this Court notified the applicants at oral argument that it viewed the motion as in effect seeking summary judgment (Tr. 15), a point that must in any event have been clear to the applicants, since the notice of motion was **[*7]** accompanied by an affidavit of ASCAP's general counsel and the motion rested squarely on the testimony contained in that affidavit, and since the applicants responded with affidavits. See National Ass'n of Pharmaceutical Mfrs. v. Ayerst Laboratories, 850 F.2d 904, 911 (2d Cir. 1988) (citing, inter alia, In re G & A Books, Inc., 770 F.2d 288, 295 (2d Cir. 1985), cert. denied, 475 U.S. 1015 (1986); Chandler v. Coughlin, 763 F.2d 110, 113 (2d Cir. 1985)). n2 In order to ensure no unfair surprise, at oral argument the Court questioned counsel for the applicants as to whether his clients needed any additional time to procure further evidence to oppose the motion, and he represented that the applicants were prepared to have the court rule on the basis of the existing papers. (Tr. 15, 16-17, 37-38.) Accordingly, I treat the motion to dismiss as a motion for summary judgment.

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n2 At the outset, the applicants sought denial of ASCAP's motion on the basis of certain procedural failings, including, for example, the failure to serve a Rule 3(g) Statement and to include a memorandum of law with its initial motion papers. These surprising failings have since been substantially remedied by ASCAP, and do not justify denial of the motion to the extent that it may otherwise be merited.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - - **[*8]**

B. General Standards for Summary Judgment

HN1Under Fed. R. Civ. P. 56(c), a court may enter summary judgment only if it finds that there is no genuine issue as to any material fact and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. See, e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986); Horn & Hardart Co. v. Pillsbury Co., 888 F.2d 8, 10 (2d Cir. 1989); Montana v. First Federal Savings & Loan Ass'n, 869 F.2d 100, 103 (2d Cir. 1989); Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, 480 U.S. 932 (1987). The movant bears the initial burden of informing the court of the basis for its motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). The burden then shifts to the party opposing the motion to "produce sufficient evidence to support a claim that a genuine factual issue exists." Gutwein v. Roche Laboratories, 739 F.2d 93, 95 (2d Cir. 1984).

In determining whether a genuine issue exists, the court must resolve all ambiguities and draw all reasonable **[*9]** inferences in favor of the party opposing the motion. Horn & Hardart, 888 F.2d at 10; Montana, 869 F.2d at 103; Donahue v. Windsor Locks Board of Fire Comm'rs, 834 F.2d 54, 57 (Id Cir. 1987); Patrick v. LeFevre, 745 F.2d 153, 158 (2d Cir.

1984). However, the opponent may not rest on rote allegations, but must set forth specific facts showing that there is a genuine issue for trial. Fed R. Civ. P. 56(e). Thus, the mere existence of some "metaphysical doubt" concerning the facts will not defeat summary judgment, Matsushita Electrical Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986), nor will speculation or conjecture as to the true nature of the facts. Quarles v. General Motors Corp., 758 F.2d 839, 840 (2d Cir. 1985).

HN2The applicable substantive law will identify which facts are material. Anderson, 477 U.S. at 248. If the dispute about a material fact is genuine -- that is, if the evidence is such that a reasonable jury could return a verdict for the non-moving party -- summary judgment is inappropriate. Id. However, if the evidence, even when viewed in the non-movant's favor, is legally insufficient to support a verdict for that party, summary **[*10]** judgment may be granted. See id. at 249, 252.

C. The Applicable Law

It is not immediately apparent what body of law governs this sui generis matter. Accordingly, although the parties did not address this preliminary question, I pause briefly to do so.

The Supreme Court has developed a two-step analysis for questions of this sort. "The first step [in determining whether state or federal law governs] is to ascertain which law creates the cause of action. . . ." Burks v. Lasker, 441 U.S. 471, 475 (1979). Accord, Carlson v. Green, 446 U.S. 14, 23 (1980); Keebler Co. v. Rovira Biscuit Corp., 624 F.2d 366, 371 (1st Cir. 1980) ("The law to be applied in the federal courts, whether jurisdiction is premised on the presence of a federal question or on diversity, is that law that is the source of the right sued upon."); Maternally Yours v. Your Maternity Shop, 234 F.2d 538, 540-41 n.1 (2d Cir. 1956). On the current motion, it is fair to characterize the relevant issues as a product of federal law in that they concern the question of whether and under what circumstances an applicant for relief pursuant to the antitrust consent decree may be deemed to have waived **[*11]** its right to invoke the rate-setting authority of this Court. Thus, we may conclude that federal law controls.

This determination does not end the inquiry, however, as the second and "more difficult task" is to "giv[e] content to this federal rule." United States v. Kimbell Foods, Inc., 440 U.S. 715, 727 (1979). This involves a decision as to "whether, although federal law governs, state law should be incorporated to provided the content of that federal law." Mardan Corp. v. C.G.C. Music, Ltd., 804 F.2d 1454, 1457 (9th Cir. 1986).

HN3Controversies. . .governed by federal law, do not inevitably require resort to uniform federal rules. Whether to adopt state law or to fashion a nationwide federal rule is a matter of judicial policy "dependent upon a variety of considerations always relevant the nature of the specific governmental interests and to the effects upon them of applying state law."

Kimbell, 440 U.S. at 727-28 (citations omitted) (quoting United States v. Standard Oil Co., 332 U.S. 301, 310 (1947)). Accord, Wilson v. Omaha Indian Tribe, 442 U.S. 653, 671-72 (1979). Primary considerations are whether there is a need for a nationally uniform body of federal **[*12]** law, whether application of state law would frustrate federal policy or functions, and the impact that a uniform federal role might have on existing relationships under state law. See Wilson, 442 U.S. at 672-73; Kimbell, 440 U.S. at 728-29; Mardan, 804 F.2d at 1458. See also In re Agent Orange Product Liability Litigation, 635 F.2d 987, 990, 993 (2d Cir. 1980), cert. denied, 454 U.S. 1128 (1981)(focusing on substantiality of federal interest).

Although the federal interest in the current controversy may be said to predominate, nationwide uniformity of law is not really an issue here, for uniformity of application is equally possible under any law, since all cases of a similar nature will necessarily be brought

in this Court as long as the Amended Final Judgment is in force. There is no reason to suspect that application of state law would adversely affect any federal policy or function, or that application of uniform federal law would have any impact whatsoever on existing relationships under state law.

Furthermore, as a practical matter it makes little difference here whether we look to state or federal common law, for the latter, to the extent that it exists, **[*13]** appears substantially the same as the former with respect to the simple questions of contract law presented here. Accordingly, and in view of the parties' apparent indifference, I will assume that New York law, as well as compatible common-law principles from other jurisdictions, may be pressed into service here. I turn, then, to the claims at issue.

D. The Involuntary Signing Claim

As noted, 139 of the applicant stations entered into license agreements incorporating the terms of the WGN license for a period concluding at the end of 1990. These agreements obviously undercut any claim of entitlement on the part of the stations to invoke the rate-setting authority of this Court.

In resisting this conclusion, the stations seek to have this Court relieve them of their obligations under their licenses. They claim that they did not in fact sign the WGN license agreements voluntarily, but rather did so because of ASCAP's misrepresentations regarding the availability of other alternatives.

In support of this position, the stations offer the affidavits of the General Counsel of three stations and the General Manager of another station. Each asserts that ASCAP's representatives **[*14]** told him that the interim and extension agreements entered into during the pendency of the WGN proceeding prospectively bound the signatories to the All-Industry licenses; that they had no alternative to signing the All-Industry agreements; that ASCAP would not negotiate a separate agreement on different terms with stations not represented by the All-Industry Committee; and that use of ASCAP-controlled music by unlicensed stations would constitute copyright infringement. (Opposition at 15, 16-18; Affidavit of Emil S. Cuccio, sworn to March 21, 1989, at para. 6; Affidavit of Gordon Bell, sworn to March 20, 1989, at paras. 5, 7.) The stations, believing they had no choice and fearing the threat of litigation, then signed the All-Industry agreements. (Cuccio Aff. at paras. 6, 7; Bell Aff. at para. 7.)

According to the stations, ASCAP's representations were false because the stations did in fact have a choice, and were not prospectively bound to the WGN licenses. (Tr. 29-30.) Since they were induced to enter into the licenses by ASCAP's misrepresentations, they argue, those licenses should be held unenforceable.

*HN4*A contract induced by fraud or misrepresentation is voidable and **[*15]** subject to rescission. See, e.g., Hoke v. Shanker, 108 A.D.2d 1065, 485 N.Y.S.2d 634, 636 (3d Dep't), app. den., 65 N.Y.2d 605, 493 N.Y.S.2d 1027 (1985); Mix v. Neff, 99 A.D.2d 180, 182-83, 473 N.Y.S.2d 31, 33 (3d Dep't 1984). To sustain such a claim, a plaintiff must show that the defendant made a false statement of material fact upon which the plaintiff reasonably relied to his detriment in entering into the agreement. See, e.g., Cohen v. Wedbush, Noble, Cooke, Inc., 841 F.2d 282, 287 (9th Cir. 1988); Rush v. Oppenheimer & Co., 650 F. Supp. 682, 683-84 (S.D.N.Y. 1986); Comtomark, Inc. v. Satellite Communications Network, 116 A.D.2d 499, 500-01, 497 N.Y.S.2d 371, 372 (1st Dep't 1986); Clearview Concrete Products Corp. v. S. Charles Gherardi Inc., 88 A.D.2d 461, 467, 453 N.Y.S.2d 750, 754-55 (2d Dep't 1982); ALI, Restatement (Second) of Contracts § 164(1) & comment a (1981). n3

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n3 Although scienter (knowledge of falsity or reckless disregard of the truth or falsity of the representation) is required in an action for damages, it is not required when the remedy sought is rescission. Even an innocent misrepresentation constitutes a ground for rescission, as long as the mispresentation is material. Rush, 650 F. Supp. at 683; Albany Motor Inn & Restaurant v. Watkins, 85 A.D.2d 797, 798, 445 N.Y.S.2d 616, 617 (3d Dep't 1981).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*16]**

In this case, the applicants' misrepresentation claim suffers from two fatal defects. First, it does not appear that ASCAP's representatives made any false statements of fact, as opposed to expressing either their opinion or ASCAP's legal position. Second, the applicants' reliance on ASCAP's alleged misrepresentations could not possibly be considered reasonable.

*HN5*A misrepresentation is actionable only if it involves a false assertion of fact. See id. § 159 & comments a, c. *HN6*A mere expression of opinion ordinarily does not constitute a misrepresentation and cannot properly be relied on by the recipient. See Stern v. Satra Corp., 539 F.2d 1305, 1308 (2d Cir. 1976); Samuels v. Eleonora Beheer B.V., 500 F. Supp. 1357, 1364 (S.D.N.Y. 1980), aff'd, 661 F.2d 907 (2d Cir. 1981); George Backer Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d 211, 220, 413 N.Y.S.2d 135, 140 (1978); Charid Properties, Inc. v. Berger, 37 A.D.2d 987, 327 N.Y.S.2d 821, 822 (2d Dep't 1971), aff'd mem., 32 N.Y.2d 667, 343 N.Y.S.2d 132 (1973); Restatement (Second) of Contracts §§ 168(1), 169 & comment b.

*HN7*In some circumstances, a statement concerning an individual's state of mind may be viewed **[*17]** as containing an assertion of fact. If a party makes an assertion as to his opinion or intention, it may be a misrepresentation if his mental state is other than he asserts it to be, or if the facts known to him are incompatible with that opinion. See Cristallina S.A. v. Christie, Manson & woods Int'l, 117 A.D.2d 284, 294-95, 502 N.Y.S.2d 165, 172-73 (1st Dep't 1986); Stahl Equities Corp. v. Prudential Bldg. Maintenance Corp., 95 A.D.2d 222, 229, 465 N.Y.S.2d 718, 722 (1st Dep't 1983) (citing Chase Manhattan Bank v. Perla, 65 A.D.2d 207, 210, 411 N.Y.S.2d 66, 68 (4th Dep't 1978)); Restatement (Second) of Contracts § 159 comment d, § 168(2) & comment d. An opinion may generally only be so viewed, however, "[i]f it is reasonable to do so" and only with respect to "facts not disclosed and not otherwise known to the recipient." Id. § 168(2).

The distinction between assertions of fact and expressions of opinion often becomes blurred in the context of adversarial legal relationships. The nature of legal advocacy is such that both parties can be expected to make self-interested statements regarding various aspects of the controversy and to assert as true that which is only **[*18]** arguable. For this reason, *HN8*statements reflecting a party's legal position, or his view of the legal import of a particular document or set of facts, are not properly treated as statements of fact. See, e.g., Amoco Oil Co. v. Ashcraft, 791 F.2d 519, 521 (7th Cir. 1986); Macon-Bibb County Hosp. Auth. v. Georgia Kaolin Co., 646 F. Supp. 90, 93 (M.D. Ga. 1986), aff'd, 817 F.2d 98 (11th Cir. 1987); Charid Properties, 37 A.D.2d at 987, 327 N.Y.S.2d at 822. Cf. Deutsch v. Health Insurance Plan, 573 F. Supp. 1433, 1440-41 (S.D.N.Y. 1983) (a party's litigation plans are not "facts").

Thus, the assertions about which the applicants here complain, though perhaps expressed in absolute terms, are properly viewed as statements of legal opinion or position only. In stating that there were no alternatives to the so-called All-Industry license and that the interim or extension licenses prospectively bound the signers to the rates set in the WGN proceeding, ASCAP was simply articulating its view of the legal consequences of the stations' signing of the extension agreements and its own unwillingness to negotiate alternative forms of

licenses. Since this was evidently an accurate [*19] characterization of ASCAP's views, it did not constitute a misrepresentation of its mental state, so to speak. And in indicating that any stations not signing licenses would be subject to copyright infringement suits, ASCAP was obviously only pointing out -- accurately -- the legal consequences of that failure.

In sum, these statements simply do not amount to misrepresentations of fact. To the extent that they were even arguably false, they were simply expressions of ASCAP's legal position. Moreover, given ASCAP's bargaining power and stated position with respect to the types of licenses that it would offer to radio stations, its statement to the effect that the stations "had no choice" accurately represented both its own beliefs and the practical realities of the situation if the stations wished to avoid litigation.

Even if we assume, however, that ASCAP's statements constituted false statements of fact, the applicants' claim cannot be sustained. HN9 Ordinarily, a misrepresentation claim will not be sustained unless the recipient's reliance on the statement was reasonable or justifiable. See, e.g., United States v. Wallace & Wallace Fuel Oil Co., 540 F. Supp. 419, 428-29 (S.D.N.Y. [*20] 1982); Barcomb v. Alford, 125 A.D.2d 907, 908, 510 N.Y.S.2d 267, 269 (3d Dep't 1986); Charid Properties, 37 A.D.2d at 987, 327 N.Y.S.2d at 822; Restatement (Second) of Contracts § 164 & comment d; E.A. Farnsworth, Contracts § 4.14 (1982). In this case, the applicants' asserted reliance on the statements was plainly not reasonable.

HN10 Reliance on another party's misrepresentation is not reasonable if the misled party had access to the facts and could have ascertained the truth of the matter. Cohen, 841 F.2d at 287 (citing cases); see, e.g., Marsh Investment Corp. v. Langford, 620 F. Supp. 880, 884-85 (E.D. La. 1985), aff'd, 784 F.2d 184 (5th Cir. 1986); Barcomb, 125 A.D.2d at 908, 510 N.Y.S.2d at 269; Lanzi V. Brooks, 54 A.D.2d 1057, 1058-59, 388 N.Y.S.2d 946, 948 (3d Dep't 1976), aff'd, 43 N.Y.2d 778, 402 N.Y.S.2d 384 (1977); Charid Properties, 37 A.D.2d at 987, 327 N.Y.S.2d at 822. From this general proposition it follows that reliance on another party's representation as to matters of law is generally not justified. See, e.g., Royal American Managers, Inc. v. IRC Holding Corp., 885 F.2d 1011, 1016 (2d Cir. 1989); Morin v. Trupin, [*21] 711 F. Supp. 97, 104 (S.D.N.Y. 1989) (citing Verschell v. Pike, 85 A.D.2d 690, 691, 445 N.Y.S.2d 489, 491 (2d Dep't 1981). "[A]s between the two parties to a contract, the recipient is ordinarily expected to draw his own conclusions or to seek his own independent legal advice." Restatement (Second) of Contracts § 170 comment b. Reliance on another party's representations is particularly unreasonable when claimed by knowledgeable or sophisticated persons with some experience in the matters at hand, especially with respect to statements made by an adversarial party. See Northern Oil Co. v. Standard Oil Co., 761 F.2d 699, 704-05 (Temp. Emer. Ct. App.). cert. denied, 474 U.S. 821 (1985); Rosenberg v. Pillsbury Co., 718 F. Supp. 1146, 1155 (S.D.N.Y. 1989); Marsh, 620 F. Supp. at 885; New York State Urban Development Corp. v. Marcus Garvey Brownstone Houses, Inc., 98 A.D.2d 767, 770, 469 N.Y.S.2d 789, 794 (2d Dep't 1983); Barcomb, 125 A.D.2d at 908, 510 N.Y.S.2d at 269. Compare West Side Federal Savings & Loan Ass'n v. Hirschfeld, 101 A.D.2d 380, 386, 476 N.Y.S.2d 292, 295-96 (1st Dep't 1984); Restatement (Second) of Contracts §§ 169(b) & (c).

In this case, [*22] the authors of the two affidavits proffered by the stations with respect to ASCAP's representations were an attorney serving as general counsel to three radio stations and a general manager who had been involved in his station's music licensing arrangements for more than a decade. (Cuccio Aff. at para. 1; Bell Aff. at para. 1.) These individuals were obviously familiar with the Amended Final Judgment and sophisticated in the business of obtaining music licenses. Thus, there is no reason why they could not have determined for themselves -- with or without consultation with legal counsel -- what other alternatives were available to them. Moreover, since ASCAP was essentially an adversary party with goals and legal views that could be expected to diverge from those of the radio stations, these sophisticated affiants could not reasonably have thought that ASCAP was stating anything other than its self-interested legal position. Accordingly, to the extent that

these individuals, and the four stations that they represent, actually did rely on ASCAP's representations as fact, such reliance was not reasonable.

As for the other 135 stations that signed WGN license agreements, the applicants **[*23]** have presented no evidence at all to demonstrate that any misrepresentations were made or that the stations relied upon them or that such reliance was reasonable.

Rather, they rely on ASCAP's communications with the two above-mentioned individuals and aver that "[t]hese communications suggest that other Applicant stations may have been similarly misle[]d." (Opposition at 15.) This invitation to speculation is clearly not sufficient to defeat a summary judgment motion. As noted, those affidavits do not demonstrate either that misrepresentations of fact were made or that reliance on such representations could have been justified. Moreover, even if we assume that ASCAP's statements could be considered misrepresentations of fact and that the two affiants' reliance on ASCAP's representations was reasonable, the affidavits of two individuals representing four stations can hardly be said to constitute a fair sample from which any inference can be drawn regarding the other 135 radio stations. In sum, the affidavits cannot serve as a source of evidence to create any concrete issue of fact between those 135 stations and ASCAP.

At most, the affidavits submitted by the applicants suggest that **[*24]** the stations were faced with a Hobson's choice. Given two distasteful alternatives, the stations made a business decision to opt for what they evidently viewed as the lesser of two evils, namely, agreeing to the WGN licenses. That the decision was made in difficult circumstances resulting in part from ASCAP's asserted inflexibility does not mean that it was fraudulently induced.

In sum, the applicants have not provided sufficient evidence of any actionable misrepresentation to create a genuine issue of material fact. n4

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n4 Although not mentioned by the parties, it is worth noting that this case also does not come within the scope of the so-called "economic duress" defense to contract obligations. See, e.g. Kamerman v. Steinberg, Dkt. No. 89-7054, slip op. 6585, 6602-03 (2d Cir. Dec. 6, 1989) (quoting Gulf & Western Corp. v. Craftique Prods. Inc., 523 F. Supp. 603, 610 (S.D.N.Y. 1981)). To invoke such a defense the party must demonstrate a threat to act unlawfully and an absence of any alternative except submission to the threat. See, e.g., id. at 6603 (quoting Hammelburger v. Foursome Inn Corp., 54 N.Y.2d 580, 593 n.4, 446 N.Y.S.2d 917, 924 n.4 (1981)); Business Incentives Co. v. Sony Corp. of America, 397 F. Supp. 63, 69-70 (S.D.N.Y. 1975). The stations have failed to demonstrate that ASCAP threatened to do anything not legally permissible or that they had no option in the face of such a threat, such as litigation in the rate court. See, e.g., Gulf & Western, 523 F. Supp. at 610 (breach of contract suit is such an alternative).

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E. The Post-1990 Period

In an effort to save at least a portion of their application, the 139 stations argue that, even if bound by their WGN licenses through December 31, 1990, they are entitled to remain in this proceeding to seek a determination of fees for a later period, commencing in 1991. They are wrong.

The jurisdiction of this Court is defined with some precision by the Amended Final Judgment. It establishes a procedure under which a performer of music must first request a license from

ASCAP. Upon such a request, ASCAP is required to propose a fee for the form of license requested, and the parties are to attempt in the first instance to negotiate an agreement on the terms of the license. Only if the parties are unable to reach an agreement and more than sixty days have passed since the licensee has requested a license may it file an application with the rate court requesting a determination of a "reasonable fee" for the license it seeks. See generally United States v. American Society of Composers, Authors and Publishers (Application of Showtime/The Music Channel Inc.), Memorandum and Order at 9-10 (S.D.N.Y. July 8, 1986). In essence, then, the Decree imposes **[*26]** on the parties a duty to negotiate the specific terms of the license and limits the Court's role to setting the fees for the license that the music user has requested of ASCAP.

In this case the stations have apparently not asked ASCAP for a license for a period commencing in 1991 (see Tr. 38-40), and necessarily they have engaged in no negotiations with ASCAP specifically for such a license. Indeed, it is difficult to imagine how either side could reasonably be expected to have discussed in the early or mid-1980's what terms would be appropriate for a licence covering the 1990's.

Since the stations have not met the prerequisites for invoking the jurisdiction of the rate court for a post-1990 license, their attempt to remain in this proceeding on the basis of such a futuristic exercise must be rejected. If the stations request such a license in the future and cannot reach an agreement with ASCAP, there will be occasion to consider the matter. At present, however, it is decidedly premature.

F. The Extension Licenses

The five remaining contested applicants present a far stronger argument for remaining in this proceeding. These five stations never signed a final license agreement **[*27]** with ASCAP, but rather entered into standard form extension agreements binding themselves to pay the same as before on an interim basis while the WGN proceeding was pending. The principal question posed by ASCAP's motion with respect to these stations concerns the scope and duration of the waiver provision in those agreements. According to ASCAP, under the agreement the stations gave up their right to seek a rate-setting order by this Court and bound themselves to accept the WGN rate even if, as was the case, ASCAP exercised its right to terminate the extended license.

The pertinent terms of the agreement are expressed in the following language:

The radio license agreement between [the stations and ASCAP] will expire on December 31, 1982. [ASCAP] and [the stations] hereby agree to extend the agreement, and all of the terms, conditions and provisions thereof, for an additional term commencing January 1, 1983, and expiring on the last day of the third full calendar month following the date of a written notice of termination given at any time by either [party] to the other by registered or certified mail.

This extension agreement is subject to retroactive adjustment on the basis **[*28]** of the terms and conditions arrived at for the period beginning January 1, 1983 [by negotiation or court determination in any proceeding brought by the All-Industry Committee].

[The stations] acknowledge that [the stations] have voluntarily chosen not to be formally represented by the Committee in negotiations or in any proceeding which the Committee may bring, or to make our own application under the Amended Final Judgment. [The stations] hereby waive [their] right to make an application to (ASCAP) or to the Court under the Amended Final Judgment for terms and conditions other than those arrived at by [ASCAP's] negotiation with the Committee, or by Court determination of an application made by the Committee to the Court.

[ASCAP] and [the stations] hereby agree that at the conclusion of such negotiation or Court proceedings [ASCAP] will offer the same license agreements on the same basis as the licence agreements made available to stations represented by the Committee, and [the stations] shall have the same right to accept them as stations represented by the Committee.

(Exh. C to Affidavit of Bernard Korman, sworn to January 13, 1989) (emphasis added). n5

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n5 "The stations" and "ASCAP" have been substituted for "we" and "you" respectively.

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According to ASCAP, this language bars the applicants from instituting the present proceeding because it demonstrates that the stations "agreed to be bound by the outcome of the WGN proceeding [and] understood that they would not be entitled to commence or otherwise participate in a separate Section IX proceeding." (Korman Aff. at para. 7.) The applicants, on the other hand, while conceding that they were bound by the WGN terms for the period during which the extension agreements were in effect (Tr. 20-21, 24-25), dispute the notion that they should also be bound to the WGN terms after ASCAP terminated the agreements. They contend that the waiver provision expired when the agreements themselves expired, and that they are therefore free to seek an independent determination of fees for the period following ASCAP's termination of the extension agreements. Since they were not named parties to the WGN proceeding and did not subsequently agree to the WGN licenses, they argue, there is no reason why they should be bound to the terms of that proceeding once ASCAP terminated the agreement by which they agreed to be so bound.

We start by noting that ASCAP cannot prevail **[*30]** on its summary judgment motion unless the relevant provision unambiguously accords with ASCAP's interpretation. See, e.g., Record Club of America, Inc. v. United Artists Records, Inc., Dkt. Nos. 89-7039, 7041, slip op. 6477, 6490-91 (2d Cir. Nov. 20, 1989); Enercomp, Inc. v. McCorhill Pub. Co., 873 F.2d 536, 549 (2d Cir. 1989); Wards Co. v. Stamford Ridgeway Assocs., 761 F.2d 117, 120 (2d Cir. 1985). In short, ASCAP must demonstrate that "reasonable persons could not differ as to its meaning. . . ." Hunt Ltd. v. Lifschultz Fast Freight, Inc., Dkt. No. 89-7466, slip op. 357, 364 (2d Cir. Nov. 20, 1989); United States Naval Institute v. Charter Communications, 875 F.2d 1044, 1048 (2d Cir. 1989). That is not the case here.

ASCAP in effect contends that the letter agreement compels the stations to accept the WGN rate and furthermore that it amounts to a waiver of any right to go to the rate court even if ASCAP has terminated the license that is the subject of the letter contract. These conclusions are not plainly consistent either with the contractual language or with generally accepted canons of contract construction.

The central provision of the contract extends **[*31]** the preexisting license forward without limitation beyond its December 31, 1982 expiration, subject to two conditions. First, by operation of the second paragraph it appears that the terms of the license would be altered retroactively to conform to whatever terms were either agreed to between ASCAP and the All-Industry Committee or ordered by the rate court in the WGN proceeding. Second, both ASCAP and the station had the right to terminate the license agreement on three months written notice.

In view of the first limitation, the stations were presumably bound, as long as the contract continued in effect, to pay fees in accordance with the prior license and then in accordance with the WGN agreement to the extent applicable. Indeed, the stations do not argue

otherwise. n6

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n6 It could conceivably be argued that the language of the second paragraph is not altogether clear as to whether the WGN rate, once determined, would be automatically applied or whether ASCAP would have to first offer the WGN rate for the consideration of the stations, as indicated in the fourth paragraph. As the extension agreement was terminated by ASCAP, this ambiguity need not be addressed.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*32]**

What is in dispute is whether the station can be held to the WGN rate after the termination of the license agreement by ASCAP. For this argument ASCAP cites both the "retroactive adjustment" provision of the agreement and the paragraph in which the station "waive[s] our right to make an application to you or to the Court . . .for terms. . .other than the" WGN rate.

The "retroactive adjustment" provision by itself plainly cannot sustain ASCAP's analysis since it refers to adjustment of the license agreement, which is terminable at will by either side. Once ASCAP chose to terminate the agreement and the three-month notice period expired, there was no license agreement to be adjusted. Indeed, this conclusion follows that of Judge Tyler in United States v. ASCAP (Petition of Radio Seaways, Inc.), Civ. 13-95, Memorandum at p. 6 (S.O.N.Y. June 3, 1974), and it was in deference to that decision that ASCAP modified its extension agreement to add a waiver provision. The question, then, is whether the addition of that waiver clause alters the result here. I conclude for several reasons that it does not unambiguously do so.

ASCAP suggests that the license extension was but one part **[*33]** of a larger agreement, that the termination provision referred only to the license portion of the agreement, and that the termination of the license therefore had no effect on the other terms of the agreement. (Tr. 10-11.) Thus, in ASCAP's view, even though the license was terminated, the waiver lives on. This argument is unavailing.

HN11↑Ordinarily, contract provisions do not continue to bind the parties after the contract has been terminated. See, e.g., M.J. Posner Constr. Co. v. Valley View Development Corp., 118 A.D.2d 1001, 1002, 499 N.Y.S.2d 997, 999 (3d Dep't 1986). Consequently, if one of the parties wishes a contract term to remain in effect after the contract ends, the contract must say so explicitly. Thus, for example, in an employment setting, if the employee's rights are to be limited after he ceases to work for the employer, the employment contract must contain an explicit non-competition clause or other post-employment restraint detailing the nature and duration of the restriction on his activities. See Farnsworth, § 5.3 at 339. See also, e.g., Application of Liebhafsky, 100 A.D.2d 764, 768, 474 N.Y.S.2d 723, 727 (1st Dep't) (Kassal, J., dissenting) (quoting **[*34]** contract provision that payment obligation shall survive termination of contract), aff'd, 62 N.Y.2d 439, 478 N.Y.S.2d 252 (1984). Here, the agreement does not give any clear indication that the termination clause concerned only the license, as distinguished from the license agreement, or that the waiver provision was intended to survive such termination.

The initial provision of the contract, which both extends the preexisting license agreement and authorizes its termination, does not make clear whether what is terminable is merely the license or the entire license extension agreement -- which includes the waiver provision and the separate provision that ASCAP must offer a new license to the station on the basis of whatever terms are arrived at in the WGN proceeding. If anything, the opening two

paragraphs can be read to suggest that the sole function of the agreement was to extend the existing license indefinitely, subject to retroactive adjustment, simply in order to prevent the station from becoming unlicensed. That this was the entire focus of the agreement is suggested by its opening sentence, which states, "The radio license agreement between us will expire on December 31, **[*35]** 1982," and by the very characterization of it as an "extension agreement". Moreover, the second paragraph provides that "[t]his extension agreement is subject to retroactive adjustment. . . ," which suggests that the agreement is coextensive with the license. If the agreement encompassed more than just the license, it would have indicated not that "this extension agreement"; was subject to retroactive adjustment, but that "the license described in paragraph one" was subject to retroactive adjustment.

The balance of the contract also cuts against ASCAP's interpretation. If, as ASCAP claims, it was understood that the station would be bound to the WGN rate n7 regardless of ASCAP's termination of the agreement, the contract would presumably have said so. It did not. Instead, it made two references to the WGN terms. First, while the license agreement was in existence it would incorporate retroactively whatever terms emerged in the WGN proceeding. Second, ASCAP would be required to offer to the station whatever terms were imposed in WGN and the station would have "the same right to accept them as the stations represented by the Committee."

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n7 I use this term as shorthand for the provisions referring to the terms that could either be negotiated between ASCAP and the All-Industry Committee or imposed by the rate court.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*36]**

This language appears to indicate that while the preexisting licensing agreement was still in effect, the WGN terms would be automatically imposed. That provision cannot apply, however, if ASCAP has terminated the agreement. In such a case, it appears, ASCAP would be bound to offer the WGN terms, and the station would have the option either to accept or reject them. See United States v. ASCAP (Application of Seaways, Inc.), Memorandum at pp. 5-6 (interpreting similar language of Consent Decree Art. XI(C)).

It is of course conceivable that ASCAP intended these provisions to reach a different result. For example, one possible interpretation is that if ASCAP terminated the license agreement, its obligation to offer the WGN rate to the station would survive, as would the waiver provision. Under such a scenario the station would be forced to choose between two alternatives -- either accepting the WGN rate or foregoing ASCAP licensing. The problem with this type of analysis is that it offers at best an arguable interpretation that is not as persuasive as a contrary reading. In substance, this construction would read the contract as binding the station to the future **[*37]** WGN rate. If, however, ASCAP wanted simply to bind the stations to the WGN rate, it could simply have provided that the preexisting license was extended and would remain in effect subject to retroactive modification to conform to the WGN license. The contract was not drafted in this manner, however, see generally George Backer Mgmt. Corp. v. Acme Quilting Co., 46 N.Y.2d at 218, 413 N.Y.S.2d at 138 ("Had that been their intention, surely no problem of draftsmanship would have stood in the way of its being spelled out."), and ASCAP's construction of what it did include does not accord with a reasonable reading of these terms.

Apart from the presumption against survival of individual terms of a terminated contract, ASCAP's reading runs afoul of the oft-cited principle that *HN12* a contract should be read in a manner that will give independent meaning to each of its terms and not reduce them to mere

surplussage. See, e.g., United States Naval Institute v. Charter Communications, supra, 875 F.2d at 1049-50 (citing cases); 67 Wall Street Co. v. Franklin Nat'l Bank, 37 N.Y.2d 245, 248, 371 N.Y.S.2d 915, 918 (1975); Farnsworth, Contracts § 7.11 at 497. If the contract **[*38]** was designed simply to impose the WGN terms, the termination provision would have no independent significance, and the additional provision requiring ASCAP to "offer" the WGN terms to the station and giving the station "the right to accept them" would equally have no separate meaning.

Not only is ASCAP's interpretation of the contract not strongly supported by the language of the agreement, it is not compelled by the circumstances in which the agreement was signed. See, e.g., Cross & Cross Properties, Ltd. v. Everett Allied Co., 886 F.2d 497, 502 (2d Cir. 1989) (court must look to language and context in order to construe contract). Given the uncertainty of the outcome of the pending WGN negotiations and proceeding and the desirability of allowing the stations to remain licensed in the interim, one may fairly infer that the agreement was intended solely as a temporary licensing mechanism that could be replaced with a regular license when that became feasible. Since at the time one could not safely predict what terms would be imposed in WGN, it would have been reasonable for the parties to agree that the stations should be given the option of rejecting those **[*39]** terms and seeking whatever terms they could get from either ASCAP or the rate court. n8 However, during the period when both parties chose to leave the agreement intact, the operative terms would be found in the prior license agreement and then in whatever provisions were incorporated from the WGN license. This arrangement would give both sides some flexibility but ensure stability while the temporary licensing agreement remained in place.

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n8 Under Article XI(C) of the Consent Decree, ASCAP was bound to offer to similarly situated stations whatever rate terms it negotiated with the WGN stations.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

ASCAP also fails to offer any evidence of circumstances, conduct, or usage tending to suggest that the licensees believed that they were binding themselves into the future to the WGN license even if the agreement were terminated. ASCAP simply declares that "[t]here can be no serious doubt that the parties understood this language. . .to bar those stations from applying for licenses on terms different from those to be reached **[*40]** in WGN." (Korman Aff. at para. 9.) It is worth noting that ASCAP never actually says that the licensees "understood" that they were bound through the end of the WGN period. It simply reiterates that they knew they were bound, as they presumably did, but does not say for how long, which is the crucial point.

In sum, neither the agreement itself nor the surrounding circumstances nor later events give any persuasive indication that the waiver provision was intended to survive the termination of the extension license or that the signatory stations were bound to the WGN rates after ASCAP terminated the license agreement. n9 Moreover, even if one were to view the agreement as entirely ambiguous on this issue, such ambiguity would have to inure to the benefit of the applicants, for it is an accepted rule of contract interpretation that *HN13* any ambiguity is to be construed against the drafter, particularly when the drafter has greater bargaining power or uses a standard form. See, e.g., Westchester Resco Co. v. New England Reinsurance Corp., 818 F.2d 2, 3 (2d Cir. 1987); Jacobson v. Sassower, 66 N.Y.2d 991, 993, 499 N.Y.S.2d 381, 382 (1985); Westbury Small Business Corp. v. **[*41]** Ballarine, 128 Misc. 2d 469, 477-78 n.4, 489 N.Y.S.2d 815, 822 n.4 (Sup. Ct. 1985), aff'd, 125 A.D.2d 462, 509 N.Y.S.2d 569 (2d Dep't 1986); cf. Levy v. National Union Fire Ins. Co., Dkt. No. 89-7381, slip op. 223, 226 (2d Cir. Nov. 9, 1989) (contra preferentum does not apply to vary

unambiguous contract); Schneider v. Revici, 817 F.2d 987, 993 (2d Cir. 1987) (ambiguous covenant not to sue strictly construed against party asserting it). n10

- - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - -

n9 ASCAP points out that it inserted the waiver provision into its uniform extension agreement following Judge Tyler's decision in the Radio Seaways case. Judge Tyler ruled that the retroactive adjustment language alone did not bar the signers of extension agreements from seeking court intervention. ASCAP then inserted the waiver provision in the hope that it would "ensure that stations like the [five] applicants [that signed extension agreements] would be precluded from commencing a successive proceeding, and would be bound by the outcome of any pending proceeding. . . ." (Korman Aff. at 8.) ASCAP's efforts were successful insofar as it is not disputed that the waiver provision bars the stations from instituting a separate proceeding with respect to the period covered by the extension. To the extent that ASCAP also hoped that the waiver language would bar later proceedings for periods after the extension agreement had been terminated, however, such a unilateral expectation cannot be enforced absent explicit language embodying it. **[*42]**

n10 There is no reason to believe that the individual stations have the type of bargaining power that might make the general presumption against the drafter inapplicable here. Compare Schering Corp. v. Home Ins. Co., 712 F.2d 4, 10 n.2 (2d Cir. 1983).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - -

In sum, it is evident that ASCAP has failed to demonstrate that its interpretation of the contract is correct as a matter of law, as is its burden under Rule 56. Necessarily, then, its summary judgment motion on this issue must be denied.

CONCLUSION

For the reasons stated, I recommend that summary judgment be granted in favor of ASCAP dismissing the applications of the 139 applicant stations that accepted WGN licenses. I further recommend that ASCAP's motion for summary judgment be denied with respect to the five stations that signed only license extension agreements that were terminated by ASCAP in June 1988.

Pursuant to Rule 7 of the Rules of Proceedings Before A United States Magistrate, the parties shall have ten (10) days from this date to file written objections to this Report and Recommendation. Such objections shall be filed with **[*43]** the Clerk of the Court and served on all adversaries, with extra copies delivered to the chambers of the Honorable William C. Conner, Room 1902, and to the chambers of the undersigned, Room 503. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. See Thomas v. Arn, 474 U.S. 140, 150 (1985); Wesolek v. Canadair Ltd., 838 F.2d 55, 58 (2d Cir. 1988); 28 U.S.C § 636(b)(1); Fed. R. Civ. P. 72, 6(a), 6(e).

DATED: New York New York
December 21, 1989

APPENDIX

Master Station List

interim licenses - ASCAP withdrew motion to dismiss (8 stations)

KAVC-FM	**KELP-AM**	**KFAX-FM**	**KJLY-FM**
KKLA-FM	**KPRZ-AM**	**KYTT-FM**	**WRJZ-AM**

signed extension agreements (5 stations)

KAGC-AM	KAIM-AM	KAIM-FM	
KARI-AM	KBIF-AM	KBLE-AM	
KBQC-FM	KCGN-FM	KCNW-AM	
KDAZ-AM	KDOV-FM	KERI-AM	
KEST-AM	KFEL-AM	KFLT-AM	
KGCR-FM	KHAC-AM	KITZ-AM	
KJAY-AM	KJNP-AM	KJNP-FM	
KKCM-AM	KKIM-AM	KKEY-AM	
KKKK-FM	KKMC-AM	KKXX-FM	
KLLF-AM	KLOC-AM	KMAX-FM	
KNRB-AM	KOEA-FM	KPLA-AM	
KPOF-AM	KPPC-AM	KRSS-AM	
KSGL-AM	KSPD-AM	KTEK-AM	(was listed KPEK-AM)
KTBA-AM	KTSJ-AM	KUDY-AM	
KVIX-AM	KWAM-AM	KWKY-AM	
KWYD-FM	KXEI-FM	KZRQ-AM	(was listed KXAK-AM)
KYCR-AM	WAEC-AM	WARV-AM	
WBMD-AM	WBTX-AM	WBLL-AM	(was listed WOHP-AM/WPKO-AM)
WBYO-FM	WCBW-FM	WCHP-AM	
WCIK-FM	WCRM-FM	WDAC-FM	
WDBA-FM	WDCT-AM	WEAS-AM	(was listed WWJD-AM)
WEBG-AM	WEMR-AM	WEDE-AM	(was listed WCBX-AM)
WFAX-AM	WFCA-FM	WFCJ-FM	
WFEL-AM	WFGW-AM	WFIA-AM	
WFIF-AM	WFMZ-FM	WGCR-AM	
WGGH-AM	WGRT-AM	WGUN-AM	
WHVN-AM	WHWL-FM	WHYD-AM	
WIBF-FM	WIVV-AM	WJSA-AM	
WJSA-FM	WJYP-FM	WKSL-FM	
WLIH-FM	WLIX-AM	WLNL-AM	
WLVJ-AM	WMHR-FM	WMIT-FM	
WNDZ-AM	WNLR-AM	WOIV-FM	
WOLC-FM	WPAQ-AM	WPEO-AM	
WPIT-AM	WPIT-FM	WPKO-FM	(was listed WTOO-FM)
WPMH-AM	WPOS-FM	WRDZ-AM	
WRVM-FM	WSCR-AM	WSCW-AM	
WSHO-AM	WSIV-AM	WSJL-FM	
WSLM-AM	WSLM-FM	WSYW-FM	(was listed WATI-FM/WGRT-FM)
WSSA-AM	WTAC-AM	WTCL-AM	

WTHE-AM WTIS-AM WTMR-AM
WTSJ-AM WVCG-AM WVLJ-FM
WVOJ-AM WVVX-FM WWBC-AM
WWCM-AM WWCS-AM WWDJ-AM
WWGL-FM WWGM-AM WWJC-AM
WXLN-FM WXRI-FM WYDE-AM
WYLO-AM WYNX-AM WZLE-FM
WZZD-AM

currently unlicensed (53 stations)

KBBX-AM KCCV-AM KCFO-AM
KCGL-FM KCIV-FM KCVS-AM
KDAR-FM KDFT-AM KGER-AM (was listed WGER-AM)
KGBA-FM KGNW-AM KGOL-FM
KGRD-FM KHYM-AM KHAA-FM (was listed WHAA-FM)
KIRV-AM KKOL-FM KNNN-FM (was listed KCIB-FM)
KLFE-AM KPDQ-AM KPDQ-FM
KQCV-AM KQXI-AM KSHY-AM
KSIV-AM KSLR-AM KXAK-AM
KXEG-AM KXEN-AM WACE-AM
WAJL-AM WBCM-AM WCCD-AM
WCTN-AM WEZE-AM WFCV-AM
WFKJ-AM WFLT-AM WGCB-AM
WGCB-FM WGRT-FM WLOB-AM
WMCA-AM WRBS-FM WPES-AM (was listed WMMM-AM)
WRFD-AM WROL-AM WTGN-FM
WTLN-AM WTLN-FM WTSB-AM
WVCH-AM WWRV-AM (was listed WNYM-AM)

Deleted from applicant list (20 stations)
(+ = party in WGN proceeding)

KAJN-FM KCTA-AM +
KDFN-AM + KOUL-AM
+
KPWS-AM KRDU-AM
+
WASG-AM + WCLV-FM
+
WCMR-AM + WCTL-FM
+
WEXL-AM + WFRN-FM
+
WGIA-AM + WHME-FM
+
WLXN-AM + WVCY-FM
+
WPJL-AM + WPLW-AM
+

WWWG-AM WYIS-AM
+

[*44]

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§ 305.01. Composition and election of board; terms of members.

The board of county commissioners shall consist of three persons who shall be elected as follows:

(A) In November, 1974, and quadrennially thereafter, one county commissioner shall be elected to take office on the first day of January following.

(B) In November, 1972, and quadrennially thereafter, two commissioners shall be elected. The term of one of such commissioners shall commence on the second day of January next after his election, and the term of the other commissioner shall commence on the third day of January next after his election.

(C) Thereafter such officers shall hold office for the term of four years and until their successors are elected and qualified.

HISTORY: RS § 839; S&C 243; 70 v 53; 83 v 198; 91 v 338; 98 v 272; GC § 2395; 108 v PtII, 1300; Bureau of Code Revision, 10-1-53; 127 v 894 (Eff 8-30-57); 134 v S 322. Eff 2-25-72.

§ 305.25. When contracts valid.

No contract entered into by the board of county commissioners, or order made by it, shall be valid unless it has been assented to at a regular or special session of the board, and entered in the minutes of its proceedings by the county auditor or the clerk of the board.

HISTORY: RS § 878; S&C 250; 53 v 153, § 4; GC § 2445; Bureau of Code Revision, 10-1-53; 139 v S 114. Eff 10-27-81.

§ 307.04. Light, heat, and power contracts.

The board of county commissioners may, at any time before or after the completion of any county building, award contracts for supplying such building with light, heat, or power for any period of time not exceeding ten years. Sections 5705.41 and 5705.44 of the Revised Code shall not apply to any such contracts.

HISTORY: GC § 2435-1; 101 v 258; Bureau of Code Revision, 10-1-53; 139 v S 114. Eff 10-27-81.

§ 307.14. Definitions.

As used in sections 307.14 to 307.19, inclusive, of the Revised Code:

(A) "Legislative authority" means the board of county commissioners, board of township trustees, or the board, council, or commission of a contracting subdivision;

(B) "Contracting subdivision" means any governmental subdivision or taxing district of the state which, by its legislative authority, enters into an agreement with a board of county commissioners under the authority of such sections.

HISTORY: GC § 2450-1; 116 v 102; Bureau of Code Revision. Eff 10-1-53.

§ 307.15. Agreement and contracts with other units of government.

(A) (1) Subject to division (C) of this section, the board of county commissioners may enter into an agreement with the legislative authority of any municipal corporation, township, port authority, water or sewer district, school district, library district, health district, park district, soil and water conservation district, water conservancy district, or other taxing district, or with the board of any other county, and such legislative authorities may enter into agreements with the board of county commissioners, whereby the board undertakes, and is authorized by the contracting subdivision, to exercise any power, perform any function, or render any service, on behalf of the contracting subdivision or its legislative authority, that such subdivision or legislative authority may exercise, perform, or render; or whereby the legislative authority of any municipal corporation undertakes, and is authorized by the board of county commissioners, to exercise any power, perform any function, or render any service, on behalf of the county or the board, that the county or the board may exercise, perform, or render. The board of county commissioners may enter into an agreement with the board of township trustees of any township within the county, whereby the board of county commissioners or any county official designated by the board, purchases at the request of the township any materials for the construction, maintenance, or repair of any township road or for the maintenance or repair of any township building, and sells the materials to the township at the cost to the county, which cost shall include the purchase price and any expenses incurred in such purchase, providing the amount involved does not exceed one thousand dollars.

(2) Upon the execution of an agreement described in division (A)(1) of this section, and within the limitations prescribed by the agreement, the board of county commissioners may exercise the same powers as the contracting subdivision possesses with respect to the performance of any function or the rendering of any service, which, by such agreement, it undertakes to perform or render, and all powers necessary or incidental thereto, as amply as such powers are possessed and exercised by the contracting subdivisions directly; and the legislative authority of any municipal corporation may exercise the same powers as the county possesses with respect to the performance of any function or the rendering of any service, which, by such agreement, it undertakes to perform or render, and all powers necessary or incidental thereto, as amply as such powers are possessed and exercised by the county directly. In the absence in the agreement of provisions determining by what officer, office, department, agency, or authority, the powers and duties of the board shall be exercised or performed, the board shall determine and assign such powers and duties. In the absence in the agreement of provisions determining by what officer, office, department, agency, or authority, the powers and duties of the legislative authority of the municipal corporation shall be exercised or performed, such legislative authority shall determine and assign such powers and duties. Sections 307.14 to 307.19 of the Revised Code, or any agreement authorized by those sections, shall not suspend the possession by a contracting subdivision of any power or function exercised or performed by the board, or the possession by a county of any power or function exercised or performed by the contracting municipal corporation, in pursuance of the agreement. Nor shall the board, by virtue of any agreement entered into under this section, acquire any power to levy taxes within, and on behalf of, a contracting subdivision unless approved by a majority of the electors of the contracting subdivision.

(B) Subject to division (C) of this section, the boards of county commissioners of any two or more counties may contract with each other or by contract create any joint agency to exercise any power, perform any function, or render any service which any board of county commissioners may exercise, perform, or render.

(C) No board of county commissioners shall enter into any agreement pursuant to division (A) of this

section or form a joint agency pursuant to division (B) of this section to exercise, with regard to public moneys, any investment powers, perform any investment function, or render any investment service on behalf of a contracting subdivision or its legislative authority, or, with respect to a joint agency, another board of county commissioners.

HISTORY: GC § 2450-2; 116 v 102, § 2; 124 v 264, § 11; Bureau of Code Revision, 10-1-53; 127 v 894 (Eff 8-30-57); 130 v 195 (Eff 9-24-63); 132 v H 487 (Eff 12-11-67); 133 v H 1 (Eff 3-18-69); 146 v S 81. Eff 9-27-96.

The provisions of § 4 of SB 81 (146 v -) read as follows:

SECTION 4. Any fund that is established by a county for the purpose of investing the public moneys of other counties or subdivisions, and that is in operation on the effective date of this section, shall begin the process of liquidation within thirty days after such effective date and shall complete the process of liquidation within eighteen months after such effective date.

If an asset held in the fund would realize a loss, the asset may be held until its maturity or the existence of market conditions allowing for its sale without loss, whichever comes first.

§ 307.16. Method of payment.

Every agreement entered into under sections 307.14 to 307.19, inclusive, of the Revised Code, shall provide, either in specific terms or by prescribing a method for determining the amounts, for any payments to be made by the contracting subdivision into the county treasury, or by the county to the municipal corporation, in consideration of the performance of the agreement. In cases where it is deemed practicable, the agreement may provide that payment shall be made by the retention in the treasury of the amounts due from taxes collected for the contracting subdivision and the county auditor and county treasurer shall be governed by any such provision in settling the accounts for such taxes.

Any agreement entered into by and between two or more boards of county commissioners shall specify the method of payment for the joint exercise of any power, the joint performing of any function, or the joint rendering of any service which method of payment shall be authorized and binding on the counties so long as the agreement is in effect.

HISTORY: GC § 2450-3; 116 v 102, § 3; Bureau of Code Revision, 10-1-53; 127 v 894 (Eff 8-30-57); 132 v H 487. Eff 12-11-67.

§ 307.19. Application of sections.

Sections 307.14 to 307.19, inclusive, of the Revised Code, do not repeal or abrogate other sections of the Revised Code authorizing contracts or agreements among particular classes of subdivisions, or modify or impair the force of such sections in respect of contracts or agreements entered into under such sections. Nor shall such other sections control or limit the making of agreements under sections 307.14 to 307.19, inclusive, of the Revised Code; it being intended that such sections shall be applied as fully as though such other sections did not exist.

HISTORY: GC § 2450-6; 116 v 102, § 6; Bureau of Code Revision. Eff 10-1-53.

§ 343.01. Establishment of county or joint solid waste management district; bonds; rules.

(A) In order to comply with division (B) of section 3734.52 of the Revised Code, the board of county commissioners of each county shall do one of the following:

(1) Establish, by resolution, and maintain a county solid waste management district under this chapter that consists of all the incorporated and unincorporated territory within the county except as otherwise provided in division (A) of this section;

(2) With the boards of county commissioners of one or more other counties establish, by agreement, and maintain a joint solid waste management district under this chapter that consists of all the incorporated and unincorporated territory within the counties forming the joint district except as otherwise provided in division (A) of this section.

If a municipal corporation is located in more than one solid waste management district, the entire municipal corporation shall be considered to be included in and shall be under the jurisdiction of the district in which a majority of the population of the municipal corporation resides.

A county and joint district established to comply with division (B) of section 3734.52 of the Revised Code shall have a population of not less than one hundred twenty thousand unless, in the instance of a county district, the board of county commissioners has obtained an exemption from that requirement under division (C)(1) or (2) of that section. Each joint district established to comply with an order issued under division (D) of that section shall have a population of at least one hundred twenty thousand.

(B) The boards of county commissioners of the counties establishing a joint district constitute, collectively, the board of directors of the joint district, except that if a county with a form of legislative authority other than a board of county commissioners participates, it shall be represented on the board of directors by three persons appointed by the legislative authority.

The agreement to establish and maintain a joint district shall be ratified by resolution of the board of county commissioners of each participating county. Upon ratification, the board of directors shall take control of and manage the joint district subject to this chapter, except that, in the case of a joint district formed pursuant to division (C), (D), or (E) of section 343.012 [343.01.2] of the Revised Code, the board of directors shall take control of and manage the district when the formation of the district becomes final under the applicable division. A majority of the board of directors constitutes a quorum, and a majority vote is required for the board to act.

A county participating in a joint district may contribute lands or rights or interests therein, money, other personal property or rights or interests therein, or services to the district. The agreement shall specify any contributions of participating counties and the rights of the participating counties in lands or personal property, or rights or interests therein, contributed to or otherwise acquired by the joint district. The agreement may be amended or added to by a majority vote of the board of directors, but no amendment or addition shall divest a participating county of any right or interest in lands or personal property without its consent.

The board of directors may appoint and fix the compensation of employees of, accept gifts, devises, and bequests for, and take other actions necessary to control and manage the joint district. Employees of the district shall be considered county employees for the purposes of Chapter 124. of the Revised Code and other provisions of state law applicable to employees. Instead of or in addition to appointing employees of the district, the board of directors may agree to use employees of one or more of the participating counties in the service of the joint district and to share in their compensation in any manner that may be agreed upon.

The board of directors shall do one of the following:

(1) Designate the county auditor, including any other official acting in a capacity similar to a county auditor under a county charter, of a county participating in the joint district as the fiscal officer of the district, and the county treasurer, or other official acting in a capacity similar to a county treasurer under a county charter, of that county as the treasurer of the district. The designated county officials shall perform any applicable duties for the district as each typically performs for the county of which he is an official, except as otherwise may be provided in any bylaws or resolutions adopted by the board of directors. The board of directors may pay to that county any amount agreed upon by the board of directors and the board of county commissioners of that county to reimburse that county for the cost properly allocable to the service of its officials as fiscal officer and treasurer of the joint district.

(2) Appoint one individual who is neither a county auditor nor a county treasurer, and who may be an employee of the district, to serve as both the treasurer of the district and its fiscal officer. That individual shall act as custodian of the funds of the board and the district and shall maintain all accounts of the district. Any reference in this chapter or Chapter 3734. of the Revised Code to a county auditor or county treasurer serving as fiscal officer of a district or custodian of any funds of a board or district is deemed to refer to an individual appointed under division (B)(2) of this section.

The fiscal officer of a district shall establish a general fund and any other necessary funds for the district.

(C) A board of county commissioners of a county district or board of directors of a joint district may acquire, by purchase or lease, construct, improve, enlarge, replace, maintain, and operate such solid waste collection systems within their respective districts and such solid waste facilities within or outside their respective districts as are necessary for the protection of the public health. A board of county commissioners may acquire within its county real property or any estate, interest, or right therein, by appropriation or any other method, for use by a county or joint district in connection with such facilities. Appropriation proceedings shall be conducted in accordance with sections 163.01 to 163.22 of the Revised Code.

(D) The sanitary engineer or sanitary engineering department of a county maintaining a district and any sanitary engineer or sanitary engineering department of a county in a joint district, as determined by the board of directors, in addition to other duties assigned to that engineer or department, shall assist the board of county commissioners or directors in the performance of their duties under this chapter and sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code and shall be charged with any other duties and services in relation thereto that the board prescribes. A board may employ registered professional engineers to assist the sanitary engineer in those duties and also may employ financial advisers and any other professional services it considers necessary to assist it in the construction, financing, and maintenance of solid waste collection, or other solid waste facilities. Such contracts of employment shall not require the certificate provided in section 5705.41 of the Revised Code. Payment for such services may be made from the general fund or any other fund legally available for that use at times that are agreed upon or as determined by the board of county commissioners or

directors, and the funds may be reimbursed from the proceeds of bonds or notes issued to pay the cost of any improvement to which the services related.

(E) (1) The prosecuting attorney of the county shall serve as the legal advisor of a county district and shall provide such services to the board of county commissioners of the district as are required or authorized to be provided to other county boards under Chapter 309. of the Revised Code, except that, if the board considers it to be necessary or appropriate, the board, on its own initiative, may employ an attorney or other legal counsel on an annual basis to serve as the legal advisor of the district in place of the prosecuting attorney. When the prosecuting attorney is serving as the district's legal advisor and the board considers it to be necessary or appropriate, the board, on its own initiative, may employ an attorney or other legal counsel to represent or advise the board regarding a particular matter in place of the prosecuting attorney. The employment of an attorney or other legal counsel on an annual basis or in a particular matter is not subject to or governed by sections 305.14 and 309.09 of the Revised Code.

Notwithstanding the employment of an attorney or other legal counsel on an annual basis to serve as the district's legal advisor, the board may require written opinions or instructions from the prosecuting attorney under section 309.09 of the Revised Code in matters connected with its official duties as though the prosecuting attorney were serving as the legal advisor of the district.

(2) The board of directors of a joint district may designate the prosecuting attorney of one of the counties forming the district to serve as the legal advisor of the district. When so designated, the prosecuting attorney shall provide such services to the joint district as are required or authorized to be provided to county boards under Chapter 309. of the Revised Code. The board of directors may pay to that county any amount agreed upon by the board of directors and the board of county commissioners of that county to reimburse that county for the cost properly allocable to the services of its prosecuting attorney as the legal advisor of the joint district. When that prosecuting attorney is so serving and the board considers it to be necessary or appropriate, the board, on its own initiative, may employ an attorney or other legal counsel to represent or advise the board regarding a particular matter in place of the prosecuting attorney.

Instead of designating the prosecuting attorney of one of the counties forming the district to be the legal advisor of the district, the board of directors may employ on an annual basis an attorney or other legal counsel to serve as the district's legal advisor. Notwithstanding the employment of an attorney or other legal counsel as the district's legal advisor, the board of directors may require written opinions or instructions from the prosecuting attorney of any of the counties forming the district in matters connected with the board's official duties, and the prosecuting attorney shall provide the written opinion or instructions as though he had been designated to serve as the district's legal advisor under division (E) (2) of this section.

(F) A board of county commissioners may issue bonds or bond anticipation notes of the county to pay the cost of preparing general and detailed plans and other data required for the construction of solid waste facilities in connection with a county or joint district. A board of directors of a joint solid waste management district may issue bonds or bond anticipation notes of the joint solid waste management district to pay the cost of preparing general and detailed plans and other data required for the construction of solid waste facilities in connection with a joint district. The bonds and notes shall be issued in accordance with Chapter 133. of the Revised Code, except that the maximum maturity of bonds issued for that purpose shall not exceed ten years. Bond anticipation notes may be paid from the proceeds of bonds issued either to pay the cost of the solid waste facilities or to pay the cost of the plans and other data.

(G) To the extent authorized by the solid waste management plan of the district approved under section 3734.521 [3734.52.1] or 3734.55 of the Revised Code or subsequent amended plans of the district

approved under section 3734.521 [3734.52.1] or 3734.56 of the Revised Code, the board of county commissioners of a county district or board of directors of a joint district may adopt, publish, and enforce rules doing any of the following:

(1) Prohibiting or limiting the receipt of solid wastes generated outside the district or outside a service area prescribed in the solid waste management plan or amended plan, at facilities covered by the plan, consistent with the projections contained in the plan or amended plan under divisions (A)(6) and (7) of section 3734.53 of the Revised Code, except that the director of environmental protection may issue an order modifying a rule adopted under division (G)(1) of this section to allow the disposal in the district of solid wastes from another county or joint solid waste management district if all of the following apply:

(a) The district in which the wastes were generated does not have sufficient capacity to dispose of solid wastes generated within it for six months following the date of the director's order;

(b) No new solid waste facilities will begin operation during those six months in the district in which the wastes were generated and, despite good faith efforts to do so, it is impossible to site new solid waste facilities within the district because of its high population density;

(c) The district in which the wastes were generated has made good faith efforts to negotiate with other districts to incorporate its disposal needs within those districts' solid waste management plans, including efforts to develop joint facilities authorized under section 343.02 of the Revised Code, and the efforts have been unsuccessful;

(d) The district in which the wastes were generated has located a facility willing to accept the district's solid wastes for disposal within the receiving district;

(e) The district in which the wastes were generated has demonstrated to the director that the conditions specified in divisions (G)(1)(a) to (d) of this section have been met;

(f) The director finds that the issuance of the order will be consistent with the state solid waste management plan and that receipt of the out-of-district wastes will not limit the capacity of the receiving district to dispose of its in-district wastes to less than eight years. Any order issued under division (G)(1) of this section shall not become final until thirty days after it has been served by certified mail upon the county or joint solid waste management district that will receive the out-of-district wastes.

(2) Governing the maintenance, protection, and use of solid waste collection or other solid waste facilities located within its district. The rules adopted under division (G)(2) of this section shall not establish design standards for solid waste facilities and shall be consistent with the solid waste provisions of Chapter 3734. of the Revised Code and the rules adopted under those provisions. The rules adopted under division (G)(2) of this section may prohibit any person, municipal corporation, township, or other political subdivision from constructing, enlarging, or modifying any solid waste facility until general plans and specifications for the proposed improvement have been submitted to and approved by the board of county commissioners or board of directors as complying with the solid waste management plan or amended plan of the district. The construction of such a facility shall be done under the supervision of the county sanitary engineer or, in the case of a joint district, a county sanitary engineer designated by the board of directors, and any person, municipal corporation, township, or other political subdivision proposing or constructing such improvements shall pay to the county or joint district all expenses incurred by the board in connection therewith. The sanitary engineer may enter upon any public or private property for the purpose of making surveys or examinations necessary for designing solid waste facilities or for supervising the construction, enlargement, modification, or operation of any such facilities. No person, municipal corporation, township, or other political

subdivision shall forbid or interfere with the sanitary engineer or his authorized assistants entering upon such property for that purpose. If actual damage is done to property by the making of the surveys and examinations, a board shall pay the reasonable value of that damage to the owner of the property damaged, and the cost shall be included in the financing of the improvement for which the surveys and examinations are made.

(3) Governing the development and implementation of a program for the inspection of solid wastes generated outside the boundaries of this state that are disposed of at solid waste facilities included in the district's solid waste management plan or amended plan. A board of county commissioners or board of directors or its authorized representative may enter upon the premises of any solid waste facility included in the district's solid waste management plan or amended plan for the purpose of conducting the inspections required or authorized by the rules adopted under division (G)(3) of this section. No person, municipal corporation, township, or other political subdivision shall forbid or interfere with a board of county commissioners or directors or its authorized representative entering upon the premises of any such solid waste facility for that purpose.

(4) Exempting the owner or operator of any existing or proposed solid waste facility provided for in the plan or amended plan from compliance with any amendment to a township zoning resolution adopted under section 519.12 of the Revised Code or to a county rural zoning resolution adopted under section 303.12 of the Revised Code that rezoned or redistricted the parcel or parcels upon which the facility is to be constructed or modified and that became effective within two years prior to the filing of an application for a permit required under division (A)(2)(a) of section 3734.05 of the Revised Code to open a new or modify an existing solid waste facility.

(H) A board of county commissioners or board of directors may enter into a contract with any person, municipal corporation, township, or other political subdivision for the operation and maintenance of any solid waste facilities regardless of whether the facilities are owned or leased by the county or joint district or the contractor.

(I) (1) No person, municipal corporation, township, or other political subdivision shall tamper with or damage any solid waste facility constructed under this chapter or any apparatus or accessory connected therewith or pertaining thereto, fail or refuse to comply with the applicable rules adopted by a board of county commissioners or directors under division (G)(1), (2), (3), or (4) of this section, refuse to permit an inspection or examination by a sanitary engineer as authorized under division (G)(2) of this section, or refuse to permit an inspection by a board of county commissioners or directors or its authorized representative as required or authorized by rules adopted under division (G)(3) of this section.

(2) If the board of county commissioners of a county district or board of directors of a joint district has established facility designations under section 343.013 [343.01.3], 343.014 [343.01.4], or 343.015 [343.01.5] of the Revised Code, or the director has established facility designations in the initial or amended plan of the district prepared and ordered to be implemented under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code, no person, municipal corporation, township, or other political subdivision shall deliver, or cause the delivery of, any solid wastes generated within a county or joint district to any solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013 [343.01.3], 343.014 [343.01.4], or 343.015 [343.01.5] of the Revised Code, or in the initial or amended plan of the district prepared and ordered to be implemented under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code, as applicable. Upon the request of a person or the legislative authority of a municipal corporation or township, the board of county commissioners of a county district or board of directors of a joint district may grant a waiver authorizing the delivery of all or any portion of the solid wastes generated in a municipal corporation or township to a solid waste transfer, disposal, recycling, or resource recovery facility other than the facility designated under section 343.013 [343.01.3], 343.014 [343.01.4], or

343.015 [343.01.5] of the Revised Code, or in the initial or amended plan of the district prepared and ordered to be implemented under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code, as applicable, regardless of whether the other facility is located within or outside of the district, if the board finds that delivery of those solid wastes to the other facility is not inconsistent with the projections contained in the district's initial or amended plan under divisions (A)(6) and (7) of section 3734.53 of the Revised Code as approved or ordered to be implemented and will not adversely affect the implementation and financing of the district's initial or amended plan pursuant to the implementation schedule contained in it under divisions (A)(12)(a) to (d) of that section. The board shall act on a request for such a waiver within ninety days after receiving the request. Upon granting such a waiver, the board shall send notice of that fact to the director. The notice shall indicate to whom the waiver was granted. Any waiver or authorization granted by a board on or before October 29, 1993, shall continue in force until the board takes action concerning the same entity under this division or until action is taken under division (G) of section 343.014 [343.01.4] of the Revised Code.

(J) Divisions (G)(1) to (4) and (I)(2) of this section do not apply to the construction, operation, use, repair, enlargement, or modification of either of the following:

(1) A solid waste facility owned by a generator of solid wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the generator regardless of whether the facility is located on a premises where the wastes are generated;

(2) A facility that exclusively disposes of wastes that are generated from the combustion of coal, or from the combustion of primarily coal in combination with scrap tires, that is not combined in any way with garbage at one or more premises owned by the generator.

(K) (1) A member of the board of county commissioners of a county solid waste management district, member of the board of directors of a joint solid waste management district, member of the board of trustees of a regional solid waste management authority managing a county or joint solid waste management district, or officer or employee of any solid waste management district, for the purposes of sections 102.03, 102.04, 2921.41, and 2921.42 of the Revised Code, shall not be considered to be directly or indirectly interested in, or improperly influenced by, any of the following:

(a) A contract entered into under this chapter or section 307.15 or sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code between the district and any county forming the district, municipal corporation or township located within the district, or health district having territorial jurisdiction within the district, of which that member, officer, or employee also is an officer or employee, but only to the extent that any interest or influence could arise from his public office or employment with the political subdivision or health district;

(b) A contract entered into under this chapter or section 307.15 or sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code between the district and a county planning commission organized under section 713.22 of the Revised Code, or regional planning commission created under section 713.21 of the Revised Code, having territorial jurisdiction within the district, of which that member also is a member, officer, or employee, but only to the extent that any interest or influence could arise from his public office or employment with the commission;

(c) An expenditure of money made by the district for the benefit of any county forming the district, municipal corporation or township located within the district, or health district or county or regional planning commission having territorial jurisdiction within the district, of which that member also is a member, officer, or employee, but only to the extent that any interest or influence could arise from his public office or employment with the political subdivision, health district, or commission;

(d) An expenditure of money made for the benefit of the district by any county forming the district, municipal corporation or township located within the district, or health district or county or regional planning commission having territorial jurisdiction within the district, of which that member also is a member, officer, or employee, but only to the extent that any interest or influence could arise from his public office or employment with the political subdivision, health district, or commission.

(2) A solid waste management district, county, municipal corporation, township, health district, or planning commission described or referred to in divisions (K)(1)(a) to (d) of this section shall not be construed to be the business associate of a person who is concurrently a member of the board of county commissioners, directors, or trustees, or an officer or employee, of the district and an officer or employee of that municipal corporation, county, township, health district, or planning commission for the purposes of sections 102.03, 2921.42, and 2921.43 of the Revised Code. Any person who is concurrently a member of the board of county commissioners, directors, or trustees, or an officer or employee, of a solid waste management district so described or referred to and an officer or employee of a county, municipal corporation, township, health district, or planning commission so described or referred to may participate fully in deliberations concerning and vote on or otherwise participate in the approval or disapproval of any contract or expenditure of funds described in those divisions as a member of the board of county commissioners or directors, or an officer or employee, of a county or joint solid waste management district; member of the board of trustees, or an officer or employee, of a regional solid waste management authority managing a county or joint solid waste management district; member of the legislative authority, or an officer or employee, of a county forming the district; member of the legislative authority, or an officer or employee, of a municipal corporation or township located within the district; member of the board of health, or an officer or employee, of a health district having territorial jurisdiction within the district; or member of the planning commission, or an officer or employee, of a county or regional planning commission having territorial jurisdiction within the district.

(3) Nothing in division (K)(1) or (2) of this section shall be construed to exempt any member of the board of county commissioners, directors, or trustees, or an officer or employee, of a solid waste management district from a conflict of interest arising because of a personal or private business interest.

(4) A member of the board of county commissioners of a county solid waste management district, board of directors of a joint solid waste management district, or board of trustees of a regional solid waste management authority managing a county or joint solid waste management district, or an officer or employee, of any such solid waste management district, neither shall be disqualified from holding any other public office or position of employment nor be required to forfeit any other public office or position of employment by reason of his serving as a member of the board of county commissioners, directors, or trustees, or as an officer or employee, of the district, notwithstanding any requirement to the contrary under the common law of this state or the Revised Code.

(L) As used in this chapter:

(1) "Board of health," "disposal," "health district," "scrap tires," and "solid waste transfer facility" have the same meanings as in section 3734.01 of the Revised Code.

(2) "Change in district composition" and "change" have the same meaning as in section 3734.521 [3734.52.1] of the Revised Code.

(3) (a) Except as provided in division (L)(3)(b) or (c), and (d), of this section, "solid wastes" has the same meaning as in section 3734.01 of the Revised Code.

(b) If the solid waste management district is not one that resulted from proceedings for a change in district composition under sections 343.012 [343.01.2] and 3734.521 [3734.52.1] of the Revised Code,

until such time as an amended solid waste management plan is approved under section 3734.56 of the Revised Code, "solid wastes" need not include scrap tires unless the solid waste management policy committee established under section 3734.54 of the Revised Code for the district chooses to include the management of scrap tires in the district's initial solid waste management plan prepared under sections 3734.54 and 3734.55 of the Revised Code.

(c) If the solid waste management district is one resulting from proceedings for a change in district composition under sections 343.012 [343.01.2] and 3734.521 [3734.52.1] of the Revised Code and if the change involves an existing district that is operating under either an initial solid waste management plan approved or prepared and ordered to be implemented under section 3734.55 of the Revised Code or an initial or amended plan approved or prepared and ordered to be implemented under section 3734.521 [3734.52.1] of the Revised Code that does not provide for the management of scrap tires and scrap tire facilities, until such time as the amended plan of the district resulting from the change is approved under section 3734.56 of the Revised Code, "solid wastes" need not include scrap tires unless the solid waste management policy committee established under division (C) of section 3734.521 [3734.52.1] of the Revised Code for the district chooses to include the management of scrap tires in the district's initial or amended solid waste management plan prepared under section 3734.521 [3734.52.1] of the Revised Code in connection with the change proceedings.

(d) If the policy committee chooses to include the management of scrap tires in an initial plan prepared under sections 3734.54 and 3734.55 of the Revised Code or in an initial or amended plan prepared under section 3734.521 [3734.52.1] of the Revised Code, the board of county commissioners or directors shall execute all of the duties imposed and may exercise any or all of the rights granted under this section for the purpose of managing solid wastes that consist of scrap tires.

(4) (a) Except as provided in division (L)(4)(b) or (c), and (d) of this section, "facility" has the same meaning as in section 3734.01 of the Revised Code and also includes any solid waste transfer, recycling, or resource recovery facility.

(b) If the solid waste management district is not one that resulted from proceedings for a change in district composition under sections 343.012 [343.01.2] and 3734.521 [3734.52.1] of the Revised Code, until such time as an amended solid waste management plan is approved under section 3734.56 of the Revised Code, "facility" need not include any scrap tire collection, storage, monocell, monofill, or recovery facility unless the solid waste management policy committee established under section 3734.54 of the Revised Code for the district chooses to include the management of scrap tire facilities in the district's initial solid waste management plan prepared under sections 3734.54 and 3734.55 of the Revised Code.

(c) If the solid waste management district is one resulting from proceedings for a change in district composition under sections 343.012 [343.01.2] and 3734.521 [3734.52.1] of the Revised Code and if the change involves an existing district that is operating under either an initial solid waste management plan approved under section 3734.55 of the Revised Code or an initial or amended plan approved or prepared and ordered to be implemented under section 3734.521 [3734.52.1] of the Revised Code that does not provide for the management of scrap tires and scrap tire facilities, until such time as the amended plan of the district resulting from the change is approved under section 3734.56 of the Revised Code, "facility" need not include scrap tires unless the solid waste management policy committee established under division (C) of section 3734.521 [3734.52.1] of the Revised Code for the district chooses to include the management of scrap tires in the district's initial or amended solid waste management plan prepared under section 3734.521 [3734.52.1] of the Revised Code in connection with the change proceedings.

(d) If the policy committee chooses to include the management of scrap tires in an initial plan prepared

under sections 3734.54 and 3734.55 of the Revised Code or in an initial or amended plan prepared under section 3734.521 [3734.52.1] of the Revised Code, the board of county commissioners or directors shall execute all of the duties imposed and may exercise any or all of the rights granted under this section for the purpose of managing solid waste facilities that are scrap tire collection, storage, monocell, monofill, or recovery facilities.

HISTORY: GC § 6600; 123 v 806; Bureau of Code Revision, 10-1-53; 131 v 231 (Eff 9-22-65); 133 v S 314 (Eff 7-23-69); 134 v S 397 (Eff 10-23-72); 136 v H 993 (Eff 7-1-76); 137 v H 435 (Eff 10-25-78); 140 v H 13 (Eff 3-19-84); 142 v H 592 (Eff 6-24-88); 143 v H 230 (Eff 10-30-89); 143 v H 656 (Eff 4-18-90); 144 v H 150 (Eff 3-4-92); 144 v H 149 (Eff 3-24-92); 144 v H 723 (Eff 4-16-93); 145 v S 165 (Eff 10-29-93); 145 v S 153 (Eff 10-29-93); 145 v H 685. Eff 3-30-95.

§ 343.08. Rates and charges; contract for municipal operation of county facilities.

(A) The board of county commissioners of a county solid waste management district and the board of directors of a joint solid waste management district may fix reasonable rates or charges to be paid by every person, municipal corporation, township, or other political subdivision that owns premises to which solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery service is provided by the district and may change the rates or charges whenever it considers it advisable. Charges for collection, storage, transfer, disposal, recycling, processing, or resource recovery service shall be made only against lots or parcels that are improved, or in the process of being improved, with at least one permanent, portable, or temporary building. The rates or charges may be collected by either of the following means:

(1) Periodic billings made by the district directly or in conjunction with billings for public utility rates or charges by a county water district established under section 6103.02 of the Revised Code, a county sewer district established under section 6117.02 of the Revised Code, or a municipal corporation or other political subdivision authorized by law to provide public utility service. When any such charges that are so billed are not paid, the board shall certify them to the county auditor of the county where the lots or parcels are located, who shall place them upon the real property duplicate against the property served by the collection, storage, transfer, disposal, recycling, processing, or resource recovery service. The charges shall be a lien on the property from the date they are placed upon the real property duplicate by the auditor and shall be collected in the same manner as other taxes.

(2) Certifying the rates or charges to the county auditor of the county where the lots or parcels are located, who shall place them on the real property duplicate against the lots or parcels. The rates or charges are a lien on the property from the date they are placed upon the real property duplicate by the auditor and shall be collected in the same manner as other taxes.

The county or joint district need not fix a rate or charge against property if the district does not operate a collection system.

Where a county or joint district owns or operates a solid waste facility, either without a collection system or in conjunction therewith, the board of county commissioners or board of directors may fix reasonable rates or charges for the use of the facility by persons, municipal corporations, townships, and other political subdivisions, may contract with any public authority or person for the collection of solid wastes in any part of any district for collection, storage, disposal, transfer, recycling, processing, or resource recovery in any solid waste facility, or may lease the facility to any public authority or person. The cost of collection, storage, transfer, disposal, recycling, processing, or resource recovery under such contracts may be paid by rates or charges fixed and collected under this section or by rates and charges fixed under those contracts and collected by the contractors.

All moneys collected by or on behalf of a county or joint district as rates or charges for solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery service in any district shall be paid to the county treasurer in a county district or to the county treasurer or other official designated by the board of directors in a joint district and kept in a separate and distinct fund to the credit of the district. The fund shall be used for the payment of the cost of the management, maintenance, and operation of the solid waste collection or other solid waste facilities of the district and, if applicable, the payment of the cost of collecting the rates or charges of the district pursuant to division (A)(1) or (2) of this section. Prior to the approval of the district's initial solid waste management plan

under section 3734.55 of the Revised Code or the issuance of an order under that section requiring the district to implement an initial plan prepared by the director, as appropriate, the fund also may be used for the purposes of division (G)(1) or (3) of section 3734.57 of the Revised Code. On and after the approval of the district's initial plan under section 3734.521 [3734.52.1] or 3734.55 of the Revised Code or the issuance of an order under either of those sections, as appropriate, requiring the district to implement an initial plan prepared by the director, the fund also may be used for the purposes of divisions (G)(1) to (10) of section 3734.57 of the Revised Code. Those uses may include, in accordance with a cost allocation plan adopted under division (B) of this section, the payment of all allowable direct and indirect costs of the district, the sanitary engineer or sanitary engineering department, or a federal or state grant program, incurred for the purposes of this chapter and sections 3734.52 to 3734.572 [3734.57.2] of the Revised Code. Any surplus remaining after those uses of the fund may be used for the enlargement, modification, or replacement of such facilities and for the payment of the interest and principal on bonds and bond anticipation notes issued pursuant to section 343.07 of the Revised Code. In no case shall money so collected be expended otherwise than for the use and benefit of the district.

A board of county commissioners or directors, instead of operating and maintaining solid waste collection or other solid waste facilities of the district with county or joint district personnel, may enter into a contract with a municipal corporation having territory within the district pursuant to which the operation and maintenance of the facilities will be performed by the municipal corporation.

The products of any solid waste collection or other solid waste facility owned under this chapter shall be sold through competitive bidding in accordance with section 307.12 of the Revised Code, except when a board of county commissioners or directors determines by resolution that it is in the public interest to sell those products in a commercially reasonable manner without competitive bidding.

(B) A board of county commissioners or directors may adopt a cost allocation plan that identifies, accumulates, and distributes allowable direct and indirect costs that may be paid from the fund of the district created in division (A) of this section and prescribes methods for allocating those costs. The plan shall authorize payment from the fund for only those costs incurred by the district, the sanitary engineer or sanitary engineering department, or a federal or state grant program, and those costs incurred by the general and other funds of the county for a common or joint purpose, that are necessary and reasonable for the proper and efficient administration of the district under this chapter and sections 3734.52 to 3734.572 [3734.57.2] of the Revised Code. The plan shall not authorize payment from the fund of any general government expense required to carry out the overall governmental responsibilities of a county. The plan shall conform to United States office of management and budget Circular A-87 "Cost Principles for State and Local Governments," published January 15, 1983.

(C) A board of county commissioners or directors shall fix rates or charges, or enter into contracts fixing the rates or charges to be collected by the contractor, for solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery services at a public meeting held in accordance with section 121.22 of the Revised Code. In addition to fulfilling the requirements of section 121.22 of the Revised Code, the board, before fixing or changing rates or charges for solid waste collection, storage, transfer, disposal, recycling, processing, or resource recovery services, or before entering into a contract that fixes rates or charges to be collected by the contractor providing the services, shall hold at least three public hearings on the proposed rates, charges, or contract. Prior to the first public hearing, the board shall publish notice of the public hearings once a week for three consecutive weeks in a newspaper of general circulation in the county or counties that would be affected by the proposed rates, charges, or contract. The notice shall include a listing of the proposed rates or charges to be fixed and collected by the board or fixed pursuant to the contract and collected by the contractor, and the dates, time, and place of each of the three hearings thereon. The board shall hear any person who wishes to

testify on the proposed rates, charges, or contract.

HISTORY: GC § 6600-7; 123 v 806, § 8; 124 v 539; Bureau of Code Revision, 10-1-53; 128 v 773 (Eff 10-12-59); 130 v 207 (Eff 8-9-63); 131 v 234 (Eff 9-22-65); 136 v H 993 (Eff 7-1-76); 137 v S 303 (Eff 2-14-78); 140 v H 13 (Eff 3-19-84); 141 v H 243 (Eff 2-25-87); 142 v H 592 (Eff 6-24-88); 144 v H 723 (Eff 4-16-93); 145 v S 165 (Eff 10-29-93); 146 v H 122. Eff 10-31-96.

§ 3734.05. Licensing requirements; application for installation and operation permit; public information sessions and hearings.

(A) (1) Except as provided in divisions (A)(4), (8), and (9) of this section, no person shall operate or maintain a solid waste facility without a license issued under this division by the board of health of the health district in which the facility is located or by the director of environmental protection when the health district in which the facility is located is not on the approved list under section 3734.08 of the Revised Code.

During the month of December, but before the first day of January of the next year, every person proposing to continue to operate an existing solid waste facility shall procure a license under this division to operate the facility for that year from the board of health of the health district in which the facility is located or, if the health district is not on the approved list under section 3734.08 of the Revised Code, from the director. The application for such a license shall be submitted to the board of health or to the director, as appropriate, on or before the last day of September of the year preceding that for which the license is sought. In addition to the application fee prescribed in division (A)(2) of this section, a person who submits an application after that date shall pay an additional ten per cent of the amount of the application fee for each week that the application is late. Late payment fees accompanying an application submitted to the board of health shall be credited to the special fund of the health district created in division (B) of section 3734.06 of the Revised Code, and late payment fees accompanying an application submitted to the director shall be credited to the general revenue fund. A person who has received a license, upon sale or disposition of a solid waste facility, and upon consent of the board of health and the director, may have the license transferred to another person. The board of health or the director may include such terms and conditions in a license or revision to a license as are appropriate to ensure compliance with this chapter and rules adopted under it. The terms and conditions may establish the authorized maximum daily waste receipts for the facility. Limitations on maximum daily waste receipts shall be specified in cubic yards of volume for the purpose of regulating the design, construction, and operation of solid waste facilities. Terms and conditions included in a license or revision to a license by a board of health shall be consistent with, and pertain only to the subjects addressed in, the rules adopted under division (A) of section 3734.02 and division (D) of section 3734.12 of the Revised Code.

(2) (a) Except as provided in divisions (A)(2)(b), (8), and (9) of this section, each person proposing to open a new solid waste facility or to modify an existing solid waste facility shall submit an application for a permit with accompanying detail plans and specifications to the environmental protection agency for required approval under the rules adopted by the director pursuant to division (A) of section 3734.02 of the Revised Code and applicable rules adopted under division (D) of section 3734.12 of the Revised Code at least two hundred seventy days before proposed operation of the facility and shall concurrently make application for the issuance of a license under division (A)(1) of this section with the board of health of the health district in which the proposed facility is to be located.

(b) On and after the effective date of the rules adopted under division (A) of section 3734.02 of the Revised Code and division (D) of section 3734.12 of the Revised Code governing solid waste transfer facilities, each person proposing to open a new solid waste transfer facility or to modify an existing solid waste transfer facility shall submit an application for a permit with accompanying engineering detail plans, specifications, and information regarding the facility and its method of operation to the environmental protection agency for required approval under those rules at least two hundred seventy days before commencing proposed operation of the facility and concurrently shall make application for the issuance of a license under division (A)(1) of this section with the board of health of the health district in which the facility is located or proposed.

(c) Each application for a permit under division (A)(2)(a) or (b) of this section shall be accompanied by a nonrefundable application fee of four hundred dollars that shall be credited to the general revenue fund. Each application for an annual license under division (A)(1) or (2) of this section shall be accompanied by a nonrefundable application fee of one hundred dollars. If the application for an annual license is submitted to a board of health on the approved list under section 3734.08 of the Revised Code, the application fee shall be credited to the special fund of the health district created in division (B) of section 3734.06 of the Revised Code. If the application for an annual license is submitted to the director, the application fee shall be credited to the general revenue fund. If a permit or license is issued, the amount of the application fee paid shall be deducted from the amount of the permit fee due under division (Q) of section 3745.11 of the Revised Code or the amount of the license fee due under division (A)(1), (2), (3), or (4) of section 3734.06 of the Revised Code.

(d) As used in divisions (A)(2)(d), (e), and (f) of this section, "modify" means any of the following:

(i) Any increase of more than ten per cent in the total capacity of a solid waste facility;

(ii) Any expansion of the limits of solid waste placement at a solid waste facility;

(iii) Any increase in the depth of excavation at a solid waste facility;

(iv) Any change in the technique of waste receipt or type of waste received at a solid waste facility that may endanger human health, as determined by the director by rules adopted in accordance with Chapter 119. of the Revised Code.

Not later than thirty-five days after submitting an application under division (A)(2)(a) or (b) of this section for a permit to open a new or modify an existing solid waste facility, the applicant, in conjunction with an officer or employee of the environmental protection agency, shall hold a public meeting on the application within the county in which the new or modified solid waste facility is or is proposed to be located or within a contiguous county. Not less than thirty days before holding the public meeting on the application, the applicant shall publish notice of the meeting in each newspaper of general circulation that is published in the county in which the facility is or is proposed to be located. If no newspaper of general circulation is published in the county, the applicant shall publish the notice in a newspaper of general circulation in the county. The notice shall contain the date, time, and location of the public meeting and a general description of the proposed new or modified facility. Not later than five days after publishing the notice, the applicant shall send by certified mail a copy of the notice and the date the notice was published to the director and the legislative authority of each municipal corporation, township, and county, and to the chief executive officer of each municipal corporation, in which the facility is or is proposed to be located. At the public meeting, the applicant shall provide information and describe the application and respond to comments or questions concerning the application, and the officer or employee of the agency shall describe the permit application process. At the public meeting, any person may submit written or oral comments on or objections to the application. Not more than thirty days after the public meeting, the applicant shall provide the director with a copy of a transcript of the full meeting, copies of any exhibits, displays, or other materials presented by the applicant at the meeting, and the original copy of any written comments submitted at the meeting.

(e) Except as provided in division (A)(2)(f) of this section, prior to taking an action, other than a proposed or final denial, upon an application submitted under division (A)(2)(a) of this section for a permit to open a new or modify an existing solid waste facility, the director shall hold a public information session and a public hearing on the application within the county in which the new or modified solid waste facility is or is proposed to be located or within a contiguous county. If the application is for a permit to open a new solid waste facility, the director shall hold the hearing not less

than fourteen days after the information session. If the application is for a permit to modify an existing solid waste facility, the director may hold both the information session and the hearing on the same day unless any individual affected by the application requests in writing that the information session and the hearing not be held on the same day, in which case the director shall hold the hearing not less than fourteen days after the information session. The director shall publish notice of the public information session or public hearing not less than thirty days before holding the information session or hearing, as applicable. The notice shall be published in each newspaper of general circulation that is published in the county in which the facility is or is proposed to be located. If no newspaper of general circulation is published in the county, the director shall publish the notice in a newspaper of general circulation in the county. The notice shall contain the date, time, and location of the information session or hearing, as applicable, and a general description of the proposed new or modified facility. At the public information session, an officer or employee of the environmental protection agency shall describe the status of the permit application and be available to respond to comments or questions concerning the application. At the public hearing, any person may submit written or oral comments on or objections to the approval of the application. The applicant, or a representative of the applicant who has knowledge of the location, construction, and operation of the facility, shall attend the information session and public hearing to respond to comments or questions concerning the facility directed to the applicant or representative by the officer or employee of the environmental protection agency presiding at the information session and hearing.

(f) The solid waste management policy committee of a county or joint solid waste management district may adopt a resolution requesting expeditious consideration of a specific application submitted under division (A)(2)(a) of this section for a permit to modify an existing solid waste facility within the district. The resolution shall make the finding that expedited consideration of the application without the public information session and public hearing under division (A)(2)(e) of this section is in the public interest and will not endanger human health, as determined by the director by rules adopted in accordance with Chapter 119. of the Revised Code. Upon receiving such a resolution, the director, at the director's discretion, may issue a final action upon the application without holding a public information session or public hearing pursuant to division (A)(2)(e) of this section.

(3) Except as provided in division (A)(10) of this section, and unless the owner or operator of any solid waste facility, other than a solid waste transfer facility or a compost facility that accepts exclusively source separated yard wastes, that commenced operation on or before July 1, 1968, has obtained an exemption from the requirements of division (A)(3) of this section in accordance with division (G) of section 3734.02 of the Revised Code, the owner or operator shall submit to the director an application for a permit with accompanying engineering detail plans, specifications, and information regarding the facility and its method of operation for approval under rules adopted under division (A) of section 3734.02 of the Revised Code and applicable rules adopted under division (D) of section 3734.12 of the Revised Code in accordance with the following schedule:

(a) Not later than September 24, 1988, if the facility is located in the city of Garfield Heights or Parma in Cuyahoga county;

(b) Not later than December 24, 1988, if the facility is located in Delaware, Greene, Guernsey, Hamilton, Madison, Mahoning, Ottawa, or Vinton county;

(c) Not later than March 24, 1989, if the facility is located in Champaign, Clinton, Columbiana, Huron, Paulding, Stark, or Washington county, or is located in the city of Brooklyn or Cuyahoga Heights in Cuyahoga county;

(d) Not later than June 24, 1989, if the facility is located in Adams, Auglaize, Coshocton, Darke, Harrison, Lorain, Lucas, or Summit county or is located in Cuyahoga county outside the cities of

Garfield Heights, Parma, Brooklyn, and Cuyahoga Heights;

(e) Not later than September 24, 1989, if the facility is located in Butler, Carroll, Erie, Lake, Portage, Putnam, or Ross county;

(f) Not later than December 24, 1989, if the facility is located in a county not listed in divisions (A)(3)(a) to (e) of this section;

(g) Notwithstanding divisions (A)(3)(a) to (f) of this section, not later than December 31, 1990, if the facility is a solid waste facility owned by a generator of solid wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the grantor regardless of whether the facility is located on a premises where the wastes are generated and if the facility disposes of more than one hindered thousand tons of solid wastes per year, provided that any such facility shall be subject to division (A)(5) of this section.

(4) Except as provided in divisions (A)(8), (9), and (10) of this section, unless the owner or operator of any solid waste facility for which a permit was issued after July 1, 1968, but before January 1, 1980, has obtained an exemption from the requirements of division (A)(4) of this section under division (G) of section 3734.02 of the Revised Code, the owner or operator shall submit to the director an application for a permit with accompanying engineering detail plans, specifications, and information regarding the facility and its method of operation for approval under those rules.

(5) The director may issue an order in accordance with Chapter 3745. of the Revised Code to the owner or operator of a solid waste facility requiring the person to submit to the director updated engineering detail plans, specifications, and information regarding the facility and its method of operation for approval under rules adopted under division (A) of section 3734.02 of the Revised Code and applicable rules adopted under division (D) of section 3734.12 of the Revised Code if, in the director's judgment, conditions at the facility constitute a substantial threat to public health or safety or are causing or contributing to or threatening to cause or contribute to air or water pollution or soil contamination. Any person who receives such an order shall submit the updated engineering detail plans, specifications, and information to the director within one hundred eighty days after the effective date of the order.

(6) The director shall act upon an application submitted under division (A)(3) or (4) of this section and any updated engineering plans, specifications, and information submitted under division (A)(5) of this section within one hundred eighty days after receiving them. If the director denies any such permit application, the order denying the application or disapproving the plans shall include the requirements that the owner or operator submit a plan for closure and post-closure care of the facility to the director for approval within six months after issuance of the order, cease accepting solid wastes for disposal or transfer at the facility, and commence closure of the facility not later than one year after issuance of the order. If the director determines that closure of the facility within that one-year period would result in the unavailability of sufficient solid waste management facility capacity within the county or joint solid waste management district in which the facility is located to dispose of or transfer the solid waste generated within the district, the director in the order of denial or disapproval may postpone commencement of closure of the facility for such period of time as the director finds necessary for the board of county commissioners or directors of the district to secure access to or for there to be constructed within the district sufficient solid waste management facility capacity to meet the needs of the district, provided that the director shall certify in the director's order that postponing the date for commencement of closure will not endanger ground water or any property surrounding the facility, allow methane gas migration to occur, or cause or contribute to any other type of environmental damage.

If an emergency need for disposal capacity that may affect public health and safety exists as a result of

closure of a facility under division (A)(6) of this section, the director may issue an order designating another solid waste facility to accept the wastes that would have been disposed of at the facility to be closed.

§ 3734.52. County or joint solid waste management districts to be established; exemptions.

(A) In order to prepare, adopt, submit, and implement a solid waste management plan that complies with section 3734.55 of the Revised Code, the board of county commissioners of each county either shall establish and maintain a solid waste management district under Chapter 343. of the Revised Code, or shall participate in establishing and maintaining a joint solid waste management district with one or more other such boards under that chapter, in compliance with division (B) of this section. Except as otherwise provided in this division, all of the incorporated and unincorporated territory of the county shall be under the jurisdiction of the county or joint solid waste management district for the purposes of preparing, adopting, submitting, and implementing the solid waste management plan for the county or joint district and for the purposes of providing for, or causing to be provided for, the safe and sanitary management of solid wastes within all of the incorporated and unincorporated territory of the county or joint solid waste management district.

If a municipal corporation is located in more than one solid waste management district, the entire municipal corporation shall be considered to be included in and shall be under the jurisdiction of the district in which a majority of the population of the municipal corporation resides.

(B) Not later than March 24, 1989, the board of county commissioners of each county shall do one of the following:

(1) Establish a county solid waste management district under Chapter 343. of the Revised Code;

(2) With the boards of county commissioners of one or more other counties, establish a joint solid waste management district under that chapter.

Upon adoption of the resolution establishing a county district, or upon entering into an agreement with one or more other such boards to establish a joint district, the board of county commissioners shall mail a copy of the resolution or agreement to the director of environmental protection. Each county and joint solid waste management district established to comply with this division shall have a population of not less than one hundred twenty thousand unless an exemption has been granted under division (C)(1) or (2) of this section.

(C) (1) The board of county commissioners of a county with a population of fewer than one hundred twenty thousand in which one or more solid waste facilities are located that have sufficient remaining capacity to dispose of all solid wastes generated within the county, or that has entered into a firm agreement that provides for the disposal of all solid wastes generated within the county whether within or outside the county or state, for a period of not less than ten years after June 24, 1988, may apply to the director for an exemption from the requirement under division (B) of this section that each district have a population of at least one hundred twenty thousand. The exemption application shall be accompanied by the board's certification and demonstration of access to sufficient solid waste management facility capacity to provide for the disposal of the solid wastes generated in the county during that ten-year period.

If the director finds that the board has made the demonstration required by this division, he shall issue an order under division (G) of section 3734.02 of the Revised Code exempting the board from that requirement of division (B) of this section.

(2) The board of county commissioners of a county with a population of less than one hundred twenty thousand that does not have sufficient solid waste management facility capacity within the county or access to sufficient capacity by contract to make the demonstrations required by division (C)(1) of this section may submit to the director, not later than December 24, 1988, a statement of how the board will provide for sufficient solid waste facility capacity within the county or for access to sufficient solid waste management facility capacity to dispose of all solid wastes generated within the county during the subsequent ten-year period. The statement shall be accompanied by a study of the financial feasibility of the measures proposed in the statement that shall contain an inventory of all existing solid waste disposal, transfer, and resource recovery facilities and recycling activities in the county and estimates of the remaining capacity available at each such facility; estimates of the amounts of solid wastes that will be generated within the county during each year of the subsequent ten-year period; an identification of the additional solid waste management facilities and capacity the county intends to provide to dispose of those estimated amounts of solid wastes; and a schedule for implementation of the measures proposed in the statement and estimates of the capital and operating costs, and rates that will be charged to meet those costs, for those additional facilities, or contracts for access to solid waste management facility capacity, identified in the study. Within sixty days after receiving the statement and financial feasibility study from any such board of county commissioners, the director shall approve or disapprove the statement and study. The director shall approve such a statement and financial feasibility study only if they demonstrate a technically and economically feasible means of providing for the environmentally sound management of solid wastes generated in the county during the subsequent ten-year period. If the director approves the statement and financial feasibility study of a county, he shall issue an order under division (G) of section 3734.02 of the Revised Code exempting the board from the requirement of division (B) of this section that each county or joint district have a population of at least one hundred twenty thousand.

(D) Upon expiration of the nine-month period under division (B) of this section, the director shall determine which counties failed to submit a copy of the resolution or agreement required by that division or, for those that filed a resolution or agreement, which of them failed either to establish a county or joint solid waste management district having a population of at least one hundred twenty thousand or to obtain an exemption order under division (C)(1) or (2) of this section. Within twelve months after June 24, 1988, the director shall issue to the board of county commissioners of each county having a population of at least one hundred twenty thousand that failed to comply with division (B) of this section or that obtained an exemption order under division (C)(1) or (2) of this section an order in accordance with Chapter 3745. of the Revised Code directing the board to submit a copy of the resolution or agreement or to establish a county or joint solid waste management district within thirty days after issuance of the order and, upon adoption of the resolution, to mail a copy of it to the director.

With respect to those counties having a population of fewer than one hundred twenty thousand that either failed to comply with division (B) of this section or submitted a resolution or agreement for establishment of a county or joint solid waste management district and failed to obtain an exemption under division (C)(1) or (2) of this section, the director shall make a determination as to how one or more of those counties should be combined with one another, with the county solid waste management district of a county that complied with division (B) of this section regardless of whether the complying county obtained an exemption under division (C)(1) or (2) of this section, or with a joint district formed by counties that complied with division (B) of this section, to form a joint district with a population of at least one hundred twenty thousand that, in the director's judgment, will be most conducive to achievement of the objectives of the state solid waste management plan adopted under section 3734.50 of the Revised Code and of this chapter. After making any such determination, the director shall mail notice of the determination to the board of county commissioners of each county named in it. Within

thirty days after mailing notice of the determination, the director shall hold a public meeting in each of the counties named in the determination. Thereafter, the director shall issue an order in accordance with Chapter 3745. of the Revised Code to each board of county commissioners named in the determination directing the boards to enter into an agreement to establish a joint solid waste management district under Chapter 343. of the Revised Code within a specified reasonable period of time and to mail a copy of the agreement to the director.

Notwithstanding section 119.06 of the Revised Code, the director may issue orders under this division without the necessity for holding an adjudication hearing in connection with the order and without first issuing a proposed action under section 3745.07 of the Revised Code.

(E) Sections 3734.52 to 3734.57 and Chapter 343. of the Revised Code do not prohibit any person, municipal corporation, or township from providing solid waste collection services; establishing, enlarging, modifying, or replacing a solid waste facility; or establishing and collecting rates or charges for the use of those facilities or services that are in compliance with sections 3734.01 to 3734.13 of the Revised Code, rules adopted under those sections, the solid waste management plan of the county or joint solid waste management district having territorial jurisdiction over the facility or service area approved or ordered under section 3734.521 [3734.52.1] or 3734.55 of the Revised Code, amendments to the plan approved or ordered under section 3734.521 [3734.52.1] or 3734.56 of the Revised Code, and rules adopted under division (G) of section 343.01 of the Revised Code. In the instance of a solid waste facility for or on behalf of which general obligation or revenue bonds were issued or a loan was made under Chapter 133., 343., or 6123. of the Revised Code on or before the effective date of the solid waste management plan of the county or joint district in which the facility is located, nothing in this section, in Chapter 343. of the Revised Code, or in the plan or amended plan of the district prohibits or limits the construction, operation, use, repair, or maintenance of the facility or the establishment and collection of rates or charges for use of the facility, regardless of whether the facility complies with the district's plan or amended plan, until such time as the principal of and interest on any such bonds or loan have been paid in full or until the owner abandons the facility.

The solid waste management plan or amended plan of each county or joint district shall provide for the maximum feasible utilization of solid waste facilities that were in operation within the district, or for which permits were issued under section 3734.05 of the Revised Code, on or before the effective date of the plan or amended plan and that are in compliance with sections 3734.01 to 3734.13 of the Revised Code and rules adopted under those sections. The plan or amended plan shall incorporate all solid waste recycling activities that were in operation within the district on the effective date of the plan or amended plan.

HISTORY: 142 v H 592 (Eff 6-24-88); 143 v H 656 (Eff 4-18-90); 144 v H 723. Eff 4-16-93.

§ 3734.53. Contents of county or joint district plan.

(A) The solid waste management plan of any county or joint solid waste management district shall be prepared in a format prescribed by the director of environmental protection and shall provide for compliance with the objectives of the state solid waste management plan and rules adopted under section 3734.50 of the Revised Code. The plan shall provide for, demonstrate, and certify the availability of and access to sufficient solid waste management facility capacity to meet the solid waste management needs of the district for the ten-year period covered by the plan. The solid waste management policy committee of a county or joint district created in section 3734.54 of the Revised Code may prepare and submit a solid waste management plan that covers and makes the required demonstration for a longer period of time.

The solid waste management plan shall contain all of the following:

(1) An inventory of the sources, composition, and quantities of solid wastes generated in the district during the current year;

(2) An inventory of all existing facilities where solid wastes are being disposed of, all resource recovery facilities, and all recycling activities within the district. The inventory shall identify each such facility or activity and, for each disposal facility, shall estimate the remaining disposal capacity available at the facility. The inventory shall be accompanied by a map that shows the location of each such existing facility or activity.

(3) An inventory of existing solid waste collection systems and routes, transportation systems and routes, and transfer facilities within the district. The inventory shall identify the entities engaging in solid waste collection within the district.

(4) An inventory of open dumping sites for solid wastes, including solid wastes consisting of scrap tires, and facilities for the disposal of fly ash and bottom ash, foundry sand, and slag within the district. The inventory shall identify each such site or facility and shall be accompanied by a map that shows the location of each of them.

(5) A projection of population changes within the district during the next ten years;

(6) For each year of the forecast period, projections of the amounts and composition of solid wastes that will be generated within the district, the amounts of solid wastes originating outside the district that will be brought into the district for disposal or resource recovery, the nature of industrial activities within the district, and the effect of newly regulated waste streams, solid waste minimization activities, and solid waste recycling and reuse activities on solid waste generation rates. For each year of the forecast period, projections of waste quantities shall be compiled as an aggregate quantity of wastes.

(7) An identification of the additional solid waste management facilities and the amount of additional capacity needed to dispose of the quantities of wastes projected in division (A)(6) of this section;

(8) A strategy for identification of sites for the additional solid waste management facilities and capacity identified under division (A)(7) of this section;

(9) An analysis and comparison of the capital and operating costs of the solid waste disposal facilities,

solid waste resource recovery facilities, and solid waste recycling and reuse activities necessary to meet the solid waste management needs of the district, projected in five- and ten-year increments;

(10) An analysis of expenses for which the district is liable under section 3734.35 of the Revised Code;

(11) A projection of solid waste transfer facilities that will be needed in conjunction with existing solid waste facilities and those projected under division (A)(7) of this section;

(12) Such other projections as the district considers necessary or appropriate to ascertain and meet the solid waste management needs of the district during the period covered by the plan;

(13) A schedule for implementation of the plan that, when applicable, contains all of the following:

(a) An identification of the solid waste disposal, transfer, and resource recovery facilities and recycling activities contained in the plan where solid wastes generated within or transported into the district will be taken for disposal, transfer, resource recovery, or recycling. An initial or amended plan prepared and ordered to be implemented by the director under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code may designate solid waste disposal, transfer, or resource recovery facilities or recycling activities that are owned by a municipal corporation, county, county or joint solid waste management district, township, or township waste disposal district created under section 505.28 of the Revised Code for which debt issued under Chapter 133., 343., or 6123. of the Revised Code is outstanding where solid wastes generated within or transported into the district shall be taken for disposal, transfer, resource recovery, or recycling.

(b) A schedule for closure of existing solid waste facilities, expansion of existing facilities, and establishment of new facilities. The schedule for expansion of existing facilities or establishment of new facilities shall include, without limitation, the approximate dates for filing applications for appropriate permits to install or modify those facilities under section 3734.05 of the Revised Code.

(c) A schedule for implementation of solid waste recycling, reuse, and reduction programs needed to meet the waste reduction, recycling, reuse, and minimization objectives of the state solid waste management plan and rules adopted by the director under section 3734.50 of the Revised Code;

(d) The methods of financing implementation of the plan and a demonstration of the availability of financial resources for that purpose.

(14) A program for providing informational or technical assistance regarding source reduction to solid waste generators, or particular categories of solid waste generators, within the district. The plan shall set forth the types of assistance to be provided by the district and the specific categories of generators that are to be served. The district has the sole discretion to determine the types of assistance that are to be provided under the program and the categories of generators to be served by it.

(B) In addition to the information, projections, demonstrations, and certification required by division (A) of this section, a plan shall do all of the following:

(1) Establish the schedule of fees, if any, to be levied under divisions (B)(1) to (3) of section 3734.57 of the Revised Code;

(2) Establish the fee, if any, to be levied under division (A) of section 3734.573 [3734.57.3] of the Revised Code;

(3) Contain provisions governing the allocation among the purposes enumerated in divisions (G)(1) to

(10) of section 3734.57 of the Revised Code of the moneys credited to the special fund of the district under division (G) of that section that are available for expenditure by the district under that division. The plan shall do all of the following:

(a) Ensure that sufficient of the moneys so credited to and available from the special fund are available for use by the solid waste management policy committee of the district at the time the moneys are needed to monitor implementation of the plan and conduct its periodic review and amendment as required under section 3734.56 of the Revised Code;

(b) Contain provisions governing the allocation and distribution of moneys credited to and available from the special fund of the district to health districts within the county or joint district that have approved programs under section 3734.08 of the Revised Code for the purposes of division (G)(3) of section 3734.57 of the Revised Code;

(c) Contain provisions governing the allocation and distribution of moneys credited to and available from the special fund of the district to the county in which solid waste facilities are or are to be located and operated under the plan for the purposes of division (G)(4) of section 3734.57 of the Revised Code;

(d) Contain provisions governing the allocation and distribution, pursuant to contracts entered into for that purpose, of moneys credited to and available from the special fund of the district to boards of health within the district in which solid waste facilities contained in the district's plan are located for the purposes of division (G)(5) of section 3734.57 of the Revised Code.

(4) Incorporate all solid waste recycling activities that were in operation within the district on the effective date of the plan.

(C) The solid waste management plan of a county or joint district may provide for the adoption of rules under division (G) of section 343.01 of the Revised Code after approval of the plan under section 3734.521 [3734.52.1] or 3734.55 of the Revised Code doing any or all of the following:

(1) Prohibiting or limiting the receipt at facilities covered by the plan of solid wastes generated outside the district or outside a prescribed service area consistent with the projections under divisions (A)(6) and (7) of this section, except that the director of environmental protection may issue an order modifying a rule authorized to be adopted under division (C)(1) of this section to allow the disposal in the district of wastes from another county or joint solid waste management district if all of the following apply:

(a) The district in which the wastes were generated does not have sufficient capacity to dispose of solid wastes generated within it for six months following the date of the director's order;

(b) No new solid waste facilities will begin operation during those six months in the district in which the wastes were generated and, despite good faith efforts to do so, it is impossible to site new solid waste facilities within the district because of its high population density;

(c) The district in which the wastes were generated has made good faith efforts to negotiate with other districts to incorporate its disposal needs within those districts' solid waste management plans, including efforts to develop joint facilities authorized under section 343.02 of the Revised Code, and the efforts have been unsuccessful;

(d) The district in which the wastes were generated has located a facility willing to accept the district's solid wastes for disposal within the receiving district;

(e) The district in which the wastes were generated has demonstrated to the director that the conditions

specified in divisions (C)(1)(a) to (d) of this section have been met;

(f) The director finds that the issuance of the order will be consistent with the state solid waste management plan and that receipt of the out-of-district wastes will not limit the capacity of the receiving district to dispose of its in-district wastes to less than eight years. Any order issued under division (C)(1) of this section shall not become final until thirty days after it has been served by certified mail upon the county or joint solid waste management district that will receive the out-of-district wastes.

(2) Governing the maintenance, protection, and use of solid waste collection, storage, disposal, transfer, recycling, processing, and resource recovery facilities within the district and requiring the submission of general plans and specifications for the construction, enlargement, or modification of any such facility to the board of county commissioners or board of directors of the district for review and approval as complying with the plan or amended plan of the district;

(3) Governing development and implementation of a program for the inspection of solid wastes generated outside the boundaries of the state that are being disposed of at solid waste facilities included in the district's plan;

(4) Exempting the owner or operator of any existing or proposed solid waste facility provided for in the plan from compliance with any amendment to a township zoning resolution adopted under section 519.12 of the Revised Code or to a county rural zoning resolution adopted under section 303.12 of the Revised Code that rezoned or redistricted the parcel or parcels upon which the facility is to be constructed or modified and that became effective within two years prior to the filing of an application for a permit required under division (A)(2)(a) of section 3734.05 of the Revised Code to open a new or modify an existing solid waste facility.

(D) Except for the inventories required by divisions (A)(1), (2), and (4) of this section and the projections required by division (A)(6) of this section, neither this section nor the solid waste management plan of a county or joint district applies to the construction, operation, use, repair, or maintenance of either of the following:

(1) A solid waste facility owned by a generator of solid wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the generator regardless of whether the facility is located on a premises where the wastes are generated;

(2) A facility that exclusively disposes of wastes that are generated from the combustion of coal, or from the combustion of primarily coal in combination with scrap tires, that is not combined in any way with garbage at one or more premises owned by the generator.

(E) (1) The initial solid waste management plans prepared by county or joint districts under section 3734.521 [3734.52.1] of the Revised Code and the amended plans prepared under section 3734.521 [3734.52.1] or 3734.56 of the Revised Code shall contain a clear statement as to whether the board of county commissioners or directors is authorized to or precluded from establishing facility designations under section 343.014 [343.01.4] of the Revised Code.

(2) A policy committee that is preparing a draft or revised draft plan under section 3734.55 of the Revised Code on October 29, 1993, may include in the draft or revised draft plan only one of the following pertaining to the solid waste facilities or recycling activities where solid wastes generated within or transported into the district are to be taken for disposal, transfer, resource recovery, or recycling:

(a) The designations required under former division (A)(12)(a) of this section as it existed prior to

October 29, 1993;

(b) The identifications required in division (A)(12)(a) of this section and the statement required under division (E)(1) of this section;

(c) Both of the following:

(i) The designations required under former division (A)(12)(a) of this section as it existed prior to October 29, 1993, except that those designations only shall pertain to solid waste disposal, transfer, or resource recovery facilities or recycling activities that are owned by a municipal corporation, county, county or joint solid waste management district, township, or township waste disposal district created under section 505.28 of the Revised Code for which debt issued under Chapter 133., 343., or 6123. of the Revised Code is outstanding;

(ii) The identifications required under division (A)(12)(a) of this section, and the statement required under division (E)(1) of this section, pertaining to the solid waste facilities and recycling activities described in division (A) of section 343.014 [343.01.4] of the Revised Code.

(F) Notwithstanding section 3734.01 of the Revised Code, "solid wastes" does not include scrap tires and "facility" does not include any scrap tire collection, storage, monocell, monofill, or recovery facility in either of the following circumstances:

(1) For the purposes of an initial plan prepared and ordered to be implemented by the director under section 3734.55 of the Revised Code;

(2) For the purposes of an initial or amended plan prepared and ordered to be implemented by the director under division (D) or (F)(1) or (2) of section 3734.521 [3734.52.1] of the Revised Code in connection with a change in district composition as defined in that section that involves an existing district that is operating under either an initial plan approved or prepared and ordered to be implemented under section 3734.55 of the Revised Code or an initial or amended plan approved or prepared and ordered to be implemented under section 3734.521 [3734.52.1] of the Revised Code that does not provide for the management of scrap tires and scrap tire facilities.

(G) Notwithstanding section 3734.01 of the Revised Code, and except as provided in division (A)(4) of this section, "solid wastes" need not include scrap tires and "facility" need not include any scrap tire collection, storage, monocell, monofill, or recovery facility in either of the following circumstances:

(1) For the purposes of an initial plan prepared under sections 3734.54 and 3734.55 of the Revised Code unless the solid waste management policy committee preparing the initial plan chooses to include the management of scrap tires and scrap tire facilities in the plan;

(2) For the purposes of a preliminary demonstration of capacity as defined in section 3734.521 [3734.52.1] of the Revised Code, if any, and an initial or amended plan prepared under that section by the solid waste management policy committee of a solid waste management district resulting from proceedings for a change in district composition under sections 343.012 [343.01.2] and 3734.521 [3734.52.1] of the Revised Code that involves an existing district that is operating either under an initial plan approved or prepared and ordered to be implemented under section 3734.55 of the Revised Code or under an initial or amended plan approved or prepared and ordered to be implemented under section 3734.521 [3734.52.1] of the Revised Code that does not provide for the management of scrap tires and scrap tire facilities unless the solid waste management policy committee of the district resulting from the change chooses to include the management of scrap tires and scrap tire facilities in the preliminary demonstration of capacity, if any, and the initial or amended plan prepared under section 3734.521

[3734.52.1] of the Revised Code in connection with the change proceedings.

If a policy committee chooses to include the management of scrap tires and scrap tire facilities in an initial plan pursuant to division (G)(1) of this section, the initial plan shall incorporate all of the elements required under this section, and may incorporate any of the elements authorized under this section, for the purpose of managing solid wastes that consist of scrap tires and solid waste facilities that are scrap tire collection, storage, monocell, monofill, or recovery facilities. If a policy committee chooses to provide for the management of scrap tires and scrap tire facilities pursuant to division (G)(2) of this section, the preliminary demonstration of capacity, if one is required, shall incorporate all of the elements required under division (E)(1) or (2) of section 3734.521 [3734.52.1] of the Revised Code, as appropriate, for the purpose of managing solid wastes that consist of scrap tires and solid waste facilities that are scrap tire collection, storage, monocell, monofill, or recovery facilities. The initial or amended plan also shall incorporate all of the elements required under this section, and may incorporate any of the elements authorized under this section, for the purpose of managing solid wastes that consist of scrap tires and solid waste facilities that are scrap tire collection, storage, monocell, monofill, or recovery facilities.

(H) Neither this section nor the solid waste management plan of a county or joint district applies to the construction, operation, use, repair, or maintenance of any compost facility that exclusively composts raw rendering material.

HISTORY: 142 v H 592 (Eff 6-24-88); 144 v H 723 (Eff 4-16-93); 145 v S 165 (Eff 10-29-93); 145 v S 153 (Eff 10-29-93); 145 v S 73 (Eff 8-10-94); 145 v H 685 (Eff 3-30-95); 146 v H 122. Eff 10-31-96.

§ 3734.54. Preparation and submission of plan; policy committee; technical advisory council.

(A) Each county and joint solid waste management district established under Chapter 343. of the Revised Code shall prepare, adopt, submit to the director of environmental protection for review and approval, and implement a solid waste management plan for the district. The plan shall be prepared and submitted to the director in accordance with the following schedule:

(1) Within twenty-four months after June 24, 1988, in the instance of a county or joint district with a population of not more than two hundred thousand;

(2) Within thirty months after June 24, 1988, in the instance of a district with a population of more than two hundred thousand, but not more than two hundred seventy thousand;

(3) Within forty-two months after June 24, 1988, in the instance of a district with a population of more than two hundred seventy thousand.

The solid waste management policy committee of a county or joint district may request in writing that the director extend the applicable date for submission of the district's plan under divisions (A)(1) to (3) of this section by not more than six months. The director may grant such an extension of the submission date if the request demonstrates to the director's satisfaction that granting the extension will not adversely affect the ability of the district to provide for the environmentally sound management of solid wastes generated within its boundaries during the period of the extension and provides a specific schedule of actions leading to the preparation, adoption, and submission of the district's plan on or before the date for submission proposed by the request.

(B) Within twelve months after June 24, 1988, the board of county commissioners of the county or the board of directors of the joint solid waste management district, as appropriate, shall establish and convene a solid waste management policy committee to prepare the solid waste management plan of the district. The solid waste management policy committee for a county district shall consist of the following members:

(1) The president of the board of county commissioners or his designee;

(2) The chief executive officer of the municipal corporation having the largest population within the boundaries of the county or his designee. A municipal corporation that is located in more than one solid waste management district, but that is under the jurisdiction of the county solid waste management district in accordance with division (A) of section 3734.52 of the Revised Code shall be considered to be within the boundaries of the county for the purposes of this division.

(3) A member representing the townships within the county chosen by a majority of the boards of township trustees within the county;

(4) The health commissioner of the health district having the largest territorial jurisdiction within the county or his designee;

(5) One member representing industrial, commercial, or institutional generators of solid wastes within the district to be appointed by the four members of the committee specified in divisions (B)(1) to (4) of this section;

(6) One member representing the general interests of citizens who shall have no conflict of interest through affiliation with a waste management company or with any entity that is a significant generator of solid wastes to be appointed by the four members of the committee specified in divisions (B)(1) to (4) of this section;

(7) One member representing the public, to be appointed by the four members of the committee specified in divisions (B)(1) to (4) of this section. The members representing generators and the general interests of citizens shall be appointed within ninety days after the effective date of this amendment. The members representing generators and the general interests of citizens and the public member shall serve for a term of two years, with each term ending on the same day of the same month of the term that it succeeds. A member representing a generator or the general interests of citizens or the public member shall hold office from the date of his appointment until the end of the term for which he was appointed. A vacancy in the office of a member representing a generator or the general interests of citizens or the public member shall be filled in the same manner as the original appointment. A member representing a generator or the general interests of citizens or a public member appointed to fill a vacancy occurring prior to the expiration date of the term for which his predecessor was appointed shall hold office for the remainder of that term. A member representing a generator or the general interests of citizens or the public member shall continue in office subsequent to the expiration date of his term until his successor takes office, or until a period of sixty days has elapsed, whichever occurs first.

(C) The solid waste management policy committee for a joint district shall consist of the members specified in divisions (B)(1) to (4) of this section from each county within the joint district, one member representing industrial, commercial, or institutional generators of solid wastes from each county within the joint district, one member representing the general interests of citizens from each county within the joint district, and one member representing the public from each county within the joint district. The members representing generators and the general interests of citizens and the public member from each such county shall be appointed by the members of the committee specified in divisions (B)(1) to (4) of this section from the county that the members representing generators and the general interests of citizens and the public member, respectively, represents. The members representing generators and the general interests of citizens and the public member shall serve in accordance with division (B)(5) of this section. The members representing generators and the general interests of citizens shall be appointed within ninety days after the effective date of this amendment. If there is an even number of counties in the joint district, the committee shall include one additional public member who shall be appointed by all the other members of the committee and shall serve in accordance with division (B)(7) of this section. For the purpose of determining the largest municipal corporation within each county under this division, a municipal corporation that is located in more than one solid waste management district, but that is under the jurisdiction of the joint solid waste management district in accordance with division (A) of section 3734.52 of the Revised Code shall be considered to be within the boundaries of the county in which a majority of the population of the municipal corporation resides.

Except for the purposes of Chapters 102., 2744., and 2921. of the Revised Code, serving as a member of the solid waste management policy committee of a county or joint solid waste management district does not constitute holding a public office or position of employment under the laws of this state and does not constitute grounds for removal of public officers or employees from their offices or positions of employment.

(D) If a body existing within a county or joint solid waste management district on June 24, 1988, has duties and responsibilities that involve planning for solid waste management within the district or advising the board of county commissioners or directors of the district regarding the operation of the district, the board of county commissioners or directors of the district, at any time before the date

required for convening a solid waste management policy committee under division (B) of this section, may request the director to issue a waiver from the requirements of division (B) or (C) of this section establishing the composition of the solid waste management policy committee of a county or joint district that authorizes the existing body to exercise the duties and responsibilities of the solid waste management policy committee of the district under sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code. The board shall request such a waiver by adopting and sending to the director a resolution requesting the waiver and setting forth the composition of the existing body, including, without limitation, the political subdivisions and other interests represented on it. The director shall approve a request for a waiver under this division unless he considers issuance of the waiver to be inappropriate under the circumstances.

Upon issuance of a waiver under this division, the existing body described in the resolution requesting the waiver constitutes the solid waste management policy committee of the county or joint district for the purposes of sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code. After issuance of the waiver, the composition of the political subdivisions and other interests represented on the policy committee shall remain the same as that described in the resolution requesting the waiver, except as otherwise provided in this division.

On the effective date of this amendment, any waiver issued under this division to the board of county commissioners of a county district is hereby amended to require that one member be added to the policy committee authorized by the waiver to represent industrial, commercial, or institutional generators of solid wastes within the district and one member be added to the policy committee to represent the general interests of citizens, and any such waiver issued to the board of directors of a joint district is hereby amended to require that one member be added to the policy committee authorized by the waiver from each county forming the joint district to represent industrial, commercial, or institutional generators of solid wastes within the county and one member be added to the policy committee from each county forming the district to represent the general interests of citizens. The additional members shall be appointed within ninety days after the effective date of this amendment in the same manner as the other members of the policy committee authorized by the waiver are appointed and shall serve for terms of the same length as the other members.

At any time after issuance of a waiver under this division, the board of county commissioners or directors of the district, and the solid waste management policy committee authorized by the waiver, by adoption of a resolution by the board and the policy committee, may request the director to vacate the waiver. After receiving both resolutions, the director shall vacate the waiver and notify the board of that fact. Within thirty days after receiving the director's notice, the board of county commissioners or directors of the district shall convene a solid waste management policy committee for the district consisting of the members prescribed by division (B) or (C) of this section, as appropriate.

(E) The committee shall select a chairman and vice-chairman from among its members. The committee may retain consultants and may request and accept assistance and staff support from persons or political subdivisions located within the district to assist it with preparation of the plan.

(F) The solid waste management policy committee of a county or joint district may establish and appoint a technical advisory council to assist it in the preparation of the plan or subsequent amended plans or in annual reviews of the implementation of the plan or amended plans. The technical advisory council shall consist of at least one person representing solid waste hauling and disposal industries and may consist of such other members as the policy committee considers appropriate, including, without limitation, health commissioners of any health districts having jurisdiction within the county or joint

district that are not represented by members serving on the policy committee, representatives of any political subdivisions within the district that are not represented by members serving on the policy committee, persons representing environmental advocacy organizations, persons representing the private recycling industry, and persons representing industrial generators of solid wastes. The technical advisory council shall exercise no administrative functions.

Serving as a member of the technical advisory council of a county or joint solid waste management district does not constitute holding a public office or position of employment under the laws of this state and does not constitute grounds for removal of public officers or employees from their offices or positions of employment.

(G) The solid waste management policy committee of a county or joint solid waste management district may request the divisions of geological survey and water in the department of natural resources to provide the committee with available information regarding the geology, hydrogeology, and hydrology of the district or portions thereof in order to assist the committee in performing its duties under Chapter 343. and sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code. Upon receipt of a request for such information, those divisions shall endeavor to provide the requested information promptly.

(H) If a regional solid waste management authority is formed under section 343.011 [343.01.1] of the Revised Code for the purpose of managing a county or joint solid waste management district, all the duties and responsibilities imposed on or granted to a solid waste management policy committee under sections 3734.52 to 3734.575 [3734.57.5] of the Revised Code shall be vested in and exercised by the board of trustees of the regional authority. As used in those sections, any reference to a solid waste management policy committee is deemed to include the board of trustees of a regional solid waste management authority.

HISTORY: 142 v H 592 (Eff 6-24-88); 143 v H 656 (Eff 4-18-90); 144 v H 723 (Eff 4-16-93); 145 v S 153. Eff 10-29-93.

§ 3734.57. Fees for disposal of waste.

(A) The following fees are hereby levied on the transfer or disposal of solid wastes in this state:

(1) One dollar per ton on and after July 1, 2003, through June 30, 2008, one-half of the proceeds of which shall be deposited in the state treasury to the credit of the hazardous waste facility management fund created in section 3734.18 of the Revised Code and one-half of the proceeds of which shall be deposited in the state treasury to the credit of the hazardous waste clean-up fund created in section 3734.28 of the Revised Code;

(2) An additional one dollar per ton on and after July 1, 2003, through June 30, 2008, the proceeds of which shall be deposited in the state treasury to the credit of the solid waste fund, which is hereby created. The environmental protection agency shall use money in the solid waste fund to pay the costs of administering and enforcing the laws pertaining to solid wastes, infectious wastes, and construction and demolition debris, including, without limitation, ground water evaluations related to solid wastes, infectious wastes, and construction and demolition debris, under this chapter and Chapter 3714. of the Revised Code and any rules adopted under them, providing compliance assistance to small businesses, and paying a share of the administrative costs of the environmental protection agency pursuant to section 3745.014 [3745.01.4] of the Revised Code.

(3) An additional one dollar and fifty cents per ton on and after July 1, 2005, through June 30, 2008, the proceeds of which shall be deposited in the state treasury to the credit of the environmental protection fund created in section 3745.015 [3745.01.5] of the Revised Code.

In the case of solid wastes that are taken to a solid waste transfer facility located in this state prior to being transported for disposal at a solid waste disposal facility located in this state or outside of this state, the fees levied under this division shall be collected by the owner or operator of the transfer facility as a trustee for the state. The amount of fees required to be collected under this division at such a transfer facility shall equal the total tonnage of solid wastes received at the facility multiplied by the fees levied under this division. In the case of solid wastes that are not taken to a solid waste transfer facility located in this state prior to being transported to a solid waste disposal facility, the fees shall be collected by the owner or operator of the solid waste disposal facility as a trustee for the state. The amount of fees required to be collected under this division at such a disposal facility shall equal the total tonnage of solid wastes received at the facility that was not previously taken to a solid waste transfer facility located in this state multiplied by the fees levied under this division. Fees levied under this division do not apply to materials separated from a mixed waste stream for recycling by a generator or materials removed from the solid waste stream through recycling, as "recycling" is defined in rules adopted under section 3734.02 of the Revised Code.

The owner or operator of a solid waste transfer facility or disposal facility, as applicable, shall prepare and file with the director of environmental protection each month a return indicating the total tonnage of solid wastes received at the facility during that month and the total amount of the fees required to be collected under this division during that month. In addition, the owner or operator of a solid waste disposal facility shall indicate on the return the total tonnage of solid wastes received from transfer facilities located in this state during that month for which the fees were required to be collected by the transfer facilities. The monthly returns shall be filed on a form prescribed by the director. Not later than thirty days after the last day of the month to which a return applies, the owner or operator shall mail to the director the return for that month together with the fees required to be collected under this division

during that month as indicated on the return. If the return is filed and the amount of the fees due is paid in a timely manner as required in this division, the owner or operator may retain a discount of three-fourths of one per cent of the total amount of the fees that are required to be paid as indicated on the return.

The owner or operator may request an extension of not more than thirty days for filing the return and remitting the fees, provided that the owner or operator has submitted such a request in writing to the director together with a detailed description of why the extension is requested, the director has received the request not later than the day on which the return is required to be filed, and the director has approved the request. If the fees are not remitted within thirty days after the last day of the month to which the return applies or are not remitted by the last day of an extension approved by the director, the owner or operator shall not retain the three-fourths of one per cent discount and shall pay an additional ten per cent of the amount of the fees for each month that they are late. For purposes of calculating the late fee, the first month in which fees are late begins on the first day after the deadline has passed for timely submitting the return and fees, and one additional month shall be counted every thirty days thereafter.

The owner or operator of a solid waste facility may request a refund or credit of fees levied under this division and remitted to the director that have not been paid to the owner or operator. Such a request shall be made only if the fees have not been collected by the owner or operator, have become a debt that has become worthless or uncollectable for a period of six months or more, and may be claimed as a deduction, including a deduction claimed if the owner or operator keeps accounts on an accrual basis, under the "Internal Revenue Code of 1954," 68A Stat. 50, 26 U.S.C. 166, as amended, and regulations adopted under it. Prior to making a request for a refund or credit, an owner or operator shall make reasonable efforts to collect the applicable fees. A request for a refund or credit shall not include any costs resulting from those efforts to collect unpaid fees.

A request for a refund or credit of fees shall be made in writing, on a form prescribed by the director, and shall be supported by evidence that may be required in rules adopted by the director under this chapter. After reviewing the request, and if the request and evidence submitted with the request indicate that a refund or credit is warranted, the director shall grant a refund to the owner or operator or shall permit a credit to be taken by the owner or operator on a subsequent monthly return submitted by the owner or operator. The amount of a refund or credit shall not exceed an amount that is equal to ninety days' worth of fees owed to an owner or operator by a particular debtor of the owner or operator. A refund or credit shall not be granted by the director to an owner or operator more than once in any twelve-month period for fees owed to the owner or operator by a particular debtor.

If, after receiving a refund or credit from the director, an owner or operator receives payment of all or part of the fees, the owner or operator shall remit the fees with the next monthly return submitted to the director together with a written explanation of the reason for the submittal.

For purposes of computing the fees levied under this division or division (B) of this section, any solid waste transfer or disposal facility that does not use scales as a means of determining gate receipts shall use a conversion factor of three cubic yards per ton of solid waste or one cubic yard per ton for baled waste, as applicable.

The fees levied under this division and divisions (B) and (C) of this section are in addition to all other applicable fees and taxes and shall be paid by the customer or a political subdivision to the owner or operator of a solid waste transfer or disposal facility notwithstanding the existence of any provision in a contract that the customer or a political subdivision may have with the owner or operator or with a transporter of waste to the facility that would not require or allow such payment.

(B) For the purposes specified in division (G) of this section, the solid waste management policy committee of a county or joint solid waste management district may levy fees upon the following activities:

(1) The disposal at a solid waste disposal facility located in the district of solid wastes generated within the district;

(2) The disposal at a solid waste disposal facility within the district of solid wastes generated outside the boundaries of the district, but inside this state;

(3) The disposal at a solid waste disposal facility within the district of solid wastes generated outside the boundaries of this state.

The solid waste management plan of the county or joint district approved under section 3734.521 [3734.52.1] or 3734.55 of the Revised Code and any amendments to it, or the resolution adopted under this division, as appropriate, shall establish the rates of the fees levied under divisions (B)(1), (2), and (3) of this section, if any, and shall specify whether the fees are levied on the basis of tons or cubic yards as the unit of measurement. A solid waste management district that levies fees under this division on the basis of cubic yards shall do so in accordance with division (A) of this section.

The fee levied under division (B)(1) of this section shall be not less than one dollar per ton nor more than two dollars per ton, the fee levied under division (B)(2) of this section shall be not less than two dollars per ton nor more than four dollars per ton, and the fee levied under division (B)(3) of this section shall be not more than the fee levied under division (B)(1) of this section

Prior to the approval of the solid waste management plan of a district under section 3734.55 of the Revised Code, the solid waste management policy committee of a district may levy fees under this division by adopting a resolution establishing the proposed amount of the fees. Upon adopting the resolution, the committee shall deliver a copy of the resolution to the board of county commissioners of each county forming the district and to the legislative authority of each municipal corporation and township under the jurisdiction of the district and shall prepare and publish the resolution and a notice of the time and location where a public hearing on the fees will be held. Upon adopting the resolution, the committee shall deliver written notice of the adoption of the resolution; of the amount of the proposed fees; and of the date, time, and location of the public hearing to the director and to the fifty industrial, commercial, or institutional generators of solid wastes within the district that generate the largest quantities of solid wastes, as determined by the committee, and to their local trade associations. The committee shall make good faith efforts to identify those generators within the district and their local trade associations, but the nonprovision of notice under this division to a particular generator or local trade association does not invalidate the proceedings under this division. The publication shall occur at least thirty days before the hearing. After the hearing, the committee may make such revisions to the proposed fees as it considers appropriate and thereafter, by resolution, shall adopt the revised fee schedule. Upon adopting the revised fee schedule, the committee shall deliver a copy of the resolution doing so to the board of county commissioners of each county forming the district and to the legislative authority of each municipal corporation and township under the jurisdiction of the district. Within sixty days after the delivery of a copy of the resolution adopting the proposed revised fees by the policy committee, each such board and legislative authority, by ordinance or resolution, shall approve or disapprove the revised fees and deliver a copy of the ordinance or resolution to the committee. If any such board or legislative authority fails to adopt and deliver to the policy committee an ordinance or resolution approving or disapproving the revised fees within sixty days after the policy committee delivered its resolution adopting the proposed revised fees, it shall be conclusively presumed that the board or legislative authority has approved the proposed revised fees. The committee shall determine if the resolution has been ratified in the same manner in which it determines if a draft solid waste

management plan has been ratified under division (B) of section 3734.55 of the Revised Code.

The committee may amend the schedule of fees levied pursuant to a resolution adopted and ratified under this division by adopting a resolution establishing the proposed amount of the amended fees. The committee may repeal the fees levied pursuant to such a resolution by adopting a resolution proposing to repeal them. Upon adopting such a resolution, the committee shall proceed to obtain ratification of the resolution in accordance with this division.

Not later than fourteen days after declaring the new fees to be ratified or the fees to be repealed under this division, the committee shall notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the fees of the ratification and the amount of the fees or of the repeal of the fees. Collection of any fees shall commence or collection of repealed fees shall cease on the first day of the second month following the month in which notification is sent to the owner or operator.

Fees levied under this division also may be established, amended, or repealed by a solid waste management policy committee through the adoption of a new district solid waste management plan, the adoption of an amended plan, or the amendment of the plan or amended plan in accordance with sections 3734.55 and 3734.56 of the Revised Code or the adoption or amendment of a district plan in connection with a change in district composition under section 3734.521 [3734.52.1] of the Revised Code.

Not later than fourteen days after the director issues an order approving a district's solid waste management plan, amended plan, or amendment to a plan or amended plan that establishes, amends, or repeals a schedule of fees levied by the district, the committee shall notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the fees of the approval of the plan or amended plan, or the amendment to the plan, as appropriate, and the amount of the fees, if any. In the case of an initial or amended plan approved under section 3734.521 [3734.52.1] of the Revised Code in connection with a change in district composition, other than one involving the withdrawal of a county from a joint district, the committee, within fourteen days after the change takes effect pursuant to division (G) of that section, shall notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the fees that the change has taken effect and of the amount of the fees, if any. Collection of any fees shall commence or collection of repealed fees shall cease on the first day of the second month following the month in which notification is sent to the owner or operator.

If, in the case of a change in district composition involving the withdrawal of a county from a joint district, the director completes the actions required under division (G)(1) or (3) of section 3734.521 [3734.52.1] of the Revised Code, as appropriate, forty-five days or more before the beginning of a calendar year, the policy committee of each of the districts resulting from the change that obtained the director's approval of an initial or amended plan in connection with the change, within fourteen days after the director's completion of the required actions, shall notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the district's fees that the change is to take effect on the first day of January immediately following the issuance of the notice and of the amount of the fees or amended fees levied under divisions (B)(1) to (3) of this section pursuant to the district's initial or amended plan as so approved or, if appropriate, the repeal of the district's fees by that initial or amended plan. Collection of any fees set forth in such a plan or amended plan shall commence on the first day of January immediately following the issuance of the notice. If such an initial or amended plan repeals a schedule of fees, collection of the fees shall cease on that first day of January.

If, in the case of a change in district composition involving the withdrawal of a county from a joint district, the director completes the actions required under division (G)(1) or (3) of section 3734.521 [3734.52.1] of the Revised Code, as appropriate, less than forty-five days before the beginning of a

calendar year, the director, on behalf of each of the districts resulting from the change that obtained the director's approval of an initial or amended plan in connection with the change proceedings, shall notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the district's fees that the change is to take effect on the first day of January immediately following the mailing of the notice and of the amount of the fees or amended fees levied under divisions (B)(1) to (3) of this section pursuant to the district's initial or amended plan as so approved or, if appropriate, the repeal of the district's fees by that initial or amended plan. Collection of any fees set forth in such a plan or amended plan shall commence on the first day of the second month following the month in which notification is sent to the owner or operator. If such an initial or amended plan repeals a schedule of fees, collection of the fees shall cease on the first day of the second month following the month in which notification is sent to the owner or operator.

If the schedule of fees that a solid waste management district is levying under divisions (B)(1) to (3) of this section is amended or repealed, the fees in effect immediately prior to the amendment or repeal shall continue to be collected until collection of the amended fees commences or collection of the repealed fees ceases, as applicable, as specified in this division. In the case of a change in district composition, money so received from the collection of the fees of the former districts shall be divided among the resulting districts in accordance with division (B) of section 343.012 [343.01.2] of the Revised Code and the agreements entered into under division (B) of section 343.01 of the Revised Code to establish the former and resulting districts and any amendments to those agreements.

For the purposes of the provisions of division (B) of this section establishing the times when newly established or amended fees levied by a district are required to commence and the collection of fees that have been amended or repealed is required to cease, "fees" or "schedule of fees" includes, in addition to fees levied under divisions (B)(1) to (3) of this section, those levied under section 3734.573 [3734.57.3] or 3734.574 [3734.57.4] of the Revised Code.

(C) For the purposes of defraying the added costs to a municipal corporation or township of maintaining roads and other public facilities and of providing emergency and other public services, and compensating a municipal corporation or township for reductions in real property tax revenues due to reductions in real property valuations resulting from the location and operation of a solid waste disposal facility within the municipal corporation or township, a municipal corporation or township in which such a solid waste disposal facility is located may levy a fee of not more than twenty-five cents per ton on the disposal of solid wastes at a solid waste disposal facility located within the boundaries of the municipal corporation or township regardless of where the wastes were generated.

The legislative authority of a municipal corporation or township may levy fees under this division by enacting an ordinance or adopting a resolution establishing the amount of the fees. Upon so doing the legislative authority shall mail a certified copy of the ordinance or resolution to the board of county commissioners or directors of the county or joint solid waste management district in which the municipal corporation or township is located or, if a regional solid waste management authority has been formed under section 343.011 [343.01.1] of the Revised Code, to the board of trustees of that regional authority, the owner or operator of each solid waste disposal facility in the municipal corporation or township that is required to collect the fee by the ordinance or resolution, and the director of environmental protection. Although the fees levied under this division are levied on the basis of tons as the unit of measurement, the legislative authority, in its ordinance or resolution levying the fees under this division, may direct that the fees be levied on the basis of cubic yards as the unit of measurement based upon a conversion factor of three cubic yards per ton generally or one cubic yard per ton for baled wastes.

Not later than five days after enacting an ordinance or adopting a resolution under this division, the legislative authority shall so notify by certified mail the owner or operator of each solid waste disposal facility that is required to collect the fee. Collection of any fee levied on or after March 24, 1992, shall commence on the first day of the second month following the month in which notification is sent to the owner or operator.

(D) (1) The fees levied under divisions (A), (B), and (C) of this section do not apply to the disposal of solid wastes that:

(a) Are disposed of at a facility owned by the generator of the wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the generator regardless of whether the facility is located on a premises where the wastes are generated;

(b) Are disposed of at facilities that exclusively dispose of wastes that are generated from the combustion of coal, or from the combustion of primarily coal in combination with scrap tires, that is not combined in any way with garbage at one or more premises owned by the generator.

(2) Except as provided in section 3734.571 [3734.57.1] of the Revised Code, any fees levied under division (B)(1) of this section apply to solid wastes originating outside the boundaries of a county or joint district that are covered by an agreement for the joint use of solid waste facilities entered into under section 343.02 of the Revised Code by the board of county commissioners or board of directors of the county or joint district where the wastes are generated and disposed of.

(3) When solid wastes, other than solid wastes that consist of scrap tires, are burned in a disposal facility that is an incinerator or energy recovery facility, the fees levied under divisions (A), (B), and (C) of this section shall be levied upon the disposal of the fly ash and bottom ash remaining after burning of the solid wastes and shall be collected by the owner or operator of the sanitary landfill where the ash is disposed of.

(4) When solid wastes are delivered to a solid waste transfer facility, the fees levied under divisions (B) and (C) of this section shall be levied upon the disposal of solid wastes transported off the premises of the transfer facility for disposal and shall be collected by the owner or operator of the solid waste disposal facility where the wastes are disposed of.

(5) The fees levied under divisions (A), (B), and (C) of this section do not apply to sewage sludge that is generated by a waste water treatment facility holding a national pollutant discharge elimination system permit and that is disposed of through incineration, land application, or composting or at another resource recovery or disposal facility that is not a landfill.

(6) The fees levied under divisions (A), (B), and (C) of this section do not apply to solid wastes delivered to a solid waste composting facility for processing. When any unprocessed solid waste or compost product is transported off the premises of a composting facility and disposed of at a landfill, the fees levied under divisions (A), (B), and (C) of this section shall be collected by the owner or operator of the landfill where the unprocessed waste or compost product is disposed of.

(7) When solid wastes that consist of scrap tires are processed at a scrap tire recovery facility, the fees levied under divisions (A), (B), and (C) of this section shall be levied upon the disposal of the fly ash and bottom ash or other solid wastes remaining after the processing of the scrap tires and shall be collected by the owner or operator of the solid waste disposal facility where the ash or other solid wastes are disposed of.

(8) The director of environmental protection may issue an order exempting from the fees levied under

this section solid wastes, including, but not limited to, scrap tires, that are generated, transferred, or disposed of as a result of a contract providing for the expenditure of public funds entered into by the administrator or regional administrator of the United States environmental protection agency, the director of environmental protection, or the director of administrative services on behalf of the director of environmental protection for the purpose of remediating conditions at a hazardous waste facility, solid waste facility, or other location at which the administrator or regional administrator or the director of environmental protection has reason to believe that there is a substantial threat to public health or safety or the environment or that the conditions are causing or contributing to air or water pollution or soil contamination. An order issued by the director of environmental protection under division (D)(8) of this section shall include a determination that the amount of the fees not received by a solid waste management district as a result of the order will not adversely impact the implementation and financing of the district's approved solid waste management plan and any approved amendments to the plan. Such an order is a final action of the director of environmental protection.

(E) The fees levied under divisions (B) and (C) of this section shall be collected by the owner or operator of the solid waste disposal facility where the wastes are disposed of as a trustee for the county or joint district and municipal corporation or township where the wastes are disposed of. Moneys from the fees levied under division (B) of this section shall be forwarded to the board of county commissioners or board of directors of the district in accordance with rules adopted under division (H) of this section. Moneys from the fees levied under division (C) of this section shall be forwarded to the treasurer or such other officer of the municipal corporation as, by virtue of the charter, has the duties of the treasurer or to the fiscal officer of the township, as appropriate, in accordance with those rules.

(F) Moneys received by the treasurer or other officer of the municipal corporation under division (E) of this section shall be paid into the general fund of the municipal corporation. Moneys received by the fiscal officer of the township under that division shall be paid into the general fund of the township. The treasurer or other officer of the municipal corporation or the township fiscal officer, as appropriate, shall maintain separate records of the moneys received from the fees levied under division (C) of this section.

(G) Moneys received by the board of county commissioners or board of directors under division (E) of this section or section 3734.571 [3734.57.1], 3734.572 [3734.57.2], 3734.573 [3734.57.3], or 3734.574 [3734.57.4] of the Revised Code shall be paid to the county treasurer, or other official acting in a similar capacity under a county charter, in a county district or to the county treasurer or other official designated by the board of directors in a joint district and kept in a separate and distinct fund to the credit of the district. If a regional solid waste management authority has been formed under section 343.011 [343.01.1] of the Revised Code, moneys received by the board of trustees of that regional authority under division (E) of this section shall be kept by the board in a separate and distinct fund to the credit of the district. Moneys in the special fund of the county or joint district arising from the fees levied under division (B) of this section and the fee levied under division (A) of section 3734.573 [3734.57.3] of the Revised Code shall be expended by the board of county commissioners or directors of the district in accordance with the district's solid waste management plan or amended plan approved under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code exclusively for the following purposes:

(1) Preparation of the solid waste management plan of the district under section 3734.54 of the Revised Code, monitoring implementation of the plan, and conducting the periodic review and amendment of the plan required by section 3734.56 of the Revised Code by the solid waste management policy committee;

(2) Implementation of the approved solid waste management plan or amended plan of the district, including, without limitation, the development and implementation of solid waste recycling or reduction programs;

(3) Providing financial assistance to boards of health within the district, if solid waste facilities are located within the district, for enforcement of this chapter and rules, orders, and terms and conditions of permits, licenses, and variances adopted or issued under it, other than the hazardous waste provisions of this chapter and rules adopted and orders and terms and conditions of permits issued under those provisions;

(4) Providing financial assistance to each county within the district to defray the added costs of maintaining roads and other public facilities and of providing emergency and other public services resulting from the location and operation of a solid waste facility within the county under the district's approved solid waste management plan or amended plan;

(5) Pursuant to contracts entered into with boards of health within the district, if solid waste facilities contained in the district's approved plan or amended plan are located within the district, for paying the costs incurred by those boards of health for collecting and analyzing samples from public or private water wells on lands adjacent to those facilities;

(6) Developing and implementing a program for the inspection of solid wastes generated outside the boundaries of this state that are disposed of at solid waste facilities included in the district's approved solid waste management plan or amended plan;

(7) Providing financial assistance to boards of health within the district for the enforcement of section 3734.03 of the Revised Code or to local law enforcement agencies having jurisdiction within the district for enforcing anti-littering laws and ordinances;

(8) Providing financial assistance to boards of health of health districts within the district that are on the approved list under section 3734.08 of the Revised Code to defray the costs to the health districts for the participation of their employees responsible for enforcement of the solid waste provisions of this chapter and rules adopted and orders and terms and conditions of permits, licenses, and variances issued under those provisions in the training and certification program as required by rules adopted under division (L) of section 3734.02 of the Revised Code;

(9) Providing financial assistance to individual municipal corporations and townships within the district to defray their added costs of maintaining roads and other public facilities and of providing emergency and other public services resulting from the location and operation within their boundaries of a composting, energy or resource recovery, incineration, or recycling facility that either is owned by the district or is furnishing solid waste management facility or recycling services to the district pursuant to a contract or agreement with the board of county commissioners or directors of the district;

(10) Payment of any expenses that are agreed to, awarded, or ordered to be paid under section 3734.35 of the Revised Code and of any administrative costs incurred pursuant to that section. In the case of a joint solid waste management district, if the board of county commissioners of one of the counties in the district is negotiating on behalf of affected communities, as defined in that section, in that county, the board shall obtain the approval of the board of directors of the district in order to expend moneys for administrative costs incurred.

Prior to the approval of the district's solid waste management plan under section 3734.55 of the Revised Code, moneys in the special fund of the district arising from the fees shall be expended for those purposes in the manner prescribed by the solid waste management policy committee by resolution.

Notwithstanding division (G)(6) of this section as it existed prior to October 29, 1993, or any provision

in a district's solid waste management plan prepared in accordance with division (B)(2)(e) of section 3734.53 of the Revised Code as it existed prior to that date, any moneys arising from the fees levied under division (B)(3) of this section prior to January 1, 1994, may be expended for any of the purposes authorized in divisions (G)(1) to (10) of this section.

(H) The director shall adopt rules in accordance with Chapter 119. of the Revised Code prescribing procedures for collecting and forwarding the fees levied under divisions (B) and (C) of this section to the boards of county commissioners or directors of county or joint solid waste management districts and to the treasurers or other officers of municipal corporations and the fiscal officers of townships. The rules also shall prescribe the dates for forwarding the fees to the boards and officials and may prescribe any other requirements the director considers necessary or appropriate to implement and administer divisions (A), (B), and (C) of this section.

HISTORY: 142 v H 592 (Eff 6-24-88); 143 v H 656 (Eff 4-18-90); 144 v H 150 (Eff 3-4-92); 144 v H 149 (Eff 3-24-92); 144 v H 723 (Eff 4-16-93); 145 v H 152 (Eff 7-1-93); 145 v S 165 (Eff 10-29-93); 145 v S 153 (Eff 10-29-93); 145 v H 685 (Eff 3-30-95); 146 v H 117 (Eff 6-30-95); 146 v H 122 (Eff 10-31-96); 147 v H 215 (Eff 6-30-97); 147 v H 770 (Eff 9-16-98); 148 v H 283 (Eff 6-30-99); 149 v H 94. Eff 6-6-2001; 150 v H 95, § 1, eff. 6-26-03; 150 v S 189, § 1, eff. 6-29-04; 151 v H 66, § 101.01, eff. 6-30-05; 151 v S 107, § 1, eff. 12-20-05; 151 v H 397, § 1, eff. 12-22-05; 151 v H 530, § 101.01, eff. 6-30-06.

The effective date is set by § 812.03 of 151 v H 530.

The provisions of § 4 of 151 v H 397 read as follows:

SECTION 4. Section 3734.57 of the Revised Code is presented in this act as a composite of the section as amended by both Am. Sub. H.B. 66 and Sub. S.B. 107 of the 126th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

The effective date is set by § 612.12 of 151 v H 66.

The effective date is set by section 78 of S.B. 189 (150 v -).

Effect of Amendments

151 v H 530, effective June 30, 2006, in the introductory language of (A), inserted "transfer or"; and, in the first paragraph following (A)(3), substituted "for disposal at a solid waste disposal facility located in this state or outside of this state" for "to a solid waste disposal facility for disposal; in the last paragraph of (A), twice inserted "or a political subdivision", and inserted "or with a transporter of waste to the facility".

151 v H 397, effective December 22, 2005, in the sixth paragraph of (A)(3), inserted "and if the request and evidence submitted with the request indicate that a refund or credit is warranted", and twice substituted "shall" for "may".

151 v S 107, effective December 20, 2005, in (E), (F), and (H), substituted "township fiscal officer" or a derivative thereof for "clerk"; and made minor stylistic changes.

151 v H 66, effective June 30, 2005, rewrote the section.

150 v S 189, effective June 29, 2004, in the second paragraph of (A)(2), substituted "thirty days" for "sixty days", and inserted "or are not remitted by the last day of an extension approved by the director".

H.B. 95, Acts 2003, effective June 26, 2003, substituted "July 1, 2003, through June 30, 2006" for "July 1, 2001 through June 30, 2004" in the introductory paragraph of (A) and in (A)(2); and in (A)(2), substituted "one dollar per ton" for "seventy-five cents per ton."

[§ 3734.57.3] § 3734.573. Fee on generation of solid wastes within district.

(A) For the purposes specified in division (G) of section 3734.57 of the Revised Code, the solid waste management policy committee of a county or joint solid waste management district may levy a fee on the generation of solid wastes within the district.

The initial or amended solid waste management plan of the county or joint district approved under section 3734.521 [3734.52.1], 3734.55, or 3734.56 of the Revised Code, an amendment to the district's plan adopted under division (E) of section 3734.56 of the Revised Code, or the resolution adopted and ratified under division (B) of this section shall establish the rate of the fee levied under this division and shall specify whether the fee is levied on the basis of tons or cubic yards as the unit of measurement.

(B) Prior to the approval under division (A) of section 3734.56 of the Revised Code of the first amended plan that the district is required to submit for approval under that section, the approval of an initial plan under section 3734.521 [3734.52.1] of the Revised Code, the approval of an amended plan under section 3734.521 [3734.52.1] or division (D) of section 3734.56 of the Revised Code, or the amendment of the district's plan under division (E) of section 3734.56 of the Revised Code, the solid waste management policy committee of a county or joint district that is operating under an initial plan approved under section 3734.55 of the Revised Code, or one for which approval of its initial plan is pending before the director of environmental protection on October 29, 1993, under section 3734.55 of the Revised Code, may levy a fee under division (A) of this section by adopting and obtaining ratification of a resolution establishing the amount of the fee. A policy committee that, after December 1, 1993, concurrently proposes to levy a fee under division (A) of this section and to amend the fees levied by the district under divisions (B)(1) to (3) of section 3734.57 of the Revised Code may adopt and obtain ratification of one resolution proposing to do both. The requirements and procedures set forth in division (B) of section 3734.57 of the Revised Code governing the adoption, amendment, and repeal of resolutions levying fees under divisions (B)(1) to (3) of that section, the ratification of those resolutions, and the notification of owners and operators of solid waste facilities required to collect fees levied under those divisions govern the adoption of the resolutions authorized to be adopted under this division, the ratification thereof, and the notification of owners and operators required to collect the fees, except as otherwise specifically provided in division (C) of this section.

(C) Any initial or amended plan of a district adopted under section 3734.521 [3734.52.1] or 3734.56 of the Revised Code, or resolution adopted under division (B) of this section, that proposes to levy a fee under division (A) of this section that exceeds five dollars per ton shall be ratified in accordance with the provisions of section 3734.55 or division (B) of section 3734.57 of the Revised Code, as applicable, except that such an initial or amended plan or resolution shall be approved by a combination of municipal corporations and townships with a combined population within the boundaries of the district comprising at least seventy-five per cent, rather than at least sixty per cent, of the total population of the district.

(D) The policy committee of a county or joint district may amend the fee levied by the district under division (A) of this section by adopting and obtaining ratification of a resolution establishing the amount of the amended fee. The policy committee may abolish the fee or an amended fee established under this division by adopting and obtaining ratification of a resolution proposing to repeal it. The requirements and procedures under division (B) and, if applicable, division (C) of this section govern the adoption and

ratification of a resolution authorized to be adopted under this division and the notification of owners and operators of solid waste facilities required to collect the fees.

(E) Collection of a fee or amended fee levied under division (A) or (D) of this section shall commence or cease in accordance with division (B) of section 3734.57 of the Revised Code. If a district is levying a fee under section 3734.572 [3734.57.2] of the Revised Code, collection of that fee shall cease on the date on which collection of the fee levied under division (A) of this section commences in accordance with division (B) of section 3734.57 of the Revised Code.

(F) In the case of solid wastes that are taken to a solid waste transfer facility prior to being transported to a solid waste disposal facility for disposal, the fee levied under division (A) of this section shall be collected by the owner or operator of the transfer facility as a trustee for the district. In the case of solid wastes that are not taken to a solid waste transfer facility prior to being transported to a solid waste disposal facility, the fee shall be collected by the owner or operator of the solid waste disposal facility where the wastes are disposed of. An owner or operator of a solid waste transfer or disposal facility who is required to collect the fee shall collect and forward the fee to the district in accordance with section 3734.57 of the Revised Code and rules adopted under division (H) of that section.

If the owner or operator of a solid waste transfer or disposal facility who did not receive notice pursuant to division (B) of this section to collect the fee levied by a district under division (A) of this section receives solid wastes generated in the district, the owner or operator, within thirty days after receiving the wastes, shall send written notice of that fact to the board of county commissioners or directors of the district. Within thirty days after receiving such a notice, the board of county commissioners or directors shall send written notice to the owner or operator indicating whether the district is levying a fee under division (A) of this section and, if so, the amount of the fee.

(G) Moneys received by a district levying a fee under division (A) of this section shall be credited to the special fund of the district created in division (G) of section 3734.57 of the Revised Code and shall be used exclusively for the purposes specified in that division. Prior to the approval under division (A) of section 3734.56 of the Revised Code of the first amended plan that the district is required to submit for approval under that section, the approval of an initial plan under section 3734.521 [3734.52.1] of the Revised Code, the approval of an amended plan under that section or division (D) of section 3734.56 of the Revised Code, or the amendment of the district's plan under division (E) of section 3734.56 of the Revised Code, moneys credited to the special fund arising from the fee levied pursuant to a resolution adopted and ratified under division (B) of this section shall be expended for those purposes in the manner prescribed by the solid waste management policy committee by resolution.

(H) The fee levied under division (A) of this section does not apply to the management of solid wastes that:

(1) Are disposed of at a facility owned by the generator of the wastes when the solid waste facility exclusively disposes of solid wastes generated at one or more premises owned by the generator regardless of whether the facility is located on a premises where the wastes were generated;

(2) Are disposed of at facilities that exclusively dispose of wastes that are generated from the combustion of coal, or from the combustion of primarily coal in combination with scrap tires, that is not combined in any way with garbage at one or more premises owned by the generator.

(I) When solid wastes that are burned in a disposal facility that is an incinerator or energy recovery facility are delivered to a solid waste transfer facility prior to being transported to the incinerator or energy recovery facility where they are burned, the fee levied under division (A) of this section shall be

levied on the wastes delivered to the transfer facility.

(J) When solid wastes that are burned in a disposal facility that is an incinerator or energy recovery facility are not delivered to a solid waste transfer facility prior to being transported to the incinerator or energy recovery facility where they are burned, the fee levied under division (A) of this section shall be levied on the wastes delivered to the incinerator or energy recovery facility.

(K) The fee levied under division (A) of this section does not apply to sewage sludge that is generated by a waste water treatment facility holding a national pollutant discharge elimination system permit and that is disposed of through incineration, land application, or composting or at another resource recovery or disposal facility that is not a landfill.

(L) The fee levied under division (A) of this section does not apply to yard waste delivered to a solid waste composting facility for processing or to a solid waste transfer facility.

(M) The fee levied under division (A) of this section does not apply to materials separated from a mixed waste stream for recycling by the generator.

(N) The director of environmental protection may issue an order exempting from the fees levied under this section solid wastes, including, but not limited to, scrap tires, that are generated, transferred, or disposed of as a result of a contract providing for the expenditure of public funds entered into by the administrator or regional administrator of the United States environmental protection agency, the director of environmental protection, or the director of administrative services on behalf of the director of environmental protection for the purpose of remediating conditions at a hazardous waste facility, solid waste facility, or other location at which the administrator or regional administrator or the director of environmental protection has reason to believe that there is a substantial threat to public health or safety or the environment or that the conditions are causing or contributing to air or water pollution or soil contamination. An order issued by the director of environmental protection under this division shall include a determination that the amount of fees not received by a solid waste management district as a result of the order will not adversely impact the implementation and financing of the district's approved solid waste managment plan and any approved amendments to the plan. Such an order is a final action of the director of environmental protection.

HISTORY: 145 v S 153 (Eff 10-29-93); 145 v H 685 (Eff 3-30-95); 146 v H 122. Eff 10-31-96; 151 v H 66, § 101.01, eff. 9-29-05.

The effective date is set by § 612.03 of 151 v H 66.

Effect of Amendments

151 v H 66, effective September 29, 2005, rewrote the first paragraph of (A); in (G), substituted "specified in that division" for "set forth in divisions (G)(1) to (10) of that section"; and added (N).

§ 5705.41. Restriction upon appropriation and expenditure of money.

No subdivision or taxing unit shall:

(A) Make any appropriation of money except as provided in Chapter 5705. of the Revised Code; provided, that the authorization of a bond issue shall be deemed to be an appropriation of the proceeds of the bond issue for the purpose for which such bonds were issued, but no expenditure shall be made from any bond fund until first authorized by the taxing authority;

(B) Make any expenditure of money unless it has been appropriated as provided in such chapter;

(C) Make any expenditure of money except by a proper warrant drawn against an appropriate fund;

(D) (1) Except as otherwise provided in division (D)(2) of this section and section 5705.44 of the Revised Code, make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days after the taxing authority receives such certificate; provided that, if the amount involved is less than one hundred dollars in the case of counties or three thousand dollars in the case of all other subdivisions or taxing units, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

(2) Annually, the board of county commissioners may adopt a resolution exempting county purchases of one thousand dollars or less from the requirement of division (D)(1) of this section that a certificate be attached to any contract or order involving the expenditure of money. The resolution shall state the dollar amount that is exempted from the certificate requirement and whether the exemption applies to all purchases, to one or more specific classes of purchases, or to the purchase of one or more specific items. Prior to the adoption of the resolution, the board shall give written notice to the county auditor that it intends to adopt the resolution. The notice shall state the dollar amount that is proposed to be exempted and whether the exemption would apply to all purchases, to one or more specific classes of purchases, or to the purchase of one or more specific items. The county auditor may review and comment on the proposal, and shall send any comments to the board within fifteen days after receiving the notice. The board shall wait at least fifteen days after giving the notice to the auditor before adopting the resolution. A person authorized to make a county purchase in a county that has adopted such a resolution shall prepare and file with the county auditor, within three business days after incurring an obligation not requiring a certificate, or within any other period of time the board of county commissioners specifies in the resolution, a written or electronically transferred document specifying the purpose and amount of the

expenditure, the date of the purchase, the name of the vendor, the specific appropriation items from which the expenditures are to be made, and any additional information as the auditor of state may prescribe.

(3) Upon certification by the auditor or other chief fiscal officer that a certain sum of money, not in excess of an amount established by resolution or ordinance adopted by a majority of the members of the legislative authority of the subdivision or taxing unit, has been lawfully appropriated, authorized, or directed for a certain purpose and is in the treasury or in the process of collection to the credit of a specific line-item appropriation account in a certain fund free from previous and then outstanding obligations or certifications, then for such purpose and from such line-item appropriation account in such fund, over a period not extending beyond the end of the fiscal year, expenditures may be made, orders for payment issued, and contracts or obligations calling for or requiring the payment of money made and assumed; provided, that the aggregate sum of money included in and called for by such expenditures, orders, contracts, and obligations shall not exceed the sum so certified. Such a certification need be signed only by the fiscal officer of the subdivision or the taxing district and may, but need not, be limited to a specific vendor. An itemized statement of obligations incurred and expenditures made under such certificate shall be rendered to the auditor or other chief fiscal officer before another such certificate may be issued, and not more than one such certificate shall be outstanding at a time.

In addition to providing the certification for expenditures as specified in this division, a subdivision also may make expenditures, issue orders for payment, and make contracts or obligations calling for or requiring the payment of money made and assumed for specified permitted purposes from a specific line-item appropriation account in a specified fund for a sum of money upon the certification by the fiscal officer of the subdivision that this sum of money has been lawfully appropriated, authorized, or directed for a permitted purpose and is in the treasury or in the process of collection to the credit of the specific line-item appropriation account in the specified fund free from previous and then-outstanding obligations or certifications; provided that the aggregate sum of money included in and called for by the expenditures, orders, and obligations shall not exceed the certified sum. The purposes for which a subdivision may lawfully appropriate, authorize, or issue such a certificate are the services of an accountant, architect, attorney at law, physician, professional engineer, construction project manager, consultant, surveyor, or appraiser by or on behalf of the subdivision or contracting authority; fuel oil, gasoline, food items, roadway materials, and utilities; and any purchases exempt from competitive bidding under section 125.04 of the Revised Code and any other specific expenditure that is a recurring and reasonably predictable operating expense. Such a certification shall not extend beyond the end of the fiscal year or, in the case of a board of county commissioners that has established a quarterly spending plan under section 5705.392 [5705.39.2] of the Revised Code, beyond the quarter to which the plan applies. Such a certificate shall be signed by the fiscal officer and may, but need not, be limited to a specific vendor. An itemized statement of obligations incurred and expenditures made under such a certificate shall be rendered to the fiscal officer for each certificate issued. More than one such certificate may be outstanding at any time.

In any case in which a contract is entered into upon a per unit basis, the head of the department, board, or commission for the benefit of which the contract is made shall make an estimate of the total amount to become due upon such contract, which estimate shall be certified in writing to the fiscal officer of the subdivision. Such a contract may be entered into if the appropriation covers such estimate, or so much thereof as may be due during the current year. In such a case the certificate of the fiscal officer based upon the estimate shall be a sufficient compliance with the law requiring a certificate.

Any certificate of the fiscal officer attached to a contract shall be binding upon the political subdivision as to the facts set forth therein. Upon request of any person receiving an order or entering into a contract with any political subdivision, the certificate of the fiscal officer shall be attached to such order or contract. "Contract" as used in this section excludes current payrolls of regular employees and officers.

(E) Taxes and other revenue in process of collection, or the proceeds to be derived from authorized bonds, notes, or certificates of indebtedness sold and in process of delivery, shall for the purpose of this section be deemed in the treasury or in process of collection and in the appropriate fund. This section applies neither to the investment of sinking funds by the trustees of such funds, nor to investments made under sections 731.56 to 731.59 of the Revised Code.

No district authority shall, in transacting its own affairs, do any of the things prohibited to a subdivision by this section, but the appropriation referred to shall become the appropriation by the district authority, and the fiscal officer referred to shall mean the fiscal officer of the district authority.

HISTORY: GC §§ 5625-33, 5625-34; 112 v 391, §§ 33, 34; 113 v 670; 122 v 559; 123 v 495; Bureau of Code Revision, 10-1-53; 132 v S 378 (Eff 4-29-68); 136 v H 8 (Eff 8-11-75); 138 v H 371 (Eff 3-14-80); 139 v S 172 (Eff 7-21-82); 139 v S 530 (Eff 6-25-82); 141 v H 201 (Eff 7-1-85); 145 v H 300 (Eff 7-1-94); 145 v S 81 (Eff 8-19-94); 147 v H 426 (Eff 7-22-98); 149 v H 94 (Eff 6-6-2001); 149 v H 21 (Eff 8-28-2001); 149 v H 454. Eff 4-7-2003; 150 v H 95, § 1, eff. 9-26-03; 150 v S 82, § 1, eff. 2-12-04.

The provisions of § 3 of HB 454 (149 v -) read as follows:

SECTION 3. Section 5705.41 of the Revised Code is presented in this act as a composite of the section as amended by both Am. H.B. 21 and Am. Sub. H.B. 94 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

Effect of Amendments

S.B. 82, Acts 2003, effective February 12, 2004, in (D)(2), substituted "county purchases of one thousand" for "for the current fiscal year county purchases of seven hundred fifty," and inserted "or within any other period of time the board of county commissioners specifies in the resolution," "or electronically transferred," and "the specific appropriation items from which the expenditures are to be made"; redesignated the fourth and fifth paragraphs of (D)(3) as (E); and made minor stylistic changes.

§ 5705.44. Contracts running beyond fiscal year; when certificate not required.

When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge.

The certificate required by section 5705.41 of the Revised Code as to money in the treasury shall not be required for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility, but in the case of any such contract made without such certification, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable, except out of such earnings. That certificate also shall not be required if requiring the certificate makes it impossible for a county board of mental retardation and developmental disabilities to pay the nonfederal share of medicaid expenditures that the county board is required by division (A) of section 5126.057 [5126.05.7] of the Revised Code to pay.

HISTORY: GC § 5625-36; 112 v 391(408), § 36; Bureau of Code Revision, 10-1-53; 149 v H 94 (Eff 6-6-2001); 149 v H 405. Eff 12-13-2001.

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-27 Solid Waste and Infectious Waste Regulations

OAC Ann. 3745-27-10 (Anderson 2006)

3745-27-10 Ground water monitoring program for a sanitary landfill facility.

(A) Applicability.

(1) General applicability. In accordance with the schedule in paragraphs (A)(2) and (A)(3) of this rule, the owner or operator of a sanitary landfill facility shall implement a "ground water monitoring program" capable of determining the impact of the facility on the quality of ground water occurring within the uppermost aquifer system and all significant zones of saturation above the uppermost aquifer system underlying the sanitary landfill facility. The "ground water monitoring program" has the following elements:

(a) A "ground water detection monitoring program" which shall be documented within a ground water detection monitoring plan. The ground water detection monitoring plan shall be submitted into the operating record in accordance with rule 3745-27-09 of the Administrative Code. The ground water detection monitoring plan shall include, but is not limited to, a description of the following:

(i) A monitoring system in accordance with paragraph (B) of this rule,

(ii) Sampling and analysis procedures, including an appropriate statistical method, in accordance with paragraph (C) of this rule,

(iii) Detection monitoring procedures, including monitoring frequency and a parameter list, in accordance with paragraph (D) of this rule,

(b) A "ground water quality assessment monitoring program" which is implemented when there is a statistically significant increase over background of waste-derived constituents within the ground water system determined during detection monitoring unless a demonstration of a false positive is presented under paragraph (D)(7)(c)(i) of this rule or presented and approved under paragraph (D)(7)(c)(ii) of this rule. A "ground water quality assessment monitoring program" includes, but is not limited to, the following:

(i) A "ground water quality assessment plan" in accordance with paragraphs (E)(4) and (E)(5) of this rule.

(ii) Determinations of rate, extent, and concentration of Waste-derived constituents detected in the ground water in accordance with paragraph (E)(5) of this rule,

(iii) Notification to persons residing on or owning land above the contaminant plume in accordance with paragraph (E)(11) of this rule,

(iv) Submission of a "ground water quality assessment report" in accordance with paragraph (E)(7) of this rule,

(v) Where applicable, the requirements of paragraphs (B) to (D) of this rule.

(vi) Where applicable, submission of a compliance monitoring plan in accordance with paragraph (E)(8) of this rule.

(c) A "corrective measures program" which is implemented when Waste-derived constituents from the facility have entered the ground water. A "corrective measures program" includes, but is not limited to, the following:

(i) A "corrective measures plan" in accordance with paragraphs (F)(2) and (F)(3) of this rule,

(ii) Proposed concentration levels in accordance with paragraph (F)(7) of this rule,

(iii) A public meeting held to discuss the results of the "ground water quality assessment report" and "corrective measures plan" with interested persons in accordance with paragraph (F)(4) of this rule;

(iv) Selection and implementation of a corrective measure in accordance with paragraphs (F)(10) of this rule,

(v) Where applicable, the requirements of paragraphs (B) to (D) of this rule.

(2) Schedule for implementation of revisions to the ground water monitoring program.

(a) THE owner or operator of AN operating sanitary landfill facility subject to rule 3745-27-19 of the Administrative Code, shall make any applicable revisions to the facility "ground water monitoring program". Submit revisions to the operating record, and implement any measures required by amendments to this rule within two hundred seventy days of the effective date of the rule.

(b) The owner or operator of a sanitary landfill facility that IS subject to post closure care in accordance with rule 3745-27-14 of the Administrative Code and that ceased acceptance of waste after March 1, 1990, as determined by the notification required by paragraph (E) of rule 3745-27-11 of the Administrative Code, shall revise their ground water monitoring program to comply with this rule.

The owner or operator of a facility subject to rule 3745-27-09 of the Administrative Code shall submit and implement revisions to the operating record within two hundred seventy days of the effective date of this rule. The owner or operator of a facility not subject to rule 3745-27-09 of the Administrative Code shall implement the revisions and mail copies of the revisions by certified mail, or any other form of mail accompanied by a receipt, to Ohio EPA and the approved health department within two hundred seventy days of the effective date of this rule.

[Comment: Owners and operators are only required to revise the portions of the facility's current ground water monitoring plans that do not comply with the amendments to this rule and are not required to submit a whole new plan. All variance approvals issued under the provisions of this rule continue in effect.]

[Comment: All owners or operators of facilities currently operating, and those that have closed since March 1, 1990, shall amend their closure plans and ground water monitoring program plans to comply with this rule. The only exception to this requirement is for those

owners or operators required to follow a past version of this rule by an order of the director.]

(c) The owner or operator of a sanitary landfill facility that is subject to post closure care in accordance with rule 3745-27-14 of the Administrative Code and is conducting a ground water monitoring program under findings and orders issued by the director shall continue monitoring, pursuant to findings and orders.

(d) The owner or operator of a sanitary landfill facility conducting a ground water monitoring program subject to paragraph (A)(2)(c) of this rule may request, on forms prescribed by the director, to comply with rule 3745-27-10 of the Administrative Code except for the provisions of paragraph (a)(2)(c) of this rule. Upon the director's approval of the request, the owner or operator shall then comply with rule 3745-27-10 of the Administrative Code except for the provisions of paragraph (A)(2)(c) of this rule. Upon the director's approval of the request, the owner or operator shall then comply with rule 3745-27-10 of the Administrative Code except for the provisions of (a)(2)(c) of this rule.

[Comment: There are landfill facilities currently required to follow past versions of this rule due to orders from the director. Paragraph (C) of this rule allows these facilities to continue to follow the orders issued by the director. Paragraph (D) of this rule allows the owners or operators of facilities under orders to follow past versions of this rule to request modification of the applicable order to allow them to follow the current version of this rule.]

(3) The owner or operator shall implement and comply with the requirements of a "ground water quality assessment monitoring program" and/or a "corrective measures program" when required by paragraph (E) or (F) of this rule. Implementation shall be in accordance with the timeframes specified in paragraphs (E) and (F) of this rule.

(4) For the purposes of this rule, the ground water monitoring program, which includes the detection monitoring program, and where required, the assessment monitoring and corrective measures programs, ARE implemented upon the commencement of sampling of ground water monitoring wells in accordance with paragraphs (D), (E), or (F) of this rule.

(5) A qualified ground water scientist shall certify, in accordance with rule 3745-27-09 of the Administrative Code, Any "ground water Detection monitoring plan," the "ground water quality assessment plan," the compliance monitoring plan, and the "corrective measures plan," and any revisions thereof and reports and data, submitted in accordance with this rule.

(6) The ground water monitoring program shall be documented within the operating record. Any revision(s) to the ground water monitoring program shall be submitted to the operating record in accordance with rule 3745-27-09 of the Administrative Code prior to implementation of the revision(s). The owner or operator of a facility not subject to rule 3745-27-09 of the Administrative Code shall mail copies of the revisions by certified mail, or any other form of mail accompanied by a receipt, to Ohio EPA and the approved health department prior to implementation of the revision(s). No approval is necessary prior to implementing the revision(s) to the ground water monitoring program unless specifically required by this rule.

(B) Ground water monitoring system.

(1) The ground water monitoring system, for detection monitoring, assessment monitoring, or corrective measures, shall consist of a sufficient number of wells, installed at appropriate locations and depths, to yield ground water samples from both the uppermost aquifer system and any significant zones of saturation that exist above the uppermost aquifer system that do the following:

(a) Represent the quality of the background ground water that has not been affected by past

or present operations at the sanitary landfill facility,

(b) Represent the quality of the ground water passing directly downgradient of the limits of solid waste placement.

The director may require or otherwise authorize an owner or operator to conduct surface water monitoring (i.e. Seeps, springs or streams) as part of the ground water monitoring system in areas where it may not be practical to place a well. Such surface water samples shall be representative of ground water quality passing directly downgradient of the limits of solid waste placement.

[Comment: The director's authorization to conduct surface water monitoring under this rule should include provisions for: sampling procedures; constituents to be analyzed; and analyzing the resulting data.]

(2) Where the uppermost aquifer system exists more than one hundred fifty feet beneath the recompacted clay liner of the sanitary landfill facility, the ground water monitoring system shall consist of a sufficient number of wells, installed at appropriate locations and depths, to yield ground water samples from an adequate number of significant zones of saturation, in accordance with paragraphs (B)(1)(a) and (B)(1)(b) of this rule, to ensure detection of any contaminant release from the facility.

(3) All monitoring wells shall be designed, installed, and developed in a manner that allows the collection of ground water samples that are representative of ground water quality in the geologic unit being monitored. And that are in accordance with the following criteria:

(a) Monitoring wells shall be cased in a manner that maintains the integrity of the monitoring well boreholes,

(b) The annular space (i.e., the space between the borehole and the well casing) above the sampling depth shall be sealed to prevent the contamination of the samples and the ground water,

(c) The casing shall be screened or perforated and surrounded by sand or gravel in such a way that allows For the following:

(i) For the minimization of the passage of formation materials into the well,

(ii) For the monitoring of discrete portions of the uppermost aquifer system or any significant zones of saturation above the uppermost aquifer system,

(d) The owner or operator shall document in the operating record, in accordance with rule 3745-27-09 of the Administrative Code, the design, installation, development, Maintenance and abandonment of any monitoring wells, piezometers, and other measurement, sampling, and analytical devices,

(e) The monitoring wells, piezometers, and other measurement, sampling, and analytical devices shall be operated and maintained to perform to design specifications throughout the life of the monitoring program.

(f) Monitoring wells constructed or used for the purposes of this rule are not required to comply with Chapter 3745-9 of the Administrative Code.

(4) The number, spacing, and depth of ground water monitoring wells shall be as follows:

(a) Based on site specific hydrogeologic information including that information listed in

paragraphs (c)(3)(a) to (c)(3)(g) of rule 3745-27-06 of the Administrative Code,

(b) Capable of detecting a release from the sanitary landfill facility to the ground water at the closest practicable location to the limits of solid waste placement.

(5) The owner or operator shall evaluate, at least annually until the end of the post-closure care period, the ground water surface elevation data obtained in accordance with paragraph (c)(3) of this rule to determine whether the requirements of paragraph (b) of this rule for locating the monitoring wells continue to be satisfied. The results of this evaluation including potentiometric maps for every geologic unit monitored shall be included in a report to be submitted to the appropriate Ohio EPA district office not later than twelve months from the previous report submitted to comply with this paragraph. If the evaluation shows that paragraph (b) of this rule is no longer satisfied, the owner or operator shall immediately revise the number, location, and/or depth of the monitoring wells to bring the ground water monitoring system into compliance with this requirement and place documentation of the revision into the operating record in accordance with paragraph (b)(3)(d) of this rule.

(C) The owner or operator shall comply with the following requirements regarding ground water sampling, analysis, and statistical methods.

(1) General requirements. The ground water monitoring program shall include consistent sampling and analysis procedures and statistical methods that are protective of human health and the environment and that are designed to ensure monitoring results that provide an accurate representation of ground water quality at the background and downgradient wells installed in accordance with paragraph (b), (d), (e), or (f) of this rule. The following shall be included in the "ground water detection monitoring plan," "ground water quality assessment monitoring plan," compliance monitoring plan, and "corrective measures plan.":

(a) A written sampling and analysis plan, which documents the sampling and analysis procedures that shall be utilized in the ground water monitoring program. The owner or operator is required to use the procedures documented within the sampling and analysis plan.

[Comment: the analysis methods used, including method detection limits and practical quantitation limits for the constituents analyzed, do not have to be documented within the sampling and analysis plan. They do have to be submitted with the analysis data as required in paragraph (c)(10) of this rule.]

(b) The statistical method selected by the owner or operator shall be in accordance with paragraphs (c)(6) and (c)(7) of this rule,

(c) The statistical determination of a statistically significant increase over background for a monitoring parameter shall be in accordance with paragraph (c)(8) of this rule,

(d) The number of samples collected shall be in accordance with paragraph (c)(9) of this rule,

(e) Submission of ground water and statistical analysis shall be in accordance with paragraph (c)(10) of this rule.

(2) A sampling and analysis plan shall, at a minimum, include a detailed description of the equipment, procedures, and techniques to be used for the following:

(a) Measurement of ground water elevations,

(b) Detection of immiscible layers,

(c) Collection of ground water samples, including the following:

(i) Well evacuation,

(ii) Sample withdrawal,

(iii) Sample containers and handling,

(iv) Sample preservation,

(d) Performance of field analysis, including the following:

(i) Procedures and forms for recording raw data and the exact location, time, and facility-specific conditions associated with the data acquisition,

(ii) Calibration of field devices,

(e) Decontamination of equipment,

(f) Chain of custody control, including the following:

(i) Standardized field tracking reporting forms to record sample custody in the field prior to and during shipment,

(ii) Sample labels containing all information necessary for effective sample tracking,

(g) Field and laboratory quality assurance and quality control, including the following:

(i) Collection of duplicate samples during each sampling event,

(ii) Collection of field and equipment blanks if non-dedicated sampling equipment is used,

(iii) Collection of trip blanks.

The number of duplicate samples, field blanks, trip blanks, and equipment blanks shall be enough to adequately demonstrate the accuracy of the analysis results.

(h) The identification of well maintenance problems encountered during routine sampling of the wells and the process to assure that necessary maintenance is performed.

(3) Measurement of ground water elevations.

(a)

(i) Ground water elevations shall be measured in all wells to be sampled that round of sampling prior to any purging and sampling.

(ii) The total depth of the monitoring well(s) shall be measured in all wells at least annually for those wells that do not have a dedicated pump installed. The depth of monitoring well(s) with a dedicated pump shall be measured whenever maintenance allows. The measurement of well depth shall be taken prior to any purging and/or sampling.

(b) The owner or operator shall at least semiannually and in conjunction with any major sampling event involving more than half the wells in the system or zone monitored determine, for the uppermost aquifer system and for all significant zones of saturation

monitored, the direction of ground water flow each time ground water elevation measurements are performed.

(c) Ground water elevations in all wells monitoring the same unit(s) or portion of unit(s) of a sanitary landfill facility shall be measured within a period of time short enough to avoid temporal variations in ground water flow which could preclude an accurate determination of ground water flow rate and direction. But within a period of time not to exceed twenty-four hours.

(d) Potentiometric maps shall be constructed using the collected ground water elevation measurements and shall be included with the sampling data submittal.

(4) The owner or operator shall establish background ground water quality, unless the exception in paragraph (C)(5) of this rule applies, by analyzing ground water samples collected from hydraulically upgradient wells(s) for each of the monitoring parameters or constituents required in the ground water monitoring program.

(5) Background ground water quality at a sanitary landfill facility may be based on sampling of wells that are not hydraulically upgradient where either of the following occur:

(a) Hydrogeologic conditions do not allow the owner or operator to determine which wells are upgradient,

(b) Sampling of other wells will provide an indication of background ground water quality that is as representative or more representative than that provided by upgradient wells.

(6) Statistical methods. Within ninety days of completing collection of the eight background samples necessary to comply with paragraphs (d)(5)(a)(ii) and (d)(5)(b)(ii) of this rule but no later than four hundred fifty days after implementing the ground water monitoring program, the owner or operator shall specify one of the following statistical methods to be used in evaluating ground water monitoring data. The statistical method chosen shall be conducted separately for each of the parameters required to be statistically evaluated in paragraph (D)(5) of this rule. The statistical method specified shall ensure protection of human health and the environment and shall comply with the performance standards outlined in paragraph (C)(7) of this rule. The owner or operator shall submit to the operating record any changes made to the statistical method. For owners or operators not subject to rule 3745-27-09 of the Administrative Code, submit to Ohio EPA any changes made to the statistical method. This submission of the revised statistical method shall be made thirty (30) days prior to submitting to the operating record and/or Ohio EPA the first set of ground water analytical data analyzed using the revised statistical method. The statistical method specified shall be selected from one of the following:

(a) A tolerance or prediction interval procedure in which an interval for each constituent is established from the distribution of the background data, and the level of each constituent in each monitoring well is compared to the upper tolerance or prediction limit,

(b) A control chart approach that gives control limits for each constituent,

(c) A Parametric analysis of variance ("ANOVA") followed by multiple comparisons procedures to identify statistically significant evidence of contamination. This shall include estimation and testing of the contrasts between each monitoring well's mean and the background mean levels for each constituent.

(d) An analysis of variance ("ANOVA") based on ranks followed by multiple comparisons procedures to identify statistically significant evidence of contamination. This shall include estimation and testing of the contrasts between each monitoring well's median and the

background median levels for each constituent.

(e) Another statistical test method submitted by the owner or operator and approved by the director or his authorized representative.

[Comment: The statistical method to be used during the initial statistical comparison required under paragraph (D)(5) of this rule needs to be submitted within ninety days of collecting the eighth back ground sample. If it is anticipated that the statistical method to be used will be an intrawell method, then the statistical plan shall be submitted ninety days after the eighth sample has been collected from the well in question. If it is anticipated that the statistical method to be used will be an interwell method, then the statistical plan shall be submitted ninety days after a total of eight samples have been collected from the background wells. The eight background samples collected shall be evenly distributed across all background wells.]

(7) Performance standards for statistical methods. Any statistical method chosen in accordance with paragraph (C)(6) of this rule shall comply with the following performance standards as appropriate:

(a) The statistical method used to evaluate ground water monitoring data shall be appropriate for the distribution of chemical parameters or waste-derived constituents. If the distribution of the chemical parameters or waste-derived constituents is shown by the owner or operator to be inappropriate for a normal theory test, then the data should be transformed or a distribution free theory test should be used. If the distributions for the constituents differ, more than one statistical method may be needed;

(b) If an individual well comparison procedure is used to compare an individual monitoring well constituent concentration with background constituent concentrations or a ground water concentration level, the test shall be conducted at a type I error level not less than 0.01 for each testing period. If multiple comparisons procedures are used, the type I experimentwise error rate for each testing period shall be not less than 0.05; however, the type I error rate of not less than 0.01 for individual monitoring well comparisons shall be maintained. This performance standard does not apply for tolerance intervals, prediction intervals, or control charts,

(c) If a control chart approach is used to evaluate ground water monitoring data, the specific type of control chart and its associated parameter values shall be protective of human health and safety and the environment. The parameters shall be determined after considering the number of samples in the background data base, the date distribution, and the range of the concentration values for each constituent,

(d) If a tolerance interval or a prediction interval is used to evaluate ground water monitoring data, the levels of confidence, and for tolerance intervals, the percentage of the population that the interval must contain, shall be protective of human health and safety and the environment. These parameters shall be determined after considering the number of samples in the background data base, the data distribution, and the range of the concentration values for each constituent of concern,

(e) The statistical method shall account for data below the limit of detection with one or more statistical procedures that ensure protection of human health and the environment. Any practical quantitation limit (PQL) used in the statistical method shall be the lowest concentration level that can be reliably achieved within the specified limits of precision and accuracy during routine laboratory operating conditions that are available to the facility,

(f) If necessary, the statistical method shall include procedures to control or correct for seasonal and spatial variability as well as temporal correlation in the data.

(g) Background data can be added only in blocks of data resulting from the analysis of four or more statistically independent samples after the data have been statistically compared to the current background data and no statistical differences are detected, unless another method is deemed acceptable to the director.

(h) Prior to using an intra-well statistical method under the ground water detection monitoring program, the owner or operator shall submit to the operating record in accordance with rule 3745-27-09 of the Administrative Code, a demonstration that the ground water has not been affected by the landfill within the relevant well(s). The owner or operator of a facility not subject to rule 3745-27-09 of the Administrative Code shall mail copies of the revisions by certified mail, or any other form of mail accompanied by a receipt, to Ohio EPA and the approved health department.

(8) Determination of a statistically significant increase over background. The owner or operator shall determine whether or not there is a statistically significant increase over background for each parameter or constituent required to be statistically analyzed within the ground water monitoring program. The owner or operator shall make this determination each time he assesses ground water quality. To determine whether a statistically-significant increase or decrease has occurred, the owner or operator shall compare the ground water quality of each parameter or constituent at each downgradient ground water monitoring well to the background value of that parameter or constituent according to the statistical procedures specified in paragraphs (C)(6) and (C)(7) of this rule.

(9) Sample number. The number of samples collected to establish ground water quality data shall be consistent with the appropriate statistical procedures determined pursuant to paragraphs (C)(6) and (C)(7) of this rule. The sampling procedures shall be those specified under paragraph (D) of this rule for detection monitoring, paragraph (E) of this rule for assessment and/or compliance monitoring, and paragraph (F) of this rule for corrective measures.

(10) Submission of results. All ground water elevation, sample analysis and statistical analysis results generated in accordance with paragraphs (B), (C), (D), (E) and (F) of this rule shall be submitted to Ohio EPA not later than seventy-five days after sampling the well. All ground water data and an accompanying text shall be submitted to Ohio EPA in a form specified by the director or his authorized representative. The data and accompanying text required to be submitted in accordance with this paragraph shall be placed in the operating record in accordance with rule 3745-27-09 of the Administrative Code. The accompanying text shall consist of, at a minimum, the following:

(a) Lab data sheets.

(b) Field and laboratory quality assurance/quality control (OA/OC) data.

(c) Chain of custody and sample receipt forms including preservation methods.

(d) Data summary table(s).

(e) Statistical analysis results and summary table(s) including the results from any test for normality.

(f) The potentiometric maps required by paragraph (c)(3) of this rule.

(g) A description of the analysis methods used including method detection limits, and practical quantitation limits for the constituents analyzed.

[Comment: The items requested in paragraph (c)(10) of this rule with the exception of paragraph (C)(10)(c) of this rule, may be submitted on an electronic format compatible with Ohio EPA software.]

(D) Ground water detection monitoring program. The owner/operator shall comply with the following requirements regarding ground water detection monitoring:

(1) Monitoring parameters. The owner or operator shall determine the concentration or value of the parameters listed in appendix I in ground water in accordance with paragraph (D) of this rule.

(2) Alternate monitoring parameter list. The owner or operator of a sanitary landfill facility may propose, in writing, to delete any of the appendix I monitoring parameters to be used to meet the requirements of paragraphs (D)(5) to (D)(8) of this rule. The director may approve the alternative list of appendix I monitoring parameters if the removed parameters are not reasonably expected to be in or derived from the waste contained or deposited in the sanitary landfill facility. Upon approval by the director or his authorized representative, the owner or operator may use the alternative list. The owner or operator shall, at a minimum, consider the following factors in proposing an alternative inorganic parameter list:

(a) Which of the parameters specified in appendix I of this rule shall be deleted from the parameters required to be monitored in paragraph (D)(5) of this rule.

(b) The types, quantities, and concentrations of constituents in wastes managed at the sanitary landfill facility.

(c) The concentrations of the Appendix I constituents in the leachate from the relevant unit (s) of the sanitary landfill facility.

(d) Any other relevant information that the director or his authorized representative deems necessary.

(3) Alternate inorganic parameter list. The owner or operator of a sanitary landfill facility may propose, in writing, that an alternative list of inorganic indicator parameters be used to meet the requirements of paragraph (D)(5) of this rule in lieu of some or all of the inorganic parameters listed in appendix I of this rule. The director may shall approve the alternative inorganic indicator parameters if the alternative list will provide a reliable indication of inorganic releases from the sanitary landfill facility to the ground water. Upon approval by the director or his authorized representative, the owner or operator shall use the alternative list. The owner or operator shall, at a minimum, consider the following factors in proposing an alternative inorganic parameter list:

(a) The types, quantities, and concentrations of constituents in wastes managed at the sanitary landfill facility,

(b) The mobility, stability, and persistence of waste constituents or their reaction products in the unsaturated zone beneath the sanitary landfill facility,

(c) The detectibility of the indicator parameters, waste constituents, and their reaction products in the ground water,

(d) The concentrations or values and coefficients of variation of monitoring parameters or constituents in the background ground water quality.

(4) Alternative parameters for low-yield wells not screened in the uppermost aquifer system. The owner or operator may propose in writing, that an alternative list of any of the appendix

I monitoring parameters be used to meet the requirements of paragraph (D)(5)(c) of this rule for those monitoring wells not screened in the uppermost aquifer system that cannot produce enough water within a twenty-four hour period to allow for the analysis of all of the required parameters. Upon approval by the director or his authorized representative, the owner or operator may use the alternative parameter list. The owner or operator shall, at a minimum, consider the following factors in proposing an alternative list for low-yield wells not screened in the uppermost aquifer:

(a) Whether the monitoring well is constructed in accordance with paragraph(B)(3) of this rule,

(b) Whether the well screen is properly placed across the significant zone or saturation in order to maximize yield;

(c) A calculation of the maximum sustainable yield of the significant zone of saturation;

(d) Field data demonstrating the time necessary for the well to recover completely after purging,

(e) The amount of water needed to analyze for all required parameters. This should include a discussion of which parameters will be deleted and the amount of water needed to analyze for these deleted parameters as well as the listing of the parameters which will be analyzed for in the samples and how much water is required to analyze for these parameters.

(5) Monitoring parameters, frequency, location. The owner or operator shall monitor the ground water monitoring well system in accordance with the following:

(a) For monitoring wells screened within the uppermost aquifer system beneath the sanitary landfill facility, the owner or operator shall, during the active life of the facility (including final closure) and the post-closure care period, monitor the wells:

(i) For one of the following parameter lists:

(a) Parameters 1 through 66 in appendix I of this rule.

(b) The alternative parameter list approved in accordance with paragraphs (D)(2) and/or (D)(3) of this rule.

(ii) At least semiannually by collecting the following samples:

(a) During the initial one hundred and eighty days after implementing the ground water detection monitoring program (the first semiannual sampling event), a minimum of four independent samples from each monitoring well screened in the uppermost aquifer system (background and downgradient) and analyzed for the parameters specified in paragraph (D)(5)(a)(i) of this rule. The owner or operator shall collect and analyze for the parameters specified in paragraph (D)(5)(a)(i) of this rule, by collecting a minimum of eight independent background samples during the initial year of sampling to use for the statistical analysis provisions of this rule. The owner or operator of a sanitary landfill facility with an existing ground water monitoring system, may use existing data to meet the provisions of this paragraph provided the information required pursuant to paragraph (C) of this rule is available.

[Comment: Existing data to meet the provision of the above rule is allowed provided that the sampling and analysis procedures used to collect and analyze the sample are documented, available for review and consistent with paragraph (c)(1) of this rule.]

(b) Beginning one year after implementing the ground water detection monitoring program and continuing during subsequent semiannual sampling events, at least one sample from each monitoring well screened in the uppermost aquifer system (background and downgradient) must be collected and analyzed for the parameters specified in paragraph (D)(5)(a)(i) of this rule,

(iii) Beginning with receiving the results from the first monitoring event collected pursuant to paragraph (D)(5)(a)(ii)(b) of this rule and semiannually thereafter, by statistically analyzing the results from wells screened in the uppermost aquifer system for the parameters specified in paragraph (d)(5)(a)(i) of this rule,

(b) For monitoring wells not screened in the uppermost aquifer system at the sanitary landfill facility, the owner or operator shall, during the active life of the facility (including final closure) and the post-closure care period, monitor the wells:

(i) For one of the following parameter lists:

(a) Parameters numbered 18, 25, 33, 61, 63, 64, 65, and 66, in appendix I of this rule.

(b) The alternate parameter list approved in accordance with paragraphs (d)(2), (d)(3) and/or (d)(4) of this rule.

(ii) At least semiannually by collecting the following samples:

(a) During the initial one hundred and eighty days after implementing the ground water detection monitoring program (the first semiannual sampling event), a minimum of four independent samples must be collected from each monitoring well not screened in the uppermost aquifer system (background and downgradient) and analyzed for the parameters specified in paragraph (D)(5)(b)(i) of this rule. The owner or operator shall collect and analyze for the parameters specified in paragraph (D)(5)(b)(i) of this rule, by collecting a minimum of eight independent background samples during the initial year of sampling to use for the statistical analysis provisions of this rule. The owner or operator of a sanitary landfill facility with an existing ground water monitoring system, may use existing data to meet the provisions of this paragraph provided the information required pursuant to paragraph (C) of this rule is available.

[Comment: Existing data to meet the provisions of the above rule is allowed provided that the sampling and analysis procedures used to collect and analyze the sample are documented, available for review and consistent with paragraph (C)(1) of this rule.]

(b) Beginning one year after implementing the ground water detection monitoring program and during subsequent semiannual sampling events, at least one sample from each monitoring well not screened in the uppermost aquifer system (background and downgradient) must be collected and analyzed for the parameters specified in paragraph (D)(5)(b)(i) of this rule,

(iii) Beginning with receiving the results from the first monitoring event collected pursuant to paragraph (D)(5)(b)(ii)(b) of this rule and at least semiannually thereafter, by statistically analyzing; the results from monitoring wells not screened within the uppermost aquifer system for the parameters specified in paragraph (D)(5)(b)(i) of this rule.

(c) All monitoring wells shall be monitored for constituents in appendix I of this rule or the alternative parameter list approved in accordance with paragraphs (d)(2), (d)(3), and/or (d)(4) of this rule at least annually during the active life of the sanitary landfill facility (including final closure) and during the post-closure care period.

(d) At least one sample from each well in the monitoring system per sampling event shall be field analyzed for parameters 67, 68, and 69 listed in appendix I of this rule.

(e) If a new well or replacement well is to be added to an existing monitoring system, the owner or operator shall statistically analyze the ground water analysis data from the well in accordance with the applicable rules as soon as possible but no later than one year from installation.

(6) Alternative sampling and statistical analysis frequency. During the active life (including final closure) of a sanitary landfill facility and the post-closure care period, the owner or operator may propose, in writing, an alternative frequency for ground water sampling and/or statistical analysis required by paragraph (d)(5) of this rule. The director or his authorized representative may approve a proposed alternative frequency provided the alternative frequency sampling and/or analysis frequency is not less than annual. Upon approval by the director or his authorized representative, the owner or operator may use the alternative sampling/analysis frequency. The owner operator shall, at a minimum, consider the following factors in proposing an alternative sampling and/or analysis frequency:

(a) Lithology of the aquifer system and all stratigraphic units above the uppermost aquifer system;

(b) Hydraulic conductivity of the uppermost aquifer system and all stratigraphic units above the uppermost aquifer system;

(c) Ground water flow rates for the uppermost aquifer system and all zones of saturation above the uppermost aquifer system;

(d) Minimum distance between the upgradient edge of the limits of waste placement of the sanitary landfill facility and the downgradient monitoring well system;

(e) Resource value of the uppermost aquifer system.

(7) Determination of a statistically significant increase over background in detection monitoring parameters.

(a) The owner or operator shall comply with paragraph (D)(7)(b) of this rule, if the owner or operator determines a statistically significant change, according to the statistical procedures specified in paragraphs (C)(6) and (C)(7) of this rule, for any of the following:

(i) Parameters 1 through 66 in appendix I of this rule, or the alternate parameter list approved in accordance with paragraphs (D)(2) and/or (D)(3), of this rule in samples from monitoring wells screened in the uppermost aquifer system.

(ii) Parameters 18, 25, 33, 61, 63, 64, 65, and 66 of appendix I of this rule or the alternate parameter list approved in accordance with paragraphs (D)(2), (D)(3), and/or (D)(4) of this rule in samples for all monitoring wells not screened in the uppermost aquifer system.

(b) The owner or operator shall submit a written notification to Ohio EPA of a statistically significant increase over background not later than seventy-five days after withdrawing a sample from the well, that upon analysis demonstrates a statistically significant change. A copy of this notification shall be placed in the operating record in accordance with rule 3745-27-09 of the Administrative Code. The notification must indicate which wells and parameters have shown a statistically significant increase over background levels.

(c) Demonstration of a false positive. The owner or operator may do one of the following to demonstrate a false positive:

(i) Use the 1 of M resampling method to demonstrate that the statistically significant increase over background was a false positive. The 1 of M resampling method to be used shall be documented within the statistical analysis plan required by paragraph (C)(6) of this rule and shall be protective of human health and safety and the environment. The number of resamples to be used shall be documented with the statistical method specified by the owner/operator as required by paragraph (C)(6) of this rule. If the owner or operator demonstrates using the 1 of m resampling method that the statistically significant increase over background was a false positive, then the owner or operator may return to detection monitoring. The owner or operator shall submit a report documenting the demonstration to Ohio EPA within one hundred and eighty days from initial sampling.

[Comment: The 1 of M method is a statistical resampling procedure to verify the statistically significant increase over background determined for the first sample taken from a monitoring well. The number of resamples used with the method will vary depending on the number of background samples available. The number of resamples usually does not exceed two. As an example, for the Ohio EPA, a 1 of 2 method means the original sample plus one resample with the analysis data from both samples having to demonstrate a statistically significant increase above background in order for the owner/operator to be required to enter the ground water quality assessment program.]

(ii) Demonstrate that a source other than the sanitary landfill facility caused the contamination or that the statistically significant increase over background resulted from error in the sampling analysis, statistical evaluation; or natural variation in ground water quality. A report documenting this demonstration must be submitted to and approved by the director or his authorized representative. If the owner or operator does not obtain approval to continue detection monitoring within two hundred and ten days from initial sampling, the owner or operator shall comply with the provisions of paragraph (e) of this rule.

(E) Ground water quality assessment monitoring program. The owner or operator shall comply with the following requirements regarding ground water quality assessment monitoring.

(1) General requirements. Unless the director approves the report submitted in accordance with paragraph (D)(7)(c) of this rule, the owner or operator shall implement a "ground water quality assessment plan" capable of determining the concentration, rate, and extent of migration of waste-derived constituent(s) in the ground water upon determining a statistically significant increase over background in accordance with paragraph (D)(7) of this rule. The owner or operator shall implement and comply with the "ground water quality assessment PLAN" and the requirements of this rule.

[Comment: The ground water quality assessment plan is a self-implementing plan which does not require approval from Ohio EPA prior to implementation by the owner or operator.]

(2) The owner or operator may undertake during the implementation of the ground water quality assessment plan, activities necessary to prevent the continued release of waste-derived constituents from the regulated unit to the ground water. Any activities undertaken by the owner or operator in accordance with this paragraph shall be in compliance with all applicable federal and Ohio statutes and regulations.

(3) Submission of ground water quality assessment plan. Within one hundred and thirty-five days of notifying Ohio EPA of a statistically significant increase over background in accordance with paragraph (D)(6)(b) of this rule, the owner or operator shall submit to the Ohio EPA, and to the operating record in accordance with rule 3745-27-09 of the Administrative Code, a "ground water quality assessment plan."

[Comment: The ground water quality assessment plan is required to be certified by a qualified ground water scientist in accordance with rule 3745-27-10(A)(5) of the Administrative Code.]

(4) Ground water quality assessment plan elements. The plan to be submitted in accordance with paragraph (E)(3) of this rule shall include, at a minimum, detailed descriptions of the following:

(a) Hydrogeologic conditions at the sanitary landfill facility,

(b) The detection monitoring program implemented by the sanitary landfill facility, including the following:

(i) The number, location, depth, and construction of detection monitoring wells with documentation,

(ii) A summary of detection monitoring ground water analytical data with written documentation of the results,

(iii) A summary of statistical analyses applied to the data,

(c) The investigatory approach to be followed during the assessment, including but not limited to the following:

(i) The proposed number, location, depth, installation method, and construction of assessment monitoring wells,

(ii) The proposed method(s) for gathering additional hydrogeologic information,

(iii) The planned use of supporting methodology (i.e., soil gas or geophysical surveys),

(d) The techniques, procedures, and analytical equipment to be used for ground water sampling during the assessment, this description shall include those sampling and analysis elements listed within paragraph (c)(2) of this rule.

(e) Data evaluation procedures, including but not limited to the following:

(i) Planned use of statistical data evaluation for the ground water quality assessment program and/or for compliance monitoring,

(ii) Planned use of computer models,

(iii) Planned use of previously gathered information,

(iv) Criteria which will be utilized to determine if additional assessment activities are warranted,

(f) A schedule of implementation which incorporates the requirements specified in paragraph (E)(5) of this rule.

(g) Provisions FOR installing additional wells, as necessary, for determining the nature and extent of any release of waste-derived constituents per paragraph (E)(6) of this rule,

(h) Provisions for installing at least one additional monitoring well at the facility boundary in the direction of downgradient ground water flow from the affected well and as many additional wells as necessary to meet the provisions of paragraph (e)(6) of this rule.

(5) Assessment monitoring schedule, frequency, and parameters.

(a) Within one hundred thirty-five days of notifying Ohio EPA of a statistically significant change in accordance with paragraph (d)(7) of this rule, the owner or operator shall do the following:

(i) Sample the affected well(s) and analyze the samples for all waste-derived constituents, including all constituents listed in Appendix I and Appendix Ii of this rule. Any background wells within the flow path or closest to the affected well and screened within the same geologic unit as the affected well shall be sampled and analyzed for Appendix I and ii parameters,

(ii) Within seventy-five days of commencing the sampling required in paragraph (E)(5)(a)(i) of this rule, sample all monitoring wells screened within the same geologic units at the facility as the affected well, not sampled under paragraph (E)(5)(a)(i) of this rule. These samples shall be analyzed for those waste-derived constituents found to be above background levels in the affected monitoring wells sampled under paragraph (E)(5)(a)(i) of this rule.

(b) The owner or operator shall sample all monitoring wells in the ground water quality assessment monitoring program, as follows, a monitoring well is considered part of the ground water quality assessment monitoring program if the well is needed or used to meet the provisions of paragraph (e)(6) of this rule:

(i) At least semiannually for the following:

(a) All parameters in appendix I of this rule or the alternative parameter list approved under paragraph (D)(2), and/or (D)(3) of this rule,

(b) All the constituents reported to the director in accordance with paragraph (E)(5)(c) of this rule,

(ii) At least annually for one of the following.

(a) All parameters in appendix II of this rule,

(b) The remaining appendix II parameters if the director has deleted appendix II parameters in accordance with paragraph (E)(5)(e) of this rule.

(c) Within seventy-five days of sampling the ground water monitoring wells in accordance with paragraph (E)(5)(a) of this rule and after all subsequent samplings, the owner or operator shall place a notice in the operating record identifying all constituents, that have been detected. The owner or operator shall send a copy of this notice to the appropriate Ohio EPA district office and the approved health department.

[COMMENT: Paragraph (C)(10) of this rule requires all ground water analysis and statistical analysis results to be submitted to the operating record within seventy-five days after sampling a monitoring well.]

(d) Within one hundred and eighty days of implementing the ground water quality assessment PLAN, the owner or operator shall collect additional statistically independent samples (a minimum of four) from any background well sampled pursuant to paragraph (e)(5)(a)(i) of this rule that does not have at least four independent analysis results of each waste-derived constituent detected in the monitoring well(s), demonstrating a statistically significant increase.

[Comment: Except for paragraph (e)(9)(a) of this rule, no statistical evaluation of any data is required to be performed under the ground water quality assessment program.]

(e) Upon the written request of the owner or operator, the director may delete any of the appendix II monitoring parameters for a sanitary landfill facility unit(s) if the owner or operator can show that the deleted constituents are not reasonably expected to be in or derived from the waste contained in the unit(s).

(f) Ground water monitoring wells not used to make a determination according to paragraph (E)(6) of this rule shall continue to be monitored in accordance with the ground water monitoring program applicable to those wells prior to the initiation of assessment monitoring.

[Comment: If a well was in compliance with the requirements for the ground water detection monitoring program prior to initiation of the ground water assessment monitoring program and the well is not necessary to make a determination in accordance with paragraph (e)(6) of this rule, then the well shall continue to be monitored under the ground water detection monitoring program requirements as the ground water assessment monitoring program continues.]

(6) A determination of rate, extent, and concentration. The owner or operator shall implement the "ground water quality assessment plan" which satisfies the requirements of paragraphs (E)(3), (E)(4), and (E)(5) of this rule and, at a minimum, determines the following:

(a) The rate and extent of migration of the waste-derived constituents in the ground water.

(b) The concentrations of the waste-derived constituents in the ground water.

This shall include portions of the contaminant plume that exist beyond the facility boundary, unless the owner/operator demonstrates to the director that, despite the owner's/operator's best efforts, the owner/operator was unable to obtain the necessary permission to undertake such action. At a minimum, the owner/operator shall submit a copy of their written access request and if a response is provided, a copy of the written statement from the off-site property owner(s) indicating that off-site access is denied. The owner/operator is not relieved of all responsibility to clean up a release that has migrated beyond the facility boundary where off-site access is denied. On-site measures to address such releases will be determined on a case-by-case basis.

(7) Ground water assessment report. The owner or operator shall make a determination according to paragraph (E)(6) of this rule within the time frame specified in the submitted "ground water quality assessment plan." The owner or operator shall submit to the director, not later than fifteen days after making a determination, a written "ground water quality assessment report" containing an assessment of the ground water quality including all data generated as part of implementation of the "ground water quality assessment plan."

(8) After complying with paragraph (E)(6), if the release of waste-derived constituents to ground water as characterized within the report required under paragraph (E)(7) of this rule exclusively consists of one or more of parameters numbered 63 through 78 of appendix I of this rule, then the owner or operator may submit a compliance monitoring plan with the ground water quality assessment report submitted in accordance with paragraph (E)(7) of this rule to Ohio EPA and the operating record instead of a corrective measures plan as required under paragraph (F) of this rule. The owners or operators of facilities not subject to rule 3745-27-09 of the Administrative Code, may submit the compliance monitoring plan with the ground water quality assessment report submitted in accordance with paragraph (E)(7) of this rule to Ohio EPA. This section of the rule is also applicable to sites meeting the above criteria that have previously submitted corrective measures plans that have not been

approved as of the effective date of this rule. These facilities may submit a compliance monitoring plan as an addendum to the existing corrective measures plan. The owner/operator complying with the provisions of paragraph (E)(8) of this rule is exempt from complying with paragraph (E)(12) of this rule, but shall comply with paragraphs (C)(10), (E)(10) and (E)(11) of this rule.

The compliance monitoring plan shall be implemented with the first semiannual sampling event that occurs after the submittal of the compliance monitoring plan. The compliance monitoring plan shall, at a minimum, include the following:

[Comment: Activities conducted while in compliance monitoring are to demonstrate that the contamination released to the environment continues to be non-hazardous and that the source control measures implemented have limited the growth of the contaminant plume, prevented new contaminants from being released, and stopped the increase in the concentrations of the contaminants already released.]

(a) A description of the monitoring wells to be sampled. The wells to be sampled during compliance monitoring shall, at a minimum, include all wells that were sampled in order to make a determination under paragraph (e)(6) of this rule.

(b) A description of the techniques, procedures, and analytical equipment to be used for ground water sampling during compliance monitoring. This description shall include those sampling and analysis elements listed within paragraph (c)(2) of this rule.

(c) Provisions for sampling the monitoring wells designated under paragraph (e)(8)(a) of this rule on a semiannual basis and analyzing the samples for the following:

(i) For monitoring wells screened within the uppermost aquifer system beneath the sanitary landfill facility, the parameters required under paragraph (d)(5)(a) of this rule and the waste-derived contaminants determined to have been released from the landfill to the ground water.

(ii) For monitoring wells not screened within the uppermost aquifer system beneath the sanitary landfill facility, the parameters required under paragraph (d)(5)(b) of this rule and the waste-derived constituents determined to have been released from the landfill to the ground water.

(d) Provisions for sampling the monitoring wells designated under paragraph (e)(8)(a) of this rule on an annual basis and analyzing the samples for the parameters required under paragraph (d)(5)(c) of this rule.

(e) Provisions for sampling the monitoring wells designated under paragraph (e)(8)(a) of this rule for the schedule and parameters required under paragraph (d)(5)(d) of this rule.

(f) Provisions for performing statistical analysis on the semiannual analytical results. Statistical analysis shall be performed using the appropriate statistical procedures specified within paragraphs (c)(6) and (c)(7) of this rule. For statistical analysis, the owner/operator shall do the following:

(i) For contaminants determined to have been released to the ground water in accordance with paragraph (e)(6) of this rule, sample and analyze the monitoring wells designated under paragraph (e)(8)(a) of this rule at least eight times during the initial year of compliance monitoring to establish background unless otherwise approved by the director. Statistical analysis shall commence with the first semiannual sampling event following completion of collecting the background samples.

(ii) Commence statistically analyzing the sampling results of constituents to be monitored in accordance with paragraph (e)(8)(c) of this rule and not being monitored in accordance with paragraph (e)(8)(f)(i) of this rule with the initial sampling event required under this paragraph.

[Comment: The above rule requires that all contaminants released from the facility have a new statistical background established for them prior to statistically analyzing the results. For those constituents that have not been released from the facility, the old statistical background data set is still appropriate to use and statistical analysis may begin for these constituents with the first sampling event required under this paragraph.]

(g) Provisions for fulfilling the requirements of paragraph (e)(6) of this rule in accordance with the requirements of paragraph (e) of this rule when a statistically significant increase is determined for parameters 1 through 62 within appendix I of this rule.

[Comment: If a statistical analysis demonstrates a statistically significant increase over background in concentration for parameters 1 through 62 of appendix I, then the facility is required to update the ground water quality assessment plan and determine the concentration of any contaminant released as well as the rate and extent of migration of the contaminants.]

(h) Provisions for sampling the monitoring wells designated under paragraph (e)(8)(a) of this rule for the parameters listed within appendix II of this rule if any parameter not included within parameters 1 through 62 within appendix I of this rule demonstrates a statistically significant increase over the new background established under the provisions of paragraph (E)(8)(f) of this rule. If any constituent from appendix II of this rule is detected, then the owner/operator shall commence provisions for fulfilling the requirements of paragraph (E)(6) of this rule in accordance with paragraph (e) of this rule. If no parameters from appendix II of this rule are detected, then the owner/operator shall revise the compliance monitoring plan and implement the revised compliance monitoring plan during the next regularly scheduled semiannual sampling event.

[Comment: If a statistical analysis demonstrates a statistically significant increase over the new background in concentration for any parameter other than parameters 1 through 62 of appendix I, then the facility is required to sample for the parameters within appendix ii of this rule. If an appendix ii parameter is detected, then the owner or operator is required to update the ground water quality assessment plan and determine the concentration of any contaminant released as well as the rate and extent of migration of the contaminants.]

(i) Provisions for continuing to implement the compliance monitoring plan until the end of the post-closure care period for the sanitary landfill facility unless otherwise approved by the director.

(j) Activities necessary to prevent the continued release of waste-derived constituents to the ground water. The described activities shall be implemented with the submittal of the compliance monitoring plan. The director may require additional activities necessary to prevent the continued release of waste-derived constituents to the ground water.

(9) Reinstatement of detection monitoring.

(a) If the owner or operator determines that the concentrations of all waste-derived constituents are shown to be at or below background values, using the statistical procedures described in paragraph (C)(6) of this rule for two consecutive sampling events, then the owner or operator may request, in writing, that the director approve reinstatement of the detection monitoring program described in paragraphs (C) and (D) of this rule.

(b) The owner or operator may demonstrate that a source other than the sanitary landfill facility caused the contamination, or that the statistically significant change resulted from error in sampling, analysis, statistical evaluation, or natural variation in ground water quality. A report documenting this demonstration must be submitted to director and request that the director approve reinstatement of the detection monitoring program described in paragraphs (c) and (D) of this rule.

(c) Until the director approves reinstatement of the detection monitoring program, the owner or operator shall comply with paragraphs (E)(10) and (F) of this rule.

(10) Semiannual determination of rate, extent, and concentration. If the owner or operator determines, based on the determination made according to paragraph (E)(6) of this rule, that waste-derived constituents from the facility have entered the ground water, then the owner or operator shall continue to make the determination required in accordance with paragraph (E)(6) of this rule on a semiannual basis until released from this obligation by the director or unless an alternate time interval is established by the director. The owner or operator shall submit documentation of the semiannual determination of rate, extent, and concentration with the reports required to be submitted in accordance with paragraph (E)(11) of this rule.

(11) Notification of adjacent landowners. After the first determination of rate, extent, and concentration in accordance with paragraph (E)(6) of this rule, the owner or operator shall notify by certified mail, or any other form of mail accompanied by a receipt, all persons who own land or reside on the land that directly overlies, or is reasonably expected to overlie, any part of the plume of the contamination, as determined in accordance with paragraph (e)(5) of this rule, of the rate, extent, and concentration of the waste-derived constituents in the ground water. The owner or operator shall place the return receipts or other evidence of notification into the operating record. Annually, the owner or operator shall re-notify persons or notify additional persons, based on the results of the determinations of rate, extent, and concentration in accordance with paragraph (e)(5) of this rule until released from this obligation by the director.

(12) Semiannual assessment activities report. The owner or operator shall submit to the appropriate Ohio EPA district office and to the approved health department, upon implementation of the "ground water quality assessment plan" submitted under paragraph (E)(2) of this rule, a report on the activities being conducted at the facility as part of implementation of the "ground water quality assessment plan." all monitoring and reporting required by paragraph (E) of this rule shall continue until the director releases the owner/operator from this obligation or the corrective measures plan is approved. Any documents or data previously submitted by the owner/operator during the six month period need not be submitted with the semiannual report. Previously submitted documents or data shall be referenced within the semiannual report as having been submitted. This report shall be submitted semiannually and contain the following:

(a) A narrative description of all assessment activities that have occurred since the previous report,

(b) All data generated as part of the assessment program since the previous report.

(F) Corrective measures program.

(1) General requirements. Unless otherwise specified in paragraph (E)(8) or (E)(9) of this rule, upon determining in accordance with paragraph (e) of this rule that waste-derived contaminants have been detected in the ground water the owner or operator shall implement a "corrective measures program plan" capable of evaluating all practicable ground water remediation procedures, attaining the concentration level for waste-derived contaminants detected in the ground water, controlling the source of the release, identifying specific

ground water monitoring requirements to monitor the effectiveness of the corrective measures and eliminating further releases. The owner or operator shall implement the "corrective measures program" in accordance with the "corrective measures plan" and the requirements of this rule.

(2) Corrective measures plan. Unless otherwise specified in paragraph (E)(8) or (E)(9), and within one hundred and eighty days of making a determination in accordance with paragraph (E)(6) of this rule, the owner or operator shall submit a corrective measures plan to the director and into the operating record. The "corrective measures plan" shall evaluate all practicable remediation procedures which are available for remediating any contamination discovered during assessment monitoring. The evaluated remediation procedures shall, at a minimum, do te following:

(a) Be protective of human health and safety and the environment.

(b) Attain the proposed ground water concentration levels specified in accordance with paragraph (F)(7) of this rule.

(c) Control the source(s) of releases to reduce or eliminate, to the maximum extent practicable, further releases of waste-derived constituents into the environment.

(d) Comply with standards for management of wastes as specified in paragraph (F)(13) of this rule.

(e) Contain a revised ground water corrective measures monitoring plan which identifies specific ground water monitoring requirements to monitor the effectiveness of the corrective measures. The ground water corrective measures monitoring plan shall, at a minimum. Contain provisions:

(i) For determining semiannually, that ground water remediation standards established in accordance with paragraph (f)(7) of this rule are achieved for those contaminants determined to have been released to ground water.

(ii) For semiannual monitoring for the presence above background levels of parameters numbered 1 - 66 of appendix i of this rule determined not to have been released to ground water.

(iii) Which meet the applicable provisions of paragraphs (B) to (D) of this rule.

(3) The owner or operator shall evaluate each proposed remediation procedure within the corrective measures plan. This evaluation shall, at a minimum, consider the following:

(a) Any potential remediation procedure, which shall be assessed for the long-term and short-term effectiveness and the protection it affords. This shall include the degree of certainty that the remediation procedure will prove successful. Factors to be considered include the following:

(i) Magnitude of reduction of existing risks.

(ii) Magnitude of residual risks in terms of likelihood of further releases due to waste remaining following implementation of a remediation procedure.

(iii) The type and degree of long-term management required, including monitoring, operation, and maintenance.

(iv) Short-term risks that may affect the community, workers, or the environment during

implementation of such a remediation procedure, including potential threats to human health and safety and the environment associated with excavation, transportation, redisposal, or containment.

(v) Potential for human and environmental receptor exposure to remaining wastes, considering the potential threat to human health and safety and the environment associated with excavation, transportation, redisposal, or containment.

(vi) Long-term reliability of the engineering and institutional controls.

(vii) Potential need for replacement of the remediation procedure.

(viii) Time until full protection is achieved.

(b) The effectiveness of the remediation procedure in controlling the source in order to reduce further releases, including the following:

(i) The extent to which containment practices will reduce further releases.

(ii) The extent to which treatment technologies may be used.

(c) The need to coordinate with, and obtain necessary approvals and permits from, other agencies.

(d) The available capacity and location of needed treatment, storage, and disposal services.

(e) The case or difficulty of implementing a potential remedy(s) based on consideration of the following types of factors:

(i) Degree of difficulty associated with constructing the technologies.

(ii) Expected operation reliability of the technologies.

(iii) Availability of necessary equipment and specialists.

(f) The degree to which community concerns are addressed by a potential corrective measure.

(g) The performance, reliability, ease of implementation, and potential impacts of the potential remediation procedures, including safety impacts, cross-media impacts, and control of exposure to any residual contamination.

(h) A schedule for initiating and completing each remediation procedure discussed in the plan. In establishing this schedule, the owner or operator shall consider the following:

(i) The extent and nature of any contamination.

(ii) The practical capability of remedial technologies to achieve compliance with ground water concentration levels established in accordance with paragraph (F)(6) of this rule and other objectives of the remediation procedure.

(iii) The availability of treatment or disposal capacity for wastes managed during implementation of the remediation procedure.

(iv) The desirability of utilizing technologies that are not currently available, but which may offer significant advantages over currently available technologies in terms of protection,

reliability, safety, or the ability to achieve remedial objectives.

(v) Potential risks to human health and the environment from contaminant exposure prior to completion of the remediation procedure.

(vi) Practicable capability of the owner or operator.

(vii) Other relevant factors.

(i) Resource value of the aquifer system, including the following:

(i) Current and future uses.

(ii) Proximity and withdrawal rate of users.

(iii) Ground water quantity and quality.

(iv) The potential damage to wildlife, crops, vegetation, and physical structures resulting from exposure to waste constituents.

(v) The hydrogeologic characteristics of the facility and surrounding area.

(vi) Ground water removal and treatment costs.

(vii) The cost and availability of alternate water supplies.

(j) Practical capability of the owner or operator.

(k) Other relevant factors.

(4) Public meeting. The owner or operator shall:

(a) Within thirty days of submitting the "corrective measures plan" to the director, place copies of the "ground water quality assessment report" and the "corrective measures plan" in the nearest public library, or other publicly accessible equivalent location, to the affected sanitary landfill facility. The owner or operator shall periodically revise and update the copies, but no later than the annual update of the operating record in accordance with rule 3745-27-09 of the Administrative Code. The copies shall be made available to the public until a remedy is selected by the director.

(b) Within sixty days of submitting the corrective measures plan to the director, discuss the results and content of the "ground water quality assessment report" and the "corrective measures plan" in a public meeting with interested and affected parties. The owner or operator shall provide adequate and reasonable public notice of the meeting, and the public meeting must be held at a place and time reasonably convenient to the interested and affected parties.

(c) Solicit public comment on the proposed "corrective measures plan." Any public comments received shall be placed in the operating record and submitted to the appropriate Ohio EPA district office and the approved health department.

(5) The director or his authorized representative may require the owner or operator to evaluate, as part of the corrective measures study, one or more specific potential remediation procedure(s).

(6) Interim corrective measures. If, at any time during the assessment described in

paragraphs (E) and (F) of this rule, the director determines that the facility threatens human health or safety or the environment, the director may require the owner or operator to implement the following measures:

(a) Notify all persons, via certified mail or any other form of mail accompanied by a receipt, who own the land or reside on the land that directly overlies or lies adjacent to any part of the plume of contamination;

(b) Take any interim measures deemed necessary by the director to ensure the protection of human health and safety and the environment. Interim measures should, to the extent practicable, be consistent with the objectives of and contribute to the performance of any remediation procedure that may be required pursuant to paragraphs (F)(1), (F)(2), (F)(3), and (F)(7) of this rule. The following factors may be considered by the director in determining whether interim measures are necessary:

(i) The amount of time required to develop and implement a final remediation procedure.

(ii) Actual or potential exposure of nearby populations or environmental receptors to waste-derived constituents.

(iii) Actual or potential contamination of drinking water supplies or sensitive ecosystems.

(iv) Any further degradation of the ground water that may occur if remedial action is not initiated expeditiously.

(v) Weather conditions that may cause waste-derived constituents to migrate or be released.

(vi) Risks of fire, explosion, or potential for exposure to waste-derived constituents as a result of an accident or failure of a container or handling system.

(vii) Other situations that threaten human health and the environment.

(7) Ground water remediation standards. The corrective measures plan shall propose a concentration level for each waste-derived constituent which has been detected in the ground water at a statistically significant level. These shall be established as follows:

(a) The proposed concentration levels in the ground water shall be protective of human health and safety AND the environment.

(b) Unless an alternate level is deemed necessary to protect environment receptors, then the following apply:

(i) For constituents for which a maximum contaminant level has been promulgated under section chapter 3745-81 of the Administrative Code, the maximum contaminant level for that constituent.

(ii) For constituents for which maximum contaminant levels have not been promulgated, the background concentration for the constituent from wells in accordance paragraphs (C)(4) and (C)(5) of this rule.

(iii) If the owner or operator can demonstrate to the director that a waste-derived constituent is already present in the ground water at a background level, then the proposed concentration levels shall not be set below background levels unless the director determines that cleanup to levels below background levels is necessary to protect human health and the environment and such cleanup is in connection with an area-wide remedial action under other

authorities.

(c) In establishing the proposed concentration levels that meet the requirements of paragraph (F)(7)(b) of this rule, the permittee shall consider the following:

(i) Multiple contaminants in the ground water.

(ii) Exposure threat to sensitive environmental receptors.

(iii) Other site-specific exposure or potential exposure to ground water.

(iv) The reliability, effectiveness, practicability, and other relevant factors of the remediation procedure.

(d) The director or his authorized representative may establish an alternative ground water remediation standard for constituents for which maximum contaminant levels have not been established. These ground water remediation standards shall be appropriate health based levels that satisfy the following criteria:

(i) The level is derived in a manner consistent with federal guidelines for assessing the health risks of environmental pollutants.

(ii) The level is based on scientifically valid studies conducted in accordance with standard laboratory practices.

(iii) For known or suspected carcinogens, the proposed concentration levels shall be established at concentration levels below those that represent a cumulative (due to lifetime exposure) excess upper-bound lifetime cancer risk to an individual within the 1 10-4 to 1 10-6 range.

(iv) For systematic toxicants, the proposed concentration levels shall be reduced to levels to which the human population (including sensitive subgroups) could be exposed on a daily basis without appreciable risk of deleterious effects during a lifetime. For the purposes of this rule, "systematic toxicants" include toxic chemicals that cause effects other than cancer or mutation.

(8) Determination that remediation is not necessary. The director may determine that remediation of a release of waste-derived constituents from the sanitary landfill facility is not necessary if the owner or operator demonstrates one of the following:

(a) The ground water is additionally contaminated by substances that have originated from a source other than the sanitary landfill facility and those substances are present in concentrations such that cleanup of the release from the sanitary landfill facility would provide no significant reduction in risk to actual or potential receptors.

(b) The constituent(s) present in ground water that:

(i) Is not currently or reasonably expected to be a source of drinking water; and

(ii) Is not hydraulically connected with waters to which the waste-derived constituent(s) are migrating or are likely to migrate in a concentration(s) that would exceed the ground water remediation standards established under paragraph (F)(7) of this rule.

(c) Remediation of release(s) is technically impractical.

(d) Remediation results in unacceptable cross-media impacts.

(9) A determination by the director pursuant to paragraph (F)(8) of this rule shall not affect the director's authority to require the owner or operator to undertake source control measures or other measures that may be necessary to eliminate or minimize further releases to ground water, to prevent exposure to ground water, or to remediate ground water to concentrations that are technically practicable and significantly reduce threats to human health and the environment.

(10) Selection of corrective measure. The director shall select from the corrective measures plan, or designate according to paragraph (F)(6) of this rule, the corrective measure which best meets the criteria listed in paragraphs (F)(2), (F)(3), and (F)(7) of this rule. The owner or operator shall implement the corrective measure designated by the director in accordance with the schedule of implementation selected by the director.

[COMMENT: Upon the selection of a corrective measure by the director, the owner/operator shall comply with the financial assurance requirements of rule 3745-27-18 of the Administrative Code.]

(11) Determination that corrective measure not technically practicable. The director may determine, based on information developed by the owner or operator after implementation of the remediation procedure has begun, or from other information, that compliance with the requirement(s) for the remediation procedure selected under paragraphs (F)(10) of this rule is not technically practicable. In making such a determination, the director shall consider the following:

(a) The owner's or operator's efforts to achieve compliance with the requirement(s).

(b) Whether other currently available or new methods or techniques could practicably achieve compliance with the requirements.

(12) Alternative measures. If the director determines that compliance with a remediation procedure requirement is not technically practicable, then the director may require that the owner or operator do the following:

(a) Implement alternate measures to control human or environmental receptor exposure to residual contamination, as necessary, to protect human health and safety and the environment.

(b) Implement alternate measures for control of the sources of contamination, or for removal or decontamination of equipment, units, devices, or structures required to implement the remediation procedure(s), that are both of the following:

(i) Technically practicable.

(ii) Consistent with the overall objective of the remediation procedure.

(13) All solid wastes that are managed pursuant to a remediation procedure required under paragraph (F)(10) of this rule, or an interim measure required under paragraph (F)(6) of this rule, shall be managed in a manner:

(a) That is protective of human health and the environment.

(b) That complies with applicable laws and regulations.

(14) Semiannual corrective measures activities report. The owner or operator shall submit to the appropriate Ohio EPA district office and the approved health department, upon

implementation of the remediation procedure chosen under paragraph (F)(10) of this rule, a report of the activities being conducted at the facility as part of implementation of the corrective measures program. Any documents or data previously submitted by the owner/operator during the semiannual period need not be submitted with the semiannual report. Previously submitted documents or data shall be referenced within the semiannual report as having been submitted. This report shall be submitted semiannually and contain the following:

(a) A narrative description of all remedial activities that have occurred since the previous report.

(b) All data generated as part of the remedial activities at the facility.

(15) Completion of corrective measures. The corrective measures selected pursuant to paragraph (F)(10) of this rule shall be considered complete when the following occurs:

(a) The owner or operator complies with the ground water remediation standards established under paragraph (F)(7) of this rule at all points within the plume of contamination that lie beyond the limits of waste placement.

(b) Compliance with the ground water remediation standards established under paragraph (F)(7) of this rule has been achieved by demonstrating semiannually via ground water monitoring that the contamination has not exceeded the ground water remediation standard (s) for a period of three years or until the end of the post-closure care period, whichever is longer, using the statistical procedures and performance standards in paragraphs (C)(6) and (C)(7) of this rule. The director may specify an alternative length of time during which the owner or operator shall demonstrate that the contamination has not exceeded the ground water protection standard(s) taking into account the following considerations:

(i) Extent and concentration of the contamination.

(ii) Behavior characteristics of the contamination in the ground water.

(iii) Accuracy of monitoring or modeling techniques, including any seasonal, meteorological, or other environmental variabilities that may affect the accuracy.

(iv) Characteristics of the ground water.

(c) All actions required to complete the corrective measure have been satisfied.

(16) Certification corrective measures completed. Upon completion of the corrective measure, the owner or operator shall certify within fourteen days to the director that the corrective measure has been completed in compliance with paragraph (F)(15) of this rule. The certification shall be signed by the owner or operator and a qualified ground water scientist. A copy of the certification shall be placed in the operating record. Upon approval by the director of the certification, the owner or operator shall be released from the financial assurance requirements for corrective measures under rule 3745-27-18 of the Administrative Code.

History

Eff 3-10-90; 6-1-94; 8-15-03

Rule promulgated under: RC Chapter RC Chapter 119.

Rule authorized by: RC R.C. 3734.02, R.C. 3734.12

Rule amplifies: RC RC Section 3734.02, RC Section 3734.12.

R.C. 119.032 review dates: June 21, 01; Aug 15, 2008

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OAC Ann. 3745-27-14

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3745 ENVIRONMENTAL PROTECTION AGENCY - ADMINISTRATION AND DIRECTOR
Chapter 3745-27 Solid Waste and Infectious Waste Regulations

OAC Ann. 3745-27-14 (Anderson 2006)

3745-27-14 Post-closure care of sanitary landfill facilities.

(A) Following completion of final closure activities in accordance with rule 3745-27-11 of the Administrative Code or following closure activities in accordance with paragraph (C) of rule 3745-27-10 of the Administrative Code, as effective July 29, 1976, and completed on or after the date three years prior March 1, 1990, the owner, operator, OR permittee shall conduct post-closure care activities at the sanitary landfill facility for a minimum of thirty years. The post-closure care period begins when the certification(s) required by paragraph (J) of rule 3745-27-11 of the Administrative Code have been submitted for all unit(s) of a sanitary landfill facility. Post-closure care activities for a sanitary landfill facility shall include, but are not limited to the following:

(1) Continuing operation and maintenance of the leachate management system, the surface water management system, any explosive gas extraction and/or control system, any explosive gas monitoring system, and the ground water monitoring system,

(2) Maintaining the integrity and effectiveness of the cap system, including making repairs to the cap system as necessary to correct the effects of settling, dead vegetation, subsidence, ponding, erosion, leachate outbreaks, or other events, and preventing run-on and runoff from eroding or otherwise damaging the cap system;

(3) Repairing any leachate outbreaks detected at the sanitary landfill facility by doing the following:

(a) Contain and properly manage the leachate at the sanitary landfill facility.

(b) If necessary, collect, treat, and dispose of the leachate, including, if necessary, following the contingency plan for leachate storage and disposal prepared pursuant to rule 3745-27-19 of the Administrative Code.

(c) Take action to minimize, control, or eliminate the conditions which contribute to the production of leachate.

(4) Quarterly inspection of a sanitary landfill facility during each year of the post-closure care period and submittal of a written summary to the appropriate Ohio EPA district office not later than fifteen days after the inspection date detailing the results of the inspection and a schedule of any actions to be taken to maintain compliance with paragraphs (A)(1) and (A)(2) of this rule;

(5) Fulfilling all monitoring and reporting requirements in accordance with rule 3745-27-10

of the Administrative Code for ground water, with rule 3745-27-12 of the Administrative Code for explosive gas. With Chapter 3745-76 of the Administrative Code for landfill emissions, and with any monitoring required by any orders or authorizing documents. the frequency of ground water detection monitoring sampling and analysis may be changed in accordance with paragraph (d)(6) of rule 3745-27-10 of the Administrative Code.

(6) Submitting a report to the appropriate Ohio EPA district office and approved health department and placing a copy into the operating record not later than the first day of April of each year, which contains the following:

(a) If a leachate collection system exists, a summary of the quantity of leachate collected for treatment and disposal on a monthly basis during the year, and the location of leachate treatment and/or disposal.

(b) If a leachate collection system exists, results of analytical testing of an annual grab sample of leachate for the parameters specified in appendix I of rule 3745-27-10 of the Administrative Code. The grab sample shall be obtained from the leachate management system.

(c) The most recent updated post-closurecost estimate adjusted for inflation and for any change in the post-closure cost estimate required by rule 3745-27-16 of the Administrative Code.

(7) Records and reports generated by paragraphs (A)(4) to (A)(6) of this rule are to be kept for the duration of the post-closure care period at a location where the records and reports are available for inspection by Ohio EPA or the approved health department during normal working hours. If the owner or operator has established an operating record, the records and reports shall be kept in the operating record in accordance with rule 3745-27-09 of the Administrative Code.

(B) Upon completion of the post-closure care period, the owner, operator, or shall submit to the director written certification that the sanitary landfill facility has completed post-closure activities in accordance with this rule and the "final closure/post-closure plan." based on such factors as the inspection or monitoring results or reports required by paragraphs (A)(4) and (A)(5) of this rule and whether human health or safety or the environment is or will be protected, the director may either discontinue or extend the post-closure care period. The certification shall be accompanied by documentation which demonstrates that all post-closure care activities have been completed. The certification shall be signed and sealed by a professional engineer registered in Ohio. The documentation shall include the following:

(1) A summary of changes to leachate quality and quantity.

(2) Rate of leachate generation and quantity of leachate in the landfill, with an explanation of how these figures were derived.

(3) A summary of any on-going ground water assessment or corrective measures.

(4) A summary of explosive gas migration and generation by the landfill.

(5) An assessment of the integrity and stability of the cap system if post-closure care activities cease.

[Comment: If the landfill shows an improvement to leachate quality, the quantity of leachate generated will not cause an outbreak or slope failure, that ground water monitoring is no longer needed, that it is not generating explosive gas which has the potential to migrate underground, and that the cap system will maintain its integrity and stability if post-closure

care activities cease, the director may release the owner, operator, or permittee from continuing post-closure care activities.]

(C) Upon the written request of the owner or operator of a noncontiguous unit(s) of a sanitary landfill facility, which has completed a minimum of thirty years of ground water detection monitoring in accordance with rule 3745-27-10 of the Administrative Code from the date the owner or operator submitted the written certification report pursuant to paragraph (j) of rule 3745-27-11 of the Administrative Code, the director may authorize discontinuance of ground water detection monitoring required by paragraph (a)(4) of this rule at the noncontiguous unit(s) prior to the end of the post-closure care period for the sanitary landfill facility, provided the following:

(1) The owner or operator is not implementing or required to implement a ground water quality assessment program or a corrective measures program pursuant to rule 3745-27-10 of the Administrative Code.

(2) The noncontiguous unit(s) are monitored separately for the purpose of ground water detection monitoring.

(D) The health commissioner and the director, or their authorized representatives, upon proper identification, may enter any closed sanitary landfill facility or closed noncontiguous unit(s) at any time during the post-closure care period for the purpose of determining compliance with this rule.

History

Eff 3-1-90; 6-1-94; 8-15-03

Rule promulgated under: RC Chapter Chapter 119.

Rule authorized by: RC 3734.02, 3734.12

Rule amplifies: RC 3734.02, 3734.12

R.C. 119.032 review date: 08-15-2003

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U.C.C. § 2-208

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ARTICLE 2. SALES
PART 2. FORM, FORMATION AND READJUSTMENT OF CONTRACT

U.C.C. § 2-208

§ 2-208. Course of Performance or Practical Construction.

(1) Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade (Section 1-205).

(3) Subject to the provisions of the next section on modification and waiver, such course of performance shall be relevant to show a waiver or modification of any term inconsistent with such course of performance.

NOTES:

Official Comment

Prior Uniform Statutory Provision: No such general provision but concept of this section recognized by terms such as "course of dealing", "the circumstances of the case," "the conduct of the parties," etc., in Uniform Sales Act.

Purposes:

1. The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was. This section thus rounds out the set of factors which determines the meaning of the "agreement" and therefore also of the "unless otherwise agreed" qualification to various provisions of this Article.

2. Under this section a course of performance is always relevant to determine the meaning of the agreement. Express mention of course of performance elsewhere in this Article carries no contrary implication when there is a failure to refer to it in other sections.

3. Where it is difficult to determine whether a particular act merely sheds light on the meaning of the agreement or represents a waiver of a term of the agreement, the preference is in favor of "waiver" whenever such construction, plus the application of the provisions on the reinstatement of rights waived (see Section 2-209), is needed to preserve the flexible character of commercial contracts and to prevent surprise or other hardship.

4. A single occasion of conduct does not fall within the language of this section but other sections such as the ones on silence after acceptance and failure to specify particular defects can affect the parties' rights on a single occasion (see Sections 2-605 and 2-607).

Cross References:

Point 1: Section 1-201.

Point 2: Section 2-202.

Point 3: Sections 2-209, 2-601 and 2-607.

Point 4: Sections 2-605 and 2-607.

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GENERAL LAWS

OF THE

ONE HUNDRED SEVENTEENTH GENERAL ASSEMBLY

Concluded

(Amended Substitute House Bill Number 592)

AN ACT

To amend sections 102.03, 133.01, 133.05, 133.06, 343.01, 343.02, 343.04 to 343.08, 343.99, 505.12, 505.27, 1502.04, 1502.05, 3707.39, 3707.40, 3707.42, 3734.01, 3734.02, 3734.021, 3734.022, 3734.04, 3734.05, 3734.06, 3734.07, 3734.08, 3734.09, 3734.10, 3734.101, 3734.11, 3734.12, 3734.13, 3734.18, 3734.31, 3734.99, and 3745.11; to enact new section 343.03 and sections 343.011, 3734.131, 3734.132, 3734.40 to 3734.47, and 3734.50 to 3734.57; and to repeal section 343.03 of the Revised Code and to amend Sections 13 and 36 of Am. Sub. H.B. 171 of the 117th General Assembly to require the Director of Environmental Protection to adopt rules governing closure and post-closure care of solid waste facilities; to authorize the Director to adopt rules governing financial responsibility of owners and operators of solid waste facilities; to increase solid waste facility permit and license fees; to require permits to install and licenses for transfer facilities; to levy fees on the disposal of solid wastes; to require the Director to adopt a state solid waste management plan; to require that certain persons consent to service of civil and criminal process before transporting or disposing of solid wastes, infectious solid wastes, or hazardous waste from outside this state to or at a facility in this state; to prohibit disposal within this state of solid wastes generated outside the boundaries of this state, unless the Governor has issued a waiver authorizing disposal of such wastes within this state;

The above boxed text was disapproved June 24, 1988, by Governor Celeste.

T

05, 133.06, 343.01,
505.12, 505.27,
3707.42, 3734.01,
734.04, 3734.05,
3734.10, 3734.101,
3734.31, 3734.99,
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1988, by Governor Celeste.

to require the preparation and implementation of county or joint county solid waste management plans; to require that after all county and joint solid waste management plans are in effect at least one-half of all litter prevention and recycling grants be made to county and joint county solid waste management districts for the purpose of recycling; to prohibit former public officials and employees who exercised substantial administrative discretion in administering or enforcing Chapter 343. or 3734. of the Revised Code from representing any person who is an applicant for or holder of a permit or license under Chapter 3734. of the Revised Code before any board, commission, or agency of the state or a political subdivision for twenty-four months after the end of their service as a public official or employee; to require background investigations by the Attorney General of applicants for and holders of solid waste facility permits and licenses and hazardous waste facility installation and operation permits; to establish regulatory fees for treatment and disposal of hazardous wastes generated outside the state at the higher of the rates applicable in the state where the waste is generated or the applicable rates of this state; to establish surcharges on regulatory fees for treatment and disposal of hazardous waste to fund local hazardous waste management programs; and to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 102.03, 133.01, 133.05, 133.06, 343.01, 343.02, 343.04, 343.05, 343.06, 343.07, 343.08, 343.99, 505.12, 505.27, 1502.04, 1502.05, 3707.39, 3707.40, 3707.42, 3734.01, 3734.02, 3734.021, 3734.022, 3734.04, 3734.05, 3734.06, 3734.07, 3734.08, 3734.09, 3734.10, 3734.101, 3734.11, 3734.12, 3734.13, 3734.18, 3734.31, 3734.99, and 3745.11 be amended and new section 343.03 and sections 343.011, 3734.131, 3734.132, 3734.40, 3734.41, 3734.42, 3734.43, 3734.44, 3734.45,

3734.46, 3734.47, 3734.50, 3734.51, 3734.52, 3734.53, 3734.54, 3734.55, 3734.56, and 3734.57 of the Revised Code be enacted to read as follows:

Sec. 102.03. (A) No present or former public official or employee shall, during his public employment or service or for twelve months thereafter, represent a client or act in a representative capacity for any person on any matter in which he personally participated as a public official or employee through decision, approval, disapproval, recommendation, the rendering of advice, investigation, or other substantial exercise of administrative discretion. For twenty-four months after the conclusion of his service, a former commissioner or attorney examiner of the public utilities commission may not represent a public utility, as defined in section 4905.02 of the Revised Code, or act in a representative capacity on behalf of such a utility before any state board, commission, or agency. FOR TWENTY-FOUR MONTHS AFTER THE CONCLUSION OF HIS SERVICE, NO FORMER PUBLIC OFFICIAL OR EMPLOYEE WHO PARTICIPATED AS A PUBLIC OFFICIAL OR EMPLOYEE THROUGH DECISION, APPROVAL, DISAPPROVAL, RECOMMENDATION, THE RENDERING OF ADVICE, THE DEVELOPMENT OR ADOPTION OF SOLID WASTE MANAGEMENT PLANS, INVESTIGATION, INSPECTION, OR OTHER SUBSTANTIAL EXERCISE OF ADMINISTRATIVE DISCRETION UNDER CHAPTER 343. OR 3734. OF THE REVISED CODE SHALL REPRESENT A PERSON WHO IS THE OWNER OR OPERATOR OF A FACILITY, AS DEFINED IN SECTION 3734.01 OF THE REVISED CODE, OR WHO IS AN APPLICANT FOR A PERMIT OR LICENSE FOR A FACILITY UNDER THAT CHAPTER, OR SHALL ACT IN A REPRESENTATIVE CAPACITY ON BEHALF OF ANY SUCH PERSON BEFORE ANY BOARD, COMMISSION, OR AGENCY OF THE STATE OR A POLITICAL SUBDIVISION. As used in this division, "matter" includes any case, proceeding, application, determination, issue, or question, but does not include the proposal, consideration, or enactment of statutes, rules, ordinances, resolutions, or charter or constitutional amendments. As used in this division, "represent" includes any formal or informal appearance before, or any written or oral communication with, any public agency on behalf of any person. Nothing contained in this division shall prohibit, during such period, a former public official or employee from being retained or employed to represent, assist, or act in a representative capacity for the public agency by which he was employed or on which he served. This division shall not be construed to prohibit the performance of ministerial functions, including, but not limited to, the filing or amendment of tax returns, applications for permits and licenses, incorporation papers, and other similar documents.

(B) No present or former public official or employee shall disclose or use, without appropriate authorization, any information acquired by him in the course of his official duties which is confidential because of statutory provisions, or which has been clearly designated to him as confidential when such confidential designation is warranted because of the status of the proceedings or the circumstances under which the information was

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(c) EACH APPLICATION FOR A PERMIT UNDER DIVISION (A)(2) (a) OR (b) OF THIS SECTION SHALL BE ACCOMPANIED BY A NONREFUNDABLE APPLICATION FEE OF FOUR HUNDRED DOLLARS THAT SHALL BE CREDITED TO THE GENERAL REVENUE FUND. EACH APPLICATION FOR AN ANNUAL LICENSE UNDER DIVISION (A)(1) OR (2) OF THIS SECTION SHALL BE ACCOMPANIED BY A NONREFUNDABLE APPLICATION FEE OF ONE HUNDRED DOLLARS. IF THE APPLICATION FOR AN ANNUAL LICENSE IS SUBMITTED TO A BOARD OF HEALTH ON THE APPROVED LIST UNDER SECTION 3734.08 OF THE REVISED CODE, THE APPLICATION FEE SHALL BE CREDITED TO THE SPECIAL FUND OF THE HEALTH DISTRICT CREATED IN DIVISION (B) OF SECTION 3734.06 OF THE REVISED CODE. IF THE APPLICATION FOR AN ANNUAL LICENSE IS SUBMITTED TO THE DIRECTOR, THE APPLICATION FEE SHALL BE CREDITED TO THE GENERAL REVENUE FUND. IF A PERMIT OR LICENSE IS ISSUED, THE AMOUNT OF THE APPLICATION FEE PAID SHALL BE DEDUCTED FROM THE AMOUNT OF THE PERMIT FEE DUE UNDER DIVISION (F) OF SECTION 3745.11 OF THE REVISED CODE OR THE AMOUNT OF THE LICENSE FEE DUE UNDER DIVISION (A)(1), (2), (3), OR (4) OF SECTION 3734.06 OF THE REVISED CODE.

(3) UNLESS THE OWNER OR OPERATOR OF ANY SOLID WASTE OR DISPOSAL FACILITY, OTHER THAN A SOLID WASTE TRANSFER FACILITY, THAT COMMENCED OPERATION ON OR BEFORE JULY 1, 1968, HAS OBTAINED AN EXEMPTION FROM THE REQUIREMENTS OF DIVISION (A)(3) OF THIS SECTION IN ACCORDANCE WITH DIVISION (G) OF SECTION 3734.02 OF THE REVISED CODE, HE SHALL SUBMIT TO THE DIRECTOR AN APPLICATION FOR A PERMIT WITH ACCOMPANYING ENGINEERING DETAIL PLANS, SPECIFICATIONS, AND INFORMATION REGARDING THE FACILITY AND ITS METHOD OF OPERATION FOR APPROVAL UNDER RULES ADOPTED UNDER DIVISION (A) OF SECTION 3734.02 OF THE REVISED CODE AND APPLICABLE RULES ADOPTED UNDER DIVISION (D) OF SECTION 3734.12 OF THE REVISED CODE IN ACCORDANCE WITH THE FOLLOWING SCHEDULE:

(a) NOT LATER THAN THREE MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN THE CITY OF GARFIELD HEIGHTS OR PARMA IN CUYAHOGA COUNTY;

(b) NOT LATER THAN SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN DELAWARE, GREENE, GUERNSEY, HAMILTON, MADISON, MAHONING, OTTAWA, OR VINTON COUNTY;

(c) NOT LATER THAN NINE MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN CHAMPAIGN, CLINTON, COLUMBIANA, HURON, PAULDING, STARK, OR WASHINGTON COUNTY, OR IS LOCAT-

ED IN THE CITY OF BROOKLYN OR CUYAHOGA HEIGHTS, IN CUYAHOGA COUNTY;

(d) NOT LATER THAN TWELVE MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN ADAMS, AUGLAIZE, COSHOCTON, DARKE, HARRISON, LORAIN, LUCAS, OR SUMMIT COUNTY OR IS LOCATED IN CUYAHOGA COUNTY OUTSIDE THE CITIES OF GARFIELD HEIGHTS, PARMA, BROOKLYN, AND CUYAHOGA HEIGHTS;

(e) NOT LATER THAN FIFTEEN MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN BUTLER, CARROLL, ERIE, LAKE, PORTAGE, PUTNAM, OR ROSS COUNTY;

(f) NOT LATER THAN EIGHTEEN MONTHS AFTER THE EFFECTIVE DATE OF THIS AMENDMENT, IF THE FACILITY IS LOCATED IN A COUNTY NOT LISTED IN DIVISIONS (A)(3)(a) TO (d) OF THIS SECTION;

(g) NOTWITHSTANDING DIVISIONS (A)(3) (a) TO (f) OF THIS SECTION, NOT LATER THAN DECEMBER 31, 1990, IF THE FACILITY IS A SOLID WASTE FACILITY OWNED BY A GENERATOR OF SOLID WASTES WHEN THE SOLID WASTE FACILITY EXCLUSIVELY DISPOSES OF SOLID WASTES GENERATED AT ONE OR MORE PREMISES OWNED BY THE GENERATOR REGARDLESS OF WHETHER THE FACILITY IS LOCATED ON A PREMISES WHERE THE WASTES ARE GENERATED AND IF THE FACILITY DISPOSES OF MORE THAN ONE HUNDRED THOUSAND TONS OF SOLID WASTES PER YEAR, PROVIDED THAT ANY SUCH FACILITY SHALL BE SUBJECT TO DIVISION (A)(5) OF THIS SECTION.

(4) UNLESS THE OWNER OR OPERATOR OF ANY SOLID WASTE FACILITY FOR WHICH A PERMIT WAS ISSUED AFTER JULY 1, 1968, BUT BEFORE JANUARY 1, 1980, HAS OBTAINED AN EXEMPTION FROM THE REQUIREMENTS OF DIVISION (A)(4) OF THIS SECTION UNDER DIVISION (G) OF SECTION 3734.02 OF THE REVISED CODE, HE SHALL SUBMIT TO THE DIRECTOR AN APPLICATION FOR A PERMIT WITH ACCOMPANYING ENGINEERING DETAIL PLANS, SPECIFICATIONS, AND INFORMATION REGARDING THE FACILITY AND ITS METHOD OF OPERATION FOR APPROVAL UNDER THOSE RULES.

(5) THE DIRECTOR MAY ISSUE AN ORDER IN ACCORDANCE WITH CHAPTER 3745. OF THE REVISED CODE TO THE OWNER OR OPERATOR OF A SOLID WASTE FACILITY REQUIRING THE PERSON TO SUBMIT TO THE DIRECTOR UPDATED ENGINEERING DETAIL PLANS, SPECIFICATIONS, AND INFORMATION REGARDING THE FACILITY AND ITS METHOD OF OPERATION FOR APPROVAL UNDER RULES ADOPTED UNDER DIVISION (A) OF SECTION 3734.02 OF THE REVISED CODE AND APPLICABLE RULES ADOPTED UNDER DIVISION (D) OF SECTION 3734.12 OF THE REVISED CODE, IF, IN THE DIRECTOR

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JUDGMENT, CONDITIONS AT THE FACILITY CONSTITUTE A SUBSTANTIAL THREAT TO PUBLIC HEALTH OR SAFETY OR ARE CAUSING OR CONTRIBUTING TO OR THREATENING TO CAUSE OR CONTRIBUTE TO AIR OR WATER POLLUTION OR SOIL CONTAMINATION. ANY PERSON WHO RECEIVES SUCH AN ORDER SHALL SUBMIT THE UPDATED ENGINEERING DETAIL PLANS, SPECIFICATIONS, AND INFORMATION TO THE DIRECTOR WITHIN ONE HUNDRED EIGHTY DAYS AFTER THE EFFECTIVE DATE OF THE ORDER.

(6) THE DIRECTOR SHALL ACT UPON AN APPLICATION SUBMITTED UNDER DIVISION (A)(3) OR (4) OF THIS SECTION AND ANY UPDATED ENGINEERING PLANS, SPECIFICATIONS, AND INFORMATION SUBMITTED UNDER DIVISION (A)(5) OF THIS SECTION WITHIN ONE HUNDRED EIGHTY DAYS AFTER RECEIVING THEM. IF THE DIRECTOR DENIES ANY SUCH PERMIT APPLICATION HE SHALL INCLUDE IN THE ORDER DENYING THE APPLICATION OR DISAPPROVING THE PLANS THE REQUIREMENTS THAT THE OWNER OR OPERATOR SUBMIT A PLAN FOR CLOSURE AND POST-CLOSURE CARE OF THE FACILITY TO THE DIRECTOR FOR APPROVAL WITHIN SIX MONTHS AFTER ISSUANCE OF THE ORDER, CEASE ACCEPTING SOLID WASTES FOR DISPOSAL OR TRANSFER AT THE FACILITY, AND COMMENCE CLOSURE OF THE FACILITY NOT LATER THAN ONE YEAR AFTER ISSUANCE OF THE ORDER. IF THE DIRECTOR DETERMINES THAT CLOSURE OF THE FACILITY WITHIN THAT ONE-YEAR PERIOD WOULD RESULT IN THE UNAVAILABILITY OF SUFFICIENT SOLID WASTE MANAGEMENT FACILITY CAPACITY WITHIN THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT IN WHICH THE FACILITY IS LOCATED TO DISPOSE OF OR TRANSFER THE SOLID WASTE GENERATED WITHIN THE DISTRICT, HE MAY IN HIS ORDER OF DENIAL OR DISAPPROVAL POSTPONE COMMENCEMENT OF CLOSURE OF THE FACILITY FOR SUCH PERIOD OF TIME AS HE FINDS NECESSARY FOR THE BOARD OF COUNTY COMMISSIONERS OR DIRECTORS OF THE DISTRICT TO SECURE ACCESS TO OR FOR THERE TO BE CONSTRUCTED WITHIN THE DISTRICT SUFFICIENT SOLID WASTE MANAGEMENT FACILITY CAPACITY TO MEET THE NEEDS OF THE DISTRICT, PROVIDED THAT THE DIRECTOR SHALL CERTIFY IN HIS ORDER THAT POSTPONING THE DATE FOR COMMENCEMENT OF CLOSURE WILL NOT ENDANGER GROUND WATER OR ANY PROPERTY SURROUNDING THE FACILITY, ALLOW METHANE GAS MIGRATION TO OCCUR, OR CAUSE OR CONTRIBUTE TO ANY OTHER TYPE OF ENVIRONMENTAL DAMAGE.

IF AN EMERGENCY NEED FOR DISPOSAL CAPACITY THAT MAY AFFECT PUBLIC HEALTH AND SAFETY EXISTS AS A RESULT OF CLOSURE OF A FACILITY UNDER DIVISION (A)(6) OF THIS SECTION, THE DIRECTOR MAY ISSUE AN ORDER DES-

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STATE SOLID WASTE MANAGEMENT PLAN AND PERIODIC REVISIONS TO THE PLAN UNDER SECTION 3734.50 OF THE REVISED CODE;

(B) APPROVE OR DISAPPROVE THE DRAFT STATE SOLID WASTE MANAGEMENT PLAN AND PERIODIC REVISIONS PRIOR TO ADOPTION OF THE PLAN UNDER SECTION 3734.50 OF THE REVISED CODE;

(C) ANNUALLY REVIEW IMPLEMENTATION OF THE STATE SOLID WASTE MANAGEMENT PLAN AND THE SOLID WASTE MANAGEMENT PLANS OF COUNTY AND JOINT SOLID WASTE MANAGEMENT DISTRICTS APPROVED UNDER DIVISION (E) OF SECTION 3734.55 OF THE REVISED CODE OR ORDERED TO BE IMPLEMENTED UNDER DIVISION (D)(2) OF THAT SECTION OR AMENDMENTS TO THOSE PLANS APPROVED OR ORDERED TO BE IMPLEMENTED UNDER SECTION 3734.56 OF THE REVISED CODE, AND REPORT ITS FINDINGS TO THE DIRECTOR.

Sec. 3734.52. (A) IN ORDER TO PREPARE, ADOPT, SUBMIT, AND IMPLEMENT A SOLID WASTE MANAGEMENT PLAN THAT COMPLIES WITH SECTION 3734.55 OF THE REVISED CODE, THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY SHALL EITHER ESTABLISH AND MAINTAIN A SOLID WASTE MANAGEMENT DISTRICT UNDER CHAPTER 343. OF THE REVISED CODE, OR PARTICIPATE IN ESTABLISHING AND MAINTAINING A JOINT SOLID WASTE MANAGEMENT DISTRICT WITH ONE OR MORE OTHER SUCH BOARDS UNDER THAT CHAPTER, IN COMPLIANCE WITH DIVISION (B) OF THIS SECTION. ALL OF THE INCORPORATED AND UNINCORPORATED TERRITORY OF THE COUNTY SHALL BE UNDER THE JURISDICTION OF THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT FOR THE PURPOSES OF PREPARING, ADOPTING, SUBMITTING, AND IMPLEMENTING THE SOLID WASTE MANAGEMENT PLAN FOR THE COUNTY OR JOINT DISTRICT AND FOR THE PURPOSES OF PROVIDING FOR, OR CAUSING TO BE PROVIDED FOR, THE SAFE AND SANITARY MANAGEMENT OF SOLID WASTES WITHIN ALL OF THE INCORPORATED AND UNINCORPORATED TERRITORY OF THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT.

(B) NOT LATER THAN NINE MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY SHALL DO ONE OF THE FOLLOWING:

(1) ESTABLISH A COUNTY SOLID WASTE MANAGEMENT DISTRICT UNDER CHAPTER 343. OF THE REVISED CODE;

(2) WITH THE BOARDS OF COUNTY COMMISSIONERS OF ONE OR MORE OTHER COUNTIES, ESTABLISH A JOINT SOLID WASTE MANAGEMENT DISTRICT UNDER THAT CHAPTER. UPON ADOPTION OF THE RESOLUTION ESTABLISHING A

COUNTY DISTRICT, OR UPON ENTERING INTO AN AGREEMENT WITH ONE OR MORE OTHER SUCH BOARDS TO ESTABLISH A JOINT DISTRICT, THE BOARD OF COUNTY COMMISSIONERS SHALL MAIL A COPY OF THE RESOLUTION OR AGREEMENT TO THE DIRECTOR OF ENVIRONMENTAL PROTECTION. EACH COUNTY AND JOINT GARBAGE AND REFUSE DISPOSAL DISTRICT SHALL HAVE A POPULATION OF NOT LESS THAN ONE HUNDRED TWENTY THOUSAND UNLESS AN EXEMPTION HAS BEEN GRANTED UNDER DIVISION (C)(1) OR (2) OF THIS SECTION.

(C)(1) THE BOARD OF COUNTY COMMISSIONERS OF A COUNTY WITH A POPULATION OF FEWER THAN ONE HUNDRED TWENTY THOUSAND IN WHICH ONE OR MORE SOLID WASTE FACILITIES ARE LOCATED THAT HAVE SUFFICIENT REMAINING CAPACITY TO DISPOSE OF ALL SOLID WASTES GENERATED WITHIN THE COUNTY, OR THAT HAS ENTERED INTO A FIRM AGREEMENT THAT PROVIDES FOR THE DISPOSAL OF ALL SOLID WASTES GENERATED WITHIN THE COUNTY WHETHER WITHIN OR OUTSIDE THE COUNTY OR STATE, FOR A PERIOD OF NOT LESS THAN TEN YEARS AFTER THE EFFECTIVE DATE OF THIS SECTION MAY APPLY TO THE DIRECTOR FOR AN EXEMPTION FROM THE REQUIREMENT UNDER DIVISION (B) OF THIS SECTION THAT EACH DISTRICT HAVE A POPULATION OF AT LEAST ONE HUNDRED TWENTY THOUSAND. THE EXEMPTION APPLICATION SHALL BE ACCOMPANIED BY THE BOARD'S CERTIFICATION AND DEMONSTRATION OF ACCESS TO SUFFICIENT SOLID WASTE MANAGEMENT FACILITY CAPACITY TO PROVIDE FOR THE DISPOSAL OF THE SOLID WASTES GENERATED IN THE COUNTY DURING THAT TEN-YEAR PERIOD.

IF THE DIRECTOR FINDS THAT THE BOARD HAS MADE THE DEMONSTRATION REQUIRED BY THIS DIVISION, HE SHALL ISSUE AN ORDER UNDER DIVISION (G) OF SECTION 3734.02 OF THE REVISED CODE EXEMPTING THE BOARD FROM THAT REQUIREMENT OF DIVISION (B) OF THIS SECTION.

(2) THE BOARD OF COUNTY COMMISSIONERS OF A COUNTY WITH A POPULATION OF LESS THAN ONE HUNDRED TWENTY THOUSAND THAT DOES NOT HAVE SUFFICIENT SOLID WASTE MANAGEMENT FACILITY CAPACITY WITHIN THE COUNTY OR ACCESS TO SUFFICIENT CAPACITY BY CONTRACT TO MAKE THE DEMONSTRATIONS REQUIRED BY DIVISION (C)(1) OF THIS SECTION MAY, NOT LATER THAN SIX MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION, SUBMIT TO THE DIRECTOR A STATEMENT OF HOW THE BOARD WILL PROVIDE FOR SUFFICIENT SOLID WASTE FACILITY CAPACITY WITHIN THE COUNTY OR FOR ACCESS TO SUFFICIENT SOLID WASTE MANAGEMENT FACILITY CAPACITY TO DISPOSE OF ALL SOLID WASTES GENERATED WITHIN THE COUNTY DURING THE SUBSEQUENT TEN-YEAR

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PERIOD. THE STATEMENT SHALL BE ACCOMPANIED BY A STUDY OF THE FINANCIAL FEASIBILITY OF THE MEASURES PROPOSED IN THE STATEMENT THAT SHALL CONTAIN AN INVENTORY OF ALL EXISTING SOLID WASTE DISPOSAL, TRANSFER, AND RESOURCE RECOVERY FACILITIES AND RECYCLING ACTIVITIES IN THE COUNTY AND ESTIMATES OF THE REMAINING CAPACITY AVAILABLE AT EACH SUCH FACILITY; ESTIMATES OF THE AMOUNTS OF SOLID WASTES THAT WILL BE GENERATED WITHIN THE COUNTY DURING EACH YEAR OF THE SUBSEQUENT TEN-YEAR PERIOD; AN IDENTIFICATION OF THE ADDITIONAL SOLID WASTE MANAGEMENT FACILITIES AND CAPACITY THE COUNTY INTENDS TO PROVIDE TO DISPOSE OF THOSE ESTIMATED AMOUNTS OF SOLID WASTES; AND A SCHEDULE FOR IMPLEMENTATION OF THE MEASURES PROPOSED IN THE STATEMENT AND ESTIMATES OF THE CAPITAL AND OPERATING COSTS, AND RATES THAT WILL BE CHARGED TO MEET THOSE COSTS, FOR THOSE ADDITIONAL FACILITIES, OR CONTRACTS FOR ACCESS TO SOLID WASTE MANAGEMENT FACILITY CAPACITY, IDENTIFIED IN THE STUDY. WITHIN SIXTY DAYS AFTER RECEIVING THE STATEMENT AND FINANCIAL FEASIBILITY STUDY FROM ANY SUCH BOARD OF COUNTY COMMISSIONERS, THE DIRECTOR SHALL APPROVE OR DISAPPROVE THE STATEMENT AND STUDY. THE DIRECTOR SHALL APPROVE SUCH A STATEMENT AND FINANCIAL FEASIBILITY STUDY ONLY IF THEY DEMONSTRATE A TECHNICALLY AND ECONOMICALLY FEASIBLE MEANS OF PROVIDING FOR THE ENVIRONMENTALLY SOUND MANAGEMENT OF SOLID WASTES GENERATED IN THE COUNTY DURING THE SUBSEQUENT TEN-YEAR PERIOD. IF THE DIRECTOR APPROVES THE STATEMENT AND FINANCIAL FEASIBILITY STUDY OF A COUNTY, HE SHALL ISSUE AN ORDER UNDER DIVISION (G) OF SECTION 3734.02 OF THE REVISED CODE EXEMPTING THE BOARD FROM THE REQUIREMENT OF DIVISION (B) OF THIS SECTION THAT EACH COUNTY OR JOINT DISTRICT HAVE A POPULATION OF AT LEAST ONE HUNDRED TWENTY THOUSAND.

(D) UPON EXPIRATION OF THE NINE-MONTH PERIOD UNDER DIVISION (B) OF THIS SECTION, THE DIRECTOR SHALL DETERMINE WHICH COUNTIES EITHER FAILED TO SUBMIT A COPY OF THE RESOLUTION OR AGREEMENT REQUIRED BY THAT DIVISION OR, FOR THOSE THAT FILED A RESOLUTION OR AGREEMENT, WHICH OF THEM EITHER FAILED TO ESTABLISH A COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT HAVING A POPULATION OF AT LEAST ONE HUNDRED TWENTY THOUSAND OR TO OBTAIN AN EXEMPTION ORDER UNDER DIVISION (C)(1) OR (2) OF THIS SECTION. WITHIN TWELVE MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE DIRECTOR SHALL ISSUE TO THE BOARD OF

MAY REQUEST THE SOLID WASTE MANAGEMENT POLICY COMMITTEE OF THE DISTRICT TO PREPARE AND ADOPT AMENDMENTS TO ANY PROVISIONS OF THE DISTRICT'S PLAN REQUIRED TO BE INCLUDED UNDER DIVISION (B) OF SECTION 3734.53 OF THE REVISED CODE AT ANY TIME AND WITHOUT THE NECESSITY OF OBTAINING APPROVAL OF ANY SUCH AMENDMENTS FROM THE DIRECTOR. THE COMMITTEE SHALL ADOPT A RESOLUTION SETTING FORTH THE PROPOSED AMENDMENTS TO THE PLAN AND SHALL PROCEED IN ACCORDANCE WITH DIVISION (B) OF SECTION 3734.57 OF THE REVISED CODE TO CONDUCT A PUBLIC HEARING ON THE PROPOSED AMENDMENTS AND OBTAIN THEIR APPROVAL AND RATIFICATION.

Sec. 3734.57. (A) FOR THE PURPOSES OF PAYING THE STATE'S LONG-TERM OPERATION COSTS OR MATCHING SHARE FOR ACTIONS TAKEN UNDER THE "COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT OF 1980," 94 STAT. 2767, 42 U.S.C.A. 9601, AS AMENDED; PAYING THE COSTS OF MEASURES FOR PROPER CLEANUP OF SITES WHERE POLYCHLORINATED BIPHENYLS AND SUBSTANCES, EQUIPMENT, AND DEVICES CONTAINING OR CONTAMINATED WITH POLYCHLORINATED BIPHENYLS HAVE BEEN STORED OR DISPOSED OF; PAYING THE COSTS OF CONDUCTING SURVEYS OR INVESTIGATIONS OF SOLID WASTE FACILITIES OR OTHER LOCATIONS WHERE IT IS BELIEVED THAT SIGNIFICANT QUANTITIES OF HAZARDOUS WASTE WERE DISPOSED OF AND FOR CONDUCTING ENFORCEMENT ACTIONS ARISING FROM THE FINDINGS OF SUCH SURVEYS OR INVESTIGATIONS; AND FOR PAYING THE COSTS OF ACQUIRING AND CLEANING UP, OR PROVIDING FINANCIAL ASSISTANCE FOR CLEANING UP, ANY HAZARDOUS WASTE FACILITY OR SOLID WASTE FACILITY CONTAINING SIGNIFICANT QUANTITIES OF HAZARDOUS WASTE, THAT CONSTITUTES AN IMMINENT AND SUBSTANTIAL THREAT TO PUBLIC HEALTH OR SAFETY OR THE ENVIRONMENT, THE FOLLOWING FEE OF

(1) ON THE DISPOSAL OF SOLID WASTES AT A SOLID WASTE DISPOSAL FACILITY LOCATED IN THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT WHERE THE WASTES ARE GENERATED:

(a) FIFTY CENTS PER TON ON THE EFFECTIVE DATE OF THIS SECTION;

(b) SIXTY CENTS PER TON TWELVE MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION;

(c) SEVENTY CENTS PER TON TWENTY-FOUR MONTHS AFTER THE EFFECTIVE DATE OF THIS SECTION.

(2) ON THE DISPOSAL OF SOLID WASTES GENERATED OUTSIDE THE BOUNDARIES OF THE COUNTY OR JOINT SOLID

DESCRIPTION OF WHY THE EXTENSION IS REQUESTED, THE DIRECTOR HAS RECEIVED THE REQUEST NOT LATER THAN THE DAY ON WHICH THE RETURN IS REQUIRED TO BE FILED, AND THE DIRECTOR HAS APPROVED THE REQUEST. IF THE FEES ARE NOT REMITTED WITHIN SIXTY DAYS OF THE LAST DAY OF THE MONTH DURING WHICH THEY WERE COLLECTED, THE OWNER OR OPERATOR SHALL PAY AN ADDITIONAL FIFTY PER CENT OF THE AMOUNT OF THE FEES FOR EACH MONTH THAT THEY ARE LATE.

ONE-HALF OF THE MONEYS REMITTED TO THE DIRECTOR UNDER THIS DIVISION SHALL BE CREDITED TO THE HAZARDOUS WASTE FACILITY MANAGEMENT FUND CREATED IN SECTION 3734.18 OF THE REVISED CODE, AND ONE-HALF SHALL BE CREDITED TO THE HAZARDOUS WASTE CLEAN-UP FUND CREATED IN SECTION 3734.28 OF THE REVISED CODE.

(B) FOR THE PURPOSE OF PREPARING, REVISING, AND IMPLEMENTING THE SOLID WASTE MANAGEMENT PLANS OF COUNTY AND JOINT SOLID WASTE MANAGEMENT DISTRICTS, INCLUDING, WITHOUT LIMITATION, THE DEVELOPMENT AND IMPLEMENTATION OF SOLID WASTE RECYCLING OR REDUCTION PROGRAMS; PROVIDING FINANCIAL ASSISTANCE TO BOARDS OF HEALTH WITHIN THE DISTRICT IN WHICH SOLID WASTE FACILITIES ARE LOCATED FOR THE ENFORCEMENT OF SECTIONS 3734.01 TO 3734.13 OF THE REVISED CODE AND RULES ADOPTED AND ORDERS AND TERMS AND CONDITIONS OF PERMITS, LICENSES, AND VARIANCES ISSUED UNDER THOSE SECTIONS; PROVIDING FINANCIAL ASSISTANCE TO THE COUNTY TO DEFRAY THE ADDED COSTS OF MAINTAINING ROADS AND OTHER PUBLIC FACILITIES AND OF PROVIDING EMERGENCY AND OTHER PUBLIC SERVICES RESULTING FROM THE LOCATION AND OPERATION OF A SOLID WASTE FACILITY WITHIN THE COUNTY UNDER THE DISTRICT'S APPROVED SOLID WASTE MANAGEMENT PLAN; PAYING THE COSTS INCURRED BY BOARDS OF HEALTH FOR COLLECTING AND ANALYZING WATER SAMPLES FROM PUBLIC OR PRIVATE WELLS ON LANDS ADJACENT TO SOLID WASTE FACILITIES THAT ARE CONTAINED IN THE APPROVED OR AMENDED PLANS OF COUNTY OR JOINT DISTRICTS; AND PAYING THE COSTS OF DEVELOPING AND IMPLEMENTING A PROGRAM FOR THE INSPECTION OF SOLID WASTES GENERATED OUTSIDE THE BOUNDARIES OF THIS STATE THAT ARE DISPOSED OF AT SOLID WASTE FACILITIES INCLUDED IN THE DISTRICT'S APPROVED SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN, THE SOLID WASTE MANAGEMENT POLICY COMMITTEE OF A COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT MAY LEVY FEES UPON THE FOLLOWING ACTIVITIES:

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(1) THE DISPOSAL AT A SOLID WASTE DISPOSAL FACILITY LOCATED IN THE DISTRICT OF SOLID WASTES GENERATED WITHIN THE DISTRICT;

(2) THE DISPOSAL AT A SOLID WASTE DISPOSAL FACILITY WITHIN THE DISTRICT OF SOLID WASTES GENERATED OUTSIDE THE BOUNDARIES OF THE DISTRICT, BUT INSIDE THIS STATE;

(3) THE DISPOSAL AT A SOLID WASTE DISPOSAL FACILITY WITHIN THE DISTRICT OF SOLID WASTES GENERATED OUTSIDE THE BOUNDARIES OF THIS STATE.

IF SUCH FEES ARE LEVIED, FEES LEVIED UNDER DIVISION (B)(1) OF THIS SECTION SHALL ALWAYS BE EQUAL TO ONE-HALF OF THE FEES LEVIED UNDER DIVISION (B)(2) OF THIS SECTION, AND FEES LEVIED UNDER DIVISION (B)(3) OF THIS SECTION, WHICH SHALL BE IN ADDITION TO FEES LEVIED UNDER DIVISION (B)(2) OF THIS SECTION, SHALL ALWAYS BE EQUAL TO FEES LEVIED UNDER DIVISION (B)(1) OF THIS SECTION. THE SOLID WASTE MANAGEMENT PLAN OF THE COUNTY OR JOINT DISTRICT APPROVED UNDER SECTION 3734.55 OF THE REVISED CODE AND ANY AMENDMENTS TO IT, OR THE RESOLUTION ADOPTED UNDER THIS DIVISION, AS APPROPRIATE, SHALL ESTABLISH THE RATES OF THE FEES LEVIED UNDER DIVISIONS (B)(1), (2), AND (3) OF THIS SECTION, IF ANY, AND SHALL SPECIFY WHETHER THE FEES ARE LEVIED ON THE BASIS OF TONS OR CUBIC YARDS AS THE UNIT OF MEASUREMENT. ALTHOUGH THE FEE UNDER DIVISION (A) OF THIS SECTION IS LEVIED ON THE BASIS OF TONS AS THE UNIT OF MEASUREMENT, THE SOLID WASTE MANAGEMENT PLAN OF THE DISTRICT AND ANY AMENDMENTS TO IT OR THE SOLID WASTE MANAGEMENT POLICY COMMITTEE IN ITS RESOLUTION LEVYING FEES UNDER THIS DIVISION, MAY DIRECT THAT THE FEE LEVIED UNDER DIVISION (A) OF THIS SECTION BE LEVIED ON THE BASIS OF CUBIC YARDS AS THE UNIT OF MEASUREMENT BASED UPON A CONVERSION FACTOR OF THREE CUBIC YARDS PER TON GENERALLY OR ONE CUBIC YARD PER TON FOR BALED WASTES IF THE FEES UNDER DIVISIONS (B)(1) TO (3) OF THIS SECTION ARE BEING LEVIED ON THE BASIS OF CUBIC YARDS AS THE UNIT OF MEASUREMENT UNDER THE PLAN, AMENDED PLAN, OR RESOLUTION.

FEES LEVIED UNDER DIVISIONS (A) AND (B) OF THIS SECTION DO NOT APPLY TO SEWAGE SLUDGE THAT IS GENERATED BY A WASTE WATER TREATMENT FACILITY HOLDING A NATIONAL POLLUTION DISCHARGE ELIMINATION SYSTEM PERMIT AND THAT IS DISPOSED OF THROUGH INCINERATION, LAND APPLICATION, OR COMPOSTING OR AT ANOTHER RESOURCE OR DISPOSAL FACILITY THAT IS NOT A LANDFILL.

PRIOR TO THE APPROVAL OF THE SOLID WASTE MANAGEMENT PLAN OF THE DISTRICT UNDER SECTION 3734.55 OF THE REVISED CODE, THE SOLID WASTE MANAGEMENT POLICY COMMITTEE OF A DISTRICT MAY LEVY FEES UNDER THIS DIVISION BY ADOPTING A RESOLUTION ESTABLISHING THE PROPOSED AMOUNT OF THE FEES. UPON ADOPTING THE RESOLUTION, THE COMMITTEE SHALL MAIL A COPY OF THE RESOLUTION TO THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY FORMING THE DISTRICT AND TO THE LEGISLATIVE AUTHORITY OF EACH MUNICIPAL CORPORATION AND TOWNSHIP HAVING TERRITORY WITHIN THE DISTRICT AND SHALL PREPARE AND PUBLISH THE RESOLUTION AND A NOTICE OF THE TIME AND LOCATION WHERE A PUBLIC HEARING ON THE FEES WILL BE HELD. THE PUBLICATION SHALL OCCUR AT LEAST THIRTY DAYS BEFORE THE HEARING. AFTER THE HEARING, THE COMMITTEE MAY MAKE SUCH REVISIONS TO THE PROPOSED FEES AS IT CONSIDERS APPROPRIATE AND SHALL THEREAFTER, BY RESOLUTION, ADOPT THE REVISED FEE SCHEDULE. UPON ADOPTING THE REVISED FEE SCHEDULE, THE COMMITTEE SHALL MAIL A COPY OF THE RESOLUTION DOING SO TO THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY FORMING THE DISTRICT AND TO THE LEGISLATIVE AUTHORITY OF EACH MUNICIPAL CORPORATION AND TOWNSHIP HAVING TERRITORY WITHIN THE DISTRICT. WITHIN SIXTY DAYS AFTER THE MAILING OF A COPY OF THE RESOLUTION ADOPTING THE PROPOSED REVISED FEES BY THE POLICY COMMITTEE, EACH SUCH BOARD AND LEGISLATIVE AUTHORITY SHALL, BY ORDINANCE OR RESOLUTION, APPROVE OR DISAPPROVE THE REVISED FEES AND MAIL A COPY OF THE ORDINANCE OR RESOLUTION TO THE COMMITTEE. IF ANY SUCH BOARD OR LEGISLATIVE AUTHORITY FAILS TO ADOPT AND MAIL TO THE POLICY COMMITTEE AN ORDINANCE OR RESOLUTION APPROVING OR DISAPPROVING THE REVISED FEES WITHIN SIXTY DAYS AFTER THE POLICY COMMITTEE MAILED ITS RESOLUTION ADOPTING THE PROPOSED REVISED FEES, IT SHALL BE CONCLUSIVELY PRESUMED THAT THE BOARD OR LEGISLATIVE AUTHORITY HAS APPROVED THE PROPOSED REVISED FEES.

THE COMMITTEE SHALL DECLARE THE PROPOSED REVISED FEES TO BE RATIFIED AS THE FEE SCHEDULE OF THE DISTRICT UPON DETERMINING THAT THE BOARD OF COUNTY COMMISSIONERS OF EACH COUNTY FORMING THE DISTRICT HAS APPROVED THE PROPOSED REVISED FEES AND THAT THE LEGISLATIVE AUTHORITIES OF A COMBINATION OF MUNICIPAL CORPORATIONS AND TOWNSHIPS WITH A COMBINED POPULATION WITHIN THE BOUNDARIES OF THE DISTRICT COMPRISING AT LEAST SIXTY PER CENT OF THE TOTAL POPULATION OF THE DISTRICT HAVE APPROVED THE PRO-

POSED REVISED FEES; PROVIDED THAT IN THE CASE OF A COUNTY DISTRICT, THAT COMBINATION SHALL INCLUDE THE MUNICIPAL CORPORATION HAVING THE LARGEST POPULATION WITHIN THE BOUNDARIES OF THE DISTRICT, AND PROVIDED THAT IN THE CASE OF A JOINT DISTRICT, THAT COMBINATION SHALL INCLUDE FOR EACH COUNTY FORMING THE DISTRICT THE MUNICIPAL CORPORATION HAVING THE LARGEST POPULATION WITHIN THE BOUNDARIES OF BOTH THE COUNTY IN WHICH THE MUNICIPAL CORPORATION IS LOCATED AND THE JOINT DISTRICT. FOR THE PURPOSES OF THIS DIVISION, ONLY THE POPULATION OF THE UNINCORPORATED AREA OF A TOWNSHIP SHALL BE CONSIDERED.

COLLECTION OF THE FEES SHALL COMMENCE ON THE FIRST DAY NEXT SUCCEEDING THE DATE ON WHICH THE COMMITTEE DECLARES THE FEE SCHEDULE TO BE RATIFIED.

(C) FOR THE PURPOSES OF DEFRAYING THE ADDED COSTS TO A MUNICIPAL CORPORATION OR TOWNSHIP FOR MAINTAINING ROADS AND OTHER PUBLIC FACILITIES AND FOR PROVIDING EMERGENCY AND OTHER PUBLIC SERVICES, AND COMPENSATING A MUNICIPAL CORPORATION OR TOWNSHIP FOR REDUCTIONS IN REAL PROPERTY TAX REVENUES DUE TO REDUCTIONS IN REAL PROPERTY VALUATIONS RESULTING FROM THE LOCATION AND OPERATION OF A SOLID WASTE DISPOSAL FACILITY WITHIN THE MUNICIPAL CORPORATION OR TOWNSHIP UNDER THE SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN OF THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT APPROVED OR ORDERED TO BE IMPLEMENTED UNDER SECTION 3734.55 OR 3734.56 OF THE REVISED CODE, A MUNICIPAL CORPORATION OR TOWNSHIP IN WHICH SUCH A SOLID WASTE DISPOSAL FACILITY IS LOCATED MAY LEVY A FEE OF NOT MORE THAN TWENTY-FIVE CENTS PER TON ON THE DISPOSAL OF SOLID WASTES AT A SOLID WASTE DISPOSAL FACILITY LOCATED IN THE DISTRICT AND WITHIN THE BOUNDARIES OF THE MUNICIPAL CORPORATION OR TOWNSHIP REGARDLESS OF WHERE THE WASTES WERE GENERATED.

THE LEGISLATIVE AUTHORITY OF A MUNICIPAL CORPORATION OR TOWNSHIP MAY LEVY FEES UNDER THIS DIVISION BY ENACTING AN ORDINANCE OR ADOPTING A RESOLUTION ESTABLISHING THE AMOUNT OF THE FEES. UPON SO DOING THE LEGISLATIVE AUTHORITY SHALL MAIL A CERTIFIED COPY OF THE ORDINANCE OR RESOLUTION TO THE BOARD OF COUNTY COMMISSIONERS OR DIRECTORS OF THE COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICT IN WHICH THE MUNICIPAL CORPORATION OR TOWNSHIP IS LOCATED OR, IF A REGIONAL SOLID WASTE MANAGEMENT AUTHORITY HAS BEEN FORMED UNDER SECTION 343.011 OF THE

REVISED CODE, TO THE BOARD OF TRUSTEES OF THAT REGIONAL AUTHORITY, THE OWNER OR OPERATOR OF EACH SOLID WASTE DISPOSAL FACILITY IN THE MUNICIPAL CORPORATION OR TOWNSHIP THAT IS REQUIRED TO COLLECT THE FEE BY THE ORDINANCE OR RESOLUTION, AND THE DIRECTOR OF ENVIRONMENTAL PROTECTION. ALTHOUGH THE FEES LEVIED UNDER THIS DIVISION ARE LEVIED ON THE BASIS OF TONS AS THE UNIT OF MEASUREMENT, THE LEGISLATIVE AUTHORITY, IN ITS ORDINANCE OR RESOLUTION LEVYING THE FEES UNDER THIS DIVISION, MAY DIRECT THAT THE FEES BE LEVIED ON THE BASIS OF CUBIC YARDS AS THE UNIT OF MEASUREMENT BASED UPON A CONVERSION FACTOR OF THREE CUBIC YARDS PER TON GENERALLY OR ONE CUBIC YARD PER TON FOR BALED WASTES.

COLLECTION OF THE FEE SHALL COMMENCE ON THE THIRTIETH DAY AFTER THE EFFECTIVE DATE OF THE ORDINANCE OR ADOPTION OF THE RESOLUTION.

(D)(1) THE FEES LEVIED UNDER DIVISIONS (A)(1) TO (3), (B)(1) TO (3), AND (C) OF THIS SECTION DO NOT APPLY TO THE DISPOSAL OF SOLID WASTES THAT:

(a) ARE DISPOSED OF AT A FACILITY OWNED BY THE GENERATOR OF THE WASTES WHEN THE SOLID WASTE FACILITY EXCLUSIVELY DISPOSES OF SOLID WASTES GENERATED AT ONE OR MORE PREMISES OWNED BY THE GENERATOR REGARDLESS OF WHETHER THE FACILITY IS LOCATED ON A PREMISES WHERE THE WASTES ARE GENERATED;

(b) ARE DISPOSED OF AT FACILITIES THAT EXCLUSIVELY DISPOSE OF WASTES THAT ARE GENERATED FROM THE COMBUSTION OF COAL THAT IS NOT COMBINED IN ANY WAY WITH GARBAGE AT ONE OR MORE PREMISES OWNED BY THE GENERATOR.

(2) THE FEES LEVIED UNDER DIVISIONS (A)(2)(a) TO (c) AND (B)(2) OF THIS SECTION DO NOT APPLY TO SOLID WASTES ORIGINATING OUTSIDE THE BOUNDARIES OF A COUNTY OR JOINT DISTRICT THAT ARE COVERED BY AN AGREEMENT FOR THE JOINT USE OF SOLID WASTE FACILITIES ENTERED INTO UNDER SECTION 343.02 OF THE REVISED CODE BY THE BOARD OF COUNTY COMMISSIONERS OR BOARD OF DIRECTORS OF THE COUNTY OR JOINT DISTRICT WHERE THE WASTES ARE GENERATED AND DISPOSED OF.

(3) WHEN SOLID WASTES ARE BURNED IN A DISPOSAL FACILITY THAT IS AN INCINERATOR OR ENERGY RECOVERY FACILITY, THE FEES LEVIED UNDER DIVISIONS (A)(1) TO (3), (B)(1) TO (3), AND (C) OF THIS SECTION SHALL BE LEVIED UPON THE DISPOSAL OF THE FLY ASH AND BOTTOM ASH REMAINING AFTER BURNING OF THE SOLID WASTES AND SHALL BE COLLECTED BY THE OWNER OR OPERATOR OF THE SANITARY LANDFILL WHERE THE ASH IS DISPOSED OF.

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(4) WHEN SOLID WASTES ARE DELIVERED TO A TRANSFER FACILITY, THE FEES LEVIED UNDER DIVISIONS (A)(1) TO (3), (B)(1) TO (3), AND (C) OF THIS SECTION SHALL BE LEVIED UPON THE DISPOSAL OF SOLID WASTES TRANSPORTED OFF THE PREMISES OF THE TRANSFER FACILITY FOR DISPOSAL AND SHALL BE COLLECTED BY THE OWNER OR OPERATOR OF THE SOLID WASTE DISPOSAL FACILITY WHERE THE WASTES ARE DISPOSED OF.

(E) THE FEES LEVIED UNDER DIVISIONS (B)(1) TO (3) AND (C) OF THIS SECTION SHALL BE COLLECTED BY THE OWNER OR OPERATOR OF THE SOLID WASTE DISPOSAL FACILITY WHERE THE WASTES ARE DISPOSED OF AS TRUSTEE FOR THE COUNTY OR JOINT DISTRICT AND MUNICIPAL CORPORATION OR TOWNSHIP WHERE THE WASTES ARE DISPOSED OF. MONEYS FROM THE FEES LEVIED UNDER DIVISIONS (B)(1) TO (3) OF THIS SECTION SHALL BE FORWARDED TO THE BOARD OF COUNTY COMMISSIONERS OR BOARD OF DIRECTORS OF THE DISTRICT IN ACCORDANCE WITH RULES ADOPTED UNDER DIVISION (F) OF THIS SECTION. MONEYS FROM THE FEES LEVIED UNDER DIVISION (C) OF THIS SECTION SHALL BE FORWARDED TO THE TREASURER OR SUCH OTHER OFFICER OF THE MUNICIPAL CORPORATION AS, BY VIRTUE OF THE CHARTER, HAS THE DUTIES OF THE TREASURER OR TO THE CLERK OF THE TOWNSHIP, AS APPROPRIATE.

MONEYS RECEIVED BY THE BOARD OF COUNTY COMMISSIONERS OR BOARD OF DIRECTORS UNDER THIS DIVISION SHALL BE PAID TO THE COUNTY TREASURER, OR OTHER OFFICIAL ACTING IN A SIMILAR CAPACITY UNDER A COUNTY CHARTER, IN A COUNTY DISTRICT OR TO THE COUNTY TREASURER OR OTHER OFFICIAL DESIGNATED BY THE BOARD OF DIRECTORS IN A JOINT DISTRICT AND KEPT IN A SEPARATE AND DISTINCT FUND TO THE CREDIT OF THE DISTRICT. IF A REGIONAL SOLID WASTE MANAGEMENT AUTHORITY HAS BEEN FORMED UNDER SECTION 343.011 OF THE REVISED CODE, MONEYS RECEIVED BY THE BOARD OF TRUSTEES OF THAT REGIONAL AUTHORITY UNDER THIS DIVISION SHALL BE KEPT BY THE BOARD IN A SEPARATE AND DISTINCT FUND TO THE CREDIT OF THE DISTRICT.

MONEYS RECEIVED BY THE TREASURER OR SUCH OTHER OFFICER OF THE MUNICIPAL CORPORATION SHALL BE PAID INTO THE GENERAL FUND OF THE MUNICIPAL CORPORATION. MONEYS RECEIVED BY THE CLERK OF THE TOWNSHIP SHALL BE PAID INTO THE GENERAL FUND OF THE TOWNSHIP. THE TREASURER OR SUCH OTHER OFFICER OF THE MUNICIPAL CORPORATION OR THE CLERK, AS APPROPRIATE, SHALL MAINTAIN SEPARATE RECORDS OF THE MONEYS RECEIVED FROM THE FEES LEVIED UNDER DIVISION (C) OF THIS SECTION.

MONEYS IN THE SPECIAL FUND OF THE COUNTY OR JOINT DISTRICT ARISING FROM THE FEES LEVIED UNDER DIVISIONS (B)(1) TO (3) OF THIS SECTION SHALL BE EXPENDED BY THE BOARD OF COUNTY COMMISSIONERS OR DIRECTORS OF THE DISTRICT IN ACCORDANCE WITH THE DISTRICT'S SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN APPROVED UNDER SECTION 3734.55 OR 3734.56 OF THE REVISED CODE EXCLUSIVELY FOR THE FOLLOWING PURPOSES:

(1) PREPARATION OF THE SOLID WASTE MANAGEMENT PLAN OF THE DISTRICT UNDER SECTION 3734.54 OF THE REVISED CODE, MONITORING IMPLEMENTATION OF THE PLAN, AND CONDUCTING THE PERIODIC REVIEW AND AMENDMENT OF THE PLAN REQUIRED BY SECTION 3734.56 OF THE REVISED CODE;

(2) IMPLEMENTATION OF THE APPROVED SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN OF THE DISTRICT, INCLUDING, WITHOUT LIMITATION, THE DEVELOPMENT AND IMPLEMENTATION OF SOLID WASTE RECYCLING OR REDUCTION PROGRAMS;

(3) PROVIDING FINANCIAL ASSISTANCE TO BOARDS OF HEALTH WITHIN THE DISTRICT IN WHICH SOLID WASTE FACILITIES ARE LOCATED FOR ENFORCEMENT OF SECTIONS 3734.01 TO 3734.13 OF THE REVISED CODE AND RULES, ORDERS, AND TERMS AND CONDITIONS OF PERMITS, LICENSES, AND VARIANCES ADOPTED OR ISSUED UNDER THOSE SECTIONS;

(4) PROVIDING FINANCIAL ASSISTANCE TO EACH COUNTY WITHIN THE DISTRICT TO DEFRAY THE ADDED COSTS OF MAINTAINING ROADS AND OTHER PUBLIC FACILITIES AND OF PROVIDING EMERGENCY AND OTHER PUBLIC SERVICES RESULTING FROM THE LOCATION AND OPERATION OF A SOLID WASTE FACILITY WITHIN THE COUNTY UNDER THE DISTRICT'S APPROVED SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN;

(5) PURSUANT TO CONTRACTS ENTERED INTO WITH BOARDS OF HEALTH WITHIN THE DISTRICT IN WHICH SOLID WASTE FACILITIES CONTAINED IN THE DISTRICT'S APPROVED PLAN OR AMENDED PLAN ARE LOCATED, FOR PAYING THE COSTS INCURRED BY THOSE BOARDS OF HEALTH FOR COLLECTING AND ANALYZING SAMPLES FROM PUBLIC OR PRIVATE WATER WELLS ON LANDS ADJACENT TO THOSE FACILITIES;

(6) DEVELOPING AND IMPLEMENTING A PROGRAM FOR THE INSPECTION OF SOLID WASTES GENERATED OUTSIDE THE BOUNDARIES OF THIS STATE THAT ARE DISPOSED OF AT SOLID WASTE FACILITIES INCLUDED IN THE DISTRICT'S APPROVED SOLID WASTE MANAGEMENT PLAN OR AMENDED PLAN. MONEYS IN THE SPECIAL FUND OF THE DISTRICT

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ARISING FROM THE FEES LEVIED UNDER DIVISION (B)(3) OF THIS SECTION SHALL BE EXPENDED EXCLUSIVELY FOR THE PURPOSES OF DIVISION (E)(6) OF THIS SECTION.

PRIOR TO THE APPROVAL OF THE DISTRICT'S SOLID WASTE MANAGEMENT PLAN UNDER SECTION 3734.55 OF THE REVISED CODE, MONEYS IN THE SPECIAL FUND OF THE DISTRICT ARISING FROM SUCH FEES SHALL BE EXPENDED FOR SUCH PURPOSES IN THE MANNER PRESCRIBED BY THE SOLID WASTE MANAGEMENT POLICY COMMITTEE BY RESOLUTION.

(F) THE DIRECTOR OF ENVIRONMENTAL PROTECTION SHALL ADOPT RULES IN ACCORDANCE WITH CHAPTER 119. OF THE REVISED CODE PRESCRIBING PROCEDURES FOR COLLECTING AND FORWARDING THE FEES LEVIED UNDER DIVISIONS (B) AND (C) OF THIS SECTION TO THE BOARDS OF COUNTY COMMISSIONERS OR DIRECTORS OF COUNTY OR JOINT SOLID WASTE MANAGEMENT DISTRICTS AND TO THE TREASURERS OR OTHER OFFICERS OF MUNICIPAL CORPORATIONS OR TO THE CLERKS OF TOWNSHIPS. THE RULES SHALL ALSO PRESCRIBE THE DATES FOR FORWARDING THE FEES TO THE BOARDS AND OFFICIALS AND MAY PRESCRIBE ANY OTHER REQUIREMENTS THE DIRECTOR CONSIDERS NECESSARY OR APPROPRIATE TO IMPLEMENT AND ADMINISTER DIVISIONS (A), (B), AND (C) OF THIS SECTION. COLLECTION OF THE FEES LEVIED UNDER DIVISION (A) OF THIS SECTION SHALL COMMENCE ON THE FIRST DAY OF THE MONTH NEXT SUCCEEDING THE EFFECTIVE DATE OF THE RULES ADOPTED UNDER THIS DIVISION THAT ARE APPLICABLE TO DIVISION (A) OF THIS SECTION.

(G) THE DIRECTOR SHALL MONITOR COLLECTION OF THE FEES LEVIED BY DIVISIONS (A) AND (B) OF THIS SECTION, THE REVENUES PRODUCED BY THEM, AND THE USES MADE OF THOSE REVENUES. NOT LATER THAN THREE YEARS AFTER THE EFFECTIVE DATE OF THIS SECTION, THE DIRECTOR SHALL PREPARE AND SUBMIT TO THE PRESIDENT OF THE SENATE AND SPEAKER OF THE HOUSE OF REPRESENTATIVES A REPORT ON THE USES MADE OF THE FEES LEVIED BY DIVISIONS (A) AND (B) OF THIS SECTION AND RECOMMENDATIONS REGARDING THE NEED FOR CONTINUATION OF THOSE FEES.

Sec. 3734.99. (A) Except as otherwise provided in ~~division~~ DIVISIONS (B), (C), AND (D) of this section, whoever recklessly violates any section of this chapter, except section 3734.18 OR 3734.57 of the Revised Code~~, governing the storage, treatment, transportation, or disposal of hazardous waste, violates division (F) of section 3734.05 of the Revised Code with respect to a report required pursuant to a plan approved under division (A) of section 3734.041 of the Revised Code, or violates division (D) of section 3734.13 of the Revised Code with respect to an order issued~~

promptly authorized, the Director may issue an order providing for the increase needed to avert the emergency, provided that the increase shall be authorized only for such period of time as the emergency will exist.

(D) This section does not apply to any facility that meets either of the following qualifications:

(1) The facility is owned by a generator of solid wastes when the solid waste facility exclusively disposes of solid wastes generated at premises owned by the generator;

(2) The facility exclusively disposes of wastes that are generated from the cumbustion of coal that is not combined in any way with garbage at one or more premises owned by the generator.

SECTION 7. Within one year after the effective date of this act, the Director of Environmental Protection shall adopt rules under division (A) of section 3734.02 and division (D) of section 3734.12 of the Revised Code establishing engineering design, construction, and operation standards governing solid waste disposal facilities that incorporate the best available technology with respect to such facilities. This section does not limit the authority of the Director to issue a permit for a solid waste disposal facility subject to terms and conditions incorporating the best available technology pursuant to division (A)(7) of section 3734.05 of the Revised Code prior to the adoption of those rules.

Within two years after the effective date of this act, the Director shall adopt rules under division (A) of section 3734.02 and division (D) of section 3734.12 of the Revised Code establishing location, engineering design, construction, and operation standards governing solid waste transfer facilities.

SECTION 8. Until the solid waste management plan of a county or joint solid waste management district established under section 343.01 of the Revised Code on or after the effective date of this act is approved or ordered to be implemented under section 3734.55 of the Revised Code, the board of county commissioners or directors of the county or joint district shall perform only such duties and exercise only such powers as pertain to the establishment of the district and to the preparation, adoption, approval, and submission of the solid waste management plan of the district and expend funds only for that purpose and for the purposes otherwise authorized by resolution of the solid waste management policy committee of the district under section 3734.57 of the Revised Code. Thereupon, the board of county commissioners or directors of the district shall perform all the duties and may exercise all the powers conferred upon the board or directors under Chapter 343. and sections 3734.52 to 3734.57 of the Revised Code.

Until a solid waste management plan for the district is approved or ordered to be implemented under section 3734.55 of the Revised Code, the board of county commissioners or directors of a county or joint district established prior to the effective date of this act shall, within the boundaries of the district established thereunder, continue to perform the duties and exercise the powers conferred upon the board or directors under

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t shall, within the bound-
nue to perform the duties
board or directors under

Chapter 343. of the Revised Code as that chapter existed immediately prior to the effective date of this act. Rules adopted by the board of county commissioners or directors of such a district under division (F) of section 343.01 of the Revised Code immediately prior to the effective date of this act shall remain in effect within the boundaries of the district as they existed on the effective date of this act until they are superseded by rules authorized to be adopted under the plan of the district approved under section 3734.55 of the Revised Code or until the board or directors are ordered to implement a plan prepared under that section.

SECTION 9. On July 1, 1991, the Director of Environmental Protection shall file a report with the General Assembly summarizing his experience regulating infectious waste treatment facilities under this act. The report shall specifically analyze the capacity of existing Ohio infectious waste treatment facilities to treat infectious waste generated in this state and shall advise the General Assembly as to whether statutory planning requirements are necessary to insure the adequacy of such capacity in the future.

SECTION 10. Within ninety days after the effective date of this act, the Governor, the President of the Senate, and the Speaker of the House of Representatives shall jointly, on behalf of the state, request the Congress of the United States to enact legislation authorizing individual states to regulate the receipt at solid waste disposal facilities within their boundaries of solid wastes generated outside their boundaries.

SECTION 11. The amendments to sections 1502.04 and 1502.05 of the Revised Code by this act are not intended to supersede the earlier repeal, with delayed effective date, of those sections.

SECTION 12. Not later than one year after the effective date of this act, the Environmental Protection Agency shall prepare and submit to the General Assembly a study that discusses the future costs of cleaning up solid waste landfills in this state and recommends any additional solid waste disposal fees needed to pay those costs.

Vernon H. Riffe Jr.

Speaker _____ *of the House of Representatives.*

Paul E. Pfeifer

President _____ *of the Senate.*

Passed June 2, 1988

Approved June 24, 1988

12 noon

Richard F. Celeste

Governor.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

Roger S Hood

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 24th day of June, A. D. 1988

Sherrod Brown

Secretary of State.

Section 1502.05 of the Revised Code is amended by this act and also by Am. Sub. H.B. 322 of the 117th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable, so that they are required by that section to be harmonized to give effect to each amendment.

Roger S Hood

Director, Legislative Service Commission

File No. 243 Effective Date June 24, 1988

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*1987 Ohio Op. Atty Gen. 421; 1987 Ohio Op. Atty Gen. No. 69; 1987 Ohio AG LEXIS 41, **

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF **OHIO**

OPINION No. **87-069**

1987 Ohio Op. Atty Gen. 421; **1987 Ohio Op. Atty Gen.** No. 69; **1987 Ohio** AG LEXIS 41

September 25, **1987**

CORE TERMS: fiscal year, continuing contract, certificate, fiscal officer, lease, appropriation, ensuing, continuing contracts, per unit, certification, amount required, termination, delivery, certify, political subdivision, current fiscal year, taxing district, school district, installment, board of education, designated, appropriated, succeeding, collection, treasury, levy, entire amount, predecessor, taxing authority, encumbrance

SYLLABUS:
[*1]

1. Except as otherwise provided by statute, the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. (1966 **Op.** Att'y **Gen.** No. 66-117 (modified, in part, on other grounds by 1979 **Op.** Att'y **Gen.** No. 79-034); 1965 **Op.** Att'y **Gen.** No. 65-126; 1964 **Op.** Att'y **Gen.** No. 1524, p. 2-428; 1959 **Op.** Att'y **Gen.** No. 451, p. 220; 1942 **Op.** Att'y **Gen.** No. 5184, p. 383; 1938 **Op.** Att'y **Gen.** No. 2491, vol. II, p. 1078, questioned.)

2. A contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided. (1940 **Op.** Att'y **Gen.** No. 1695, p. 9, questioned.)

3. A contract entered into on a per unit basis may be a continuing contract.

4. Pursuant to R.C. 5705.41(D), a continuing contract to be performed in whole or in part in an ensuing fiscal year may not be entered into unless the fiscal officer has certified that the amount required to meet the obligation in the fiscal year in which the contract is made has been lawfully appropriated **[*2]** for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

5. Pursuant to R.C. 5705.41(D), a contract may not be entered into on a per unit basis unless the fiscal officer has certified the availability of sufficient funds to satisfy the amount estimated as becoming due upon the contract in the current year. (1974 **Op.** Att'y **Gen.** No. 74-043, qualified. 1940 **Op.** Att'y **Gen.** No. 1695, p. 9, questioned.)

6. The words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. (1957 **Op.** Att'y **Gen.** No. 898, p. 372 and 1928 **Op.** Att'y **Gen.** No. 1678, vol. I, p. 316, overruled in part.)

7. Continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made.

8. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under **[*3]** which delivery of the goods or services will not take place until the ensuing fiscal year and payment will not be due until delivery, the fiscal officer need not, under R.C. 5705.41(D), certify any amount as being available during the fiscal year in which the contract is made. Pursuant to R.C. 5705.44, the amount of the obligation remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.

9. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which it cannot, in good faith, be determined whether delivery of the goods or services and the corresponding obligation to make payment will take place in the current fiscal year or in an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41 (D), certify the entire amount due under the contract as available during the fiscal year in which the contract is made.

10. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which certain goods or services are to be delivered in **[*4]** the current fiscal year but payment is not to be made until an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify as available during the year in which the contract is made the amount required to meet the obligation for goods or services delivered during that fiscal year.

11. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a contract that is not a continuing contract, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available when the contract is made, regardless of whether delivery of the goods or services and payment for such goods or services will take place during the fiscal year in which the contract is made or during a subsequent fiscal year. No certification of availability need be made in subsequent fiscal years.

12. Unless a contract is necessary for compliance with R.C. 3317.13(B) or comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41, no school district shall make the contract unless there is a certificate signed by the treasurer and president of the board of education and the superintendent **[*5]** that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient to enable the district to operate an adequate educational program for the current fiscal year and the succeeding fiscal year, regardless of when goods or services are to be provided under the contract and regardless of when payment is to be made.

REQUESTBY:
ANTHONY J. CELEBREZZE, JR., Attorney General

OPINION:

The Honorable Thomas E. Ferguson
Auditor of State
88 East Broad Street
Columbus, **Ohio** 43216

I have before me your request for an opinion on a number of issues involving contracts that are not completely performed during the fiscal year in which they are made. Your questions relate to certain provisions of R.C. 5705.41, R.C. 5705.412, and R.C. 5705.44. Because your questions are general in nature and you have not indicated any particular factual situations with which you are concerned, I am providing you with a general discussion of relevant legal principles and a general interpretation of the statutory language about **[*6]** which you have inquired. I am unable, by means of an opinion, to address each of the numerous factual situations that this general analysis may cover.

R.C. 5705.41, the subject of your first three questions, states, in part:

No subdivision or taxing unit shall:

(D) Except as otherwise provided in section 5705.413 of the Revised Code [relating to townships], make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. If no certificate is furnished as required, **[*7]** upon receipt by the taxing authority of the subdivision or taxing unit of a certificate of the fiscal officer stating that there was at the time of the making of such contract or order and at the time of the execution of such certificate a sufficient sum appropriated for the purpose of such contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances, such taxing authority may authorize the drawing of a warrant in payment of amounts due upon such contract, but such resolution or ordinance shall be passed within thirty days from the receipt of such certificate; provided, that if the amount involved is less than one hundred dollars, the fiscal officer may authorize it to be paid without such affirmation of the taxing authority of the subdivision or taxing unit, if such expenditure is otherwise valid.

In any case in which a contract is entered into upon a per unit basis, the head of the department, board, or commission for the benefit of which the contract is made shall make an estimate of the total amount to become due upon such contract, which estimate shall be certified in writing to the fiscal officer **[*8]** of the subdivision. Such a contract may be entered into if the appropriation covers such estimate, or so much thereof as may be due during the current year. In such a case the certificate of the fiscal officer based upon the estimate shall be a sufficient compliance with the law requiring a certificate.

. . . "Contract" as used in this section excludes current payrolls of regular employees and officers. (Emphasis added.)

Your first question asks: "What constitutes a 'continuing contract' as that term is used in [R.C. 5705.41(D)]?" The Revised Code contains no statutory definition of the term "continuing contract." It is, therefore, appropriate to consider the common meaning of that term, and also to examine the interpretation that it has been given in the past. See$O R.C. 1.42 ("[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly").

Black's Law Dictionary 291 (5th ed. 1979) defines "continuing contract" as "[a] contract calling for periodic performances over **[*9]** a space of time." Certain opinions of my predecessors have applied similar definitions. See 1965 **Op.** Att'y **Gen.** No. 65-30 at 2-72

("[a] continuing contract is a present agreement intended to cover or apply to successive similar obligations, the payment to be made upon the performance of each successive obligation"). 1958 **Op.** Att'y **Gen.** No. 1604, p. 22, contains a comprehensive analysis of R.C. 5705.41(D) and its predecessor provisions and concludes, at 26, that the term "continuing contract" was intended to include the types of contracts and leases that had been mentioned previously in G.C. 5660 -- namely, contracts "for salaries of educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made." 1958 **Op.** No. 1604 at 25 (emphasis omitted). See 1960 **Op.** Att'y **Gen.** No. 1304, p. 305 at 307-08 (discussing with approval the historical analysis of R.C. 5705.41 contained in 1958 **Op.** No. 1604); 1928 **Op.** **[*10]** Att'y **Gen.** No. 1678, vol. I, p. 316. 1958 **Op.** No. 1604 states, at 27-28:

Without attempting an exhaustive survey of the law of contracts, it is reasonably clear that the words "continuing contract" as used by the legislature and as interpreted by numerous of my predecessors, describe what is known as a 'divisible contract.' As briefly as possible, 3 Williston On Contracts, (Rev. Ed.) defines a divisible contract at page 2408 as:

"A contract is divisible when by its terms, 1, performance of each party is divided into two or more parts, and, 2 the number of parts due from each party is the same, and, 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party." (Emphasis added [by the author of 1958 **Op.** No. 1604.])

1958 **Op.** No. 1604 concludes that a lease for a period of years comes within this definition and, thus, is a "continuing contract" for purposes of R.C. 5705.41(D). This analysis is consistent with the analysis that has been applied by the courts and by prior Attorneys General. See Lee v. Brewster Village School District, 29 **Ohio** N.P. (n.s.) 134 (C.P. Stark County 1932) (a three-year employment **[*11]** contract is a continuing contract); 1966 **Op.** Att'y **Gen.** No. 66-117 (modified, in part, on other grounds by 1979 **Op.** Att'y **Gen.** No. 79-034) (a lease for years is a continuing contract); 1965 **Op.** Att'y **Gen.** No. 65-126 (a lease with an option to purchase is a continuing contract); 1960 **Op.** No. 1304 (a five-year irrevocable rental agreement for the acquisition of mechanical office equipment is a continuing contract); 1941 **Op.** Att'y **Gen.** No. 4006, p. 585 at 587 (a contract of insurance for a period of five years, under which county commissioners were obligated to pay premiums annually, would be a continuing contract); 1928 **Op.** Att'y **Gen.** No. 2355, vol. III, p. 1733 (a contract for the transportation of pupils is a continuing contract). I conclude, therefore, that, for purposes of R.C. 5705.41(D), a contract that comes within the common definition of a divisible contract is a "continuing contract."

1958 **Op.** No. 1604 also concludes that a contract for the purchase and sale of real estate cannot be considered a divisible or continuing contract since "[d]elivery of a deed begins and ends with the single act, and even though payments may be spread out over a number of installments there is **[*12]** no corresponding continuing performance on the part of the grantor." 1958 **Op.** No. 1604 at 28. Accord, 1928 **Op.** Att'y **Gen.** No. 2656, vol. III, p. 2235 (a contract for the purchase of a building with a portion of the purchase price payable upon the execution of the contract and the remainder payable at the end of two years is not a continuing contract). See also **Op.** No. 65-30; 1933 **Op.** Att'y **Gen.** No. 1041, vol. II, p. 1063. The conclusion that an installment purchase is not a divisible contract is consistent with the definition of a divisible contract that is discussed above. n1

n1 In concluding that an installment purchase of real estate is not a continuing contract, 1958 **Op.** Att'y **Gen.** No. 1604, p. 22, considered also the fact that there was at that time no statutory authority for a board of education to undertake an installment purchase of real

estate. Accord, 1958 **Op.** Att'y **Gen.** No. 1879, p. 181; 1957 **Op.** Att'y **Gen.** No. 398, p. 118. See also 1965 **Op.** Att'y **Gen.** No. 65-30; 1961 **Op.** Att'y **Gen.** No. 2456, p. 471; 1958 **Op.** Att'y **Gen.** No. 2820, p. 597. Authority for the board of education of a school district other than a county school district to purchase lands by installment payments was granted by 1961 **Ohio** Laws 463-64 (Am. S.B. 447, eff. Oct. 12, 1961) (amending R.C. 3313.37). R.C. 3313.37 as now in effect authorizes boards of education of school districts other than county school districts to make installment purchases of lands and of office equipment and specifies that certain purchases of office equipment are to be considered continuing contracts. See 1986 **Op.** Att'y **Gen.** No. 86-031. See also 1964 **Op.** Att'y **Gen.** No. 1522, p. 2-419. **[*13]**

The General Assembly has, by statutory enactment, designated as continuing contracts certain contracts that might not be categorized as divisible contracts. Clearly, any contract that has, by statute, been designated as a continuing contract must be considered a continuing contract for purposes of R.C. 5705.41(D). See, e.q.,$O R.C. 154.06(D) (authorizing the **Ohio** Public Facilities Commission to enter into leases or other agreements with governmental agencies, authorizing such governmental agencies to enter into leases and agreements, and providing that any agreement of such an agency "to make rental, use, or other payments or payment of purchase price, in installments or otherwise, or repayments to or on account of the commission and the obligations issued by the commission, shall not be deemed to constitute indebtedness, bonded or otherwise . . . of such governmental agency for . . . any . . . purpose" and that "such leases and agreements requiring payments beyond the current year are continuing contracts for the purposes of" R.C. 5705.41 and 5705.44); R.C. 3313.37(B)(5) (authorizing a board of education to acquire office equipment "by purchase, by lease, by installment **[*14]** payments, by entering into lease-purchase agreements, or by lease with an option to purchase" and providing that, "[i]f the purchase price is to be paid over a period of time, the contract setting forth the terms of such purchase shall be considered a continuing contract pursuant to [R.C. 5705.41], and such payments shall not extend for a period of more than five years" and may be made from funds available for operating purposes); R.C. 3313.373 (stating that where a "shared-savings contract" for energy savings measures extends beyond the fiscal year, the contract is a continuing contract for purposes of R.C. 5705.41(D)).

I am aware that certain opinions of prior Attorneys General have found that contracts for installment purchases n2 or lease-purchases of real estate by a county pursuant to R.C. 307.02 (formerly G.C. 2433) are continuing contracts for purposes of R.C. 5705.41(D) (formerly G.C. 5625-33) on the basis that R.C. 307.02 authorizes such purchases, even though R.C. 307.02 contains no reference to the term "continuing contract" or to R.C. 5705.41. See 1964 **Op.** Att'y **Gen.** No. 1524, p. 2-428 (finding that an agreement for the installment purchase of real estate under **[*15]** R.C. 307.02 was a contract running beyond the termination of the fiscal year in which it was made for purposes of R.C. 5705.44, and, thus, that when the contract was made certification was required for only such amounts as were due during that fiscal year, in accordance with R.C. 5705.41(D)); 1959 **Op.** Att'y **Gen.** No. 451, p. 220 (indicating that a lease-purchase agreement under R.C. 307.02 was subject to the provision of R.C. 5705.41 that, in the case of contracts which are to be performed over a period of years, certification of the availability of funds for the first year is required); 1942 **Op.** Att'y **Gen.** No. 5184, p. 383 (finding that a contract for the installment purchase of real estate under G.C. 2433 (now R.C. 307.02) was a contract running beyond the termination of the fiscal year in which it was made for purposes of G.C. 5625-36, predecessor to R.C. 5705.44); 1938 **Op.** Att'y **Gen.** No. 2491, vol. II, p. 1078 (finding that a contract for the purchase of real estate by installment payments under G.C. 2433 (now R.C. 307.02) was a contract running beyond the fiscal year in which it was made for purposes of G.C. 5625-36, predecessor to R.C. 5705.44, and created an exception to G.C. **[*16]** 5625-33, predecessor to R.C. 5705.41). Such findings were discussed favorably in **Op.** No. 66-117 and **Op.** No. 65-126. On the basis of the analysis set forth above, I question these opinions. Contracts for installment purchases are not divisible contracts. See **Op.** No. 65-30 at 2-72 ("[a]n installment contract . . . is an agreement for present performance with payment to be

made in the future at designated times"). Further, it does not appear to be clearly indicated by the language of R.C. 307.02 that contracts for installment purchases entered into pursuant to its provisions are to be treated as continuing contracts. Compare$O R.C. 307.02 with, e.q.,$O R.C. 154.06(D) and R.C. 3313.37(B)(5). See also 1985 **Op.** Att'y **Gen.** No. 85-008 at 2-31 n. 6; note 2, supra.

n2 I note that, in situations involving purchases by installment payments, it may be appropriate to consider **Ohio** Const. art. XII, § 11, which provides that, when bonded indebtedness is created, the enabling legislation must provide for the levy of a tax for the liquidation of the debt. **Ohio** Const. art. XII, § 11 states:

No bonded indebtedness of the state, or any political subdivisions thereof, shall be incurred or renewed unless, in the legislation under which such indebtedness is incurred or renewed, provision is made for levying and collecting annually by taxation an amount sufficient to pay the interest on said bonds, and to provide a sinking fund for their final redemption at maturity.

See State ex rel. Kitchen v. Christman, 31 **Ohio** St. 2d 64, 285 N.E.2d 362 (1972) (holding that, since the lease agreement in question was an installment purchase, the entire contract price constituted a present indebtedness of the city under **Ohio** Const. art. XII, § 11); 1986 **Op.** Att'y **Gen.** No. 86-031; 1985 **Op.** Att'y **Gen.** No. 85-008 at 2-31 n. 6; 1984 **Op.** Att'y **Gen.** No. 84-050; 1980 **Op.** Att'y **Gen.** No. 80-042 at 2-178 ("[i]t is likely that, upon entering the installment purchase contract . . ., the county would incur bonded indebtedness within the meaning of **Ohio** Const. art. XII, § 11 in the amount of the total contract price"). Cf.$O R.C. 154.06(D); R.C. 3313.37(B)(2) (authorizing a board of education to purchase lands by, inter alia, installment payments and providing that "if the purchase price is to be paid over a period of time, such payments shall not extend for a period of more than five years, and a special tax levy shall be authorized by the voters of the school district in accordance with [R.C. 5705.21] to provide a special fund to meet the future time payments"); R.C. 3313.37(B)(5). See generally 1963 **Op.** Att'y **Gen.** No. 167, p. 273 at 275 ("[t]he use of the so-called continuing contract was made possible by the enactment of [R.C. 5705.41] in 1927 (112 **Ohio** Laws, 391 (406)). This was done to avoid any possibility of conflict with Section II, Article XII of the Constitution of **Ohio**"); 1939 **Op.** Att'y **Gen.** No. 1087, vol. II, p. 1565 at 1569 ("[t]he very obvious purpose of the people in adopting [**Ohio** Const. art. XII, § 11] was to put an end to the then too prevalent practice on the part of political subdivisions of incurring indebtedness with little more than a hope that such indebtedness might some day and in some manner be paid"). **[*17]**

In response to your first question, I conclude that the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. It is, of course, clear that a contract that would fit within one of these categories may, by appropriate statutory language, be excluded from the provisions of R.C. 5705.41(D). See, e.g.,$O R.C. 307.04 ("[t]he board of county commissioners may . . . award contracts for supplying [any county] building with light, heat, or power for any period of time not exceeding ten years. Sections 5705.41 and 5705.44 of the Revised Code shall not apply to any such contracts"). The determination as to whether a particular contract is a continuing contract for purposes of R.C. 5705.41(D) must be made on a case-by-case basis.

Your second question asks: "What constitutes a ['per unit' contract] as that term is used in [R.C. 5705.41(D)]? In what respects, if any, does a ['per unit' contract] differ from a 'continuing contract'?" No definition of a "per unit" contract is provided by statute. The term is used in R.C. 5705.41(D) in the context of "a contract . . . entered into upon **[*18]** a per unit basis." In common understanding, see$O R.C. 1.42, this term refers to a contract that sets forth a price for each unit of a particular item and states that such a price will be paid for

each unit of the item that is provided. The court in Northeastern Road Improvement Co. v. Chester Township Board of Trustees, No. 1254, slip **op.** at 3 (Ct. App. Geauga County Aug. 22, 1986) (unreported), found that the contract at issue in that case was entered into on a per unit basis for purposes of R.C. 5705.41(D) and described the contract as follows: "the contract . . . was a unit price contract, meaning that while estimated quantities of materials served to fix the contract price, the actual amount of materials used were to be measured in determining final payment." See also McMichael v. Van Ho, 8 **Ohio** Misc. 281, 219 N.E.2d 831 (C.P. Paulding County 1966). See generally$O R.C. 6103.22 (discussing a contract that provides "in lieu of all other payments an agreed price per unit for water furnished"). I conclude, therefore, that a contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular **[*19]** item and provides that payment will be made on that basis for such number of units as may be provided. A per unit contract is a continuing contract for purposes of R.C. 5705.41(D) if it is a divisible contract or if it is designated by statute as a continuing contract. See note 4, infra.

Your third question inquires about the differences in the manner in which a continuing contract and a per unit contract are to be administered under R.C. 5705.41(D). The language of that statute calls for certain procedures. With respect to continuing contracts, R.C. 5705.41(D) states that no subdivision or taxing unit shall make a contract without a certificate of the fiscal officer that, "in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances." With respect to per unit contracts, R.C. 5705.41(D) makes provision for estimating the total amount to become due, and states that such **[*20]** a contract may be entered into if the appropriation covers the amount estimated as becoming due during the current year. R.C. 5705.41(D) provides further that, in such circumstances, the certificate of the fiscal officer based upon the estimate constitutes sufficient compliance with the law requiring a certificate. Thus, in each of the cases with which you are concerned, the contract may be entered into if there is an appropriation covering the amount required, or estimated as necessary, n3 to meet the obligation due during the current year. n4

n3 1974 **Op.** Att'y **Gen.** No. 74-043 considered a contract under which a board of education was to pay a certain percentage of gross sales as operating costs of a food service program. **Op.** No. 74-043 stated that certification could not be made under R.C. 5705.41 and R.C. 5705.412 unless the contract contained a total maximum price that could become due under the contract. I note that the portion of R.C. 5704.41(D) that provides for an estimate of the amount that may become due under a per unit contract permits certification in circumstances in which the contract does not itself contain a maximum amount that may become due and, to this extent, qualify the analysis set forth in **Op.** No. 74-043.

n4 In 1940 **Op.** Att'y **Gen.** No. 1695, vol. I, p. 9, my predecessor considered a "requirement contract" under which a city agreed to purchase all of the materials of designated types that it might need during the ensuing year, at designated unit prices, to be delivered when and if requisitioned. 1940 **Op.** No. 1695 concluded that a certificate was required under G.C. 5625-33 (now R.C. 5705.41) for only the amount of the initial delivery requisitioned in the contract, and supported that conclusion by a finding that such a procedure had been established as a consistent administrative practice. The contract was not analyzed as a per unit contract. Without purporting to make a judgment as to the particular factual circumstances and local provisions involved in that opinion, I question that opinion and suggest that a requirement contract containing designated unit prices may be considered a "per unit" contract under R.C. 5705.41(D), so that certification is required of the amount estimated as becoming due upon the contract during the year in which it is made. **[*21]**

Your fourth question asks: "When does a contract 'run beyond the termination of the fiscal year' in which it was made, in terms of [R.C. 5705.44]?" R.C. 5705.44 states:

When contracts or leases run beyond the termination of the fiscal year in which they are made, the fiscal officer of the taxing authority shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such fiscal year. The amount of the obligation under such contract or lease remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge.

The certificate required by section 5705.41 of the Revised Code as to money in the treasury shall not be required for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility, but in the case of any such contract made without such certification, no payment shall be made on account thereof, and no claim or demand thereon shall be recoverable, except out of such earnings.

On its face, R.C. 5705.44 appears to apply to all contracts or leases **[*22]** that "run beyond the termination of the fiscal year in which they are made" -- that is, to any contract or lease that encompasses time periods from more than one fiscal year. R.C. 5705.44 is, however, in pari materia with R.C. 5705.41 and should be read together, and harmonized, with that section. See generally State ex rel. Pratt v. Weygandt, 164 **Ohio** St. 463, 132 N.E.2d 191 (1956).

As discussed in 1958 **Op.** No. 1604, both R.C. 5705.41 (formerly G.C. 5625-33) and R.C. 5705.44 (formerly G.C. 5625-36) were derived from G.C. 5660, which stated, in part:

In the case of contracts running beyond the termination of the fiscal year in which they are made for salaries of educational employees of boards of education, or for street lighting, collection or disposal of garbage or other current services for which contracts may lawfully be made extending beyond the end of the fiscal year in which made, or to the making of leases the term of which runs beyond the termination of the fiscal year in which they are made, the certification of the auditor or chief fiscal officer as to money in the treasury or in process of collection, above required as a condition precedent **[*23]** to the making of such contract or lease shall be deemed sufficient if such certification cover the money required to meet such contract or lease throughout the fiscal year in which such contract or lease be made, provided further that in each subsequent fiscal year in which such contract or lease is in effect the auditor or fiscal officer shall make a certification for the amount required to meet the obligation of such contract or lease maturing in such year. In all such contracts or leases, the amount of the obligation remaining unfulfilled at the end of a fiscal year and which will become payable during the next fiscal year shall be included in the appropriations for such next year.

1925 **Ohio** Laws 376. On the basis of this history, I conclude that the words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. The certification mentioned in the first sentence of R.C. 5705.44 is clearly the same as the certificate required by R.C. 5705.41(D). The second sentence **[*24]** of R.C. 5705.44 explains how funds for the following fiscal year are to be obtained. In order to harmonize R.C. 5705.41(D) and R.C. 5705.44, the reference in R.C. 5705.44 to "contracts or leases [that] run beyond the termination of the fiscal year in which they are made" must be construed as applying to "continuing contract[s] to be performed in whole or in part in an ensuing fiscal year," as that language is used in R.C. 5705.41(D). n5

n5 I am aware of the following language that appears in 1928 **Op.** Att'y **Gen.** No. 1678, vol. I, p. 316 at 317 and was quoted favorably in 1957 **Op.** Att'y **Gen.** No. 898, p. 372 at 375:

Reading . . . Sections 5625-36 and 5625-33, General Code [now R.C. 5705.44 and 5705.41], together, it seems clear that the words "contracts or leases running beyond the termination of the fiscal year in which they are made" [refer] to continuing contracts or leases which by their terms extend beyond the fiscal year in which they are made, for which payment is made out of funds raised by taxation and which require annual appropriations to meet the obligations thereof.

As was discussed by my predecessor in 1980 **Op.** Att'y **Gen.** No. 80-060, at 2-237 through 2-238, efforts have been made to restrict the application of R.C. 5705.41(D) to tax revenue, and to exclude non-tax revenue from its provisions. Those efforts have, however, been rendered nugatory by the existence of certain statutory exceptions to the requirement of certification under R.C. 5705.41(D), such as the exception currently set forth in the second paragraph of R.C. 5705.44 "for contracts on which payments are to be made from the earnings of a publicly operated water works or public utility," and by case law holding that the certification requirement of R.C. 5705.41(D) is applicable to any expenditure of public funds. See, e.g., Pincelli v. **Ohio** Bridge Company, 5 **Ohio** St. 2d 41, 213 N.E.2d 356 (1966); State v. Kuhner & King, 107 **Ohio** St. 406, 140 N.E. 344 (1923). In accordance with **Op.** No. 80-060, I find that R.C. 5705.41(D) and R.C. 5705.44 may, in appropriate circumstances, be applicable to funds derived from sources other than taxation, and I overrule 1957 **Op.** No. 898 and 1928 **Op.** No. 1678 to the extent that they are inconsistent with this conclusion. **[*25]**

Your fifth question asks whether continuing contracts and per unit contracts are within the scope of R.C. 5705.44. It follows directly from the analysis set forth above that continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made. See 1985 **Op.** Att'y **Gen.** No. 85-043 at 2-153 n. 2 (stating that continuing contracts are subject to R.C. 5705.44).

Your sixth question asks:

If a political subdivision or taxing district subject to [R.C. 5705.41(D)] enters into a contract or places an order for goods or services where it is either expressly or implicitly provided that the delivery of the . . . goods or services will not take place [until] the ensuing fiscal year and that payment is not due and will not be paid until delivery, must the fiscal officer of the taxing authority certify the availability of any funds at any time?

Your eighth question n6 asks, in connection with the circumstances described in question six, what actions must be taken by the fiscal officer or other representatives of the political subdivision or taxing district in an ensuing **[*26]** fiscal year.

n6 Your seventh question concerns R.C. 5705.412, which is applicable only to school districts. For ease of discussion, I shall first address the questions that relate generally to R.C. 5705.41(D) and shall then consider your seventh question.

It should be noted, first, that a contract is not considered to be a continuing contract simply because it carries over from one year to the next. See generally 1933 **Op.** No. 1041. A contract is a continuing contract for purposes of R.C. 5705.41(D) if it is a divisible contract or if it is designated by statute as a continuing contract. A contract that calls for a single order of goods or the performance of a single service is not a continuing contract unless it is so designated by statute.

If the contract under consideration in your sixth question is a continuing contract, then, under R.C. 5705.41(D), in the year in which the contract is made the fiscal officer need certify the availability of only such amount as is required to meet the obligation in that fiscal year. If no goods or services are to be delivered during that year and no payments are due during that year, the fiscal officer need not certify any amount **[*27]** as being available that year. Pursuant to R.C. 5705.44, the amount of the obligation under such a contract remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.

From the phrasing of your sixth question it appears, however, that the contract in question is not a continuing contract, but is simply a contract to be performed in the following fiscal year. Such a contract is not subject to the exception applicable to continuing contracts. It comes, instead, within the general rule set forth in R.C. 5705.41: "No subdivision or taxing unit shall: . . . (D) . . . make any contract . . . unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation . . . has been lawfully appropriated for such purpose and is in the treasury or in process of collection. . . ." Thus, the entire amount due under such a contract must be certified as available when the contract is entered into, even though such amount may not be due until the following fiscal year. See generally 1933 **[*28]** **Op.** No. 1041.

The procedure to be followed when making payment under a contract that is not a continuing contract during a year subsequent to the year in which the contract was made was discussed in **Op.** No. 85-043. R.C. 5705.41 sets forth a procedure for furnishing a certificate in a subsequent year, if none was furnished as required when the contract was made, and provides that such certificate must state that there was at the time of the making of the contract and at the time of the execution of the certificate a sufficient sum appropriated for the purpose of the contract and in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. n7 If a certificate was furnished as required, payment on the contract may be made in a subsequent year, since the amount so certified becomes encumbered and may not be used for other purposes. On this point, **Op.** No. 85-043 states, at 2-152 through 2-153:

When the availability of funds is certified under R.C. 5705.41(D) prior to the making of a contract or order for the expenditure of funds, the funds so certified are considered to be encumbered and remain available in subsequent years for **[*29]** the expenditure for which they have been certified. See generally City of Findlay v. Pendleton, 62 **Ohio** St. 80, 88, 56 N.E. 649, 650 (1900) ("[t]he filing of the proper certificate would have tied up the money in the treasury to be used only for the payment of those fees"); 1933 **Op.** Att'y **Gen.** No. 1041, vol. II, p. 1063 at 1064-65 ("the amount so certified becomes at once encumbered for the purpose of meeting the contract and cannot be spent or certified against for any other purpose"); 1928 **Op.** Att'y **Gen.** No. 2465, vol. III, p. 1964 at 1967 ("where a certificate has once been issued, the mere expiration of the fiscal year does not remove the encumbrance so as to make the funds so certified available for other purposes").

R.C. 5705.40 states, in part:

Any appropriation ordinance or measure may be amended or supplemented, provided that such amendment or supplement shall comply with all provisions of law governing the taxing authority in making an original appropriation and that no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation. **[*30]** Transfers may be made by resolution or ordinance from one appropriation item to another. At the close of each fiscal year, the unencumbered balance of each appropriation shall revert to the respective fund from which it was appropriated and shall be subject to future appropriations; provided that

funds unexpended at the end of such fiscal year previously appropriated for the payment of obligations unliquidated and outstanding need not be reappropriated, but such unexpended funds shall not be included by any budget making body or board or any county budget commission in estimating the balance available for the purpose of the next or any succeeding fiscal year. (Emphasis added.)

It is clear from this provision that, once an obligation has been certified against an appropriation, that appropriation may not be reduced below an amount sufficient to cover such obligation. At the close of a fiscal year, the unencumbered balance of each appropriation shall revert to the fund from which it was appropriated and shall be available for future appropriations. Encumbered funds do not so revert. They remain available for the obligations for which they have been certified. See 1951 **[*31]** **Op.** Att'y **Gen.** No. 640, p. 379 (syllabus, paragraph 2) ("[t]he unencumbered and unexpended balance remaining in the annual operating fund of a village fire department at the end of the fiscal year may not be retained in such fund but must revert to the general fund from which it was appropriated"); 1950 **Op.** Att'y **Gen.** No. 1554, p. 148; 1949 **Op.** Att'y **Gen.** No. 290, p. 67; 1928 **Op.** No. 2465.

Thus, once the funds have been certified as available, they need not be certified again in a subsequent year.

n7 Since you have inquired only about the actions that should be taken to certify available funds when a contract is entered into, I am not providing a detailed discussion of steps that may be taken in subsequent years if such certification was not properly furnished.

Your ninth question asks to what extent, if any, the answer to question six is altered "if the political subdivision or taxing district cannot, in good faith, determine whether the delivery of the goods or services and the corresponding obligation to make payment will arise in the current or in an ensuing fiscal year." As discussed in connection with question six, it appears that the contract in question is not a continuing **[*32]** contract. As a result, the time of delivery and the time of payment make no difference. The amount due under such a contract must be certified as available when the contract is made.

If, however, the contract considered in the ninth question is a continuing contract, then it is necessary to consider whether it is a "continuing contract to be performed in whole or in part in an ensuing fiscal year," so as to come within the exception set forth in R.C. 5705.41(D). You have described a situation in which it cannot, in good faith, be determined whether the delivery of the goods or services and the obligation to make payment will arise in the current fiscal year or in an ensuing fiscal year. In such a situation, it is also impossible to determine, in good faith, whether the contract is to be performed in whole or in part in an ensuing fiscal year. By its terms, the provision of R.C. 5705.41(D) pertaining to continuing contracts applies only "in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year." Where there is uncertainty as to when a contract is to be performed, the contract does not fit within the category of contracts "to be performed **[*33]** in whole or in part in an ensuing fiscal year." Thus, the exception established by R.C. 5705.41(D) for continuing contracts that are to be performed in an ensuing fiscal year is not applicable. See generally State ex rel. Keller v. Forney, 108 **Ohio** St. 463, 467, 141 N.E. 16, 17 (1923) ("[t]he rule is well and wisely settled that exceptions to a general law must be strictly construed. . . . [T]he presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law"). Rather, the fiscal officer must assume that the entire amount of the obligation will become due in the current fiscal year and must certify the entire amount due under the contract as available during the fiscal year in which the contract is made. See generally 1928 **Op.** Att'y **Gen.** No. 2708, vol. III, p. 2346.

Your tenth question asks:

What are the responsibilities of the fiscal officer and the taxing authority of a political subdivision or taxing district if a contract contemplates delivery of goods or services in the current fiscal year but expressly provides for payment of the corresponding obligation in an ensuing fiscal year?

As **[*34]** discussed above, where a contract is not a continuing contract, R.C. 5705.41(D) requires that the amount needed to meet the obligation be certified as available when the contract is made. The fact that payment will not be made until an ensuing fiscal year is irrelevant. My predecesor considered a contract of this sort in 1928 **Op.** No. 2708 and stated, at 2348:

I have not overlooked the portion of G.C. 5625-33(d) [now R.C. 5705.41(D)] which constitutes an exception where there is a continuing contract to be performed in whole, or in part, in an ensuing fiscal year to the effect that the fiscal officer need not certify as to the appropriation and availability of the funds except as to the amount required to meet the contract in the fiscal year in which it is made. In this instance, however, the contract is to be immediately performed, except that it is proposed to withhold payment until after the end of the fiscal year of 1928. I do not believe that this kind of contract is contemplated by the exception above noted. The local authorities cannot, by an arrangement such as is contemplated here, actually have services performed during one fiscal year and postpone payment therefor **[*35]** until the succeeding fiscal year, thereby encumbering the available funds of such succeeding year for the purpose of providing for the expenses legitimately chargeable to the previous year. That is to say, I believe that it clearly is the intent of the provisions of [G.C. 5625-33(d)] to require an appropriation and certificate for all expenditures to be made for contracts to be performed within the fiscal year.

Where a contract is a continuing contract, R.C. 5705.41(D) requires that the fiscal officer certify the availability of the amount required to meet the obligation in the fiscal year in which the contract is made. Your question refers specifically to the obligation corresponding to the goods or services provided in the year in which the contract is made. Such obligation must be considered as having been incurred in the year in which the goods or services were delivered and the amount required to meet that obligation must be certified as available in that year.

Your eleventh question asks whether the answer to question ten is altered "if the contract is silent as to the time of payment but it is the intention of the political subdivision or taxing district to delay payment **[*36]** to an ensuing fiscal year." The answer is not altered. Where a contract is not a continuing contract, the entire amount due under the contract must be certified as available when the contract is made, regardless of when payment is to be made. Where a contract is a continuing contract, the amount required to meet the obligation incurred in the fiscal year in which the contract is made must be certified as available in that year.

I turn now to your seventh question, which asks whether R.C. 5705.412 has an impact on the answer to question six as far as school districts are concerned. R.C. 5705.412 states, in part:

Notwithstanding section 5705.41 of the Revised Code, no school district shall adopt any appropriation measure, make any contract, give any order involving the expenditure of money, or increase during any school year any wage or salary schedule unless there is attached thereto a certificate signed by the treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes including the renewal of existing levies which, **[*37]** when combined with the estimated revenue from all other

sources available to the district at the time of certification, are sufficient to provide the operating revenues necessary to enable the district to operate an adequate educational program for all the days set forth in its adopted school calendars for the current fiscal year and for a number of days in the succeeding fiscal year equal to the number of days instruction was held or is scheduled for the current fiscal year, except that a certificate attached to an appropriation measure under this section shall cover only the fiscal year in which the appropriation measure is effective and shall not consider the renewal of an existing levy as the authority to levy taxes that are subject to appropriation in the current fiscal year unless the renewal levy has been approved by the electors and is subject to appropriation in the current fiscal year. . . . Every contract made, order given, or schedule adopted or put into effect without such a certificate shall be void, and no payment of any amount due thereon shall be made. . . .

This section does not apply to any contract, order, or increase in any wage or salary schedule that **[*38]** is necessary in order to enable a board of education to comply with division (B) of section 3317.13 of the Revised Code, provided the contract, order, or increase does not exceed the amount required to be paid to be in compliance with such division.

This section does not require the attachment of an additional certificate beyond that required by section 5705.41 of the Revised Code for any purchase order, for current payrolls of, or contracts of employment with, regular employees or officers. (Emphasis added.)

Your question is whether, if a school district enters into a contract or places an order for goods or services where it is either expressly or implicitly provided that the delivery of the goods or services will not take place until the ensuing fiscal year and that payment is not due and will not be made until delivery, the fiscal officer must certify the availability of funds at any time.

Pursuant to R.C. 5705.412, no school district may make any contract "unless there is attached thereto a certificate signed by the treasurer and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and **[*39]** the succeeding fiscal year the authorization to levy taxes . . . which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient" to enable the district to operate an adequate educational program for the current and succeeding fiscal years. An exception is made for contracts that are necessary to enable a board of education to comply with the minimum salary requirements imposed by R.C. 3317.13(B). Further, R.C. 5705.412 expressly provides that it "does not require the attachment of an additional certificate beyond that required by [R.C. 5705.41] for any purchase order, for current payrolls of, or contracts of employment with, regular employees or officers"; any contract that comes within this language is excepted from the requirement that a certificate be attached under R.C. 5705.412. n8 No general exception is made, however, for continuing contracts. See generally$O R.C. 3313.37 (authorizing certain purchases by installment payments and specifying that some of such purchases are to be considered continuing contracts). Thus, R.C. 5705.412 provides that a school district may not enter into a contract **[*40]** without the certification required by the first paragraph of R.C. 5705.412 unless the contract is necessary for compliance with R.C. 3317.13(B) or unless the contract comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41. The certification requirement of R.C. 5705.412 applies in such instances regardless of when the goods or services are to be provided and regardless of when payment is to be made.

n8 It is not clear precisely which contracts are excepted from the certification requirement of R.C. 5705.412 by virtue of this language, and I am not addressing that issue. I note, however, that in Board of Education v. Maple Heights Teachers Association, 41 **Ohio** Misc.

27, 322 N.E.2d 154 (C.P. Cuyahoga County 1973), the court stated that the provisions of R.C. 5705.412 take precedence over those contained in R.C. 5705.41. The court construed the "additional certificate" language of R.C. 5705.412 as follows: "This must mean that as to any certificate specifically required by R.C. 5705.412, which is not required by R.C. 5705.41, the provisions of R.C. 5705.412 are mandatory and controlling. This certificate is the one required to be made by the clerk, president of the board, and superintendent, as set out in R.C. 5705.412." Id. at 33, 322 N.E.2d at 158. See also 1980 **Op.** Att'y **Gen.** No. 80-060 at 2-238 through 2-239. I note, further, that CADO Business Systems of **Ohio**, Inc. v. Board of Education, 8 **Ohio** App. 3d 385, 389, 457 N.E.2d 939, 943-44 (Cuyahoga County 1983), motion to certify overruled, No. 83-791 (**Ohio** Sup. Ct. Oct. 26, 1983), contains the following discussion:

To apply appellee's interpretation of the meaning of the language in R.C. 5705.412 [that no certificate is required under R.C. 5705.412 for any purchase order that comes within R.C. 5705.41(D)] would permit all purchase contracts by the board to be made under R.C. 5705.41 and would completely nullify the total force and effect of the lengthy statute spelling out the responsibilities of the [treasurer] and the president of the board of education and the superintendent of the district. Clearly, it was the legislative intent that R.C. 5705.412 should take precedence over R.C. 5705.41 and hold school officials to a higher degree of responsibility in expending public funds than other public officials. Confusion ensues and problems arise only because of the board's liberal interpretation of its powers and the questionable practice of using whichever of the two statutes suits its convenience.

It is the responsibility of the judiciary to place a strict construction on specific statutory provisions designed by the legislature to safeguard public funds. It is the responsibility of boards of education that if they intend to avail themselves of both the general provisions of R.C. 5705.41 as well as the specific provisions of R.C. 5705.412, that they clearly delineate the types of transactions to be handled under each statute respectively. **[*41]**

It is, therefore, my opinion, and you are hereby advised, as follows:

1. Except as otherwise provided by statute, the term "continuing contract," as used in R.C. 5705.41(D), includes divisible contracts and contracts that are designated by statute as continuing contracts. (1966 **Op.** Att'y **Gen.** No. 66-117 (modified, in part, on other grounds by 1979 **Op.** Att'y **Gen.** No. 79-034); 1965 **Op.** Att'y **Gen.** No. 65-126; 1964 **Op.** Att'y **Gen.** No. 1524, p. 2-428; 1959 **Op.** Att'y **Gen.** No. 451, p. 220; 1942 **Op.** Att'y **Gen.** No. 5184, p. 383; 1938 **Op.** Att'y **Gen.** No. 2491, vol. II, p. 1078, questioned.)

2. A contract is entered into on a "per unit" basis for purposes of R.C. 5705.41(D) if it sets forth a price for each unit of a particular item and provides that payment will be made on that basis for such number of units as may be provided. (1940 **Op.** Att'y **Gen.** No. 1695, p. 9, questioned.)

3. A contract entered into on a per unit basis may be a continuing contract.

4. Pursuant to R.C. 5705.41(D), a continuing contract to be performed in whole or in part in an ensuing fiscal year may not be entered into unless the fiscal officer has certified that the amount required to meet the obligation in the **[*42]** fiscal year in which the contract is made has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances.

5. Pursuant to R.C. 5705.41(D), a contract may not be entered into on a per unit basis unless the fiscal officer has certified the availability of sufficient funds to satisfy the amount estimated as becoming due upon the contract in the current year. (1974 **Op.** Att'y **Gen.** No. 74-043, qualified. 1940 **Op.** Att'y **Gen.** No. 1695, p. 9, questioned.)

6. The words "contracts or leases [that] run beyond the termination of the fiscal year in which they are made," as used in R.C. 5705.44, refer to contracts that are continuing contracts under R.C. 5705.41(D) and that by their terms extend beyond the fiscal year in which they are made. (1957 **Op.** Att'y **Gen.** No. 898, p. 372 and 1928 **Op.** Att'y **Gen.** No. 1678, vol. I, p. 316, overruled in part.)

7. Continuing contracts, including continuing contracts entered into on a per unit basis, come within R.C. 5705.44 if they run beyond the termination of the fiscal year in which they are made.

8. If a political subdivision or taxing district **[*43]** subject to R.C. 5705.41(D) enters into a continuing contract under which delivery of the goods or services will not take place until the ensuing fiscal year and payment will not be due until delivery, the fiscal officer need not, under R.C. 5705.41(D), certify any amount as being available during the fiscal year in which the contract is made. Pursuant to R.C. 5705.44, the amount of the obligation remaining unfulfilled at the end of a fiscal year and becoming payable during the following fiscal year shall be included in the annual appropriation measure for such following year as a fixed charge.

9. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract under which it cannot, in good faith, be determined whether delivery of the goods or services and the corresponding obligation to make payment will take place in the current fiscal year or in an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41 (D), certify the entire amount due under the contract as available during the fiscal year in which the contract is made.

10. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a continuing contract **[*44]** under which certain goods or services are to be delivered in the current fiscal year but payment is not to be made until an ensuing fiscal year, the fiscal officer must, under R.C. 5705.41(D), certify as available during the year in which the contract is made the amount required to meet the obligation for goods or services delivered during that fiscal year.

11. If a political subdivision or taxing district subject to R.C. 5705.41(D) enters into a contract that is not a continuing contract, the fiscal officer must, under R.C. 5705.41(D), certify the entire amount due under the contract as available when the contract is made, regardless of whether delivery of the goods or services and payment for such goods or services will take place during the fiscal year in which the contract is made or during a subsequent fiscal year. No certification of availability need be made in subsequent fiscal years.

12. Unless a contract is necessary for compliance with R.C. 3317.13(B) or comes within the exception set forth in R.C. 5705.412 for certain contracts requiring certificates under R.C. 5705.41, no school district shall make the contract unless there is a certificate signed by the treasurer **[*45]** and president of the board of education and the superintendent that the school district has in effect for the remainder of the fiscal year and the succeeding fiscal year the authorization to levy taxes which, when combined with the estimated revenue from all other sources available to the district at the time of certification, are sufficient to enable the district to operate an adequate educational program for the current fiscal year and the succeeding fiscal year, regardless of when goods or services are to be provided under the contract and regardless of when payment is to be made.

Legal Topics:

For related research and practice materials, see the following legal topics:
Contracts Law > Types of Contracts > Installment Contracts

Real Property Law > Landlord & Tenant > Lease Agreements > Lease Provisions

Contracts Law > Types of Contracts > Divisible Contracts

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1999 Ohio Op. Atty Gen. 302; 1999 Ohio Op. Atty Gen. No. 49;
*1999 Ohio AG LEXIS 49, **

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF **OHIO**

OPINION No. 99-049

1999 Ohio Op. Atty Gen. 302; **1999 Ohio Op. Atty Gen.** No. 49; **1999 Ohio** AG LEXIS 49

September 21, **1999**

CORE TERMS: hold harmless, entity, indemnification, fiscal year, indemnify, appropriated, appropriation, maximum, lending, continuing contract, dollar amount, obligated, amount required, per unit, specify, financial obligation, continuing contracts, bonded indebtedness, contract containing, authority to enter, amount sufficient, certification, certificate, encumbered, collecting, elevator, levying, sufficient to support, constitutional provision, statutory authority

SYLLABUS:
[*1]

1. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract specifies a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1).

2. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract complies with the provisions of **Ohio** Const. art. VIII, § 6 that prohibit a county from lending its credit to a private entity. Such compliance is achieved if the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless the private entity.

REQUESTBY:

William R. Swigart, Fulton County Prosecuting Attorney, Wauseon, **Ohio**

OPINIONBY:
Betty D. Montgomery, Attorney General

OPINION:
[*2] We have received your request for an opinion on the following questions:

> 1. May a board of county commissioners on behalf of the county enter into a contract with a private entity which in part provides that the county will indemnify or hold harmless that entity without violating any provision of the **Ohio**

Revised Code or the **Ohio** Constitution?

2. If so, are there any constitutional or statutory prerequisites or limitations that must be complied with by the board of county commissioners?

We are informed that these questions have arisen because the county commissioners are frequently asked to execute contracts consisting of "form" agreements that contain clauses declaring that the county will indemnify and hold harmless the other party to the contract if a legal dispute should ensue with respect to the subject matter of the contract. The significance of the clauses is that the county assumes potentially substantial financial obligations in the event that negligence claims are asserted by injured third parties.

An indemnification or hold harmless clause may appear in a variety of types of contracts. Such a provision imposes a financial obligation upon one party to **[*3]** the contract for the benefit of another party to the contract. *See* Worth v. Aetna Cas. & Sur. Co., 32 **Ohio** St. 3d 238, 513 N.E.2d 253 (1987); 1996 **Op.** Att'y **Gen.** No. 96-060. You have provided as an example an agreement for the purchase of elevator service which states that the purchaser of the service (the county) unconditionally agrees to indemnify and hold harmless the seller (the elevator service company) from any demands, judgments, awards, liabilities, costs, attorney's fees, or other damages to persons or property which may result from riding on or being about the elevator or the associated areas, regardless of the cause of the actions and regardless of any negligence on the part of the seller.

We begin our consideration of your questions by noting that a board of county commissioners is a creature of statute and, as such, it has only the powers it is granted by statute. *See* State ex rel. Shriver v. Board of Comm'rs, 148 **Ohio** St. 277, 74 N.E.2d 248 (1947). Various statutes grant boards of county commissioners, acting on behalf of their respective counties, authority to enter into contracts **[*4]** for different purposes. *See, e.g.*, R.C. 307.02; R.C. 307.04, R.C. 307.15; R.C. 307.69. Clearly, each contract is subject to such statutes as are applicable. In the exercise of its authority to enter into contracts, a board of county commissioners has discretion to agree upon any contractual terms, including an indemnification or hold harmless clause, provided that the terms come within its statutory authority and are not in conflict with constitutional provisions. *See, e.g.*, 1996 **Op.** Att'y **Gen.** No. 96-060, at 2-236; 1987 **Op.** Att'y **Gen.** No. 87-025; 1983 **Op.** Att'y **Gen.** No. 83-069. n1

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n1 Certain types of indemnity agreements are prohibited by **Ohio** law. *See, e.g.*, R.C. 2305.31; R.C. 4123.82. Where no such prohibition applies, indemnification agreements are generally enforceable. *See* Worth v. Aetna Cas. & Sur. Co., 32 **Ohio** St. 3d 238, 513 N.E.2d 253 (1987); 1996 **Op.** Att'y **Gen.** No. 96-060, at 2-237 n.2. The wisdom and efficacy of including an indemnification or hold harmless clause in a public contract, however, are subject to question. *See, e.g.*, 1996 **Op.** Att'y **Gen.** No. 96-060.

- - - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*5]**

The statutory provisions of most immediate concern in matters involving a county's authority to enter into a contract containing an indemnification or hold harmless clause are those governing the expenditure of county funds. Pursuant to R.C. 5705.41, a county cannot enter into a contract (with limited exceptions) unless there is a certificate of the county auditor that the amount required to meet the obligation, or for a continuing contract the amount required to meet the obligation in the fiscal year in which the contract is made, "has been lawfully

appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances." R.C. 5705.41(D)(1); *see also* R.C. 5705.01(D). A contract made without such a certificate is void. *Id.; see also State v. Kuhner & King*, 107 **Ohio** St. 406, 413, 140 N.E. 344, 346 (1923) (the purpose of requiring such a certificate is "particularly to preclude the creation of any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose").

If the contract is to be performed **[*6]** in a single fiscal year, then the amount required to complete the contract must be appropriated and certified for that fiscal year. If the contract is a continuing contract to be performed in whole or in part in an ensuing fiscal year, then the amount required to meet the obligation for the fiscal year in which the contract is made must be appropriated and certified. R.C. 5705.41(D)(1). If the contract runs beyond the termination of the fiscal year in which it is made, the amount "remaining unfulfilled at the end of a fiscal year, and which will become payable during the next fiscal year, shall be included in the annual appropriation measure for the next year as a fixed charge." R.C. 5705.44.

If it is not known when liability may be incurred under a contract, the funds neces sary to cover the liability must be presumed due and payable in the first fiscal year and appropriated and certified accordingly. *See* 1987 **Op.** Att'y **Gen.** No. 87-069, at 2-433 (if a contract is not a continuing contract, "the entire amount due under such a contract must be certified as available when the contract is entered into, even though such amount may not be due until the following fiscal year"). Amounts **[*7]** that are certified in accordance with R.C. 5705.41 (D)(1) are considered to be encumbered and remain available in subsequent years for the expenditures for which they have been certified. *See* 1987 **Op.** Att'y **Gen.** No. 87-069, at 2-433 to 2-434; 1985 **Op.** Att'y **Gen.** No. 85-043; *see also* R.C. 5705.40 ("no appropriation for any purpose shall be reduced below an amount sufficient to cover all unliquidated and outstanding contracts or obligations certified from or against the appropriation"); 1933 **Op.** Att'y **Gen.** No. 1041, vol. II, p. 1063, at 1064-65 ("the amount so certified becomes at once encumbered for the purpose of meeting the contract and cannot be spent or certified against for any other purpose"); 1928 **Op.** Att'y **Gen.** No. 2465, vol. III, p. 1964, at 1966-67 ("so long as a certification is outstanding against such funds, they remain encumbered and available for the purpose of the contract or obligation, irrespective of the termination of the fiscal year").

An indemnification or hold harmless clause commits the contracting party to financial obligations that are generally unknown at the time the contract is made. A county has no statutory authority to promise that, at some time **[*8]** in the future, it will secure funds to pay whatever liability may occur under a contract. Rather, pursuant to R.C. 5705.41(D)(1), the county must certify at the time it makes a contract that it has sufficient money to pay its obligations under that contract. In order to make such a certification, the county must identify a specific dollar amount that is at risk under the contract.

Exceptions to the requirement that the total amount due under a contract must be appropriated and certified apply to continuing contracts and contracts entered into upon a per unit basis, for which it is sufficient to certify the amount due during the fiscal year. R.C. 5705.41; R.C. 5705.44; 1987 **Op.** Att'y **Gen.** No. 87-069. Continuing contracts are divisible contracts that provide for periodic performances over a space of time--such as contracts for salaries, rents, insurance payments, or utilities--and other contracts designated by statute as continuing contracts. Per unit contracts are contracts under which amounts due are determined according to the number of units provided. *See* 1987 **Op.** Att'y **Gen.** No. 87-069; 1958 **Op.** Att'y **Gen.** No. 1604, p. 22.

Although an indemnification or hold harmless **[*9]** clause might be included in a continuing or per unit contract, that clause itself would not constitute a continuing or per unit contract because it is not so designated by statute and because it is a present obligation to pay such

liability as might accrue in the future, whenever it might accrue, rather than an obligation to pay for portions of a product or service on a periodic basis. *See* 1987 **Op.** Att'y **Gen.** No. 87-069. Hence, an indemnification or hold harmless clause is not subject to the exceptions that apply to continuing or per unit contracts.

The continuing contract provisions operate to assure compliance with **Ohio** Const. art. XII, § 11. *See* 1963 **Op.** Att'y **Gen.** No. 167, p. 273, at 275. That constitutional provision says that if the state or a political subdivision incurs bonded indebtedness, provision must be made for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and to provide a sinking fund for their final redemption at maturity. The continuing contract statutes indicate that continuing contracts of a subdivision can be financed on the basis of amounts due in each fiscal year without constituting bonded indebtedness. **[*10]** *See Dix v. Shoemaker*, 24 **Ohio** N.P. (n.s.) 321, 325 (C.P. Delaware County 1922), *error dismissed*, 109 **Ohio** St. 629 (1923) (the sole purpose of **Ohio** Const. art. XII, § 11 "is to prevent the state and other subdivisions from contracting a debt without providing a revenue to meet such indebtedness when it becomes due"); 1939 **Op.** Att'y **Gen.** No. 1087, vol. II, p. 1565, at 1569-70. *See generally State v. Medbery*, 7 **Ohio** St. 522 (1857), *writ of error dismissed*, 65 **Ohio** St. 413 (1860).

No similar statute permits liability assumed under an indemnification or hold harmless clause to be financed on the basis of amounts due each fiscal year. *See generally* 1986 **Op.** Att'y **Gen.** No. 86-031; 1984 **Op.** Att'y **Gen.** No. 84-050; 1980 **Op.** Att'y **Gen.** No. 80-042; 1958 **Op.** Att'y **Gen.** No. 1604, p. 22. Therefore, amounts obligated under such a clause must be appropriated and certified when the contract is made as required by R.C. 5705.41(D)(1) in order to avoid the creation of debt in violation of **Ohio** Const. art. XII, § 11. *See State ex rel. Kitchen v. Christman*, 31 **Ohio** St. 2d 64, 285 N.E.2d 362 (1972); **[*11]** 1985 **Op.** Att'y **Gen.** No. 85-008, at 2-31 n.6; 1984 **Op.** Att'y **Gen.** No. 84-050.

Hence, a county cannot enter into a contract unless there is assurance that there will be adequate funds to meet the county's obligations. A county cannot satisfy this requirement if an indemnification or hold harmless clause included in the contract would permit a liability of an undefined and unlimited amount. In order to comply with R.C. 5705.41(D)(1), a contract containing an indemnification or hold harmless clause must specify a maximum dollar amount for which the county is obligated, and that amount must be appropriated and certified as available for payment prior to the contract's execution. We conclude, therefore, that a board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract specifies a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1). n2

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n2 We are aware that one reason a party might seek to have an indemnification or hold harmless clause in a contract is that the amount of potential liability is unknown and may be substantial. *See, e.g.*, 1996 **Op.** Att'y **Gen.** No. 96-060. Hence, a clause that is restricted to a specified amount to comply with R.C. 5705.41(D)(1) may not serve the intended purpose and may be lacking in practical value. *Id.*

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*12]**

We turn now to the question whether an indemnification or hold harmless clause that complies with R.C. 5705.41(D)(1) will violate any provision of the **Ohio** Constitution.

Questions similar to those you have raised were considered in 1996 **Op.** Att'y **Gen.** No. 96-060 in the context of the authority of the Treasurer of State to enter into a contract containing an indemnification or hold harmless clause. That opinion found that the authority to include such a clause in a state contract was affected by the provisions of **Ohio** Const. art. VIII, §§ 1-3, which restrict the authority of the state to create debt, and by the provisions of **Ohio** Const. art. II, § 22, which provide that money may be drawn from the state treasury only pursuant to specific appropriation and appropriations may be for no longer than two years. Those provisions are not applicable to counties and are not discussed in this opinion. *See, e.g.,* Walker v. City of Cincinnati, 21 **Ohio** St. 14, 52 (1871) ("the limitations imposed upon the State by the first three sections of art. 8, were not intended as limitations upon her political subdivisions--her counties and townships"); *Tereck v. **Ohio** Dep't of Taxation*, 84 **Ohio** Law Abs. 129, 168 N.E.2d 332 (Ct. App. Cuyahoga County 1960). **[*13]**

The debt limitation of **Ohio** Const. art. XII, § 11, discussed above, is applicable to political subdivisions as well as to the state. As noted, that limitation requires that, for bonded indebtedness to be lawfully incurred, there must be provision for levying and collecting taxes sufficient to pay the interest on the bonds and provide a sinking fund for their redemption at maturity. If the county should pledge to make future appropriations of tax revenues and create debt for purposes of **Ohio** Const. art. XII, § 11, the county would be required to make provision for levying and collecting annually by taxation an amount sufficient to pay the debt. *Id.* It does not appear that an indemnification or hold harmless clause imposing a single maximum liability would violate this provision, but such a clause would remain subject to the appropriation and certification provisions of R.C. 5705.41(D)(1) requiring that adequate funds be available. n3

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n3 A debt limitation is imposed upon counties under the Uniform Public Securities Law, *see* R.C. Chapter 133, but that limitation pertains only to the amount of securities issued by the county and is not affected by liability under the indemnity or hold harmless clause of a contract. *See* R.C. 133.04; R.C. 133.07; 1942 **Op.** Att'y **Gen.** No. 5184, p. 383. Hence, that limitation is not relevant to the issues addressed in this opinion.

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The remaining provision that is relevant to your question is **Ohio** Const. art. VIII, § 6, which prohibits a county from becoming a stockholder in a private enterprise, raising money for a private enterprise, or lending its credit to, or in aid of, a private enterprise. n4 Under **Ohio** Const. art. VIII, § 6, a county may contract with a private person or enterprise to buy or sell goods or services on whatever terms it deems appropriate, in the reasonable exercise of the authority granted by statute, provided that the contract does not create a joint enterprise between the county and a private entity or obligate the county to raise money for, or lend its credit to, the private entity. Exceptions to the prohibition of **Ohio** Const. art. VIII, § 6 have been created by constitutional provision, *see* **Ohio** Const. art. VIII, §§ 13-16, and other exceptions have been recognized for transactions with public entities or with private non-profit entities engaged in activities that serve a public purpose, *see* 1996 **Op.** Att'y **Gen.** No. 96-060.

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n4 **Ohio** Const. art. VIII, § 4 contains similar provisions relating to the State of **Ohio. Ohio** Const. art. VIII, §§ 4 and 6 have been construed in the same manner and decisions relating to one of those sections are considered authoritative with respect to the other. *See* State ex

rel. Eichenberger v. Neff, 42 **Ohio** App. 2d 69, 330 N.E.2d 454 (Franklin County 1974); 1996 **Op.** Att'y **Gen.** No. 96-060, at 2-242.

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A contract that defines the county's obligation in terms of a maximum dollar figure, as required by R.C. 5705.41(D)(1), will not violate the constitutional lending credit prohibition, provided that the consideration received is equal in value to the obligations undertaken, so that there is no gratuitous transfer of public moneys. *See* 1996 **Op.** Att'y **Gen.** No. 96-060; 1989 **Op.** Att'y **Gen.** No. 89-010. Questions concerning a violation of the lending credit provisions will not arise unless the county undertakes obligations that are disproportionate to the benefits received. *Id.* We conclude, therefore, that a board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract complies with the provisions of **Ohio** Const. art. VIII, § 6 that prohibit a county from lending its credit to a private entity. Such compliance is achieved if the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless **[*16]** the private entity.

Therefore, it is my opinion, and you are advised:

1. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract specifies a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1).

2. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract complies with the provisions of **Ohio** Const. art. VIII, § 6 that prohibit a county from lending its credit to a private entity. Such compliance is achieved if the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless the private entity.

[*17]

Legal Topics:

For related research and practice materials, see the following legal topics:
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*2005 Ohio Op. Atty Gen. No. 7; 2005 Ohio AG LEXIS 12, **

OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF **OHIO**

Opinion No. **2005-007**

2005 Ohio Op. Atty Gen. No. 7; **2005 Ohio** AG LEXIS 12

March 1, **2005**

CORE TERMS: indemnification, void, prosecuting attorney, unenforceable, enforceable, appropriated, allowable, financial obligation, hold harmless, entity, appropriation, specify, indemnify, maximum, insertion, dollar amount, sufficient to support, certificate, open-ended, obligated, biennium, state agency, certification, prosecutor, township, lease, enforceability, inclusion, municipal, continuing contract

SYLLABUS:
[*1]

1. If a contract entered into by a board of county commissioners on behalf of the county includes a clause under which the county agrees to indemnify another party to the contract, that indemnification clause is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41 (D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. (1999 **Op.** Att'y **Gen.** No. 99-049, approved and followed.)

2. An indemnification clause that does not meet the requirements set forth in paragraph 1 is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable.

3. An indemnification clause that meets the requirements set forth in paragraph 1 is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification **[*2]** clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes the clause void and unenforceable if it is not approved as to form.

REQUESTBY:

The Honorable Martin P. Votel
Preble County Prosecuting Attorney
103 North Barron Street
Eaton, **Ohio** 45320

OPINIONBY:

JIM PETRO, Attorney General

OPINION:
We have received your predecessor's request for an opinion concerning the ability of a county to include indemnification clauses in its contracts with the state or with private parties, and also to include particular phrases designed to ensure that the county's execution of the contracts are in conformity with **Ohio** law. The request asks specifically about the inclusion of the phrase "to the extent allowable by law" and the phrase "approved as to form except as to the indemnification clause in paragraph [as designated]."

For the reasons discussed below, we conclude, in accordance with 1999 **Op.** Att'y **Gen.** No. 99-049, that an indemnification clause in a county contract is valid **[*3]** and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. An indemnification clause that does not meet these requirements is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable. An indemnification clause that meets these requirements is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes **[*4]** the clause void and unenforceable if it is not approved as to form.

Background

The questions regarding the legality and acceptable phrasing of an indemnity clause pertain to contracts between the county and a state agency and also to contracts between the county and private parties. The example given involves a contract including a clause under which the county would indemnify the State of **Ohio** for any damage or liability arising from a particular transaction.

It is important to note initially that statutory and constitutional provisions governing state agency contracts differ in some respects from those governing the contracts of counties. Accordingly, the principles governing the State of **Ohio's** authority to include an indemnification clause in a contract are not identical to the principles governing a county's authority to include a similar clause. *See* 1999 **Op.** Att'y **Gen.** No. 99-049; 1996 **Op.** Att'y **Gen.** No. 96-060. This opinion addresses the county's authority. n1

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n1 To understand the significance of this opinion, it is helpful also to be familiar with the general principles governing the authority of a state agency or entity to include an indemnification clause in a contract. Those principles are discussed in 1996 **Op.** Att'y **Gen.** No. 96-060. Like a county contract, a state contract is subject to the requirement that an indemnification clause specify a maximum dollar amount of obligation to avoid creating debt in violation of the **Ohio** Constitution, and to the requirement that the amount specified be appropriated and certified as required by law. On the state level, the money is appropriated to the Treasurer of State and certified as available by the Director of Budget and Management. *See* **Ohio** Const. art. II, § 22 ("no money shall be drawn from the treasury, except in pursuance of a specific appropriation, made by law"); R.C. 126.07 (no contract involving the expenditure of money chargeable to an appropriation is valid and enforceable

unless the Director of Budget and Management first certifies that there is a balance in the appropriation not already obligated to pay existing obligations in an amount at least equal to the portion of the contract to be performed in the current fiscal year, and any written agreement entered into by the state must specify that the obligations of the state are subject to this section); R.C. 131.33 ("no state agency shall incur an obligation which exceeds the agency's current appropriation authority"). Constitutional provisions restricting the debt of the state appear in **Ohio** Const. art. VIII, §§ 1 to 3 and 17, setting limits on the amounts of debt that may be created by or on behalf of the state for various purposes. *See also* **Ohio** Const. art. XII, § 4 ("the General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt"); **Ohio** Const. art. XII, § 11 (prohibiting the state or a political subdivision from incurring bonded indebtedness without making provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and provide a sinking fund for their redemption). In addition, state contracts are subject to the limitation that "no appropriation shall be made for a longer period than two years." **Ohio** Const. art. II, § 22. Therefore, an indemnification clause may not bind the state for any length of time beyond the duration of the biennium in which the contract is executed. 1996 **Op.** Att'y **Gen.** No. 96-060 at 2-241.

The constitutional debt restrictions prevent the state from incurring any debt except as permitted by the **Ohio** Constitution, including debt incurred by contract. A prohibited debt is created if the state incurs a financial obligation for which the General Assembly has not already provided an appropriation within the current biennium or if the state incurs a financial obligation that extends beyond the current biennium and attempts to bind successive General Assemblies. *See State v. Medbery*, 7 **Ohio** St. 522 (1857); 1996 **Op.** Att'y **Gen.** No. 96-060 at 2-239; *see also State ex rel. **Ohio** Funds Mgmt. Bd. v. Walker*, 55 **Ohio** St. 3d 1, 561 N.E.2d 927 (1990); *Sorrentino v **Ohio** Nat'l Guard*, 53 **Ohio** St. 3d 214, 560 N.E.2d 186 (1990). Like a county contract, a state contract is also subject to the lending credit prohibition (appearing in **Ohio** Const. art. VIII § 4, *see* note 7, *infra*), which requires that the state receive consideration sufficient to support the financial obligation that it assumes under the indemnification clause.

1996 **Op.** Att'y **Gen.** No. 96-060 reaches the following conclusions:

> 1. The inclusion of a hold harmless or indemnification clause in a contract to which the Treasurer of State is a party and that imposes a financial obligation upon the Treasurer of State or the State of **Ohio** for the benefit of another party to the contract must comply with the state debt and appropriation provisions of **Ohio** Const. art. II, § 22, art. VIII, §§ 1-3, R.C. 126.07, and R.C. 131.33. In order to comply with those provisions, the hold harmless or indemnification clause may obligate the Treasurer of State or the State of **Ohio** only for the duration of the biennium in which the contract is executed, and may not impose a financial obligation for any period beyond that biennium. The clause also must specify a maximum dollar amount for which the Treasurer of State or the State of **Ohio** is thus obligated, and the amount specified must be appropriated to the Treasurer of State and certified by the Director of Budget and Management as available for payment prior to the contract's execution.
>
> 2. The inclusion of a hold harmless or indemnification clause in a contract to which the Treasurer of State is a party and that imposes a financial obligation upon the Treasurer of State or the State of **Ohio** for the benefit of another party to the contract must comply with the prohibition in **Ohio** Const. art. VIII, § 4 against the state lending its credit. In order to comply with that prohibition, under the terms of the contract the other party to the contract must provide the Treasurer of State consideration sufficient to support the financial obligation the Treasurer assumes under the hold harmless or indemnification clause.

1996 **Op.** Att'y **Gen.** No. 96-060 (syllabus). These conclusions permit the state to include indemnification clauses in its contracts, provided that the clauses comply with relevant constitutional and statutory provisions. State contracts may provide for renewal in a subsequent biennium, conditioned upon the appropriation of money for that purpose by the General Assembly. *See, e.g.,* *State ex rel. Preston v. Ferguson*, 170 **Ohio** St. 450, 456-59, 166 N.E.2d 365 (1960) (no debt is created when a contract, or any renewal contract, does not extend beyond two years and appropriations are made and revenue provided for each two-year obligation; renewal for the next biennium is conditioned upon there being a balance in the appropriation to meet the obligation incurred by the election to renew); *State ex rel. Ross v. Donahey*, 93 **Ohio** St. 414, 113 N.E. 263 (1916) (no debt is incurred where lease is made subject to the appropriation by the state legislature of the necessary funds); *Butler County Transp. Improvement Dist. v. Tracy*, 120 **Ohio** App. 3d 346, 355-56, 697 N.E.2d 1089 (Butler County 1997) (no unconstitutional debt is created where lease is conditioned upon the appropriation of funds); *see also* 1979 **Op.** Att'y **Gen.** No. 79-103.

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*5]**

Authority of a county to include an indemnification clause in a contract

An indemnification clause is a contractual provision that imposes a financial obligation upon one party to a contract for the benefit of another party to the contract, providing that one party will indemnify the other party, or keep the other party free from loss, if a legal dispute should ensue. Under an indemnification clause, one party may assume financial obligations that have the potential of being substantial if injured third parties assert negligence claims. *See* *Worth v. Aetna Cas. & Sur. Co.*, 32 **Ohio** St. 3d 238, 513 N.E.2d 253 (1987); *Black's Law Dictionary* 772 (7th ed. 1999) ("indemnify" means to reimburse or promise to reimburse another for a loss suffered because of a third party's act or default); 1999 **Op.** Att'y **Gen.** No. 99-049; 1996 **Op.** Att'y **Gen.** No. 96-060. n2

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n2 Indemnification clauses are sometimes linked with or referred to as "hold harmless" clauses, which serve similar purposes. *See* 1996 **Op.** Att'y **Gen.** No. 96-060 at 2-234 to 2-235. This opinion uses only the term "indemnification clauses."

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*6]**

The question whether a board of county commissioners, acting on behalf of the county, may include an indemnification clause in a contract with a private entity is addressed in 1999 **Op.** Att'y **Gen.** No. 99-049. This opinion discusses the question in detail and reaches the following conclusions:

> 1. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to indemnify or hold harmless that private entity, but such a clause may be included only if the contract specifies a maximum dollar amount for which the county is obligated under the indemnification or hold harmless clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1).
>
> 2. A board of county commissioners, acting on behalf of the county, may include in a contract with a private entity a clause under which the county agrees to

indemnify or hold harmless that private entity, but such a clause may be included only if the contract complies with the provisions of **Ohio** Const. art. VIII, § 6 that prohibit a county from lending its credit to a private entity. **[*7]** Such compliance is achieved if the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the agreement to indemnify or hold harmless the private entity.

1999 **Op.** Att'y **Gen.** No. 99-049 (syllabus); *see also* 2003 **Op.** Att'y **Gen.** No. 2003-035 at 2-292 to 2-293; 2003 **Op.** Att'y **Gen.** No. 2003-008 at 2-56 to 2-57. We affirm the conclusion reached in this opinion, and provide the following summary of the applicable analysis. We find, further, that this analysis is applicable also to contracts with public entities unless specific statutes provide to the contrary.

The conclusions reached in 1999 **Op.** Att'y **Gen.** No. 99-049 are based on the statutes governing boards of county commissioners. A board of county commissioners is authorized to enter into various contracts, as provided by statute. *See, e.g.*, R.C. 307.02; R.C. 307.04; R.C. 307.15; R.C. 307.69. In exercising its authority to contract, a board of county commissioners has discretion to agree upon any contractual **[*8]** terms, including an indemnification clause, provided that the terms come within the board's statutory authority and do not conflict with constitutional provisions. *See* 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-303; 1983 **Op.** Att'y **Gen.** No. 83-069 at 2-287 (where no statutes prescribe contractual terms, a board of township trustees may agree to the terms and conditions it deems appropriate, subject to the standard of abuse of discretion); 1977 **Op.** Att'y **Gen.** No. 77-048 at 2-170 (the power to contract implies the power to set contractual terms); *see also* 1988 **Op.** Att'y **Gen.** No. 88-076 (except as provided by law, contracts of a governmental entity are governed by the same principles applicable to contracts between private persons). n3

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n3 **Ohio** law prohibits certain types of indemnity agreements. *See, e.g.*, R.C. 2305.31; R.C. 4123.82. If no prohibition applies, indemnification agreements are generally enforceable. *See* *Worth v. Aetna Cas. & Sur. Co.*, 32 **Ohio** St. 3d 238, 241, 513 N.E.2d 253 (1987); *Buckeye Union Ins. Co. v. Zavarella Bros. Constr. Co.*, 121 **Ohio** App. 3d 147, 699 N.E.2d 127 (Cuyahoga County 1997); 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-303 n.1. There are, however, questions concerning the wisdom and efficacy of including an indemnification clause in a public contract. *See, e.g.*, 1999 **Op.** Att'y **Gen.** 99-049 at 2-303 n.1; 1996 **Op.** Att'y **Gen.** 96-060 at 2-244 ("a state agency... should consider whether agreeing to include such clauses in its contracts is prudent or advisable as a matter of public fiscal policy... An obligation of that character may have unforeseeable and undesirable consequences for the state agency at some time in the future... [A] state agency should make a close and careful examination of the nature and probability of that risk, and then determine whether that risk is worth whatever benefit, if any, the agency receives by having the clause in the contract" (citations omitted)).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*9]**

The statutes of greatest importance in determining a county's authority to include an indemnification clause in a contract are those governing the expenditure of county funds. In particular, R.C. 5705.41(D)(1) prevents a county from entering into a contract (subject to certain exceptions n4) unless there is attached to the contract a certificate of the county auditor that the amount required to meet the obligation (or in the case of a continuing contract to be performed in whole or in part in an ensuing fiscal year, the amount required to

meet the obligation in the fiscal year in which the contract is made n5) has been lawfully appropriated for that purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances. A contract without the required certificate is void. R.C. 5705.41(D)(1); *see* *State v. Kuhner & King*, 107 **Ohio** St. 406, 413, 140 N.E. 344 (1923) (the purpose of the certificate requirement is to prevent fraud and reckless expenditures "but particularly to preclude the creation of **[*10]** any valid obligation against the county above or beyond the fund previously provided and at hand for such purpose"); *Buchanan Bridge Co. v. Campbell*, 60 **Ohio** St. 406, 54 N.E. 372 (1899) (a contract made in violation of governing statutes is void, and the courts will leave the parties where they have placed themselves); 2004 **Op.** Att'y **Gen.** No. 2004-031 at 2-277 to 2-278.

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n4 Exceptions are allowed for purchases of $ 1000 or less made pursuant to resolution of the board of county commissioners, for contracts or leases running beyond the termination of the fiscal year, for contracts on which payments are made from the earnings of a publicly operated water works or public utility, and in certain circumstances involving a county board of mental retardation and developmental disabilities. R.C. 5705.41(D)(2); R.C. 5705.44; 1987 **Op.** Att'y **Gen.** No. 87-069. Specific provisions govern particular types of expenditures, including contracts entered into upon a per unit basis and current payrolls. R.C. 305.17; R.C. 307.04; R.C. 5705.41(D)(3); R.C. 5705.46. **[*11]**

n5 A continuing contract is a divisible contract that provides for periodic performances over a course of time, or any contract designated by statute as a continuing contract. *See* 1987 **Op.** Att'y **Gen.** No. 87-069. Contracts for rent or insurance payments are commonly continuing contracts. *Id.* at 2-425 to 2-428; *see* 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-304 to 2-305. A typical indemnification clause is not a continuing contract. *See* 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-305 (an indemnification clause "is a present obligation to pay such liability as might accrue in the future, whenever it might accrue, rather than an obligation to pay for portions of a product or service on a periodic basis").

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As was stated in 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-304, "if it is not known when liability may be incurred under a contract, the funds necessary to cover the liability must be presumed due and payable in the first fiscal year and appropriated and certified accordingly." Funds that are certified pursuant to R.C. 5705.41(D)(1) are encumbered funds that remain **[*12]** available in subsequent years for the purposes for which they were certified. 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-304.

Compliance with R.C. 5705.41(D)(1) is required to avoid the creation of debt in violation of **Ohio** Const. art. XII, § 11. Section 11 prohibits the state or a political subdivision from incurring bonded indebtedness without making provision for levying and collecting annually by taxation an amount sufficient to pay the interest on the bonds and to provide a sinking fund for their redemption. *Id.* A contract that provides for future payments without providing a source of funds for those payments may create bonded indebtedness in violation of **Ohio** Const. art. XII, § 11. *See* 2003 **Op.** Att'y **Gen.** No. 2003-035 at 2-292 to 2-293; 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-305 to 2-306; 1996 **Op.** Att'y **Gen.** No. 96-060; *see also* *State ex rel. **Ohio** Funds Mgmt. Bd. v. Walker*, 55 **Ohio** St. 3d 1, 561 N.E.2d 927 (1990); *State ex rel. Kitchen v. Christman*, 31 **Ohio** St. 2d 64, 285 N.E.2d 362 (1972); *State v. Medbery*, 7 **Ohio** St. 522 (1857); **[*13]** 1939 **Op.** Att'y **Gen.** No. 1087, vol. II, p. 1565 at 1569 ("the very obvious purpose of the people in adopting [**Ohio** Const. art. XII, § 11] was to put an end to

the then too prevalent practice on the part of political subdivisions of incurring indebtedness with little more than a hope that such indebtedness might some day and in some manner be paid"). The certification requirements of R.C. 5705.41(D)(1) prevent a county from entering into a contract without assurance that there will be sufficient funds to meet the obligations assumed under the contract. n6

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n6 In certain circumstances, the failure to assure that the moneys required to pay the obligations assumed under a public contract are currently available may result in personal liability. In this regard, R.C. 3.12 states:

> An officer or agent of the state or of any county, township, or municipal corporation who is charged or entrusted with the construction, improvement, or keeping in repair of a building or work of any kind, or with the management of or providing for a public institution, shall make no contract binding or purporting to bind the state, or such county, township, or municipal corporation, to pay any sum of money not previously appropriated for the purpose for which such contract is made, and remaining unexpended and applicable thereto, unless such officer or agent has been authorized to make such contract. If such officer or agent makes or participates in making a contract without such appropriation or authority, he is personally liable thereon, and the state, county, township, or municipal corporation in whose name or behalf the contract was made shall not be liable thereon.

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A typical indemnification clause is open ended, providing simply that one party to a contract agrees to indemnify another party from any demands, judgments, liabilities, costs or other damages that may result from activities related to the contracted matter. A county is not permitted to enter into an indemnification clause of this type because the clause does not comply with the requirements of R.C. 5705.41(D)(1). In particular, an open-ended indemnification clause does not specify the maximum obligation that the county may incur under the clause and does not have a certificate stating that the amount required to meet that obligation has been lawfully appropriated for that purpose and is in the treasury or in the process of collection to the credit of an appropriate fund free from any previous encumbrances. *See* 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-304 ("an indemnification or hold harmless clause commits the contracting party to financial obligations that are generally unknown at the time the contract is made. A county has no statutory authority to promise that, at some time in the future, it will secure funds to pay whatever liability may **[*15]** occur under a contract"); *see also* 2003 **Op.** Att'y **Gen.** No. 2003-035 at 2-292 ("while a public agency is not absolutely prohibited from agreeing to an indemnification or hold harmless clause, it must meet certain constitutional and statutory requirements").

Another provision that must be considered in determining the validity and enforceability of an indemnification clause in a county contract is **Ohio** Const. art. VIII, § 6, which prohibits a county from becoming a stockholder in a private enterprise and from raising money for, or loaning its credit to or in aid of, a private enterprise. n7 **Ohio** Const. art. VIII, § 6 does not

prevent a county from entering into contracts with private persons for the purchase or sale of goods or services, provided that the contracts do not create a joint enterprise between the county and a private entity or require the county to raise money for, or lend its credit to, a private entity. Transactions with public entities, or with private nonprofit entities serving a public purpose, are permitted, and certain constitutional provisions create exceptions to the lending credit prohibition. *See* **Ohio** Const. art. VIII, §§ 13-16; 1996 **Op.** Att'y **Gen.** No. **[*16]** 96-060.

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n7 Similar provisions pertaining to the State of **Ohio** appear in **Ohio** Const. art. VIII, § 4, and the same construction has been applied to both § 4 and § 6. *See State ex rel. Eichenberger v. Neff*, 42 **Ohio** App. 2d 69, 74-75, 330 N.E.2d 454 (Franklin County 1974); 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-306 n.4.

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As discussed in 1999 **Op.** Att'y **Gen.** No. 99-049, an indemnification clause in a county contract will not violate **Ohio** Const. art. VIII, § 6, if the contract complies with R.C. 5705.41 (D)(1) by setting a maximum amount of the county's obligation and if "the consideration received is equal in value to the obligations undertaken, so that there is no gratuitous transfer of public moneys." 1999 **Op.** Att'y **Gen.** No. 99-049 at 2-307. Thus, an issue arises under **Ohio** Const. art. VIII, § 6 only if the obligations that the county undertakes are disproportionate to the benefits received. *Id.*; *see also* 2003 **Op.** Att'y **Gen.** No. 2003-035 **[*17]** at 2-293; 2003 **Op.** Att'y **Gen.** No. 2003-008 at 2-57; 1996 **Op.** Att'y **Gen.** No. 96-060 at 2-242 to 2-244; 1989 **Op.** Att'y **Gen.** No. 89-010 at 2-41.

Inclusion of language "to the extent allowable by law"

The questions before us assume that, in proceeding with the normal operations of government, the county has been presented with a contract including an indemnification clause providing that the county shall indemnify another party to the contract for any damage or liability arising from the transaction. As discussed above, if the indemnification clause is for an undefined amount and no certification under R.C. 5705.41(D)(1) provides funds to meet the obligation, the contract is void and unenforceable. n8 *See* 2003 **Op.** Att'y **Gen.** No. 2003-017 at 2-129 ("a contract that is void is a nullity, of no legal effect whatsoever"). If the language "to the extent allowable by law" is inserted into this open-ended indemnification clause, the clause remains void and unenforceable. n9 The "extent allowable by law" is the extent of funds certified under R.C. 5705.41(D)(1) to meet the obligations of a contract. Without **[*18]** the required certification, the provision is not enforceable regardless of whether it says "to the extent allowable by law." *See generally George H. Dingledy Lumber Co. v. Erie R.R. Co.*, 102 **Ohio** St. 236, 131 N.E. 723 (1921) (syllabus, paragraph 1) ("public policy requires that contracts of indemnity purporting to relieve one from the results of his failure to exercise ordinary care shall be strictly construed, and will not be held to provide such indemnification unless so expressed in clear and unequivocal terms"); *Vannoy v. Capital Lincoln-Mercury Sales, Inc.*, 88 **Ohio** App. 3d 138, 144, 623 N.E.2d 177 (Ross County 1993) (phrase "where permitted by law" in clause providing for payment of attorney fees upon default of note refers to the law of each jurisdiction; where the provision is void, it is excluded from the contract). n10

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n8 R.C. 5705.41(D)(1) states: "Every such contract made without such a certificate shall be

void, and no warrant shall be issued in payment of any amount due thereon." If a contract containing an indemnification clause is in compliance with R.C. 5705.41(D)(1) with regard to matters other than the indemnification clause, it seems likely that a court would treat the indemnification clause as a separate contract and find that clause alone void under R.C. 5705.41(D)(1). *See generally* *George H. Dingledy Lumber Co. v. Erie R.R. Co.*, 102 **Ohio** St. 236, 241, 131 N.E. 723 (1921) (agreement referred to as "contract of indemnification" is part of a lease); *Vannoy v. Capital Lincoln-Mercury Sales, Inc.*, 88 **Ohio** App. 3d 138, 143, 623 N.E.2d 177 (Ross County 1993) ("it is one thing to hold that a single provision in an instrument is void and it is quite another to hold that the entire instrument is unenforceable"); 1999 **Op.** Att'y **Gen.** 99-049 at 2-305 ("although an indemnification or hold harmless clause might be included in a continuing or per unit contract, that clause itself would not constitute a continuing or per unit contract"). **[*19]**

n9 Although our research finds an open-ended indemnification clause in a county contract to be void and unenforceable, there remains the possibility that a court might find the indemnification clause valid to the extent of moneys appropriated and certified as available for other purposes of the contract. Thus, moneys appropriated for the purchase of goods or services might be expended instead for indemnification purposes, creating a deficiency in moneys available for goods or services and raising issues of the unconstitutional creation of debt in violation of the **Ohio** Constitution.

n10 Were the language "to the extent allowable by law" construed to mean "to the extent that funds are subsequently properly appropriated and certified for this purpose," the purpose of the indemnification clause could be accomplished, but that would result not from the operation of the phrase "to the extent allowable by law" but from the subsequent action of the public body. If this is the intent of the contract, the better practice would be to state so directly.

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If, on the other hand, the indemnification clause meets **[*20]** the requirements set forth in 1999 **Op.** Att'y **Gen.** No. 99-049 -- that is, it specifies a maximum dollar amount for which the county is obligated, has funds certified as available under R.C. 5705.41(D)(1), and provides consideration sufficient for the obligations that the county assumes -- then the indemnification clause is valid and enforceable. Inserting the language "to the extent allowable by law" does not change this result.

Inclusion of language "approved as to form except as to the indemnification clause"

The second question asks about the effect of including in the contract language stating "approved as to form except as to the indemnification clause." To address this question, it is helpful to consider the prosecuting attorney's responsibility to approve county contracts "as to form."

The county prosecuting attorney has various statutory responsibilities to review or certify certain types of documents. For example, with regard to public improvements under R.C. Chapter 153, the board of county commissioners is required to submit all contracts over $ 1,000 to the county prosecuting attorney before work is done or material furnished. **[*21]** "If found by [the prosecuting attorney] to be in accordance with [R.C. 153.01 to R.C. 153.60], and [the county prosecuting attorney's] certificate to that effect is indorsed thereon, such contracts shall have full effect, otherwise they shall be void." R.C. 153.44. Under this

provision, the prosecutor is required to provide certification of compliance with the substantive requirements set forth in R.C. 153.01 to R.C. 153.60, and not merely approval as to form. *State ex rel. Fornoff v. Nash*, 23 **Ohio** St. 568, 574 (1873) ("in determining whether the contract is in accordance with the provisions' of the act, the prosecuting attorney, in discharging his duty, is not limited to the form of the contract, but is to ascertain whether the preceding steps required by the statute have been followed"); 1954 **Op.** Att'y **Gen.** No. 3743, p. 207 at 212 (the statutory prerequisites, including the endorsement of the prosecuting attorney, "are of the essence of the contract, and **[*22]** without them no legal obligation is created and the purported agreement will be treated as a nullity"). Similarly, at the request of the county board of mental retardation and developmental disabilities, the prosecuting attorney must "prepare a legal review" of certain direct services contracts and determine whether they are in compliance with state law. R.C. 5126.032(B). Again, it appears that the required review contemplates a substantive review and not merely approval as to form. *See also* R.C. 307.02 (the board of county commissioners may not enter into a lease agreement "until the agreement is submitted to the county prosecutor and the county prosecutor's approval certified thereon"); R.C. 309.11 (the prosecuting attorney must prepare the official bonds for all county officers and see that the acceptance by the proper authorities, the signing, and the indorsements "are in conformity to law"; no bond may be accepted or approved for a county officer until the prosecuting attorney has inspected it and certified it as sufficient). *See generally* *Kelly v. State*, 25 **Ohio** St. 567 (1874) **[*23]** (syllabus, paragraph 2) ("the provision of the statute requiring the indorsement of the certificate of the prosecuting attorney upon the bond of the treasurer is merely directory, and the want of such indorsement does not invalidate the bond").

One statute that expressly requires the prosecuting attorney to approve the form of legal documents is R.C. 5155.31, which states, with regard to the lease of a county home or county nursing home that the board of county commissioners has closed, that the "form... shall be approved by the prosecuting attorney." *See generally* 2004 **Op.** Att'y **Gen.** No. 2004-031 (syllabus) ("there must... be compliance in each instance with the statutory requirements that apply to a particular contract"). Apart from statutes providing expressly for approval as to form, the county prosecutor's general duties to provide legal counsel and services to county officers and boards clearly permit the prosecutor to establish a policy or procedure for reviewing county contracts and approving them as to form. *See* R.C. 309.09 (A); 2004 **Op.** Att'y **Gen.** No. 2004-032; 2000 **Op.** Att'y **Gen.** No. 2000-008 **[*24]** at 2-41 ("in the absence of... statutory mandates,... the nature and extent of advice the prosecuting attorney renders to county officers and entities under R.C. 309.09(A) is a matter to be determined by the prosecuting attorney in a reasonable exercise of discretion" (footnote and citations omitted)). n11

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n11 Our research has disclosed no general statute that attaches a particular legal significance to the failure of the county prosecuting attorney to approve the form of a county contract. By way of comparison, R.C. 705.11 expressly imposes upon the village solicitor or city director of law the duty to prepare all contracts, bonds, and other instruments in writing in which the municipal corporation is concerned, and to "indorse on each his approval of the form and the correctness thereof." The statute specifies: "No contract with the municipal corporation shall take effect until the approval of the village solicitor or city director of law is endorsed thereon." R.C. 705.11; *see, e.g.,* *State ex rel. City Asphalt & Paving Co. v. City of Campbell*, 76 **Ohio** L. Abs. 58, 60-61, 145 N.E.2d 234 (Ct. App. Mahoning County 1954) (city solicitor approved form and legality of contract).

- - - - - - - - - - - - End Footnotes- - - - - - - - - - - - - - **[*25]**

In determining the effect of including in a county contract the language "approved as to form except as to the indemnification clause," it is clear that the provisions of applicable statutes prevail. If a statute requires that a particular contract be approved as to form by the prosecuting attorney, the absence of the required approval will result in such consequences as the statute provides, and may render the contract void. In the absence of a statute requiring the county prosecutor's approval as to form, it appears that, if an indemnification clause is included in a county contract, that clause is part of the contract and is given the legal significance appropriate to its language, regardless of whether the language was approved as to form by the prosecuting attorney.

Therefore, if an indemnification clause is void and unenforceable because it does not contain the provisions required by law, it will remain void and unenforceable if the contract states that the indemnification clause was not approved as to form. If an indemnification clause complies with the requirements needed to be valid and enforceable, it remains valid and enforceable even if the contract asserts that the indemnification **[*26]** clause was not approved as to form, unless a statute conditions the validity and enforceability of the clause upon its approval as to form. Of course, if the lack of approval results in the language being deleted from the contract before the contract is executed, then the deleted language is of no legal effect. *See, e.g.*, R.C. 5126.032(B) (following review by the prosecuting attorney, the county board of mental retardation and developmental disabilities "shall enter into only those contracts submitted for review that are determined by the prosecuting attorney to be in compliance with state law"); note 11, *supra*.

Retaining an indemnification clause in a county contract

We have been asked to consider a situation in which a public or private party asks a county to enter into a contract that contains an indemnification clause. If, as discussed above, the indemnification clause meets the requirements needed to be valid and enforceable, then it may clearly be retained in the contract. However, if the indemnification clause is deemed void and unenforceable because it is an open-ended clause that does not specify a maximum dollar amount **[*27]** for which the county is obligated and include a certification that funds have been appropriated and are available, as required by R.C. 5705.41(D)(1), or because it does not provide the county with consideration sufficient to support the obligation that the county assumes under the contract, we cannot recommend that the indemnification clause be retained in the contract. *See* 2003 **Op.** Att'y **Gen.** No. 2003-035 at 2-293 (an indemnification clause that does not set a maximum amount "is not a term to which a township may constitutionally or statutorily agree").

Including contractual language that is acknowledged to be of no legal effect does not promote the goal of expressing the agreement of the parties. *See, e.g.*, *Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facilities Auth.*, 78 **Ohio** St. 3d 353, 363, 678 N.E.2d 519 (1997) (in construing a contract, the court "must attempt to give effect to each and every part of it"); *Kelly v. Medical Life Ins. Co.*, 31 **Ohio** St. 3d 130, 509 N.E.2d 411 (1987) (syllabus, paragraph 1) ("the intent of the **[*28]** parties to a contract is presumed to reside in the language they chose to employ in the agreement"); *Farmers Nat'l Bank v. Delaware Ins. Co.*, 83 **Ohio** St. 309, 330, 94 N.E. 834 (1911) ("the terms and conditions are written into a contract for the purpose of being observed by the parties thereto"). The presence of an open-ended indemnification clause believed to have no legal effect may be misleading and may be the cause of unnecessary litigation. *See generally* *Johnson v. Lincoln Nat'l Life Ins. Co.*, 69 **Ohio** App. 3d 249, 590 N.E.2d 761 (Montgomery County 1990); *Warren Educ. Ass'n v. Warren City Bd. of Educ.*, 18 **Ohio** St. 3d 170, 175, 480 N.E.2d 456 (1985) ("public agencies should be aware that their agreements are as sacrosanct as those made between strictly private parties. Public agencies, like those in the private sector, are bound by the agreements made by those who negotiate on their behalf"). Indeed, the presence of an open-ended indemnification clause may result in the personal liability of an individual who makes or participates in making a **[*29]** public contract. *See*

note 6, *supra*.

Further, If an open-ended indemnification clause is retained in a contract in the belief that it is void and unenforceable, there is a possibility that a court may ascribe an unintended meaning to the language. *See* note 9, *supra*; *see also, e.g., Sys. Automation Corp. v.* ***Ohio*** *Dep't of Admin. Servs.*, 2004-**Ohio**-5544, P 26 (Ct. App. Franklin County) (determining that a public contract had been renewed when the actions of the parties reflected that understanding and stating: "Government contracts are not exempt from the requirement of good faith and fair dealing, and where evidence suggests that the parties were in mutual understanding about the contents and performance of a contract, government may not take advantage of an ultratechnical construction' of a statutory requirement"); *LaConte Enters. v. Cuyahoga County*, 145 **Ohio** App. 3d 806, 764 N.E.2d 1051 (Cuyahoga County 2001). Instead of retaining contractual language that is intended to be meaningless, the better options are to rephrase the clause to give it meaning, to delete the clause, or to refuse to enter into the contract. **[*30]** *See* note 10, *supra*.

Conclusions

For the reasons discussed above, it is my opinion, and you are advised, as follows:

1. If a contract entered into by a board of county commissioners on behalf of the county includes a clause under which the county agrees to indemnify another party to the contract, that indemnification clause is valid and enforceable only if: (1) the contract specifies a maximum dollar amount for which the county is obligated under the indemnification clause and that amount is appropriated and certified as available in accordance with R.C. 5705.41(D)(1); and (2) the contract provides the county consideration sufficient to support the financial obligation that the county assumes under the indemnification clause. (1999 **Op.** Att'y **Gen.** No. 99-049, approved and followed.)

2. An indemnification clause that does not meet the requirements set forth in paragraph 1 is void and unenforceable, and insertion of the language "to the extent allowable by law" or "approved as to form except as to the indemnification clause" does not render that indemnification clause enforceable.

3. An indemnification clause that meets the requirements **[*31]** set forth in paragraph 1 is valid and enforceable. Insertion of the language "to the extent allowable by law" into a valid indemnification clause does not change the validity or enforceability of the indemnification clause. Insertion of the language "approved as to form except as to the indemnification clause" into a contract containing a valid indemnification clause renders the indemnification clause void and unenforceable only if a statute makes the clause void and unenforceable if it is not approved as to form.

Legal Topics:

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17A Am Jur 2d CONTRACTS § 530

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Contracts
V. Modification, Extinguishment, and Renewal
C. Rescission, Termination, or Discharge
1. In General

17A Am Jur 2d CONTRACTS § 530

§ 530 Duration and expiration of contract

Where a contract specifies the period of its duration, it terminates on the expiration of such period.[1] Where the time for a contract's duration is not specified, or where the language in regard thereto lacks precision, the court may inquire into the intent of the parties and supply the missing term, if duration may be fairly and reasonably fixed by the surrounding circumstances and the parties' intent.[2]

Observation: Even though a contract may not state in express terms that it is to endure for a definite period, the time mentioned therein may indicate that the parties intended that it should continue at least for such a period.[3]

A contract which names a specific period for duration, followed by a clause describing the period in terms other than those of specific time, is not necessarily limited by the specific period designated; the ultimate criterion is the intention of the parties, which, where not expressed, is to be determined in accordance with the usual rules of construction.[4]

A contract which, by its terms, expires on a certain day remains in force for the whole of that day unless, by its express wording, it is limited to a certain time of the day upon which it expires.[5]

FOOTNOTES:

n1 Fritzen v. Concord Life Ins. Co., 131 Ill. App. 2d 941, 267 N.E.2d 676 (4th Dist. 1971); Benelli v. Hopkins, 198 Misc. 734, 103 N.Y.S.2d 526 (Sup 1950); Mollett v. City of Tacoma, 53 Wash. 2d 729, 337 P.2d 48 (1959).

n2 Haines v. City of New York, 41 N.Y.2d 769, 396 N.Y.S.2d 155, 364 N.E.2d 820 (1977).

n3 Mangini v. Wolfschmidt, Limited, 165 Cal. App. 2d 192, 331 P.2d 728 (2d Dist. 1958); Maimon v. Telman, 40 Ill. 2d 535, 240 N.E.2d 652 (1968); United Chemical & Exterminating Co. v. Security Exterminating Corp., 246 A.D. 258, 285 N.Y.S. 291 (1st Dep't 1936); Wilson v. Wernwag, 217 Pa. 82, 66 A. 242 (1907).

n4 Williams v. Batson, 186 Miss. 248, 187 So. 236, 128 A.L.R. 1138 (1939).

n5 Garelick v. Rosen, 274 N.Y. 64, 8 N.E.2d 279 (1937).

REFERENCE:

West's Key Number Digest, Contracts [westkey]249, 252 to 262, 264 to 266, 270(1) to 271, 273, 274
A.L.R. Digest: Contracts §§ 510 to 545.5
A.L.R. Index: Contracts
Proof of Circumstances Establishing Purchaser's Waiver of Right to Rescind Real Estate Contract, 57 Am. Jur. Proof of Facts 3d 287
Proof of Circumstances Establishing Purchaser's Abandonment of Real Estate Contract, 56 Am. Jur. Proof of Facts 3d 335
Am. Jur. Legal Forms 2d, Advertising § 12:81
Am. Jur. Legal Forms 2d, Contracts §§ 68:291 to 68:299, 68:303, 68:405, 68:422, 68:461 to 68:473
Am. Jur. Pleading and Practice Forms, Contracts §§ 102, 106, 108, 128, 132, 136, 137
Restatement Second, Contracts §§ 229, 241, 283(1), (2)
West's Key Number Digest, Contracts [westkey]274
Provision -- Future event as terminating contract. Am. Jur. Legal Forms 2d, Contracts § 68:296

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CORBIN ON CONTRACTS

RESTITUTION
SPECIFIC PERFORMANCE
ELECTION OF REMEDIES

By

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Yale Law School

Volume 12

INTERIM EDITION

[This volume comprises a reprint of Chapters 61 through 66 as published in the 1964 edition of Volumes 5 and 5A.]

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PUBLISHER'S NOTE

Publication of the Revised Edition of *Corbin on Contracts* began in 1993. As additional Revised Editions volumes have been issued, in most instances there has not been a volume-for-volume correlation between Revised Edition material and the material replaced. The result has been some duplicate and out-of-sequence volume numbers. To remedy any confusion and to assist readers in their use of the treatise, we are republishing the original volume material that has not yet been superseded by the Revised Edition in an order that corresponds to the planned volume sequence of the Revised Edition. The material contained in these "Interim Edition" volumes is a reprint of the older material, which dates from 1951, 1960, 1962, or 1964, depending on the particular volume. Interim Edition Volume 12 comprises the text of Chapters 61 through 66 as published in Volumes 5 and 5A (1964).

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for allowing such amendments where it appears that special circumstances exist that have made the first remedy sued for unavailable, but without affecting other remedies.[30]

§ 1220 Estoppel as the True Basis of Election of Remedy

The view with respect to election of remedies that is now becoming the prevailing one and that ought to be accepted is that, where a party injured by a breach definitely manifests a choice of a remedy that is actually available to him, in the place of some other alternative remedy, such a manifestation will bar an action for the latter remedy, provided that the party against whom the remedy is asked makes a substantial change of position in reliance on the manifestation of intention before notice of its retraction. This makes the conclusiveness of an "election" depend upon the existence of facts sufficient to create an "estoppel." Cases stating this view are now very numerous and hold either that the remedy asked was not barred because there was no basis for an estoppel, or that an election was conclusive only because such a basis had been proved.[31] The mere bringing of a suit asking

[30] Cal.—Schumm v. Berg, 231 P.2d 39, 37 Cal.2d 174, 21 A.L.R.2d 1051 (1951), action brought against father of illegitimate child for support was dismissed because defendant died; this did not bar a subsequent action for breach of an oral contract for support made by the father.

In Weddingfield v. Gregersen, 216 P. 1053, 73 Colo. 582 (1923), an amendment shifting to a remedy in damages was allowed even after there had already been one appeal to the supreme court while the complaint asked for specific performance.

In Gorman-Head Auto Co. v. Barrett, 188 P. 1083, 78 Okl. 34 (1920), after the purchaser of a machine brought suit for the restitution of the purchase price because of a breach of warranty, it appeared that he had made this remedy unavailable by continuing to use the machine after knowledge of the breach. The court thereupon permitted the plaintiff to amend his decision and to get judgment for damages, instead of restitution.

In Speed v. McMurray, 176 P. 506, 73 Okl. 325 (1918), restitution was impossible because of a transfer to an innocent purchaser for value.

[31] U.S.—In re Rose, 39 F.2d 242 (D.C.Tex.1930); North American Graphite Corp. v. Allan, 184 F.2d 387 (C.A.D.C.1950), citing Restatement, Contracts, § 381.

In Lake v. New York Life Ins. Co., 218 F.2d 394 (C.A.4th, 1955), certiorari denied 75 S.Ct. 606, 349 U.S. 917, 99 L.Ed. 1250, the court held that the plaintiff's remedy on an insurance policy for the surrender value was not barred by his previous attempt to recover assets. The defendant had not been harmed. The court said: "Whether a choice of remedies has been followed by a material change of position detrimental to the party subsequently sued is an element which may be considered in the application of the doctrine." It cites Restatement, Contracts, § 381.

Ala.—Register v. Carmichael, 53 So. 799, 169 Ala. 588 (1910).

Cal.—Roullard v. Rosenberg Bros., 224 P. 449, 193 Cal. 360 (1924); Crittenden v. St. Hill, 166 P. 1016, 34 Cal.App. 107 (1917), semble.

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In an action for fraudulent conversion of a check, it is permissible to join alternative counts: (1) for money had and received; (2) for damages for the tort. But the levying of an attachment is a final election to claim on the first count, because it involves such a change of position as to cause an estoppel. Acme Paper Co. v. Goffstein, 270 P.2d 505, 125 Cal.App.2d 175 (1954).

Idaho—Gridley v. Ross, 217 P. 989, 37 Idaho 693 (1923).

Ill.—Jackson v. Industrial Board of Ill., 117 N.E. 705, 280 Ill. 526 (1917), where choice was between statutory action and common law action; First Nat. Bank v Barse Live Stock Com. Co., 64 N.E. 1097, 198 Ill. 232 (1902); Stier v. Harms, 40 N.E. 296, 154 Ill. 476 (1895); Gibbs v. Jones, 46 Ill. 319 (1868); Merle & Heaney Mfg. Co. v. Hicks, 178 Ill.App. 406 (1913), first bringing of assumpsit does not bar a later action of replevin.

Ind.—Kuhns v. Gates, 92 Ind. 66 (1883).

Kan.—Darnell v. Haines, 240 P. 582, 119 Kan. 633 (1925).

Ky.—Joseph Goldberger Iron Co. v. Cincinnati Iron & S. Co., 154 S.W. 374, 153 Ky. 20 (1913).

Md.—Bolton Mines Co. v. Stokes, 33 A. 491, 82 Md. 50 (1895).

Mich.—Selznick Enterprises v. Garson Prod., 167 N.W. 1011, 202 Mich. 111 (1918); Humiston, K. & Co. v. Bridgman, 161 N.W. 852, 195 Mich. 82 (1917).

Minn.—First Nat. Bank v. Flynn, 250 N.W. 806, 190 Minn. 102, 92 A.L.R. 1272 (1933); Mulcahy v. Dieudonne, 115 N.W. 636, 103 Minn. 352 (1908).

Miss.—Warriner v. Fant, 74 So. 822, 823, 114 Miss. 174, 181 (1917), "there are elements of estoppel in the doctrine of election."

Mo.—Cowan v. Young, 220 S.W. 869, 282 Mo. 36 (1920); Johnson-Brinkman Comm. Co. v. Missouri Pac. R. Co., 28 S.W. 870, 126 Mo. 344 (1894); Brayton v. Gunby, 267 S.W. 450 (Mo.App.1924), first suit went as far as a judgment against the plaintiff, but it was set aside and the suit dismissed.

Neb.—Huffman v. Bankers Auto. Ins. Co., 199 N.W. 716, 112 Neb. 277, reversed 200 N.W. 994 (1924).

N.H.—Ricker v. Mathews, 53 A.2d 196, 94 N.H. 313, 171 A.L.R. 296 (1947).

N.J.—Schrage v. Liebstein, 84 A.2d 750, 16 N.J.Super. 384 (1951).

See the note herein under § 1225, as to Ajamian v. Schlanger, 103 A.2d 9, 14 N.J. 483 (1954), certiorari denied 75 S.Ct. 58, 348 U.S. 835, 99 L.Ed. 659, holding that a suit for damages for deceit was barred by long persistence in suit for rescission when the plaintiff had by his conduct affirmed the voidable contract, without amending his complaint for rescission to ask for the alternative relief in damages.

In Deerhurst Estates v. Meadow Homes, Inc., 165 A.2d 543, 548, 64 N.J.Super. 134 (1960), on remand 176 A.2d 555, 71 N.J.Super. 255, the purchaser of a tract of land, by a contract containing a warranty by the vendor, was held not to have lost his right to damages for breach of warranty by the fact that he did not "rescind" the contract and accepted a conveyance. His action did not operate as a discharge by an "election of remedy," because there was no inconsistency between the two alleged "remedies" and his action caused no change of position by the vendor on which to base an "estoppel." See also § 766 n. 89; § 1227 n. 67. This case is cited or quoted in many sections, one of which is § 551 n. 35.

N.Y.—Schenck v. State Line Tel. Co., 144 N.E. 592, 238 N.Y. 308 (1924), "it is probable that some element either of ratification or of estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality."

(Text continued on page 499)

N.C.—Baker v. Edwards, 97 S.E. 16, 17, 176 N.C. 229, 233 (1918), "generally regarded as being an application of the law of estoppel"; Warren v. Susman, 84 S.E. 760, 762, 168 N.C. 457, 463 (1915).

Warren v. Susman, 84 S.E. 760, 762, 168 N.C. 457, 463 (1915). "It may also be said that the authorities are about evenly divided in number as to whether the mere bringing of a suit is to be considered as a conclusive election, the weight of reason being against it when no one is prejudiced by the change in the form of relief afterwards prayed, the doctrine of election being founded on the idea of an estoppel."

N.D.—Kallberg v. Newberry, 170 N.W. 113, 43 N.D. 521 (1918).

Ohio—Tuttle v. Burgett, 42 N.E. 427, 53 Ohio St. 498 (1895).

Okl.—Sauer v. Bradley, 210 P. 725, 87 Okl. 277 (1923); Gorman-Head Auto Co. v. Barrett, 188 P. 1083, 78 Okl. 34 (1920).

Pa.—Pennsylvania Co. for Insurances v. Harr, 183 A. 37, 320 Pa. 523 (1936); Hyde v. Kiehl, 38 A. 998, 183 Pa. 414 (1898).

S.C.—McMahan v. McMahon, 115 S.E. 293, 122 S.C. 336, 26 A.L.R. 1295 (1922), the doctrine of election of remedies is regarded as being an application of the law of estoppel.

Tex.—Crutcher v. Eaves, 259 S.W. 970 (Civ.App.1924); Lewis v. Powell, 205 S.W. 737 (Civ.App.1918).

This section is cited in Letterman v. City of Tacoma, 333 P.2d 650, 654, 53 Wash.2d 294 (1958). By statute, a fireman was given an election between pension rights under a prior statute or a later one. He made an election, not knowing until the present decision that certain statutory provisions were unconstitutional. His election under this mistake was held not to be binding, in the absence of an estoppel by reason of change of position.

In Schlotthauer v. Krenzelok, 79 N.W.2d 76, 274 Wis. 1 (1956), the court quotes with approval from the opinion in Ricker v. Mathews, 94 N.H. 313, 53 A.2d 196, 199, 171 A.L.R. 296 (1947) cited in this note.

In Richard v. Credit Suisse, 152 N.E. 110, 242 N.Y. 346 (1926), the defendant broke its contract to establish a credit abroad, and the plaintiff sued for the restitution of the consideration paid. The court said: "In the other situation, which in the view of learned authors is not properly to be characterized as an instance of rescission at all (Woodward, Quasi-Contracts, § 260; Anson, Contracts [Corbin's Ed.], § 402, note), notice may be given at any time within the period of the Statute of Limitations unless delay would be inequitable. Such inequity will result, for instance, if there is property to be returned, or if reliance upon apparent acquiescence will result in hardship or oppression. 'Indeed it is probable that some element either of ratification or of estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality' (Schenck v. State Line Telephone Co., 238 N.Y. 308, 312, 144 N.E. 592). Inaction without more is not tantamount to choice."

In First Nat. Bank v. Barse Live Stock Commission Co., 64 N.E. 1097, 198 Ill. 232 (1902), it was held that the bringing of an attachment suit by the plaintiff, later dismissed without prejudice, was not such an election between alternative remedies as to estop the plaintiff from afterwards maintaining a bill of interpleader. The court said: "The word 'election,' as applied to remedies, is but another term for 'estoppel.' There is no element of estoppel by record, as the attachment suit was not prosecuted to judgment; and there is no estoppel in pais, for neither W. nor the bank has taken such action, in consequence of the suing out of the attachment, that they will receive detriment, in a legal sense, from the conduct of plaintiff."

(Text continued on page 499)

In Lewis v. Powell, 205 S.W. 737 (Civ.App.1918), the court said: "The more reasonable rule is that the mere bringing of an action which has been dismissed before judgment, in which no element of estoppel in pais has arisen—that is where no advantage has been granted and no detriment has been occasioned—is not an election . . . . Election is treated as an estoppel in pais. Now, estoppel in pais, independent of contract, arises from act or conduct which has induced a change of position in accordance with the real or apparent intention of the party against whom the estoppel is lodged." In this case the court held that an attempt by a mortgagee to foreclose by a trustee's sale that was ineffective because the appointment of the trustee was irregular, was not such an election of one alternative method of foreclosure as to bar a subsequent foreclosure by court action.

In First Nat. Bank v. Flynn, 250 N.W. 806, 190 Minn. 102, 92 A.L.R. 1272 (1933), the court held that the making of a levy, promptly abandoned, by a chattel mortgagee on the mortgaged property did not prevent him from afterwards proceeding otherwise under the provisions of the mortgage itself. A levy on the chattels as the property of the mortgagor was not an operative election to abandon his own property interest as mortgagee. The court said: "It is a safe premise that a party should not be bound by an election unless he has pursued the chosen course to a determinative conclusion, or has procured advantage therefrom, or has thereby subjected his adversary to injury."

In Kallberg v. Newbury, 170 N.W. 113, 43 N.D. 521 (1918), the court said: "The real basis for a binding election is estoppel, and if the election is held binding or not binding, depending upon whether or not the elements of an estoppel are present, no injustice can result. In the present case the appellant first sought to avail himself of his right to rescind, and in the action brought litigated every issue that is material to the maintenance of his present action. His adversary not only relied upon his choice to the extent of meeting the issues present, but, after the determination of the case, he dealt with others on the strength of the result. We are convinced that, under the facts stated in the main opinion and repeated here, the appellant should be and is estopped to maintain the action at bar."

In Del Vecchio v. Del Vecchio, 148 A.2d 554, 146 Conn. 188 (1959), a widow had a choice between accepting benefits as provided in her husband's will and asserting her right to a widow's share under statutes of distribution. The court rightly classified this as a choice between "rights" rather than between "remedies"; but it rightly held, also, that in either case the widow's statement of an election to take the statutory widow's share was not final and conclusive unless her choice was with knowledge of the material facts or there had been such a change of position by other parties in reliance on her statement as to create an "estoppel." Her statement certainly did not constitute an election between remedies for a "breach of duty," since no such breach was alleged.

If a plaintiff first sues for restitution this action will not be dismissed by reason of his bringing a later action for damages for fraud. Clark v. Kirby, 153 N.E. 79, 243 N.Y. 295 (1926). A similar decision was rendered in Otto v. Young, 127 S.W. 9, 227 Mo. 193 (1910). Also, an action for damages will not be dismissed by reason of the plaintiff's unsuccessful effort to amend and get judgment for restitution. Rasmussen v. Hungerford Potato Growers Ass'n, 195 N.W. 469, 111 Neb. 58 (1923). See also Cowan v. Young, 220 S.W. 869, 282 Mo. 36 (1920).

See also Woodward, Quasi-Contracts, § 298; Keener, Quasi-Contracts, p. 203; Articles in 34 Yale L.Jour. 665; 16 Law Q.Rev. 160, 269; 26 Harv.L.Rev. 707; 27 Col.L.Rev. 269; also Bijur, J., in Bank of U.S. v. National City Bank, 206 N.Y.S. 428, 123 Misc. 801, (1924)

one remedy rather than another practically never affords ground for an estoppel and is not sufficient reason to deny an application for an alternative remedy.[32]

There are, indeed, cases laying down the rule that the bringing of a suit for one remedy is a conclusive election that operates as a bar to any subsequent action for an alternative remedy.[33] In many of these cases, however, there was ample basis for an estoppel, of which the court was fully aware while stating the reasons for its decision in terms of election.[34]

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[32] **Cal.**—Ferguson v. Fajardo, 27 Cal.Rptr. 72, 211 Cal.App.2d 119 (1962), plaintiff sued for damages for breach of defendant's contract to sell land. This was not such an "election" of remedy as prevented the plaintiff from amending to seek specific performance. The defendant had expended $5,000 in improvements during the two years; but this was not sufficient for an "estoppel" for the reason that the trial court allowed the defendant to retain all income received for the 4 years between breach and trial, this being greatly in excess of the expenditures.

See Restatement, Contracts, § 381 and Comment.

[33] **U.S.**—Issenhuth v. Kirkpatrick, 258 F. 293 (C.C.A.8th, 1919).

Ark.—Belding v. Whittington, 243 S.W. 808, 154 Ark. 561 (1922).

Ga.—Board of Education v. Day, 57 S.E. 359, 128 Ga. 156 (1907), dictum.

Iowa—Ellis v. Annis & Rohling, 173 N.W. 282, 187 Iowa 423 (1919).

Kan.—Ireland v. Waymire, 191 P. 304, 107 Kan. 384 (1920), cf. Darnell v. Haines, 200 P. 582, 119 Kan. 633 (1925).

Mass.—Connihan v. Thompson, 111 Mass. 270 (1873), dictum.

Mich.—Van Scherpe v. Ulberg, 206 N.W. 323, 232 Mich. 699 (1926), criticised in 39 Harv.L.Rev. 772; Mintz v. Jacob, 128 N.W. 211, 163 Mich. 280 (1910), dictum, cf. cases cited in preceding note; Thompson v. Howard, 31 Mich. 309 (1875), a waiver of tort case.

Minn.—Aho v. Republic Iron etc. Co., 116 N.W. 590, 104 Minn. 322 (1908), dictum; Pederson v. Christofferson, 106 N.W. 958, 97 Minn. 491 (1906), dictum.

N.J.—Maturi v. Fay, 129 A. 185, 98 N.J.Eq. 377 (1925).

N.Y.—Terry v. Munger, 24 N.E. 272, 121 N.Y. 161 (1890), dictum.

Tenn.—Grizzard v. Fite, 191 S.W. 969, 137 Tenn. 103 (1916), see strong dissent; O'Bryan v. Glenn, 17 S.W. 1030, 91 Tenn. 106 (1892) [said by the Missouri court in Johnson-Brinkman Comm. Co. v. Missouri Pac. R. Co., 28 S.W. 870, 126 Mo. 344 (1894), to be "inconsistent with reason and justice"].

In Terry v. Munger, 24 N.E. 272, 121 N.Y. 161 (1890), it was held that a judgment in assumpsit against one of two converters of goods barred a subsequent tort action against a prior converter. The court said, also, that merely bringing the assumpsit action would have been a final election with respect to all the tort feasors. This case has been severely and justly criticised by Keener, Quasi-Contracts, p. 210.

[34] **N.Y.**—Conrow v. Little, 22 N.E. 346, 115 N.Y. 387 (1889), in the first suit the plaintiff attached property of the defendant and actually received part payment, although not prosecuting the suit to judgment.

In Robb v. Vos, 15 S.Ct. 4, 155 U.S. 13, 39 L.Ed. 52 (1894), the case was one of ratification of the unauthorized act of an agent, and also the position of other parties had been seriously affected. This case was cited in Intertype Corp. v. Pulver, 2 F.Supp. 4 (D.C.Fla.1932), where

In others, the first case had been carried to judgment on the merits, so that there was a discharge by merger or by res judicata.[35] Other cases, however, cannot be so distinguished, but should be disapproved on the ground that they work an injustice to an innocent party in favor of a guilty one.[36] This

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the plaintiff's choice was between claiming title to a chattel under a conditional sale reservation or claiming as a mortgagee under a chattel mortgage. As a seller of the chattel, he had attempted to secure himself by both methods. It may be that there was a sufficient basis for an estoppel against maintaining replevin after first suing for a decree of foreclosure, that suit having been dismissed on appeal without a final determination.

In Thompson v. Howard, 31 Mich. 309 (1875), the first suit had gone to trial, and after a disagreement by the jury had been dismissed; but since a new action for the same remedy could have been maintained, it would seem that a suit for the alternative remedy would also be proper. The theory of ratification, on which the decision was based, is untenable, if respect is paid to fact, and not fiction.

[35] **Fla.**—Weeke v. Reeve, 61 So. 749, 65 Fla. 374 (1913), bill for rescission held barred by a previous action for damages for fraud in which judgment was for the defendant. It is evident that the issue as to fraud had been finally adjudicated.

Wash.—Kimble Motor Car Co. v. Androw, 215 P. 340, 125 Wash. 225 (1923), claim for contract price of machine allowed in administration of buyer's estate barred a subsequent action for restitution of the machine.

In Paoli v. Zipout, Inc., 157 N.E.2d 79, 2 Ill.App.2d 53 (1959), the plaintiff, a patentee who had given a license to the defendant, brought suit in two counts, the first for specific performance and affirmance, the second for cancellation and disaffirmance. He elected to proceed to trial on the first count; and he obtained a judgment for royalties due. Later, he brought the present suit for cancellation and rescission. The court held that the suit was barred by a conclusive election between the two inconsistent remedies.

In U.S. v. Hougham, 81 S.Ct. 13, 364 U.S. 310, 5 L.Ed.2d 8, rehearing denied 81 S.Ct. 376, 364 U.S. 938, 5 L.Ed.2d 372 (1960) a federal statute gave to the Government, in recovering damages for fraud, a choice of three measures of recovery. The Government filed a complaint asking damages measured in manner number one. It then moved for permission to file an amended complaint asking damages measured in a second manner. Up to this point there was no election of remedy. Without pressing its motion, the Government filed a new complaint in accord with its original complaint and obtained judgment thereon. It then appealed on the ground of inadequacy of the recovery. The court held (two judges dissenting) that there had been no election preventing it from still claiming under the second alternative measure. The dissenting opinion asks: "If that conduct did not effect the election, I would ask what could?" This treatise must refer to the majority opinion for the answer thought to be sufficient. The judgment had been appealed from and so did not make the issue as to inadequacy res judicata. See also a note under § 1277 n. 7.

[36] In Friederichsen v. Renard, 38 S.Ct. 450, 452, 247 U.S. 207, 213, 62 L.Ed. 1075 (1918), the court said: "At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended." Approved and followed in Abbadessa v. Puglisi, 124 A. 838, 840, 101 Conn. 1, 7 (1924).

In King v. Guy, 297 S.W.2d 617, (Mo.App.1957), the buyer of a used automobile, alleging many breaches of an oral warranty, offered to return the machine and sued for his money back. However, he continued to make use of the machine. The court held that he thereby "waived" his right to restitution. The seller counterclaimed for the balance of the price.

injustice is particularly obvious in those cases in which the plaintiff was held barred by his election of a remedy that was in fact unavailable to him, but for which he had mistakenly sued.[37] One who sues for the enforcement

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as against this counterclaim, the buyer attempted (without amendment) to recoup in damages for breach of warranty. The court held that, although merely bringing suit did not operate as an election, proceeding with the suit until judgment was an election that barred his claim for damages; so held even though the judgment in his own suit was against him. Observe that when the plaintiff first brought suit (clearly a suit for restitution) he had a choice of remedies, but that when judgment was rendered he had no such choice; this was due to his own conduct after bringing suit. This might be the basis for an estoppel, but the court says that the election was final, even though the seller suffered no loss or change of position. The court's reasoning is not in harmony with this treatise.

[37] In U.S. v. Oregon Lumber Co., 43 S.Ct. 100, 260 U.S. 290, 67 L.Ed. 261 (1922), it was held that, where the United States brought suit to annul a patent for fraud and prosecuted it to judgment in which it was held that this remedy was barred by a six-year statute of limitations, this constituted such an election of remedies as to bar a subsequent action for damages for the fraud. Taft, Holmes, and Brandeis dissented; and the decision should be disapproved. But at all events, it does not hold that bringing the equity suit was a final election. That suit was prosecuted to an adverse judgment, forcing the defendant to defend and to incur heavy expense. *See*, also expressing disapproval, Nuveen v. Board of Public Instr., 88 F.2d 175 (C.C.A.5th, 1937).

In Intertype Corp. v. Pulver, 2 F.Supp. 4 (D.C.Fla.1932), the language of the district judge is subject to criticism as concerns election; but it was expressly stated that it had not been determined that the first remedy sought (foreclosure) was actually unavailable. If it was in fact unavailable, the court certainly should have sustained the present action (replevin).

In Schenck v. State Line Tel. Co., 144 N.E. 592, 238 N.Y. 308 (1924), the court distinguished the Oregon Lumber case. Here, the plaintiff had brought suit for damages for fraud, but on finding that this remedy was barred by statute of limitations, withdrew the suit and brought a bill in equity for rescission and restitution. The court sustained this bill. It said: "It is probable that some element either of ratification or of estoppel is at the root of most cases, if not all, in which an election of remedies, once made, is viewed as a finality." And further, the court said: "An election of remedies presupposes a right to elect. It 'is simply what its name imports; a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone.' If in truth there is but one remedy, and not a choice between two, a fruitless recourse to a remedy withheld does not bar recourse thereafter to the remedy allowed . . . . The plaintiff thought he had a remedy at law, and so thinking sued for damages. In truth he had no such remedy, for, irrespective of his knowledge of the fraud, his right of action for damages had been barred by lapse of time. The defendants have blocked his recourse to a remedy which he had not. They now say that because of his mistake, he must be held to have renounced forever the remedy he had. 'There would be no sense or principle in such a rule.' "

Other cases holding that an attempt in good faith to get a remedy that is not in fact available is no bar, by "election" or otherwise, to a subsequent action for another remedy:

Cal.—Agar v. Winslow, 56 P. 422, 123 Cal. 587 (1899).

Ind.—Bunch v. Grave, 111 Ind. 351 (1887).

Mass.—Snow v. Alley, 30 N.E. 691, 156 Mass. 193 (1892).

Minn.—In re Van Norman, 43 N.W. 334, 41 Minn. 494 (1889).

Neb.—State v. Bank of Commerce, 84 N.W. 406, 61 Neb. 22 (1900).

of a written contract, and is refused judgment because the court holds that the evidence offered by him contradicts or varies the writing and is excluded by the "parol evidence rule," is not barred from maintaining a second suit asking "reformation" and enforcement.[38] Originally, this was justified by the fact that common-law and equitable remedies were not available in a single court. Even under some modern systems of procedure, the distinction between the remedies of enforcement without "reformation" and enforcement after "reformation" is still recognized, so that an unsuccessful attempt to get the first would not bar an attempt to get the second.[39]

In still other cases the court may put its decision in terms of election, although the real ground for refusing restitution is that the plaintiff has received and retained property under the contract, the return of which is required as a condition precedent to the remedy of restitution.[40] Cases of this kind are treated in another section. Failure to put the other party in statu quo may bar a remedy, but it is not an election of remedy.

The basis for an estoppel may be made out not merely because of a change of position made by the defendant in reliance on the plaintiff's

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[38] U.S.—Northern Assurance Co. v. Grand View Bldg. Ass'n, 27 S.Ct. 27, 203 U.S. 106, 51 L.Ed. 109 (1906), affirming 73 Neb. 149, 102 N.W. 246 (1905); Sadowski v. General Discount Corp., 81 F.Supp. 381 (D.C.Mich.1948).

[39] It seems clear that under most modern systems of code procedure or of rules of court the plaintiff would not have to ask for these remedies in separate actions; also, the "parol evidence rule" should never cause the exclusion of relevant evidence offered for purposes of interpretation or reformation. But if a court refuses to admit the evidence, even though erroneously, on grounds that would not have been applicable "in equity," it should not charge a party with having made a voluntary election or assert that the whole matter is now res judicata.

Cf. Angel v. Bullington, 67 S.Ct. 657, 330 U.S. 183, 91 L.Ed. 832 (1947).

[40] Cal.—Herdan v. Hanson, 189 P. 440, 182 Cal. 538 (1920).

Fla.—Mizell v. Watson, 49 So. 149, 57 Fla. 111 (1909).

Ga.—Harden v. Lang, 36 S.E. 100, 110 Ga. 392 (1900).

Ill.—Sanford v. Emory, 34 Ill. 468 (1864).

Ind.—Axtel v. Chase, 77 Ind. 74 (1881).

Iowa—Ellis v. Annis & Rohling, 173 N.W. 282, 187 Iowa 423 (1919).

Neb.—Alfree Mfg. Co. v. Grape, 82 N.W. 11, 59 Neb. 777 (1900).

Tenn.—Lamborn & Co. v. Green, 262 S.W. 467, 150 Tenn. 38 (1923).

Wis.—Mueller v. Michels, 197 N.W. 201, 184 Wis. 324, modified 199 N.W. 380 (1924).

Eng.—Reynolds v. Nelson, 6 Mad. 18 (1821).

The acceptance of a settlement or of any substantial advantage, under and by virtue of a claim of one alternative remedy, will bar a subsequent claim to a different remedy.

U.S.—Holmes v. Henry Jenning & Sons, 7 F.2d 231 (D.C.Or.1921).

N.Y.—Conrow v. Little, 22 N.E. 346, 115 N.Y. 387 (1889).

S.C.—McMahan v. McMahon, 115 S.E. 293, 122 S.C. 336 (1922), semble.

election, but also in some cases by reason of the effect of the plaintiff's own conduct. The form of the procedure invoked by him may be such as to make it unjust thereafter to harass the defendant in a different manner. So, it might well be held that, after suing for one remedy and arresting the body of the defendant, it would be inequitable to permit another action for a different remedy.[41] Likewise, the levying of an attachment or the obtaining of an injunction might sometimes involve so serious a change of position as to justify the barring of a later action.[42] In such cases,

[41] In Frisch v. Wells, 86 N.E. 775, 200 Mass. 429 (1909), it was held that an action of replevin for the restitution of goods was barred by the fact that the plaintiff had previously brought suit for the price and had arrested and held the body of the debtor until his discharge by taking the poor debtors' oath. The court said: "It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting inconsistent remedy in a court having jurisdiction, which constitutes the decisive act, and makes the election binding." It might well be held, however, that the arrest of the defendant was a sufficient basis for an estoppel, even though it involved no voluntary act on the part of the defendant.

[42] In Rice v. Reed, [1900] 1 Q.B. 54, the plaintiff's goods had been converted by one S and sold by him to the defendant, who bought with knowledge of the tort. The plaintiff first sued S for money had and received and got an injunction restraining a bank from parting with the fund paid by the defendant to S and deposited by him in the bank. Later, the plaintiff sued the present defendant for his conversion of the goods and was given judgment. Here, the tying up of the money paid to S might perhaps be held to estop the plaintiff from suing S in a later tort action; but the money no longer belonged to the defendant, against whom the second suit was brought, and hence was no ground for an estoppel in his favor.

Bringing suit for breach of contract and levying an attachment; later tort action barred. Estrada v. Alvarez, 240 P.2d 278, 38 Cal.2d 386 (1952).

After joining with other creditors in suing for the appointment of a receiver and in tying up funds by injunction, a creditor will not be permitted to proceed separately by attachment. "The intervening rights of his co-complainants in the receivership may be seriously affected by the attachment." Warriner v. Fant, 74 So. 822, 114 Miss. 174, 181 (1917).

But in First Nat. Bank v. Flynn, 250 N.W. 806, 190 Minn. 102, 92 A.L.R. 1272 (1933), it was held that the making of a levy on property, promptly discontinued, did not estop the creditor from proceeding otherwise under the terms of a mortgage.

See further:

La.—Lowenstein v. Glass, 20 So. 890, 48 La.Ann. 1422 (1896).

Ohio—Frederickson v. Nye, 144 N.E. 299, 110 Ohio St. 484 (1924).

Tex.—Seaman's Oil Co. v. Guy, 276 S.W. 424 (Civ.App.1925).

In Lenard v. Edmonds, 312 P.2d 308, 151 Cal.App.2d 764 (1957) the purchaser of a motel brought a complaint containing two causes of action, one for rescission, the other for damages. Prior thereto he had obtained a preliminary injunction forbidding the defendant from disposing of promissory notes given by plaintiff as part of the price. Later, the plaintiff abandoned his claim for rescission, obtained a jury trial, and received a verdict and judgment for damages. The defendant appealed, alleging that by obtaining the injunction the plaintiff had "elected" a remedy "in equity" for rescission and was thereby barred from maintaining his action "at law" for damages. The court held that there had been no election. It said that the plaintiff was "entitled to the preliminary injunction as an incident to either or both causes

however, the court should not talk in terms of election, but should consider the inequity of the plaintiff's conduct and the weight of the reasons advanced for giving effect to an estoppel. The purpose of all supposed rules as to election of remedies is never to deny a remedy to an injured party; such rules are for the purpose of preventing a double recovery for a single injury and to prevent multiple and vexatious litigation.[43]

§ 1221 Meaning of Statement That Remedies Are Inconsistent

In order to avoid the injustice that would follow the application of some of the commonly stated rules as to the election of remedies, there has been some juggling with such terms as inconsistent remedies and alternative remedies. It is highly undesirable to make a decision appear to rest upon such verbal distinctions. Certain legal relations are, indeed, inconsistent with others. A cannot have a right that B shall pay him money, while at the same time B is legally privileged not to pay it. Right and no right in A are "inconsistent"; duty to pay and privilege not to pay in B are inconsistent; right to payment in A is inconsistent with privilege not to pay in B. A right in A that B shall not hurl rocks upon A's land is quite inconsistent with B's privilege to do what he will with his own rocks. So, also, power in A to act as B's agent and to bind B by contract is inconsistent with disability in A and with immunity in B.

The legal relations indicated above are logical contradictories.[44] The same cannot be said, however, with respect to the various legal remedies that are available. There is no necessary inconsistency between specific performance and damages, or between damages and restitution. If it were

of action. This being so, applying for and securing such an injunction could not possibly constitute an election to proceed on either one . . . . But, under the modern view, before an election will be held to have been made, all the elements of an estoppel must be present." To this effect it quoted from Pacific Coast Cheese, Inc. v. Security First Nat. Bank, 286 P.2d 353, 356, 45 Cal.2d 75, 80 (1955).

[43] See First Nat. Bank v. Flynn, 250 N.W. 806, 190 Minn. 102, 92 A.L.R. 1292 (1933), Restatement, Contracts, § 381, Comment *e*.

[44] It should be observed that such relations are not at all contradictory if they are not relations with the same person. A can have a right that B shall pay money, while at the same time C has no right that B shall pay it. A can have a right that B shall not throw rocks on A's land; while at the same time, with respect to C and innumerable third persons, B may be legally privileged to throw as many rocks on A's land as he pleases. In any particular case of rock throwing by B on A's land, the court must decide between the two contradictories, right or no right in A, privilege or no privilege in B. If it decides that B's throwing was tortious, it is holding that B did not have the legal privilege of throwing his rocks that way.

See discussion in Ondrasek v. Ondrasek, 238 P.2d 535, 172 Kan. 100 (1951).

CORBIN ON CONTRACTS

CONDITIONS

By

CATHERINE M.A. Mc CAULIFF

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contracts. To create an "estoppel," both parties must act but mutual expressions of agreement or an exchange of agreed equivalents are unnecessary.[15]

In transactions for the sale of goods the buyer sometimes "waives all warranties express or implied." Such a "waiver" merely limits the number and kind of promises the seller makes—that is, limits the extent of the vendor's obligation to the buyer. In this chapter we are not dealing with this kind of "waiver," but we start with the assumption that a contract has been made, in which the legal duty of a party is conditional on some fact or event. The problem is did the second party, by some act of "waiver," make the first party's duty (as well as the first party's own correlative right) unconditional on that fact or event?[16]

§ 40.2 Waiver of a Condition May Be Effective Without a Consideration

In the chapters on contract formation, we saw that a promise can become enforceable by reason of factors other than a bargained-for-exchange. The

15. In Colbath v. H.B. Stebbins Lumber Co., 127 Me. 406, 144 A. 1 (1929), the defendant promised to pay $10 a thousand for the excess of certain lumber above a specified amount if such excess should be determined by December 31. With respect to the defendant's alleged "waiver" of this time condition, the court said: "While there may be all the elements of waiver in estoppel, the converse may not be true; for a party may so conduct himself as to show an intention to waive his rights when the adverse party has not been deceived or misled thereby and no estoppel would arise, although a waiver may well be found. In voluntary waiver, the result is intended; in waiver by estoppel in pais the conduct may have been voluntary but the effect, as a matter of law, may not have been intended...."

A waiver, whether of a condition or of any other defense, can be conditional in express terms; and if the condition is not fulfilled, the waiver is inoperative. Lidral v. Sixth & Battery Corp., 47 Wash. 2d 831, 290 P.2d 459 (1955). See also § 1239. *Condition of a charitable subscription.* In re Field's Will, 11 A.D.2d 774, 204 N.Y.S.2d 947 (1960). Decedent subscribed $125,000 to a charity, on condition that a total of $2,000,000 be subscribed by a certain date. The charity received an oral promise of $750,000, payable in installments, without fixing definitely the terms of payment. Decedent, as a trustee of the charity, participated in the charity's making commitments and obligations in reliance on the oral pledge itself and also in reliance on this trustee's subscription as having been made enforceable by fulfillment of the condition. Without deciding whether or not the oral pledge of $750,000 had become enforceable, the court held that, because the decedent recognized the fulfillment of the condition of his own subscription, his executors were estopped from asserting its nonfulfillment. The charity was held entitled to the promised $125,000.

16. In Nichols v. Williams Pontiac, Inc., 95 Ga. App. 752, 98 S.E.2d 659 (1957), the defendant sold an automobile to the plaintiff, representing it both orally and in writing to be a "new Pontiac." In fact it was a used car. The bill of sale stated that the buyer waived all warranties express or implied. The Court held that the seller was liable in damages for breach. The waiver did not operate to nullify the seller's obligation to deliver a "new Pontiac," or to make his misrepresentation less wrongful.

This section (§ 752, 1960 ed.) is cited in East Orange v. Board of Water Comm'rs, 41 N.J. 6, 194 A.2d 459, 465 (1963). The city leased land at a low rent conditioned on its continued public use as a golf course. The city's failure to object for some years to its use as a private club was not a "waiver" of the condition subsequent to the leasehold. The lease was terminated.

promisee's substantial action in reliance on the promise may be such a fact. Certain kinds of antecedent events called "past consideration" may cause reliance. We need not be surprised, therefore, to find that a promisor can sometimes turn a conditional duty into an unconditional one by a "waiver" of the condition without any consideration. The decision depends, however, upon the kind of condition being waived.

Generally, the promisor's waiver of a condition is followed by the promisee's substantial change of position. At the very least, the promisee will be induced by the waiver not to perform the condition, if the condition consists of some act or forbearance of the promisee. Thus, if a promisor's duty to convey is conditional on payment by a stated day, the promisor's waiver of the condition may induce the promisee to cease efforts to raise the money and to forbear to pay on the day. Here we have ample reason for an estoppel, or for the enforcement of a promise because of subsequent reliance.

In many cases, however, the waiver takes place after the failure to perform the condition has already occurred, and the promisee makes no subsequent change of position on which to base an estoppel. Suppose that an insurance company, after the insured's failure to pay a premium on the last day allowed, promises that it will "waive the forfeiture" and reinstate the policy on "satisfactory evidence of insurability." This new promise is binding in accordance with its terms.[17] The past transaction, including the execution of the policy and the insured's payment of premiums, is a sufficient basis on which to rest the new promise without any new consideration for the promise or the promisee's new action in reliance on the new promise. Of course, the promisee must show performance of the conditions of the new promise, whatever they may be.

In a New York case, *Clark v. West*, in a contract between a publisher and a writer, the author promised to write a law book and to refrain from drinking

17. Thompson v. Postal Life Ins. Co., 226 N.Y. 363, 123 N.E. 750 (1919). By a "waiver" the company recreates a duty to pay in accordance with the terms of the policy. Although it was discharged, the company is again bound. If the promise had been an original promise to insure, it would not be enforceable without consideration or its equivalent.

Whenever time is made of the essence, the condition can usually be waived. Ordinarily, the time of a performance is not a material part of the agreed equivalent of a return promise. In re Campbell, 105 F.2d 197 (9th Cir. 1939).

Condition of delivery of goods on time can be waived even after the time has expired. Hartley v. Hymans (1920) 3 K.B. 475.

In Nathan Miller, Inc. v. Northern Ins. Co., 42 Del. 523, 39 A.2d 23 (Super. Ct. 1944), making proofs of loss within 60 days was an express condition of the insurer's duty to pay. The insurer's recognition of its continuing duty to pay, even though made after expiration of the 60 days and without any change of position by the insured, was held to be an operative waiver of the condition.

intoxicants while so occupied.[18] The publisher promised to pay two dollars a page, if the manuscript should be accepted and published. Further, if the author, Clark, actually forbore to drink, John West agreed to pay an additional four dollars per page. The author did not forbear to drink, as the publisher knew. When the manuscript was done, West accepted and published it. In the suit to collect the extra four dollars per page, Clark alleged that the publisher waived the condition—that is, the author's forbearance to drink. To assert his theory of waiver, the author alleged, first, that the publisher permitted him to continue writing, with knowledge of his drinking, and accepted the manuscript. Secondly, Clark alleged that, with full knowledge of his having consumed liquor, the publisher expressly promised to pay the additional four dollars per page. The court adopted the second contention, held that West waived the condition, and ordered the publisher to pay the additional four dollars per page. The plaintiff's first contention was certainly unsound. By the express terms of the contract, the publisher had a right to the delivery of the manuscript, whether the plaintiff drank or not. If the plaintiff drank, the price was to be only two dollars per page. No estoppel arose from the fact that the publisher "permitted" the writer to continue to do what he was bound to do, or from the fact that the publisher received and used the manuscript to which he had a contract right.

The plaintiff's second contention, that the publisher expressly waived the condition of his duty to pay the extra four dollars per page, can be sustained only in case a voluntary waiver were held operative without either a consideration given in exchange or any subsequent action of the plaintiff sufficient to support an estoppel. In supporting this voluntary waiver, the court said that the forbearance to drink was no part of the consideration for the publisher's promise to pay two and four dollars per page. This statement is inconsistent with the express terms of the contract. However, it may well be that, as things turned out, it was not a material, or essential, part of the consideration. It cannot be proved with certainty whether or not the plaintiff's drinking materially decreased the value and quality of his manuscript. The fact that the defendant published the book establishes no more than that he thought the manuscript was good enough to publish.

In a land sale, a condition that a payment, or conveyance itself, be made exactly at the agreed time, is a part of the consideration for the promise to convey, or the promise to pay. Nevertheless, it may be of comparatively little importance. Therefore, payment, or conveyance, exactly on time, even though it is expressly made a condition of legal duty, can be waived by a mere voluntary expression of that intention.[19] On such a basis as the foregoing, therefore, we can construct the

18. 193 N.Y. 349, 86 N.E. 1 (1908).

19. This treatise is cited in Evelyn v. Raven Realty, Inc., 215 Md. 467, 138 A.2d 898 (1958), as to the distinction between waiver and estoppel. The court refused specific performance for the

following tentative working rule of law: *A condition of a promisor's duty can eliminated by a mere voluntary expression of willingness to waive it, if performance does not constitute a material part of the agreed equivalent of promise and its nonperformance does not materially affect the value promisor received.*[20] If the waived condition constitutes no part of the agre equivalent, this suggested rule is not difficult to apply. If it does constitute a p of that equivalent, the question whether it is so material as to invalidate a wai will not always be easy to answer.

In order to illustrate the kind of condition that cannot thus be volunta waived, let us suppose the following case: B contracts to erect a building for who promises to pay $100,000 therefor after completion. In such a contract, t completion of the building, substantially according to plans and specifications, by construction of law a condition of O's duty to pay the price. If O agrees withou consideration to waive this condition and to pay $100,000 to B without getti any building whatever, no court would enforce O's promise to pay $100,000 f nothing. A promise to make a gift of $100,000 would not be enforced, if no ant cedent building contract had been made. One cannot "waive" oneself into a du

purchaser of land because he had failed to pay the price within the period required, time of payme being expressly "of the essence." The plaintiff argued that the vendor's assenting by telephone an extension of time for 60 days orally waived the condition, payment having been tender accordingly. The court recognized that an oral waiver of time may be effective, but found waiver or estoppel in this case because the plaintiff failed to show that but for the waiver he could and would have performed on time. In the absence of proof there was no "estoppel." Many cas however, have held that a voluntary "waiver" is effective, even after the time for performance ha expired, if the "condition" merely relates to time and does not constitute a material part of the bargained-for equivalent of the defendant's promise.

20. The Restatement (Second) of Contracts § 84(1) (1981) reads as follows: "[A] promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor."

Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc., 50 F.3d 388 (7th Cir. 1995) cites this section (§ 753, 1960 ed.) in holding that the franchisor presumptively waived its right to arbitrate dispute with a franchisee when the franchisee brought a state court action, and the franchisor responding by seeking removal to federal court rather than seeking arbitration then.

Similarly, in Gould v. Artisoft, Inc., 1 F.3d 544 (7th Cir. 1993), an employer waived a condition requiring an employee to sign a noncompetition agreement by failing to provide a copy of the agreement for the employee to sign. But Tennessee law requires either consideration or estoppel in order for a contractual waiver to be effective. Patton v. Bearden, 8 F.3d 343 (6th Cir. 1993).

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to make a gift of money.[21] The fact that a building contract had formerly been made is not a good reason to reach a different result when the waiver eliminates the building and causes the new promise to be in a substantial part at least, the promise of a gift.

Many conditions of a promisor's duty, however, do not constitute any substantial part of the agreed equivalent the contract provides. Although the waiver of such a condition does change the contract, it does not require the promisor to give something for nothing. So, if an accident insurance company promises to pay, on the express condition that notice of accident be given within ten days, waiving the condition does not affect the company's receipts or the size of the fund out of which losses must be paid. In the absence of other defenses, the insurer's promise to pay will be enforced, even though notice has not been given.

In an aleatory contract, depending on a chancy event, the degree of uncertainty about the likelihood of the condition's occurrence determines the risk of having to perform the promise, and determines "the odds" that are given—that is, the ratio between the promised performances. The total elimination of such a condition would greatly affect "the odds" and this ratio. Therefore a mere voluntary waiver of the condition should be held ineffective. In the case of a wager on a horse race, one promises to pay on condition that a specified horse wins. Suppose that this condition is "waived," and a promise to pay is made even though the horse does not win. Must the promisor pay, even though the wager has been turned into a case of "heads I win, tails you lose?" A life insurance company promises to pay at the death of the insured. Will the company be bound to pay if it waives the condition and promises to pay even though the insured does not die? A voluntary waiver of a condition in an aleatory contract like insurance will not change the terms of the contract by materially increasing the risk the waiving party has assumed. The waiver of a condition may incidentally increase the burden a waiving party carries by relieving the other party of complying with notice or time provisions but waiver is not used to boot-strap other obligations onto the waiving party.[22]

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21. This treatise is quoted in National Utility Service, Inc. v. Whirlpool Corp., 325 F.2d 779 (2d Cir. 1963). The defendant contracted to pay for plaintiff's services in producing cost reductions a stated percentage of such reductions, expressly excluding reductions produced by an operation already in process. The plaintiff recommended an installation that was included within that contemplated operation. Later, the plaintiff asked if the defendant would make a payment without waiting to determine the savings, and the defendant promised to do so. The court held that this promise created no duty to pay for savings resulting from the contemplated operation. The new promise, if enforced, does not waive a condition of a duty to pay already conditionally promised. Instead, it was a promise to pay more than the amount previously agreed upon.

22. So an insurer who has promised to pay double indemnity in case of death outside of military service does not become bound, by a mere voluntary waiver, to pay such an indemnity in case of death while in military service also. A general inclusion of such an additional risk in its policies

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Farnsworth Contracts Sec. 8.5

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VOLUME 2

PART 3 - SCOPE AND EFFECT OF PROMISES

Chapter 8 - Performance and Nonperformance

SUBPART B - CONDITIONS

Farnsworth Contracts Sec. 8.5

LENGTH: 1662 words

§ 8.5 - Excuse of Condition by Waiver

TEXT:
We have already seen that, even if a duty is conditional at the time a contract is made, subsequent events may excuse the condition, causing performance to become due even though the condition has not occurred at all or even though it has not occurred within the required time. n1 A common ground for excuse of a condition is that, after the contract was made, the obligor promised to perform despite the nonoccurrence of the condition or despite a delay in its occurrence. Such a promise is known as a *waiver*. If an owner whose duty to make progress payments is conditional on the contractor's furnishing architect's certificates excuses that condition by promising to make payments without certificates, the owner is said to waive the condition. The promise may be made either before or after expiration of the time during which the condition must occur. The obligor's promise to perform is not effective unless the obligor knows or at least has reason to know of the essential facts, but the obligor's knowledge of its legal situation and of the legal effect of the promise is immaterial. n2 And in the unusual situation in which the condition is a condition of the duties of both parties, it cannot be waived by one party. n3

The meaning of *waiver* has provoked much discussion. n4 Although it has often been said that a waiver is "the intentional relinquishment of a known right," n5 this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the nonoccurrence of or a delay in the occurrence of a condition of a duty. n6 The owner that leads the builder to believe that progress payments will be made without architect's certificates "waives" the condition, since the owner's duty to pay is no longer conditional on certificates. n7 But the creditor that discharges a debt by release or renunciation does not "waive" the debt in the sense in which that term is used here. n8 It is desirable to confine the use of *waiver* in this way to avoid confusion. Yet as Corbin put it, the word is one "of indefinite connotation" that, "like a cloak, covers a multitude of sins." n9 What explains the fondness courts have shown for this cloak?

The explanation seems to be that the rules applicable to waiver permit more flexibility in

dealing with the conduct of the parties at the performance stage than would the rules applicable to either course of performance or modification. An argument based on waiver has an advantage over one based on course of performance since the latter is confined to interpretation. And it has an advantage over an argument based on modification because it avoids three requirements for a modification. By characterizing conduct as a "waiver" rather than a "modification," a court may avoid the requirement of assent, the requirement of a writing under the statute of frauds, and the requirement of consideration or of detrimental reliance.

First, if a court asks whether the conduct of the parties amounted to a "modification," it will determine whether there was assent by applying the usual rules for the formation of contracts; if the court asks whether the conduct amounted to a "waiver," it may give effect to more dubious manifestations of assent. The promise that is the basis of a waiver may be expressed in words, n10 but often it is inferred. Conduct such as continuing performance with knowledge that the condition has not occurred might be questionable as the manifestation needed for a modification but sufficient for waiver. n11 An owner that repeatedly makes progress payments without demanding the architect's certificates on which the duty to pay is conditioned may find that the condition has been waived. n12 When a party under a conditional duty that calls for repeated performance performs without insisting on the condition, it is often difficult to determine whether that party is assenting to continue to do so in the future. n13 Characterizing the question as one of "waiver" rather than one of "modification" facilitates a finding of assent.

Second, if a court concludes that the conduct of the parties amounted to a "modification," it must then determine whether the contract as modified comes within the statute of frauds and, if it does, whether the statute is satisfied; n14 if the court concludes that the conduct amounted to a "waiver," the statute is not relevant. n15 Thus, by characterizing the conduct as a "waiver," a court may avoid any requirement of a writing and give effect to oral assent. The **concept of waiver** may be similarly effective against a no-oral-modification clause, by which the parties have erected their own private writing requirement as to future modification. n16

Third, if a court characterizes the conduct of the parties as a "modification," it must then, to the extent that the pre-existing duty rule retains its vigor, n17 ask whether the modification is supported by consideration or at least detrimental reliance; if the court characterizes the conduct as a "waiver," it begins with the proposition that a waiver is effective though not supported by consideration or detrimental reliance. n18 However, even if effective, a waiver may be subject to retraction.

A party that, without consideration, has waived a condition that is within the other party's control *before* the time for occurrence of the condition has expired, can retract the waiver and reinstate the condition unless the other party has relied to such an extent that retraction would be unjust. n19 The retracting party must either give notice while there is still a reasonable time to permit the other party to cause the condition to occur or must give an extension of time. The owner that has waived the condition that the contractor furnish architect's certificates can retract the waiver and reinstate the condition as to future payments if the owner allows the contractor a reasonable time to obtain the certificates and if the contractor has not detrimentally relied on the waiver. n20 However, a party that has waived a condition *after* the time for occurrence of the condition has expired is subject to a dramatically different rule, one that has been influenced by the concept of election. n21

The word *election* signifies a choice, one that is often binding on the party that makes it. n22 Holmes called election "a choice, shown by an overt act, between two inconsistent rights, either of which may be asserted at the will of the chooser alone." n23 When the time for occurrence of a condition has expired, the party whose duty is conditional has such a choice. That party can take advantage of the nonoccurrence of the condition and treat the duty as

discharged or can disregard the nonoccurrence of the condition and treat the duty as unconditional. n24 Courts often hold that a party that chooses to disregard the nonoccurrence of a condition is bound by an election to treat the duty as unconditional; that party cannot reinstate the condition even if the other party has not relied on this choice. n25 The parties that have most often been bound by election waivers are insurers. The insurer that chooses to engage in settlement negotiations despite the insured's failure to give timely notice of loss is likely to be precluded by its election from later resisting the claim on that ground, even if the insured in no way relied on the election. n26

The **concept of waiver**--including both ordinary and election waiver--has been responsible for substantial erosion of the rule of strict compliance generally applicable to conditions. To keep this erosion in check, the **concept of waiver** is restricted to conditions that are relatively minor. n27 A vendor that has made an offer coupled with an option contract to sell land on condition that the purchaser pay $ 100,000 cannot waive this condition. Nor can an obligor waive a condition that is material to the likelihood of the obligor's having to render its own performance. An insurance company that has promised to pay the owner of a house $ 100,000 on condition that the house is destroyed by fire cannot waive that condition. n28 Parties can most easily waive conditions that are essentially procedural or technical, as in the example given above involving the furnishing of architect's certificates as a condition of the duty to make progress payments. Waiver is often invoked to excuse delay in the occurrence of a condition, and courts have been especially receptive to claims that an insurer has waived the insured's delay in giving notice of loss. n29

An obligor may excuse a condition of its duty by breach as well as by waiver.

SUPPLEMENT:

§ 8.5 n.3 p.425 Add the following at the end:

As to the admission of extrinsic evidence in this context, *see* Wyler Summit Partnership v. Turner Broad. Sys., 135 F.3d 658 (9th Cir. 1998) (fn.10: "how and why the . . . provision was included in the . . . contract [is] an inquiry that calls for extrinsic evidence").

§ 8.5 n.7 p.425 Add the following after the first sentence:

Francis v. Buttonwood Realty Co., 765 A.2d 437 (R.I. 2001) (purchaser could waive condition that vendor procure tax abatements because it was "included for the benefit of the waiving party"). *Cf.* Wyler Summit Partnership v. Turner Broadcasting Sys., 135 F.3d 658 (9th Cir. 1998) (though "potentially probative of the parties' intent, the fact that the . . . provision *presently* benefits, or has benefited [the other party], is not, *ipso facto* determinative of the relevant inquiry . . .--whether said provision was *originally* . . . included in the contract solely for [the waiving party's] benefit").

§ 8.5 p.426 Add a new footnote 9a on line 11:

. . . ification. n9a

n9a International Bus. Lists v. American Tel. & Tel. Co., 147 F.3d 636 (7th Cir. 1998) ("valid modification must satisfy all the criteria essential for a valid contract: offer, acceptance, and consideration").

§ 8.5 n.27 p.430 In the first paragraph, add the following after the third sentence:

Wyler Summit Partnership v. Turner Broad. Sys., 135 F.3d 658 (9th Cir. 1998) (finding

waiver though "most of the previously cited cases concern minor or procedural conditions"; dissent: majority "overlooks the black letter rule that waiver may not operate materially to alter the parties' agreed upon exchange").

FOOTNOTES:

n1 *See* the discussion of the possibility of excuse in § 8.3 *supra*.

n2 According to Restatement Second § 93, though the promisor must know or have reason to know the essential facts, "his knowledge of the legal effect of the facts is immaterial."

n3 *See* the discussion of how conditions relate in § 8.3 *supra*.

n4 *See* E. Farnsworth, Changing Your Mind ch. 16 (1998). For a discussion of waiver in a historical context, *see* L. Friedman, Contract Law in America 122-124 (1965). A classic study is J. Ewart, Waiver Distributed (1917), which explores in detail the various meanings of the term. *See also* Ewart, Professor Williston's Review of Waiver, 11 Minn. L. Rev. 415 (1927).

n5 Clark v. West, 86 N.E. 1 (N.Y. 1908) ("A waiver has been defined to be the intentional relinquishment of a known right."). *Accord:* Hoxie v. Home Ins. Co., 32 Conn. 21 (1864) ("A waiver is the intentional relinquishment of a known right.").

n6 The quoted definition is also misleading in that the word *known* must be read as going only to the facts and not to their legal effect. As Williston said, "blameworthy ignorance is sufficient." *See* 3 S. Williston, Contracts § 685 (1st ed. 1920).

n7 Note that a party can waive a condition only if it is for its own benefit, i.e., only if that party is the one that owes the duty that is subject to the condition. If the duty of the purchaser of a house is conditional on the purchaser's obtaining a mortgage, that condition can be waived by the purchaser, but not by the vendor. *Cf.* Gatoil (U.S.A.) v. Washington Metro. Area Transit Auth., 801 F.2d 451 (D.C. Cir. 1986) ("extension [of time], unlike a complete waiver, is not without burdens for the other party, and thus cannot be achieved unilaterally").

n8 UCC 1-107 uses the word *waiver* as equivalent to a renunciation, but Restatement Second § 277(1), which is based on UCC 1-107 in substance, does not. *See* Draper v. Oswego County Fire Relief Assn., 82 N.E. 755 (N.Y. 1907) (doctrine of waiver inapplicable to insurer where provision "is not a condition" but "is simply an exception from the risk insured against"). *But see* McElroy v. B.F. Goodrich Co., 73 F.3d 722 (7th Cir. 1996) (Easterbrook, J.: waiver seems "to rest on an idea no more complicated than that any competent adult can abandon a legal right and if he does so he has lost it forever").

n9 Corbin, Conditions in the Law of Contracts, 28 Yale L.J. 739, 754 (1919).

n10 Clark v. West, *supra* note 5 (author's abstinence from liquor while writing book as condition of publisher's duty to pay additional sum was waived when publisher with "full knowledge of the . . . non-observance of that stipulation . . . not only accepted the completed manuscript without objection but 'repeatedly avowed and represented . . . that he . . . would receive said royalty payments'").

n11 Schultz v. Los Angeles Dons, 238 P.2d 73 (Cal. App. 1951) (professional football player's failure to give written notice of injury as condition of club's duty to pay full season's salary was waived when head coach and trainer supervised examination and treatment after oral notice). *Accord:* Loda v. H.K. Sargeant & Assocs., 448 A.2d 812 (Conn. 1982) (purchasers "did, by their actions, agree to waive the financing contingency . . . and proceed with the sale with the 75 percent commitment received"); Forman v. Benson, 446 N.E.2d 535 (Ill. App. 1983) (condition of vendor's satisfaction with purchaser's credit rating was waived by

vendor's "logically inconsistent" attempt to renegotiate contract at increased price and interest rate); Shaeffer v. Kelton, 619 P.2d 1226 (N.M. 1980) (condition that purchaser obtain loan on specified terms was waived when purchaser asserted it only when vendor attempted to close).

As to whether waiver is a matter of fact or of law, *see* Tenneco Inc. v. Enterprise Prods. Co., 925 S.W.2d 640 (Tex. 1996) (though waiver is ordinarily a matter of fact, it becomes one of law if "facts and circumstances are admitted or clearly established"). Vexing problems may arise where words and conduct conflict. *But see* J.R. Hale Contracting Co. v. United New Mexico Bank, 799 P.2d 581 (N.M. 1990) (bank's conduct was not waiver of requirement of timely payment since it "indicated an intention simply to ignore the delinquency for about three weeks" but it might be basis for estoppel).

As to the effect of an explicit reservation of rights, *see* UCC 1-207. That section is treated in another context in the discussion of reservation by a creditor in § 4.23a *supra*. For a case indicating the more exacting test for assent to a modification, *see* Simpson v. Norwesco, 583 F.2d 1007 (8th Cir. 1978).

n12 McKenna v. Vernon, 101 A. 919 (Pa. 1917) ("with a single exception each of the seven payments made as the work progressed was made without a certificate being asked for"). *Accord:* Maurer v. School Dist. No. 1, 152 N.W. 999 (Mich. 1915) ("no such certificates were ever asked for . . . until . . . the building had been completed for about two months"). *But cf.* American Continental Life Ins. Co. v. Ranier Constr. Co., 607 P.2d 372 (Ariz. 1980) (owner's failure to insist on "other rights under the contract relating to change orders or extensions of time, . . . does not manifest an intent to waive" condition that architect issue certificate); Peninsula Fed. Sav. & Loan v. DKH Properties, 616 So. 2d 1070 (Fla. App. 1993) ("fact that the lender based its refusal on other grounds did not, without more, give rise to an estoppel or constitute waiver").

n13 In such situations it is often difficult to draw the line between waiver and course of performance or practical construction. *See* the discussion of course of performance in § 7.13 *supra*. The practical importance is that a party may be able to retract a waiver but cannot wipe out a course of performance or practical construction. That failure to object to nonoccurrence of a condition under an earlier separate contract is not a waiver, *see* W.P. Harlin Constr. Co. v. Utah State Road Commn., 431 P.2d 792 (Utah. 1967).

n14 *See* the discussion of modification and rescission in § 6.2 *supra*.

n15 North v. Simonini, 457 A.2d 285 (Vt. 1983) ("waiver and estoppel operate independently of the statute"). *Accord:* Imperator Realty Co. v. Tull, 127 N.E. 263 (N.Y. 1920) (oral "waiver" supported by consideration was enforceable though contract for exchange of real property was within statute of frauds). *See also* UCC 2-209(4) (attempt at modification or rescission that does not satisfy requirements of statute of frauds "can operate as a waiver").

n16 *See* the discussion of statutory inroads in § 7.6 *supra*. *Cf.* Mundy v. Arcuri, 267 S.E.2d 454 (W. Va. 1980) (parol evidence rule not applicable to waiver, as distinguished from modification).

n17 *See* §§ 4.21, 4.22 *supra*.

n18 Wachovia Bank & Trust Co. v. Rubish, 293 S.E.2d 749 (N.C. 1982) ("waiver is valid even if not supported by consideration or estoppel"). *Accord:* Cabinetree of Wisconsin v. Kraftmaid Cabinetry, 50 F.3d 388 (7th Cir. 1995) ("waiver normally is effective without proof of consideration or detrimental reliance"); Nassau Trust Co. v. Montrose Concrete Prods. Corp., 436 N.E.2d 1265 (N.Y. 1982) (neither waiver nor estoppel "rests upon consideration or agreement.").

As to the distinction between waiver and estoppel, *see* Lone Mountain Prod. Co. v. Natural Gas Pipeline Co., 710 F. Supp. 305 (D. Utah 1989) (estoppel "focuses not on the obligor's intent, but on the effects of his conduct"). *But see* United States ex. rel. Trans-Colorado Concrete Co. v. Midwest Constr. Co., 653 F. Supp. 903 (D. Colo. 1987) ("party estopped . . . must intend that his conduct will be acted on").

n19 UCC 2-209(5) (party "may retract the waiver by reasonable notification . . . unless the retraction would be unjust in view of a material change of position in reliance on the waiver"); Restatement Second § 84(2) ("promisor can make his duty again subject to the condition" by notice if "reinstatement of the requirement of the condition is not unjust because of a material change of position"). *Accord:* Getty Terminals Corp. v. Coastal Oil New England, 995 F.2d 372 (2d Cir. 1993) ("Section 2-209(5) requires timely notice of a retraction of waiver," and there is "no trace of a requirement that prejudice be shown"); Cassidy Podell Lynch v. SnyderGeneral Corp., 944 F.2d 1131 (3d Cir. 1991) (though seller "could have retracted its waiver with respect to future shipments, it could not demand compliance with respect to past shipments" and thus it "was not entitled to withhold future shipments on this basis"). *Cf.* Gilbert v. Globe & Rutgers Fire Ins. Co., 178 P. 358 (Or. 1919) (where contract required action to be brought within 12 months of fire, "the ban of an estoppel [to invoke the 12-month deadline] may be lifted by the party against whom it is invoked, by the giving of proper notice").

As to the importance of convincing proof of waiver, *see* Bank v. Truck Ins. Exch., 51 F.3d 736 (7th Cir. 1995) (Posner, C.J.: "courts have not been indifferent to the danger of self-serving testimony that the other party to the contract waived a right"). *Accord:* Stovall of Chattanooga v. Cunningham, 890 S.W.2d 442 (Tenn. App. 1994) (waiver "cannot be made out by acts of uncertain implication, but ought to clearly appear").

n20 Restatement Second § 84(2)(a) (enough if there is "a reasonable time to cause the condition to occur under . . . an extension given by the promisor").

n21 Under Restatement Second § 84, this is also true if the condition is not within the control of the party asserting the waiver, even if the time for occurrence of the condition has not expired.

n22 *See* E. Farnsworth, Changing Your Mind ch. 19 (1998).

n23 Wm. W. Bierce, Ltd. v. Hutchins, 205 U.S. 340, 346 (1907) (Holmes, J.). *See* Bigda v. Fischbach Corp., 849 F. Supp. 895 (S.D.N.Y. 1994) (fn. 2: because "decision of a nonbreaching party to continue to perform is not a 'waiver' . . . but an election," no-waiver clause is "irrelevant").

n24 *See* the discussion of duty discharged in § 8.3 *supra*.

n25 *See* Restatement Second § 84. *Accord:* Williams v. Ubaldo, 670 A.2d 913 (Me. 1996) (purchaser that proceeds with transaction despite inability to secure financing under financing clause "is deemed to have waived the protections of that clause" and "cannot later resurrect the condition").

n26 United States Fidelity & Guar. Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353 (Tex. 1971) (when burglary insurer admitted partial liability, the case was "one of waiver" and need not have been "based upon an estoppel"). *Accord:* Lee v. Casualty Co. of Am., 96 A. 952 (Conn. 1916) (when casualty insurer attempted to settle claim although insured had not given timely notice, "rights waived cannot be regained by revoking the waiver"). *Contra:* Coleman Furniture Corp. v. Home Ins. Co., 67 F.2d 347 (4th Cir. 1933) (quoting trial judge: "'insurer is not estopped unless the insured relied upon the action of the insurance

company'").

That a denial of liability for one reason may preclude the insurer from later asserting a different reason, *see* Phoenix Ins. Co. v. Ross Jewelers, 362 F.2d 985 (5th Cir. 1966). *But cf.* Larson v. Occidental Fire & Cas. Co., 446 P.2d 210 (N.M. 1968) (insurer not precluded in absence of reliance). That an election waiver may be conditional, *see* Thompson v. Postal Life Ins. Co., 123 N.E. 750 (N.Y. 1919) (insurer waived delay in payment of premiums "subject to conditions" that insured be examined and furnish evidence of insurability).

n27 Bank v. Truck Ins. Exch., *supra* note 19 (Posner, C.J., citing this section of the treatise: waiver is limited to a minor condition, otherwise "why would someone give it up in exchange for nothing?"). *Accord:* Rose v. Mitsubishi Intl. Corp., 423 F. Supp. 1162 (E.D. Pa. 1976) (condition of "clear and marketable title," indicated by title insurance, was "a material part of the agreed exchange" and, "as opposed to a mere matter of performance such as a settlement date," could not be waived). *See* Restatement Second § 84(1)(a) (occurrence of the condition must not be "a material part of the agreed exchange for the performance of the duty"). However, if the condition is a promissory condition, the requirement of immateriality does not apply. *See* the discussion of the effect of a condition and a duty in § 8.3 *supra*.

For an exaggerated description of the extent of the erosion of the rule of strict compliance, *see* Childres, Conditions in the Law of Contracts, 45 N.Y.U. L. Rev. 33 (1970).

n28 *Cf.* National Util. Serv. v. Whirlpool Corp., 325 F.2d 779 (2d Cir. 1963) (party "cannot by waiver of a condition precedent to his own liability create obligation in himself where none previously existed"). But for a particularly striking case of waiver of a condition that could scarcely be regarded as immaterial, *see* Bowman v. Surety Fund Life Ins. Co., 182 N.W. 991 (Minn. 1921) (condition in life insurance policy that insured not enter military service).

n29 *See* United States Fidelity & Guar. Co. v. Bimco Iron & Metal Corp., *supra* note 26.

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Restatement of the Law, Second, Contracts, § 84

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Rules and Principles

Chapter 4 - Formation of Contracts -- Consideration

Topic 2 - Contracts Without Consideration

Restat 2d of Contracts, **§ 84**

§ 84 Promise to Perform a Duty in Spite of Non-Occurrence Of a Condition

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

COMMENTS & ILLUSTRATIONS: Comment:

a. Rationale. Like the rules stated in §§ 82 and 83, the rule of Subsection (1) can be thought of in terms of waiver of a defense not addressed to the merits, and rests in large part on the policies against forfeiture and unjust enrichment. Where the waiver is made before the time for the occurrence of the condition, it may induce non-occurrence of the condition, and enforcement may also rest on reliance or on excuse by prevention or hindrance. See §§ 89, 90, and Comment *d* to § 205. But a waiver made after the original

duty has been discharged, though it is sometimes said to "reinstate" the duty, in fact creates a new duty unqualified by the condition.

Conditions are the subject of more detailed treatment in §§ 224-29. In many situations an agreement or a rule of law, in the interest of simplicity and certainty, provides for absolute discharge of the promisor although a discharge to the extent of loss caused by a non-occurrence of condition might seem more equitable. See, e.g., Uniform Commercial Code § 3-502. The likelihood of waiver and the pressure to find waiver or other excuse increase in proportion to the extent and unfairness of the forfeiture involved; in extreme cases the non-occurrence of the condition may be excused without other reason. See § 229.

b. "Waiver" and "estoppel"; mistake. "Waiver" is often inexactly defined as "the voluntary relinquishment of a known right." When the waiver is reinforced by reliance, enforcement is often said to rest on "estoppel." Compare §§ 89, 90. Since the more common definition of estoppel is limited to reliance on a misrepresentation of an existing fact, reliance on a waiver or promise as to the future is sometimes said to create a "promissory estoppel." The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. But under § 93 it is sufficient if he has reason to know the essential facts. And if the waiver is supported by reliance or by consideration, the effect of mistake on the part of the promisor depends on the rules stated in Chapter 6.

c. Conditions material to the exchange or risk. A promise is often conditional on the receipt of some performance regarded as the equivalent of the performance promised, as in the case of an option contract to sell a horse if the promisee pays $ 500 for him. A promise may also be conditional on a fortuitous event, and the risk or burden assumed by the promisor may depend on the probability that the condition will occur, as in a promise to insure a house against fire. In both types of cases, where a promise to disregard the non-occurrence of the condition materially affects the value received by the promisor or the burden or risk assumed by him, the promise is not binding under Subsection (1). Such a promise may be binding by virtue of reliance or for some other reason. See §§ 89, 90. See also § 246. But a waiver of the price of a horse or of the fire required by an insurance policy is not within this Section.

Illustration:

1. In an insurance policy the insurer promises to pay $ 1000 if the insured is killed on a railroad. The insurer's subsequent promise to pay $ 1000 even though the insured is not killed on a railroad is not binding under this Section, whether the promise is made before or after the death of the insured.

d. Conditions which may be waived. The rule of Subsection (1) applies primarily to conditions which may be thought of as procedural or technical, or to instances in which the non-occurrence of condition is comparatively minor. Examples are conditions which merely relate to the time or manner of the return performance or provide for the giving of notice or the supplying of proofs. Insurance policies ordinarily contain conditions of notice and proof of loss and of time for suit; and guarantors, indorsers and other sureties may be discharged by an agreement varying the duty of the principal debtor, by failure of diligence in presentment or prosecution, or by failure to give a required notice. In such cases, even though a promise to disregard the non-occurrence of the condition subjects the promisor to a new duty, the new duty is not regarded as significantly different from the old and the promise is binding without consideration, reliance, or formality. See, e.g., Uniform Commercial Code § 3-606, Comment 2.

Illustrations:

2. A is surety for B on a debt due C. C makes a contract with B, the principal debtor,

extending the time for payment. Thereafter A, with knowledge of that fact, promises C to pay the debt. The promise is binding, and A has no power to retract it.

3. A employs B to build a house, promising to pay therefor $ 10,000 on the production of a certificate from A's architect, C, stating that the work has been satisfactorily completed. B builds the house but the work is defective in certain trivial particulars. C refuses to give B a certificate. A says to B, "My architect rightfully refuses to give you a certificate but the defects are not serious; I will pay you the full price which I promised." A is bound to do so, and has no power to restore the requirement of the condition.

4. A, an insurance company, insures B's house for $ 5000 against loss by fire. The insurance policy provides that it shall be payable only if B gives written notification of any loss within thirty days after its occurrence. An insured loss occurs and B gives only oral notification thereof within thirty days. A tells him, either before or after the lapse of thirty days from the loss, that this notification is sufficient. A cannot thereafter rely upon B's failure to give written notification as an excuse for failure to pay for the loss.

e. Form. Adjustments in an on-going transaction commonly take place in a setting which fulfills some of the functions of legal formalities, and the probability of reliance is high. Compare § 89. Even when the requirement of a technical condition is waived after the non-occurrence of that condition, the effect is often to achieve a result which seems fair without regard to waiver. The Statute of Frauds may make unenforceable an oral promise which has not been relied on. See § 150; compare Uniform Commercial Code § 2-209, Comment 4. Otherwise, formal requirements are at a minimum. It is immaterial how the promisor manifests his intention to fulfill the prior duty without the performance of the condition. Words of promise or waiver, though often used, are unnecessary; in many situations nonverbal conduct is enough. A mere acknowledgment of the antecedent duty does not suffice unless there is a manifestation of intention to disregard the condition, and a conditional or partial waiver is effective only according to its terms.

Illustration:

5. A, an insurance company, issues to B a policy of automobile liability insurance, under which it is a condition of A's duty to pay that B notify A "as soon as practicable" after an accident. An accident occurs, but B does not notify A as soon as practicable. Without any statement concerning the non-occurrence of the condition, A begins to defend B in an action brought against B as a result of the accident. A's beginning to defend B operates as a promise to pay in spite of the non-occurrence of the condition.

f. Reinstatement after waiver. If the requirement of a condition has been eliminated from a contract by an agreement supported by consideration it cannot be reinstated by unilateral action of the promisor. Nor can it be reinstated if a new unconditional duty has been created by a promise made after the original duty was discharged by non-occurrence of the condition, or if reinstatement would be unjust in view of a change of position by the other party. Compare Uniform Commercial Code § 2-209(5); Restatement of Restitution § 142. But where the requirement of a condition is waived in advance, the promisor may reinstate the requirement by giving notice to the other party before the latter has materially changed his position. Whether delay alone makes reinstatement unjust depends upon the circumstances: in some cases a reasonable extension of time sufficiently protects the other party; in others the extension may be required to be both definite and reasonable; in some no extension can put him in as good a position to perform as before the waiver.

Illustrations:

6. In Illustration 4, A can restore the requirement of the condition by notifying B of his intention to do so if there still remains a reasonable time for the occurrence of the condition

before the expiration of the thirty-day period, unless such action would be unjust in view of a material change of position by B in reliance on A's waiver. If a reasonable time does not remain, A cannot restore the requirement of the condition by extending the time.

7. A, an insurance company, insures B's house against loss by fire. The insurance policy provides that unless suit is brought on the policy within twelve months after a loss, no recovery can be had. An insured loss occurs and A tells B that it is unnecessary to bring suit within that time. Unless B has so changed his position that it would be unjust to restore the time limitation, A can do so by giving B notice. Thereafter B has a reasonable time to bring suit. In the absence of special circumstances, the reasonable time will expire twelve months after the notice is received.

8. On February 1, A agrees to sell and B to buy land for the price of $ 10,000, the transfer to be made on March 1. B makes an advance payment of $ 1,000, and the contract provides that time is of the essence and that if the balance of the price is not paid promptly B's rights are forfeited and A may retain the $ 1,000. On February 15, A informs B that A will not insist on the March 1 date. In the absence of special circumstances, A can thereafter restore the requirement of the condition by giving B notice that A will insist on performance within thirty days from the time of the notice.

REPORTERS NOTES: This Section is based on former § 88. See 1 Williston, Contracts § 157 (3d ed. 1957); 5 id. 678-79, 689-93 (3d ed. 1961); 1A Corbin, Contracts § 224 (1963); 3A id. § 753 (1960).

Comment a. See 3A Corbin, Contracts § 754 (1960 & Supp. 1980); Llewellyn, The Common Law Tradition -- Deciding Appeals 404-10 (1960) (diligence against drawer and indorser).

Comment b. See 1 Williston, Contracts §§ 140, 203 (3d ed. 1957); 3A Corbin, Contracts § 752 (1960 & Supp. 1980); Ewart, Waiver Distributed Among the Departments Election, Estoppel, Contract, Release (1917).

Comment c. Illustration 1 was Illustration 4 to former § 88.

Comment d. Illustrations 2 and 3 were Illustrations 1 and 3 to former § 88. Illustration 4 is part of Illustration 2 to former § 88.

Comment e. See Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 805, 818 (1941). Illustration 5 is based on Lee v. Casualty Ins. Co., 90 Conn. 202, 96 A. 952 (1916); Merchants Indem. Corp. v. Eggleston, 37 N.J. 114, 179 A.2d 505 (1962). See also Fritts v. Cloud Oak Flooring Co., 478 S.W.2d 8 (Mo. Ct. App. 1972).

Comment f. See 5 Williston, Contracts § 741 (3d ed. 1961); 3A Corbin, Contracts §§ 722, 757, 764 (1960). Illustration 6 is based on part of Illustration 2 to former § 88; cf. Annot., 49 A.L.R.2d 87, 106 (1956). Illustration 7 is based on Gilbert v. Glove & Rutgers Fire Ins. Co., 91 Or. 59, 178 P. 358 (1919); see Annot., 29 A.L.R.2d 636, 646 (1953); Note, 41 Yale L.J. 1069 (1932). As to Illustration 8, compare Sliwinski v. Gootstein, 234 Mich. 74, 208 N.W. 47 (1926); Fritts v. Cloud Oak Flooring Co., 478 S.W.2d 8 (Mo. Ct. App. 1972); see Annot., 4 A.L.R. 815(1919).

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Restatement of the Law, Second, Contracts, § 202

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Rules and Principles

Chapter 9 - The Scope of Contractual Obligations

Topic 1 - The Meaning of Agreements

Restat 2d of Contracts, § 202

§ 202 Rules in Aid of Interpretation

(1) Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight.
(2) A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together.
(3) Unless a different intention is manifested,

(a) where language has a generally prevailing meaning, it is interpreted in accordance with that meaning;

(b) technical terms and words of art are given their technical meaning when used in a transaction within their technical field.
(4) Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.
(5) Wherever reasonable, the manifestations of intention of the parties to a promise or agreement are interpreted as consistent with each other and with any relevant course of performance, course of dealing, or usage of trade.

COMMENTS & ILLUSTRATIONS: Comment:

a. Scope of special rules. The rules in this Section are applicable to all manifestations of intention and all transactions. The rules are general in character, and serve merely as guides in the process of interpretation. They do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings.

b. Circumstances. The meaning of words and other symbols commonly depends on their context; the meaning of other conduct is even more dependent on the circumstances. In interpreting the words and conduct of the parties to a contract, a court seeks to put itself in the position they occupied at the time the contract was made. When the parties have adopted a writing as a final expression of their agreement, interpretation is directed to the meaning of that writing in the light of the circumstances. See §§ 209, 212. The circumstances for this purpose include the entire situation, as it appeared to the parties, and in appropriate cases may include facts known to one party of which the other had reason to

know. See § 201.

Illustrations:

1. A contracts with B to do concrete work on a bridge, to be paid for according to "the number of square yards of concrete surface included in the bridge deck." An estimate included in the proposal for bids and an estimate submitted by A to B after award are shown to have been based on the top surface only, not including the side and bottom surfaces. On a finding that this was the mutual understanding, the contract is to be sointerpreted.

2. In a written agreement between A and B it is stated that B owns half of the stock of C Company, that "A has rendered valuable services to C Company for which B desires to compensate A in the sum of $ 25,000 payable in the manner hereinafter set forth," and that B will pay A "one-half of all money received from C Company, such as dividends, or profits until A has been paid the said amount of $ 25,000." It is shown that the written agreement was executed after the services were rendered, that there was no prior explicit understanding that A would be compensated, and that before signing the written agreement A and B orally agreed that the $ 25,000 was to be a "bonus out of B's profit," "double or nothing," "a gamble." The written agreement is to be interpreted in accordance with the oral agreement.

c. Principal purpose. The purposes of the parties to a contract are not always identical; particularly in business transactions, the parties often have divergent or even conflicting interests. But up to a point they commonly join in a common purpose of attaining a specific factual or legal result which each regards as necessary to the attainment of his ultimate purposes. Moreover, one party may know or have reason to know the purpose of the other and thus that his meaning is one consistent with that purpose. Determination that the parties have a principal purpose in common requires interpretation, but if such a purpose is disclosed further interpretation is guided by it. Even language which is otherwise explicit may be read with a modification needed to make it consistent with such a purpose.

Illustrations:

3. A promises B as follows: "In consideration of your supplying my nephew C with china and earthenware during the coming year, I guarantee the payment of any bills you may draw on him on account thereof to the amount of $ 200." C is engaged in the business of selling such goods. B sells C $ 2,000 of china during the year and draws bills for their price in varying amounts. C pays $ 1,000 and then defaults. A's promise is to be interpreted as a continuing undertaking, not limited to the first $ 200 of purchases.

4. A agrees with his divorced wife B and C, trustee, to pay to C $ 1,200 each year for the benefit of D, the 10-year-old son of A and B, until D enters college, and to pay $ 2,200 each year for the period of D's higher education but not more than four years. At age 19 D completes high school and is inducted into the army. Upon a finding that the main purpose of the agreement is to provide for D's maintenance and education, the agreement is to be interpreted as not requiring payments during D's military service.

d. Interpretation of the whole. Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole. Where the whole can be read to give significance to each part, that reading is preferred; if such a reading would be unreasonable, a choice must be made. See § 203. To fit the immediate verbal context or the more remote total context particular words or punctuation may be disregarded or supplied; clerical or grammatical errors may be corrected; singular may be treated as plural or plural as singular.

Illustrations:

5. A written agreement between A and B for the exchange of real estate provides that A and B will each pay a $ 200 commission to C, a broker, "upon the signing of this agreement by both parties hereto." The last sentence of the agreement states, "The commission being due and payable upon the transfer of the properties." It is shown that A refused to sign the agreement until the last sentence was added. The agreement is to be interpreted to make the commission due only when both the signing and the transfer take place.

6. A agrees to appoint B exclusive distributor in a specified area for a new product to be manufactured by A, and B agrees to use his best efforts to promote sale of the product. The written agreement includes an initial retail price list and a provision that A will sell to B at the lowest price and highest discount it gives to any distributor. Whether the parties intend to be bound before any other distributor is appointed or any price fixed is a question of the meaning of the entire agreement in its context. If they do, the agreement has the effect of an agreement to sell at a reasonable price at the time for delivery. See Uniform Commercial Code § 2-305.

7. A contracts in writing to build a house for B according to specifications, and C, a surety company, guarantees A's performance. After completion and acceptance the house and its contents are damaged by hot water because of defective work by the plumbing and heating subcontractor. In determining the responsibility of A and C, the contract, specifications and surety bond are to be read together.

e. General usage. In the United States the English language is used far more often in a sense which would be generally understood throughout the country than in a sense peculiar to some locality or group. In the absence of some contrary indication, therefore, English words are read as having the meaning given them by general usage, if there is one. This rule is a rule of interpretation in the absence of contrary evidence, not a rule excluding contrary evidence. It may also yield to internal indications such as inconsistency, absurdity, or departure from normal grammar, punctuation, or word order.

Illustrations:

8. A issues to B a fire insurance policy covering lumber stored in "sheds." In the absence of contrary indication, lumber in the basement of a two-story warehouse is not covered.

9. A leases restaurant premises to B. The lease provides that A will pay for electricity and that B will "pay for gas or fuel used in the preparation of food." In the absence of contrary indication, "fuel" should be read not to include electricity.

f. Technical terms. Parties to an agreement often use the vocabulary of a particular place, vocation or trade, in which new words are coined and common words are assigned new meanings. But technical terms are often misused, and it may be shown that a technical word or phrase was used in a non-technical sense. Moreover, the same word may have a variety of technical and other meanings. "Mules" may mean animals, shoes or machines; a "ram" may mean an animal or a hydraulic ram; "zebra" may refer to a mammal, a butterfly, a lizard, a fish, a type of plant, tree or wood, or merely to the letter "Z".

Illustrations:

10. The facts being otherwise as stated in Illustration 9, there is a local usage in the restaurant trade that "fuel" includes electricity used in cooking. In the absence of contrary indication, "fuel" may be read in accordance with the usage. But a provision in the lease that if B installs a new electric range he will also install a special meter and pay for electricity used by the range would show that the parties did not adopt the local usage.

11. A contract for the sale of horsemeat scraps calls for "minimum 50% protein." As both parties know, by a usage of the business in which they are engaged, 49.5 per cent is treated as the equivalent of 50 per cent. The contract is to be interpreted in accordance with the usage.

g. Course of performance. The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning. But such "practical construction" is not conclusive of meaning. Conduct must be weighed in the light of the terms of the agreement and their possible meanings. Where it is unreasonable to interpret the contract in accordance with the course of performance, the conduct of the parties may be evidence of an agreed modification or of a waiver by one party. See Uniform Commercial Code § 2-208. Or there may be simply a mistake which should be corrected. The rule of Subsection (4) does not apply to action on a single occasion or to action of one party only; in such cases the conduct of a party may be evidence against him that he had knowledge or reason to know of the other party's meaning, but self-serving conduct is not entitled to weight.

Illustrations:

12. A discloses to B a secret formula for an antiseptic liquid and B agrees to pay monthly royalties based on amounts sold. Fifty years later the formula has been published in medical journals. After continuing to pay for 25 years more, B contends that the duty to pay royalties ended when the formula ceased to be secret. B's conduct strongly negates the contention.

13. Several railroads agree in writing to share working expenses and taxes of X, another railroad, on a "wheelage basis." For several years they pay shares in proportion to their stock ownership in the other railroad. Then all but one agree that they have been mistaken and that future payments will be made on a basis of use of X's physical properties. Stock ownership is so plainly unrelated to any possible meaning of "wheelage" that the course of performance does not support an interpretation of "wheelage basis" as requiring payments in proportion to stock ownership.

h. Preference for consistency. Subsection (5) states a rule fairly implied in Subsections (1) and (2); words and conduct are interpreted in the light of the circumstances, and writings are interpreted as a whole. A meaning consistent with all the circumstances is preferred to a meaning which requires that part of the context be disregarded. But the parties may have agreed to displace normal meanings, may have modified a prior understanding, or may have agreed to confusing or self-contradictory terms. They may even have entirely failed to agree, though each thought there was an agreement. See §§ 20, 201.

REPORTERS NOTES: Former § 228 is replaced by new § 209. This Section is former § 235, rearranged to put the most general rules first, plus former § 236(a) and (b). Subsection (4), formerly § 235(e), is revised to use the terminology of Uniform Commercial Code § 2-208. See 4 Williston, Contracts §§ 618-19, 628-30 (3d ed. 1961); 3 Corbin, Contracts §§ 542-45, 549, 552, 555, 558 (1960 & Supp. 1980); Patterson, The Interpretation and Construction of Contracts, 64 Colum. L. Rev. 833 (1964).

Comment b. Illustration 1 is based on Berke Moore Co. v. Phoenix Bridge Co., 98 N.H. 261, 98 A.2d 150 (1953). Illustration 2 is based on Hood v. Gordy Homes, Inc., 267 F.2d 882 (4th Cir. 1959).

Comment c. Cases seeking to ascertain the parties' purpose as an aid to interpretation include Crestview Bowl, Inc. v. Womer Constr. Co., 225 Kan. 335, 592 P.2d 74 (1979); Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123 (3d Cir. 1969); and Graziano v. Tortora Agency, Inc., 78 Misc.2d 1094, 359 N.Y.S.2d 489 (Civ. Ct. 1974). Illustration 3 was

substantially Illustration 2 to former § 236. Illustration 4 is based on Spaulding v. Morse, 322 Mass. 149, 76 N.E.2d 137 (1947).

Comment d. For discussions of interpretation of the whole, see Ludwig Honold Mfg. Co. v. Fletcher, 405 F.2d 1123, 1130 n.31 (3d Cir. 1969); Elliott Leases Cars, Inc. v. Quigley, 118 R.I. 321, 373 A.2d 810 (1977); Castellano v. State, 43 N.Y.2d 909, 403 N.Y.S.2d 724, 374 N.E.2d 618 (1978). In the last two cases, both the majority and dissenting opinions deserve attention on this point. Illustration 5 is based on Mealey v. Kanealy, 226 Iowa 1266, 286 N.W. 500 (1939); see Annot., 131 A.L.R. 955 (1941). Illustration 6 is based on Mantell v. International Plastic Harmonica Corp., 141 N.J. Eq. 379, 55 A.2d 250 (Ct. Err. & App. 1947). Illustration 7 is based on Paisner v. Renaud, 102 N.H. 27, 149 A.2d 867 (1959).

Comment e. Illustration 8 is based on Easton v. Washington County Ins. Co., 391 Pa. 28, 137 A.2d 332 (1957). Illustration 9 is based on John F. Davis Co. v. Shepard Co., 71 R.I. 499, 47 A.2d 635 (1946). See also Wahlenmaier v. American Quasar Petroleum Co., 517 S.W.2d 390 (Tex. Civ. App. 1974), ref. n.r.e.

Comment f. Illustration 10 is based on John F. Davis Co. v. Shepard Co., 71 R.I. 499, 47 A.2d 635 (1946). Illustration 11 is based on Hurst v. W. J. Lake & Co., 141 Or. 306, 16 P.2d 627 (1932). See also Robin v. Sun Oil Co., 548 F.2d 554, 558 (5th Cir. 1977), involving the interpretation of a settlement agreement: "Counsel in this case were competent maritime lawyers. They knew the difference between liability and negligence. They knew how to use other words if they chose to do so."

Comment g. See Note, Evaluating the Conduct of Successors in the Interpretation of Contract Terms: Practical Construction and Judicial Method, 57 Iowa L. Rev. 215 (1971). Illustration 12 is based on Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655 (S.D.N.Y. 1959), aff'd, 280 F.2d 197 (2d Cir. 1960). Illustration 13 is based on In re Chicago & E.I. Ry., 94 F.2d 296 (7th Cir. 1938).

Comment h. Compare Elliott Leases Cars, Inc. v. Quigley, 118 R.I. 321, 373 A.2d 810 (1977) with Western Oil Fields, Inc. v. Pennzoil United, Inc., 421 F.2d 387 (5th Cir. 1970).

CROSS REFERENCES: ALR Annotations:

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 A.L.R.3d 1018.
Validity, construction, and effect of real-estate brokers' multiple-listing agreement. 45 A.L.R.3d 190.
Effect of provision in real-estate option or land sale contract making the contract subject to zoning or rezoning of the property. 76 A.L.R.2d 1195.
Time specified in real-estate contract for giving notice of exercise of option to purchase as of essence. 72 A.L.R.2d 1127.
Validity, construction, and effect of land sale contract providing that title must be satisfactory to purchaser. 47 A.L.R.2d 455.

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Restatement of the Law, Second, Contracts, § 225

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Rules and Principles

Chapter 9 - The Scope of Contractual Obligations

Topic 5 - Conditions and Similar Events

Restat 2d of Contracts, **§ 225**

§ 225 Effects of the Non-Occurrence Of a Condition

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.
(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.
(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

COMMENTS & ILLUSTRATIONS: Comment:

a. Two effects. The unexcused non-occurrence of a condition has two possible effects on the duty subject to that condition. The first effect always follows and the second often does. The first, stated in Subsection (1), is that of preventing performance of the duty from becoming due. This follows from the definition of "condition" in § 224. Performance of the duty may still become due, however, if the condition occurs later within the time for its occurrence. The non-occurrence of the condition within that time has the additional effect, stated in Subsection (2), of discharging the duty. The time within which the condition can occur in order for the performance of the duty to become due may be fixed by a term of the agreement or, in the absence of such a term, by one supplied by the court (§ 204). Where discharge would produce harsh results, this second effect may be avoided by rules of interpretation (§§ 226, 228) or of excuse of conditions (Comment *b* and § 229).

Illustrations:

1. A contracts to sell and B to buy A's business. The contract provides that B is to pay in installments over a five-year period following the conveyance, and that A is to convey on condition that B pledge specified collateral to secure his payment. Conveyance by A does not become due until B pledges the collateral. If the agreement does not provide for the time within which the collateral is to be pledged, A's duty is discharged if it is not pledged within a reasonable time.

2. B gives A $ 10,000 to use in perfecting an invention, and A promises to repay it only out of royalties received during his lifetime from the sale of the patent rights. In spite of diligent

efforts, A is unable to perfect his invention and obtain a patent, and no royalties are received. A dies after six years. B has no claim against A's estate. Receipt of royalties is a condition of A's duty to repay the money and A's duty is discharged by the non-occurrence of that condition during his lifetime.

b. Excuse. The non-occurrence of a condition of a duty is said to be "excused" when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of "waiver" in § 84, and the treatment of discharge in §§ 273-85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246-48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250-51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse toavoid forfeiture. See § 229.

c. Effect of excuse. When the non-occurrence of a condition of a duty is excused, the damages for breach of the duty will depend on whether or not the occurrence of the condition was also part of the performances to be exchanged under the exchange of promises. If it was not part of the agreed exchange, the obligor is liable for the same damages for which he would have been liable had the duty originally been unconditional. If it was part of the agreed exchange, however, the saving to the obligee resulting from the non-occurrence of the condition must be subtracted in determining the obligor's liability for damages. Rules for determining damages are set out in § 347; see generally §§ 346-56. If the obligee is under a duty that the condition occur, the ground for the excuse of the non-occurrence of the condition may not be a ground for discharge of that duty. He may therefore be liable for breach of the duty in spite of the excuse of the non-occurrence of the condition. Not only may a party excuse entirely the non-occurrence of a condition of his duty, but he may merely excuse its non-occurrence during the period of time in which it would otherwise have to occur. If he does this, the non-occurrence of the condition during that period will not discharge the duty under Subsection (2), although its non-occurrence will ultimately have that effect. See Illustration 8 to § 84.

Illustrations:

3. A contracts with B to build a house for $ 50,000, payable on condition that A present a certificate from C, B's architect, showing that the work has been properly completed. A properly completes the work, but C refuses to give the certificate because of collusion with B, and the non-occurrence of the condition is therefore excused. See § 239. Since the presentation of the architect's certificate is not part of the performances to be exchanged under the exchange of promises, A has a claim against B for $ 50,000.

4. Under an option contract, A promises to sell B a painting "on condition that B pay $ 100,000" by a stated date. Before that date, the non-occurrence of the condition is excused by A's repudiation of the contract. See § 255. Since the payment of the $ 100,000 is B's part of the performances to be exchanged under the exchange of promises, B saved that amount when the non-occurrence of the condition was excused, and it should be subtracted in determining damages. B has a claim against A for the value of the painting to B less $ 100,000.

5. A leases property to B for a stated monthly rental. The lease provides that A is under a duty to remove described property from the premises, and that its removal is a condition of

B's duty to pay the rent. After A has removed most of the property from the premises, B says that he will pay the rent even though not all of it has been removed. The non-occurrence of the condition is excused and B is under a duty to pay the rent even though A does not remove the rest of the property. See § 84. But A's duty to remove the rest of the property is not discharged and his failure to remove the rest is a breach.

d. Imposition of duty distinguished. When one party chooses to use the institution of contract to induce the other party to cause an event to occur, he may do so by making the event a condition of his own duty (Introductory Note to this Topic). Or he may do so by having the other party undertake a duty that the event occur. Or he may do both. But, as Subsection (3) makes clear, a term making an event a condition of anobligor's duty does not of itself impose a duty on the obligee and the non-occurrence of the event is not of itself a breach by the obligee. Unless the obligee is under such a duty, the non-occurrence of the event gives rise to no claim against him. The same term may, however, be interpreted not only to make an event a condition of the obligor's duty, but also to impose a duty on the obligee that it occur. And even where no term of the agreement imposes a duty that a condition occur, the court may supply such a term. See § 204.

Illustrations:

6. A, a shipowner, promises to carry B's cargo on his ship to Portsmouth. B promises to pay A the stipulated freight on condition that A's ship sail directly there on its next sailing. A's ship carries B's cargo to Portsmouth, but puts into port on the way. Since carrying B's cargo directly to Portsmouth is a condition of B's duty, no duty to pay arises, and, since the condition can no longer occur, B's duty is discharged. Since A is under no duty to carry B's cargo directly to Portsmouth, however, his failure to do so is not a breach.

7. The facts being otherwise as stated in Illustration 6, A promises to carry B's cargo on his ship directly to Portsmouth on its next sailing. Since carrying B's cargo directly to Portsmouth is a condition of B's duty, no duty to pay arises and, since the condition can no longer occur, B's duty is discharged. Since A is under a duty to carry B's cargo directly to Portsmouth, his failure to do so is also a breach.

8. A contracts to sell and B to buy a house for $ 50,000, with the provision, "This contract is conditional on approval by X Bank of B's pending mortgage application." Approval by X Bank is a condition of B's duty. B is under no duty that the X Bank approve his application, but a court will supply a term imposing on him a duty to make reasonable efforts to obtain approval. See §§ 204, 205.

e. Ignorance immaterial. The rules stated in this Section apply without regard to whether a party knows or does not know of the non-occurrence of a condition of his duty.

Illustration:

9. The facts being otherwise as stated in Illustration 6, B refuses to pay the freight without knowing that A's ship has put into port on the way. B's refusal is not a breach since his duty is discharged.

REPORTERS NOTES: Subsection (1) is new, but is based in part on former § 294. See § 224. Subsection (2) is based on former § 395. Subsection (3) is based on former § 257. See 5 Williston, Contracts § 676 (3d ed. 1961); 3A Corbin, Contracts § 655 (1960).

Comment a. For the basic rule of Subsection (1), see Addison Terry Co. v. N.F.L. Films, Inc., 390 F. Supp. 621 (S.D.N.Y. 1974), citing this Section in Tentative Draft. Illustration 1 is suggested by Kingston v. Preston, 2 Doug. 689, 99 Eng. Rep. 437 (K.B. 1773). Illustration 2 is based on Palmer v. Guillow, 224 Mass. 1, 112 N.E. 493 (1916).

Comment b. Excuse of condition by waiver is covered in § 84, and former § 297, which dealt with that subject, is therefore omitted. See Rose v. Mitsubishi Int'l Corp., 423 F. Supp. 1162 (E.D. Pa. 1976); Williamson v. Wanlass, 545 P.2d 1145 (Utah 1976); Fritts v. Cloud Oak Flooring Co., 478 S.W.2d 8 (Mo. Ct. App. 1972). On excuse to avoid forfeiture, see the two last-cited cases. On prevention or hindrance, see R.G. Pope Constr. Co. v. Guard Rail of Roanoke, Inc., 219 Va. 111, 244 S.E.2d 774 (1978); Chemetron Corp. v. McLouth Steel Corp., 381 F. Supp. 245 (N.D.Ill 1974), aff'd, 522 F.2d 469 (7th Cir. 1975). On excuse generally, see 3A Corbin, Contracts §§ 752-71 (1960 & Supp. 1980); 5 Williston, Contracts §§ 676-811 (3d ed. 1961).

Comment c. Illustration 3 is based on Illustration 1 to former § 294. Illustration 4 is suggested by Illustration 3 to former § 294. Illustration 5 is suggested by Budget Way Cleaners & Laundry v. Simon, 151 Cal. App.2d 476, 311 P.2d 591 (1957).

Comment d. Illustrations 6 and 7 are suggested by Bornmann v. Tooke, 1 Camp. 377, 170 Eng. Rep. 991 (1807). Illustration 8 is based on Lach v. Cahill, 138 Conn. 418, 85 A.2d 481 (1951).

Comment e. This is based on former § 278. Illustration 9 is new; cf. Addison Terry Co. v. N.F.L. Films, Inc., 390 F. Supp. 621 (S.D.N.Y. 1974). But see Barbara Oil Co. v. Patrick Petroleum Co., 1 Kan. App.2d 437, 566 P.2d 389 (1977).

CROSS REFERENCES: ALR Annotations:

Validity and construction of provision (Escalator Clause) in land contract or mortgage that rate of interest payable shall increase if legal rate is raised. 60 A.L.R.3d 473.
Construction and operation of "optional agreement-flat payment" land contract under which optionee has right to take title when periodic payments (otherwise to be treated as rent) equal agreed price. 55 A.L.R.3d 159.
Landlord and tenant: Tenant's rights under provision giving him pre-emptive right to purchase on terms offered by third person, where third person's offer is withdrawn before tenant exercises pre-emptive right. 46 A.L.R.3d 1377.
Effect of provision in real-estate option or land sale contract making the contract subject to zoning or rezoning of the property. 76 A.L.R.2d 1195.
Restitution of property conveyed in consideration of previous reconciliation, as condition of entertaining divorce action. 4 A.L.R.2d 1210.

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Restatement of the Law, Second, Contracts, § 378

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Rules and Principles

Chapter 16 - Remedies

Topic 5 - Preclusion by Election and Affirmance

Restat 2d of Contracts, **§ 378**

§ 378 Election Among Remedies

If a party has more than one remedy under the rules stated in this Chapter, his manifestation of a choice of one of them by bringing suit or otherwise is not a bar to another remedy unless the remedies are inconsistent and the other party materially changes his position in reliance on the manifestation.

COMMENTS & ILLUSTRATIONS: Comment:

a. Election among remedies. The rules stated in this Chapter give a party three basic types of remedies: damages (Topic 2), specific performance or an injunction (Topic 3), and restitution (Topic 4). The rule stated in this Section precludes a party who has manifested his choice of one of those remedies from shifting to another remedy if such a shift would be unjust because of the other party's reliance on the earlier manifestation. The mere manifestation of an intention to pursue one remedy rather than another does not, however, preclude a party from making such a shift. Nor must the shift be made within any particular time. Only if the other party has materially changed his position in reliance on the original choice is a shift to another remedy precluded by the election of the first. A change of position is "material" within the meaning of this Section if it is such that in all the circumstances a shift in remedies would be unjust. This rejection of any doctrine of election in the absence of reliance is consistent with a similar policy in the Uniform Commercial Code. See Uniform Commercial Code § 2-703 and Comment 1; § 2-711 and § 2-721. Even if the bringing of an action for one remedy is a manifestation of choice of that remedy, it does not preclude the plaintiff from shifting to another remedy as long as the defendant has not materially changed his position. Alternative counts seeking inconsistent remedies are generally permitted in the same complaint and a change in remedy may often be made by amendment of the complaint, even at an advanced stage of the action.

Illustrations:

1. A contracts to sell a tract of land to B. A repudiates and B brings an action for damages. While this action is pending, A makes valuable improvements on the land reasonably believing that B does not intend to pursue his remedy of specific performance. B then amends his complaint to ask specific performance. If A's change of position is material, B's

claim for specific performance is precluded.

2. A contracts to transfer his farm to B in return for B's promise to support A for life. After A has transferred the farm, B repudiates the contract and A sues for specific restitution. Before any change in B's position, A learns that a part of the farm has been sold by B and amends his complaint to ask for damages for the breach. A's claim for damages is not precluded.

3. A contracts to transfer his farm to B in return for B's promise to support A for life. After A has transferred the farm, B repudiates the contract and A sues for damages. Before any change in B's position, A discovers that it will be difficult to prove his damages with reasonable certainty and that a judicial sale of B's property including the farm would be unlikely to realize enough to satisfy a judgment and amends his complaint to ask specific restitution. Specific restitution is not precluded.

b. Additional circumstances. In two situations a party is not precluded from seeking a different remedy, even after reliance on his first choice by the other party, because his shift is justified by additional circumstances. The first situation is that in which the party made his original choice while ignorant of facts that give him a remedy based on, for example, misrepresentation or mistake and later discovers those facts. In that situation he is not bound by his original choice because he made it when mistaken. The second situation is that in which after a party makes his original choice, a later breach by the other party occurs. In that situation he can pursue any remedy based on the later breach without regard to his original choice.

c. Remedy not available. The rule stated in this Section applies only where a party pursues a remedy that he actually has. A party is not precluded from pursuing other remedies by the fact that he has made a mistaken attempt to obtain a remedy that is not available to him, even if his original choice has been relied on by theother party.

Illustrations:

4. A makes an oral contract to transfer his farm to B in return for B's promise to support A for life. After A has transferred the farm, B repudiates the contract and A sues for damages. B pleads the Statute of Frauds and A's action is about to be dismissed. A then amends his complaint to ask specific restitution. Regardless of whether B has changed his position, specific restitution is not precluded.

5. A makes a written contract to sell a tract of land to B. A repudiates the contract and B, claiming that both parties were mistaken as to the contents of the writing, sues A for reformation of the writing and for specific performance of the contract as reformed. The court refuses to reform the writing on the ground that mistake was not proved and B amends his complaint to ask damages for breach of the contract as written. B's claim for damages is not precluded.

d. Other remedy not inconsistent. The rule stated in this Section applies only where a party seeks to shift to a remedy that is inconsistent with the one he has chosen. A party who seeks specific performance or an injunction may, for example, be entitled to damages to compensate him for delay in performance. See Comment *c* to § 358. Similarly, a party who seeks restitution may, for example, be entitled to damages to compensate him for costs of transportation of goods that he has incurred. A later request for such damages in a suit for specific performance or an injunction or in one for restitution is not precluded because it is not inconsistent with that suit. However, the remedy of specific performance or an injunction and that of damages for total breach of contract are inconsistent. The remedy of specific performance or an injunction and that of restitution are also inconsistent. And the remedy of restitution and that of damages for total breach are inconsistent.

Illustration:

6. A contracts to sell a tract of land to B. A fails to convey the tract and B sues A for specific performance. B later amends his complaint to add a claim for damages resulting from the delay caused by A's failure. Regardless of whether A has changed his position, such a further claim is not precluded.

e. Other situations distinguished. The rule stated in this Section applies only as among the remedies provided for in this Chapter. It does not, for example preclude a party from pursuing a claim in tort for misrepresentation or a claim for breach of warranty in the sale of goods. See Uniform Commercial Code § 2-721. It does not determine whether a party is barred by election from treating his remaining duties of performance as discharged (§ 379). Nor does it apply in the many instances in which a party makes a choice that affects his substantive rights, such as the choice of an offeree between acceptance (§ 50) and rejection (§ 38), the choice of an intended beneficiary between disclaiming the contract and not doing so (§ 306), or the choice of an infant between affirmance and disaffirmance (§§ 14, 380). Furthermore, this rule does not apply to situations in which a party is precluded by his delay from enforcing a substantive right, as is the case where one having the power of avoidance loses it by delay (§ 381). Finally this Section is inapplicable to matters of procedure, such as the requirement that a party choose between inconsistent remedies at some stage of a judicial proceeding, and to matters governed by the law of judgments, such as merger and bar. See Restatement, Second, Judgments §§ 17, 18, 19.

REPORTERS NOTES: This Section is based on former §§ 381, 382, 383 and 384. See 5A Corbin, Contracts §§ 1214-27 (1964 & Supp. 1980); 11 Williston, Contracts §§ 1444, 1444A (3d ed. 1968); 1 Palmer, Law of Restitution §§ 3.10, 4.15 (1978); Dobbs, Remedies § 1.5 (1973); Dobbs, Pressing Problems for the Plaintiff's Lawyer in Rescission: Election of Remedies and Restoration of Consideration, 26 Ark. L. Rev. 322 (1972).

Comment a. The rule stated in former § 381(2), under which the mere bringing of an action might amount to an election, is abandoned as no longer representing the weight of authority. See Lewis v. Dansker, 68 F.R.D. 184 (S.D.N.Y. 1975); see also Friederichsen v. Renard, 247 U.S. 207, 213 (1918); Ajamian v. Schlanger, 14 N.J. 483, 103 A.2d 9, cert. denied, 348 U.S. 835 (1954); Parrish v. Tahtaras, 7 Utah 2d 87, 91, 318 P.2d 642, 645 (1957). Illustration 1 is based on Illustration 2 to former § 382. Illustrations 2 and 3 are based on Illustrations 2 and 3 to former § 381.

Comment b. As to the effect of a subsequent breach, see Seaboard Sur. Co. v. United States, 355 F.2d 139 (9th Cir. 1966).

Comment c. Illustrations 4 and 5 are based on Illustrations 2 and 4 to former § 383; cf. Riess v. Murchison, 503 F.2d 999 (9th Cir. 1974), cert. denied, 420 U.S. 993 (1975).

Comment d. Illustration 6 is based on Greenstone v. Claretian Seminary, 139 Mont. 295, 363 P.2d 161 (1959). For cases allowing damages in addition to restitution, see Runyan v. Pacific Air Indus., 2 Cal.3d 304, 85 Cal. Rptr. 138, 466 P.2d 682 (1970); Rabinowitz v. Marcus, 100 Conn. 86, 123 A. 21 (1923).

CROSS REFERENCES: ALR Annotations:

Decree allowing or denying specific performance of contract as precluding, as a matter of res judicata, subsequent action for money damages for breach. 38 A.L.R.3d 323.
Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules. 84 A.L.R.2d 1077.
Comment Note. -- Contractual provisions as to remedy as excluding other possible remedies. 84 A.L.R.2d 322.

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