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APPLYING BINDING ARBITRATION TO MINORS IN PENNSYLVANIA: A CASE TO WATCH

By Nicole Cramer, Esquire, Sweeney & Sheehan

OVERVIEW

Currently pending before the Supreme Court of Pennsylvania is a question of first impression: can a parent, acting on behalf of their minor child, sign an agreement to submit disputes to binding arbitration? This issue was directly addressed for the first time in Pennsylvania in *Santiago v. Philly Trampoline Park, LLC*, 291 A.3d 1213 (Pa. Super. 2023).

In *Santiago*, the court considered two factually similar cases in which minors were injured at Sky Zone trampoline parks in Philadelphia. In both instances, a parent of each injured child signed a waiver before entering the park, which included a provision requiring the parties to submit any claims arising from their visit to binding arbitration. Following the injuries, the parents filed suit both in their own names and on behalf of their children.

The Court of Common Pleas denied Sky Zone's requests to enforce the arbitration clauses. On appeal, the Superior Court upheld this ruling, concluding that the parents lacked the legal authority to act as agents for their children in waiving their constitutional right to a jury trial.

In rendering its opinion, the *Santiago* court conducted in a lengthy analysis of whether the parent who signed the binding arbitration agreement was acting as an agent of their spouse.

While Sky Zone contended that the signing parents were acting with apparent and implied authority on behalf of their spouses, the court disagreed. In each

case, Sky Zone relied on the words and conduct of the alleged agent rather than the principal in attempting to establish the existence of an agency relationship. Although Sky Zone asserted it was not feasible for them to verify the authority of each person signing the waiver on behalf of their spouse, the court rejected this contention. It emphasized that third parties must exercise reasonable diligence to determine the authority of an apparent agent.

The court noted that minor children do not have the capacity to contract, meaning they neither consent to binding arbitration themselves nor grant their parents authority to sign such an agreement on their behalf.

Absent the agency relationship, the court considered whether a parent has the independent right to sign an arbitration agreement on behalf of their child. The court clarified that while minors act through their guardians in matters of property, parents do not inherently have guardianship over the estate of their children. As a result, parents do not possess the authority to manage their children's property, including their tort claims.

The court acknowledged the public

policy interest in safeguarding the rights of minors, noting that Pennsylvania has codified certain protections, such as exempting children from statutes of limitations during their minority. While parents have the right to initiate a lawsuit on behalf of their child, they do not have the authority to settle or otherwise dispose of their child's claim without a petition from the child's guardian and approval of the court. This serves a protective function which the *Santiago* court believed would be undermined by allowing these claims to be litigated in binding arbitration.

The court equated entering into a binding arbitration agreement with waiving the constitutional right to a jury trial. It reasoned that if a parent is not permitted to settle their child's claim without court approval, they certainly cannot waive the child's constitutional rights. This creates a challenging situation in which a parent is limited in their ability to act on behalf of their child in legal matters.

Notably, courts have ordered the submission of minors' claims to binding arbitration. One such example is *Power v. Tomarchio*, 701 A.2d 1371, 1375 (Pa. Super. 1997), where the court declined to enforce a high-low agreement of

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the parties in favor of honoring the arbitration award exceeding the high end of the agreement because it was more favorable to the child. This case illustrates how the court could retain its protective function while enforcing binding arbitration agreements.

ALTERNATIVE APPROACHES

Neighboring states have decided this issue differently. In *Hojnowski v. Vans Skate Park*, 901 A.2d 381 (N.J. 2006), the New Jersey Supreme Court ruled that a parent can sign a binding arbitration agreement on behalf of their minor child. The court reasoned that binding arbitration does not waive any substantive rights, merely dictates the forum in which the minor’s rights are vindicated. As such, parents may bind their children to arbitration absent a contractual defense such as fraud, duress, or unconscionability.

Similarly, in *Cross v. Carnes*, 724 N.E.2d 828 (Ohio Ct. App. 1998), Ohio’s Court of Appeals held that parents could bind their children to arbitration. The court explained that consenting to arbitration only specifies the forum for resolving the child’s claim and does not extinguish the claim itself. It further reasoned that it is only logical if a parent has the authority to bring and conduct a lawsuit on behalf of their child, they have the same authority to choose arbitration as the forum for litigation.

Santiago specifically disavowed the *Hojnowski* and *Cross* decisions, stating that a parent’s right to pursue litigation on behalf of a minor child is subject to

the trial court’s control and supervision. The court reasoned that without the authority to settle or discontinue the claims of a minor, a parent cannot reasonably consent to submitting those claims to arbitration. Moreover, unlike Ohio, Pennsylvania lacks legal precedent permitting a parent to enter a pre-injury release of a child’s right to bring substantive claims. Therefore, the court found the reasoning in *Cross*, which relied upon such precedent, unpersuasive.

IMPACT

The *Santiago* decision has the potential for wide reaching impact as it imposes an unexpected burden on businesses that rely on binding arbitration agreements to shield themselves from costly litigation. As it stands, the ruling effectively invalidates any existing binding arbitration agreements signed on behalf of a minor child. The vast array of recreational facilities that cater to minor children such as trampoline parks, skate parks, indoor jungle gyms, laser tag, etc., will have to re-evaluate their litigation exposure. This may result in increased legal costs, which businesses may also pass on to consumers.

Noticeably absent in the court’s contractual analysis is any discussion of the ability of parents to voluntarily submit their child’s claims to arbitration in the absence of a binding arbitration agreement. The holding, that “the parent-child relationship did not empower the signatory parents to waive their minor children’s rights to have

their claims resolved in a court of law,” seems to leave open the possibility that a parent can never permit the litigation of their child’s claims anywhere other than a courtroom. *Santiago*, 291 A.3d at 1229.

The *Santiago* court’s extensive discussion of agency in relation to one parent’s ability to bind the other to arbitration raises another significant concern regarding the enforceability of these agreements. It is not uncommon for one parent to take a child to an activity while the other parent is not present, and in cases where the parents are not even in a relationship, this further complicates the establishment of agency.

The result here seems to suggest that for the arbitration agreement to be enforceable as to all potential parties, either both parents would need to sign the agreement themselves or the absent parent would need to make clear their intention to consent to the arbitration agreement.

POSSIBLE SOLUTIONS

Notably, the *Santiago* decision does not discuss whether the same holding would apply to agreements for non-binding arbitration. A key concern of the *Santiago* court was the waiver of a child’s constitutional right to a jury trial. This right is not implicated by the submission of a claim to non-binding arbitration where an unsatisfactory outcome can still be pursued in a court of law. It is therefore possible that non-binding arbitration agreements could withstand the *Santiago* decision and remain enforceable based on the argument that no rights are waived, the agreement simply dictates the forum for resolving the claim.

The *Santiago* court specifically noted that it was not considering whether this same outcome would apply if a minor were a third-party beneficiary to the agreement. It commented that in the absence of a suggestion or argument that the children were third-party beneficiaries of the agreements, the parents’ status as natural guardians of the children did not grant them the authority to bind their minor children to an arbitration agreement. This commentary

suggests an argument that may change the outcome of these cases.

A child could be considered third-party beneficiary if the enforcement of the performance of the contract is appropriate to effectuate the intention of the parties and the circumstances indicate that the promisee intends to benefit the child through the performance of the agreement. *See* Restatement (Second) Contracts §302.

In a case like *Santiago*, for instance, the intent of the parties would be to allow a child to participate in an activity where they are at risk of harm, while limiting both the child’s and the business’s exposure to costly and lengthy litigation. If the child is then allowed to participate in the activity in

exchange for their parent’s promise to resolve any claims through arbitration, this could demonstrate the mutual intent of the parties to confer a benefit upon the child, potentially making the child a third-party beneficiary to the agreement.

One possible solution to address the agency concerns related to the need for both parents’ consent for binding arbitration would be to require both parents to sign the agreement themselves. Given that many waivers are now completed electronically, this could be implemented by requiring both parents to submit an electronic waiver through a facility’s website or via email before a child is allowed entry. While this approach imposes additional burdens, it would eliminate the argument against

enforceability of the arbitration clause when one parent is absent. Furthermore, this would address a situation in which a child attends such an activity with someone other than their parent or legal guardian.

There is still an opportunity for the Pennsylvania Supreme Court to rule that binding arbitration clauses are enforceable as to minors, as the court agreed to take the appeal of the issue.

This will undoubtedly be a case to watch as it develops, and could have a lasting impact on recreational facilities whose primary clientele is largely comprised of children.



PENNSYLVANIA SUPERIOR COURT CLEARS UP THE INTERPRETATION OF “SOLE NEGLIGENCE EXCEPTION” UNDER PERRY-RUZZI

By Sara Gray, Esquire, Bennett, Bricklin & Saltzburg

As litigators in Pennsylvania, we frequently eye the *Perry-Ruzzi* rule to determine parties’ rights to contractual defense and indemnification in the context of personal injury claims. We inspect indemnification clauses to see if they “meet *Perry-Ruzzi*” i.e., whether a party is indemnified for their own negligence. In personal injury practice, this is a common occurrence given the multitudes of personal injury claims in Pennsylvania that bring countless indemnification clauses to our attention. However, when we come across terms of “sole negligence” in an indemnification clause, which means the party is indemnified for all claims except those arising out of their sole negligence, we pause – because, until recently, there was conflicting law around that phrase.

Now, with the recent decision in *Sunoco R&M, LLC v. Pa. Nat’l Mut. Cas. Ins. Co.*, 322 A.3d 930 (Pa. Super 2024), the Pennsylvania Superior Court has clarified its interpretation of sole negligence exception language. *Sunoco* holds that a clause which indemnifies for all conduct other than the indemnitee’s

sole negligence satisfies *Perry-Ruzzi*, and requires indemnification for that entity’s own negligence, as long as it is not solely negligent. To properly frame the impact of this opinion, this article will lay out the history of the *Perry-Ruzzi* rule, discuss prior inconsistent opinions regarding sole negligence exceptions in indemnification clauses, and articulate the current rule in light of the recent decision in *Sunoco*.

I. HISTORY OF THE *PERRY-RUZZI* RULE

The *Perry-Ruzzi* rule is an amalgamation of two Pennsylvania Supreme Court opinions that were decided eighty four years apart, *Perry v. Payne*, 217 Pa. 252, 66 A. 553 (1907) and *Ruzzi v. Butler Petroleum Co.*, 527 Pa. 1, 588 A.2d 1 (1991). The *Perry-Ruzzi* rule¹ holds “that a contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms.”² It is applicable “only in those situations where a party seeks indemnification for its own negligence.”³

In *Perry v. Payne*, plaintiff, Edward Perry, owner of a property at 16th and Chestnut Streets in Philadelphia, sought indemnification from Payne and Company which was contracted to build at the site.⁴ As part of the construction contract, Payne promised to “protect and keep harmless said Edward Perry of and from all loss, costs and damages . . . arising from accidents to persons employed in the construction of, or passing near the said work [.]”⁵ The Pennsylvania Supreme Court noted “[t]he principal and controlling question in the case depends upon the interpretation of the bond on which the action was brought.”⁶

In his argument, Perry claimed that the bond given to him by Payne indemnified him for the personal injury caused by his own negligence. The Supreme Court of Pennsylvania disagreed. It held that the language employed in the bond was not specific enough to conclude that the parties contracted to shift the risk of liability for personal injuries caused by the indemnitee (Perry) to the indemnitor (Payne). The holding states “that a

contract of indemnity against personal injuries should not be construed to indemnify against the negligence of the indemnitee, unless it is so expressed in unequivocal terms.”⁷ Thus, the language of the bond was not explicit enough to award Perry indemnification for his own negligence.

Eighty four years later, in *Ruzzi v. Butler Petroleum Company, et al.*, our Supreme Court reaffirmed the rule in *Perry*, indicating that no inference from words of general import can establish indemnification for a parties own acts. The *Ruzzi* case had multiple parties and multiple consolidated cases and a complicated fact pattern.⁸ In *Ruzzi*, the Zinzers owned a gasoline station and contracted with Butler Petroleum to refurbish the station. While working on the project, Mr. Ruzzi was injured in an explosion. In the underlying matter, a jury found that Butler Petroleum was negligent and awarded damages. Subsequently, Butler Petroleum took action against the Zinzers claiming that it was entitled to be indemnified for the damages it was obligated to pay to Mr. Ruzzi.

The contractual clause at issue in *Ruzzi* obligated the indemnitors to indemnify the indemnitee, Butler Petroleum, “from any and all liability for claims for loss, damage, injury or other casualty to persons or property.”⁹ In reviewing this language, the Supreme Court assumed that the parties to the contract were aware that Pennsylvania law would not construe the indemnity clause so as to cover negligent acts of Butler Petroleum itself, unless an express stipulation concerning Butler’s negligence were included in the document.¹⁰ Following *Perry*, the *Ruzzi* Court concluded that “the only intent that can be gleaned from this document is that the parties did not intend to indemnify for acts of the indemnitee’s negligence, since words of general import are used.”¹¹

Our Supreme Court held that:

[t]he law has been well settled in this Commonwealth for 87 years that if parties intend to include within the scope of their indemnity agreement a provision that covers losses due to the indemnitee’s own negligence, they

must do so in clear and unequivocal language. No inference from words of general import can establish such indemnification.¹²

Thus, the *Perry-Ruzzi* Rule was set. There is no question that if indemnitees in Pennsylvania expect to be indemnified for their own negligence, the language of the contract must be expressed in unequivocal terms and no inference from words of general import can establish such indemnification.

While the *Perry-Ruzzi* rule is clear in its requirement, the courts have struggled with the application of the rule when a party is indemnified for all claims “except those caused by the sole negligence of the indemnitee.” On one hand, it seems clear from the language that indemnification for that party’s own partial negligence must be contemplated, since only its “sole negligence” is excluded. On the other hand, this is also an “inference” from the language, as opposed to the express, unequivocal statement required by *Perry-Ruzzi*. So what happens when an indemnification clause uses the “sole negligence exception” of indemnitees?

II. THE CONFLICTING “SOLE NEGLIGENCE” CASES

Through the lens of *Perry-Ruzzi*, indemnity clauses stating that indemnity would be granted *except* for the sole negligence of the indemnitee have been subject to two schools of thought in the Pennsylvania Superior Court. One line of cases interprets “except for sole negligence” of the indemnitee to mean that if the indemnitee was not 100% solely negligent for the claimed damages, then the indemnitee was entitled to indemnification. Thus meeting the *Perry-Ruzzi* rule through an inference, without regard to whether the indemnitee was partially negligent. In another line of cases, the Superior Court found the “except for sole negligence” language too ambiguous to meet *Perry-Ruzzi* and did not rule in favor of indemnification for indemnitees who were found to be partially negligent.

Babcock & Wilcox Co. v. Fischbach & Moore, Inc., 280 A.2d 582 (Pa. Super 1971), laid the groundwork for “sole negligence” language to meet *Perry-*

Ruzzi.¹³ The indemnity agreement in *Babcock* did not specifically state that indemnification was required even for the property owner’s own negligence, but it did stipulate, “[t]his agreement **shall not include** injuries or damage **due wholly to the negligence**, whether by affirmative act or by failure to exercise vigilance, of [the property owner].” *Id.* at 583 (emphasis added). The trial court found the clause ambiguous as to whether indemnity for the property owner’s own negligence was required, but the Superior Court reversed holding:

... an ambiguity was created by the failure to use clear and unequivocal language to indicate the [contractor’s] intention to indemnify although the accident was caused in part by the [property owner’s] negligence. However, by the subsequent sentence, it stated that it would not be bound if the accident was caused wholly by the [property owner’s] negligence, whether that negligence be by affirmative act or failure to exercise vigilance, which was the situation present in *Perry v. Payne*.

Id. at 328, 280 A.2d at 584. The court concluded that the sentence “was not open to question.” *Id.* The Court reasoned, under *Perry*, if the last sentence were not included, there would be no indemnification for the property owner’s negligence under any circumstances. *Id.* at 328-29, 584-85. Thus, the inclusion of the statement that the indemnification did not apply to injuries “due wholly to the negligence” of the property owner, implied that the indemnity would apply to the property owner’s *partial* negligence. Otherwise, the last sentence would have no purpose whatsoever. *Id.* Therefore, although *Perry* demanded unequivocal terms, the *Babcock* Court interpreted “it would not be bound” ... “due wholly to the negligence” as indemnity for one’s own partial negligence.

For clarity, *Babcock* was decided before the Supreme Court’s reaffirmation of the *Perry-Ruzzi* rule in *Ruzzi v. Butler Petroleum* in 1991. Thus, it could be argued that *Ruzzi*’s reaffirmation of *Perry* (decided in 1901) was to bring the Superior Court decisions (like *Babcock*) back into line, having strayed from the

strict application *Perry* decided decades earlier, which demanded “unequivocal terms” of indemnification for one’s own negligence.

However, the case of *Woodburn v. Consolidation Coal Co.*, 590 A.2d 1273 (Pa. Super 1991), was decided after *Ruzzi* and follows *Babcock*’s inferential reasoning. In *Woodburn*, the Superior Court sought to determine the right to a general contractor’s indemnification from a subcontractor. *Id.* at 1274. The contract stated that “indemnification and hold harmless shall not apply to claims for injury or alleged injury or death to persons, or damage to property ... **caused by the sole negligence**” of the general contractor.¹⁴ The Court reasoned, the parties had “expressly agreed” that the subcontractor would indemnify the general contractor “against any and all claims arising from the work to be conducted under the contract, except for any injuries caused by the “sole negligence” of the general contractor.¹⁵ Therefore, since a jury found the general contractor to be less than 100% negligent, the subcontractor was contractually bound to indemnify the general contractor.

Following the reasoning in *Babcock*, the Superior Court concluded that “the negative inference to be drawn [from the sole negligence exception] is that any injuries occurring by less than the sole fault of [indemnitee] fall within the scope of the indemnification clause.” *Id.* at 364-65, 590 A.2d at 1275 (emphasis added). In sum, *Woodburn*, similar to *Babcock*, relied on inferences to reach its conclusion, an exercise specifically prohibited by both *Perry* and *Ruzzi*.

On the other side of the “sole negligence” interpretation coin, the “negative inference” reasoning of *Woodburn*, was expressly rejected by the Superior Court in *Mace v. Atlantic Refining & Marketing Corp.*, 717 A.2d 1050, 1052 (Pa. Super 1998).¹⁶

In *Mace*, a gas station’s employee attacked a customer, and the customer sued both the gas station and its franchisor, an oil company. The gas station had a franchising agreement with the oil company which required the gas station to indemnify the oil company for

all claims “excepting any damage or loss caused **solely** by the negligence of [the oil company].” 567 Pa. at 74-75, 785 A.2d at 493 (emphasis added). The oil company was eventually adjudicated non-negligent and dismissed from the suit on summary judgment. It then attempted to recover its defense costs from the gas station. On appeal, the Superior Court concluded that the oil company could not obtain a defense under the indemnity agreement because the clause did not meet the *Perry-Ruzzi* rule. The Superior Court explained:

[A]ny attempt to read into the provisions the inference that since [oil company] is foreclosed in cases of sole responsibility, it inferentially has entitlement in lesser cases of joint or partial responsibility must also fail. ***Such inferential reasoning would violate the cardinal reasoning of Perry-Ruzzi.*** ...At best it can be said on [oil company’s] behalf that the exception clause creates ambiguity.¹⁷

The Court emphasized that “*Perry-Ruzzi* demands precision and parties who rely on ambiguity or inference cannot thereby claim the benefit of indemnity.”¹⁸ Contrary to its rulings in *Babcock* and *Woodburn*, the Superior Court found that an indemnity agreement containing a “sole negligence exception” failed to comply with *Perry-Ruzzi*, and did not require indemnification for the indemnitee’s own negligence for damages or the cost of defense.

The Superior Court’s decision was reversed on other grounds in *Mace v. Atlantic Refining & Marketing Corp.*, 567 Pa. 71, 785 A.2d 491 (2001).¹⁹ This reversal did not upset the Superior Court’s conclusion that the contract language of being “solely” negligent failed to meet *Perry-Ruzzi*. In other words, if the indemnitor’s negligence had still been at issue (meaning it had not been dismissed on summary judgment), it would not have been entitled to indemnity because the “sole negligence” exception in the indemnity agreement failed to satisfy *Perry-Ruzzi*.

In his dissenting opinion, Justice Cappy agreed with Superior Court’s conclusion that the indemnification agreement failed to satisfy *Perry-*

Ruzzi. Justice Cappy observed that the agreement specifically referred to the oil company’s negligence “when addressing liability that will **not** be assumed by [gas station].”²⁰ In his dissent, he noted, The *Perry-Ruzzi* rule does not permit the subtleties of discerning, by resort to inferences, what the parties intended. The rule requires clarity. At best, the indemnity provisions are ambiguous as to the liability that [gas station] agreed to assume, and under *Perry-Ruzzi*, this ambiguity cannot be construed in [oil company’s] favor to afford indemnity for its own negligent acts.”²¹

In short, had the indemnitee’s negligence been at issue, Justice Cappy would have found that it was not entitled to indemnification under *Perry-Ruzzi*. Thus, in *Mace* the Superior Court expressly found that an indemnity agreement containing a “sole negligence” exception failed to satisfy *Perry-Ruzzi* because it required inferential reasoning. It inferred that since there was no indemnity for the indemnitor’s sole negligence, indemnity for its partial negligence must be assumed. On review, this position was acknowledged by one member of the Supreme Court, without disagreement by the remainder of the court.

This is the gray area of conflicting rulings that the sole negligence exception to the *Perry-Ruzzi* rule resided in for over twenty years, until the *Sunoco* ruling in August 2024.

III. THE *SUNOCO* RULING CHOOSES THE INFERENCE ON SOLE NEGLIGENCE

In *Sunoco R&M, LLC v. Pa. Nat’l Mut. Cas. Ins. Co.*, 322 A.3d 930 (Pa. Super 2024), Sunoco (R&M), LLC and Sunoco LLC (collectively, “Sunoco”) pursued indemnification from Greyhound Aramingo Petroleum Company, Inc. (“Greyhound”), its insurer, and its parent company for the amount Sunoco paid to settle underlying personal injury actions.

As a backdrop, Sunoco supplied branded motor fuel to franchised gas stations in exchange for the ability to use the “Sunoco” name and other considerations. Greyhound and its parent company entered into a dealer

franchise agreement with Sunoco where Sunoco would supply Greyhound's gas station with Sunoco-branded motor fuel. The underlying case stemmed from an incident that occurred at Greyhound's Aramingo gas station in Philadelphia. Plaintiff suffered injuries when a third-party vehicle drove into the plaintiff's vehicle and the gasoline pumps, thereby igniting a fire at the gasoline pump the plaintiff was using. Sunoco entered into a settlement agreement to resolve the personal injury claims that arose from the accident at the Aramingo station. After it settled, it pursued indemnification from Greyhound pursuant to the franchise agreement entered into by the parties.

The franchise agreement in question contained an indemnification clause that in relevant part provided that "[Greyhound] shall not be liable to [Sunoco], and does not protect, indemnify[,] or save harmless [Sunoco] for claims, losses[,] or damages *caused solely by the negligence of* [Sunoco], its employees, contractors[,] and agents."²² With regard to Sunoco's claim for indemnification from Greyhound, the trial court granted it summary judgement stating, "As these facts are undisputed it is evident that Sunoco could not have been the sole cause of the negligence as a third non-party's actions were at a minimum partially responsible. As such, Sunoco is entitled to summary judgment as a matter of law."²³

Stated differently, since the damages were not the result of Sunoco's sole negligence, the trial court inferred that Sunoco was entitled to indemnification by Greyhound. The trial court specifically pointed to the reasoning in *Woodburn* stating, "Greyhound is not liable only when Sunoco is solely negligent. As such, *Woodburn*[...] clearly dictates that Greyhound must indemnify Sunoco as they were not solely negligent in this matter."²⁴

On appeal, Greyhound challenged the portion of the trial court's order that granted summary judgment in favor of Sunoco and against Greyhound, holding

that the indemnification clause required Greyhound to indemnify Sunoco based on inferential reasoning. Greyhound asserted that the indemnification clause contained in the Franchise Agreement "does not meet the requirements of the *Perry-Ruzzi* rule" in that the indemnification clause "is void of any provision explicitly stating that Greyhound was required to indemnify Sunoco for Sunoco's own negligent conduct."²⁵

The Pennsylvania Superior Court disagreed with Greyhound and stated, "that the use of the provision '*caused solely by the negligence of [Sunoco]*' specifically and expressly denotes Greyhound's intent to indemnify Sunoco for damages except when the damages were caused solely by Sunoco's negligence. In other words, Greyhound intended to indemnify Sunoco for damages resulting from causes other than the sole negligence of Sunoco."²⁶

In sum, the *Sunoco* Court followed the negative inference reasoning of *Babcock* and *Woodburn* and inferred that any injuries occurring by less than the sole fault of Sunoco fell within the scope of the indemnification clause, thus meeting *Perry-Ruzzi*. In spite of the fact that the *Ruzzi* portion of the rule unequivocally states "[n]o inference from words of general import can establish such indemnification,"²⁷ it appears the Superior Court does allow the negative inference of the "sole negligence" exception to establish indemnification.

Moving forward, as we continue to analyze the multiple indemnification clauses that cross our desks, it is fair to assume that the negative inference of the "sole negligence" exception is the proper interpretation of the *Perri-Ruzzi* rule.

ENDNOTES

¹*Perry v. Payne*, 66 A. 553 (Pa. Super 1907); *Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1 (Pa. Super 1991).

²*Hershey Foods Corporation v. General Electric Service*, 619 A.2d 285 (Pa. Super 1992), (citing and quoting *Perry*)

³*Sunoco R&M, LLC v. Pa. Nat'l Mut. Cas.*

Ins. Co., 322 A.3d 930, 951(Pa. Super 2024) (citing and quoting *Mace v. Atl. Refin. Mktg. Corp.*, 785 A.2d 491, 496 (Pa. 2001).

⁴In the underlying matter, a painter employed by Payne was killed when an elevator, operated by one of Perry's employees, descended on him while he worked in the elevator shaft. Perry was found to be fully liable for his employee's negligence by a jury, which also awarded damages for the painter's survivors and against Perry.

⁵*Perry*, 66 A at 553.

⁶*Id.*

⁷*Perry*, 66 A. at 557.

⁸*Ocean Spray Cranberries, Inc. v. Refrigerated Food Distribs.*, 2006 Phila. Ct. Com. Pl. LEXIS 229, *16-17, (Reversed by, Remanded by *Ocean Spray Cranberries, Inc. v. Refrigerated Food Distribs., Inc.*, 2007 Pa. Super. LEXIS 3501 (Pa. Super. Ct., 2007)) concisely sets forth the facts of *Ruzzi*.

⁹*Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 3 (Pa. Super 1991).

¹⁰*Id.*, 588 A.2d at 5.

¹¹*Id.*

¹²*Id.*, 588 A.2d 1, 4 (Pa. Super 1991).

¹³This case was actually decided after *Perry* but before *Ruzzi*.

¹⁴*Id.* at 1275 (emphasis added).

¹⁵*Id.* at 1276

¹⁶*rev'd. on other grounds*, 567 Pa. 71, 785 A.2d 491 (2001).

¹⁷*Mace*, 717 A.2d at 1050 (emphasis added).

¹⁸*Id.*

¹⁹On review, the Supreme Court found that *Perry-Ruzzi* did not apply when the indemnitor had been adjudicated non-negligent, because the indemnitor was not seeking indemnification for its own negligence. *Mace*, 567 Pa. at 78, 785 A.2d at 495. Any possible negligence was that of the indemnitee, so the issue of whether indemnification for the indemnitor's negligence was required under the contract was simply irrelevant. *Id.*

²⁰*Id.* at 499, 785 A.2d at 84-85 (Cappy, J., dissenting) (emphasis added).

²¹*Id.* (Cappy, J., dissenting).

²²*Id.* at 953 (emphasis in original).

²³*Id.*

²⁴*Id.* at 953 citing Trial Court Opinion, 11/3/23, at 6.

²⁵*Id.* citing Greyhound Brief (1532 EDA 2023) at 21,24.(Alternatively, Greyhound argued that if the indemnification clause satisfies the *Perry-Ruzzi* rule then Sunoco must prove Greyhound was negligent in the underlying action.)

²⁶*Sunoco*, 322 A.3d at 955 (emphasis in original).

²⁷*Ruzzi v. Butler Petroleum Co.*, 588 A.2d 1, 4 (Pa. Super 1991).



“IYKYK” – KEEPING UP TO DATE WITH SOCIAL MEDIA

By Patricia A. Lafferty, Esquire and Nicole E. Tanana, Esquire, Marshall, Dennehey, Warner, Coleman & Goggin

If you know, you know! Social media has become ubiquitous and continues to evolve into myriad platforms. As the chaos surrounding a threatened shutdown and brief outage of TikTok illustrated in January 2025, most people believe that they cannot and simply, do not, want to live without it. Since Facebook was founded in 1996, social media has reached over half the world’s population. In 2010, there were 970 million active social media users globally. That number has ballooned to 5.24 billion users in January of 2025. In the United States, 70.1% of the total population actively use social media. Amazingly, Americans spend an average of 2 hours and 9 minutes on social media every day. With these staggering numbers in mind, it would be naïve to think that social media does not play a role in litigation and the discovery process.

ETHICAL AND TECHNOLOGICAL CONSIDERATIONS

When it comes to social media users, research has shown that there are stark differences in not only the generational usage of the various types of social media, but gender differences as well. It should be no surprise that age has an effect on usage. According to DataReportal, a website that provides global digital insights and trends, recent usage numbers show that everyone is embracing social media and all that it has to offer, with 84% of 18 to 29-year olds and 45% of those aged 65 and older using social media.

Additional research demonstrates that in the United States, females are more prevalent and account for 78% of social media users, whereas, 66% of men use social media. Women were noted to use platforms such as Snapchat and Pinterest and men tend to favor sites like YouTube and X(Twitter). According to a recent article by *Exploding Topics*, YouTube is the world’s most popular and widely used social media platform, followed by Facebook, Instagram, WeChat, Reddit, Messenger, TikTok, Telegram and Viber.

These statistics can be a useful guide in directing you to where your target audience is spending their “down” time, leading to more pointed additional discovery requests. Due to the vast amount of information and data being generated by each user, it is important to cater your discovery requests to get as much information without going down the rabbit hole of, what could be, mountains of documentation and paperwork. Keeping up to date on the research related to ever-changing social media trends and the various demographics can help to narrowly tailor your discovery requests and yield pertinent information to defend your case.

It is important to keep in mind that the Rules of Professional Conduct require attorneys to “keep abreast of changes in the law and its practice, including the *benefits* and *risks* associated with relevant technology.” (Pa. R.P.C. 1.1.) The obligation also exists for lawyers to ensure that preservation of such discoverable materials is maintained at the risk of spoliation issues arising. In 2014, the Pennsylvania Bar Association adopted the view of the Philadelphia Bar Association Professional Guidance Committee that a lawyer may advise a client to change the privacy settings on the client’s Facebook page, however, a lawyer “may not instruct or permit the client to delete/destroy a relevant photo, link, text, or other content, so that it no longer exists.” (Pa. Bar Ass’n Formal Op. 2014-300 [Sept. 2014]). The same principles still apply today and lawyers are required to take affirmative steps to preserve social networking evidence and advise client(s) of the same.

Since social media discovery has to be maintained by the party, considerations can and should be given for an individual to preserve their own account. Many social media sites are now on the second and third generation of these platforms and technological advances have allowed access to more features

that may have not been feasible at their inception. For example, many platforms now allow individual users to download their entire account in just a few steps. Social media powerhouses such as Facebook, Instagram and TikTok all offer this feature. This process can be accomplished, in some circumstances, in a few “clicks” and arguably alleviates the “overly burdensome” obstacle of Pennsylvania Rule of Civil Procedure 4011.

WHAT THE COURTS HAVE TO SAY

Under the general discovery principals in Pennsylvania, information contained on a litigant’s social media platforms is generally discoverable. In Pennsylvania, “...a party may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it related to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, content, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.” (Pa.R.C.P. 4003.1.) Pennsylvania Rule of Civil Procedure 4009.1 explicitly permits the discovery of electronically stored information. This broad general principle of what is discoverable is limited by Pennsylvania Rule of Civil Procedure No. 4011, which states: “No discovery, including discovery of electronically stored information, shall be permitted which (a) is sought in bad faith; (b) would cause unreasonable annoyance, embarrassment, oppression, burden or expense to the deponent or any person or party; ... or (e) would require the making of an unreasonable investigation by the deponent or any party or witness.”

Despite the popularity and extensive use of social media platforms, Pennsylvania Appellate Courts have not yet addressed the parameters of what is discoverable and appellate review is scant. The trial

courts, however, have seen their fair share of attempts to widen and/or limit the net of discoverable data. The court's interpretations have been varied when it comes to how far litigants can go when delving into the world of social media discovery.

Most courts have treated social media information as they would any other information sought in discovery. In *Brogan v. Rosenn, Jenkins & Greenwald, LLP*, the Court stated:

Consistent with that firmly established discovery maxim, a party may obtain discovery of private Facebook posts, photographs and communications only if the electronically stored information is relevant, and the party must satisfy that relevancy requirement by showing that publically accessible information posted on the user's Facebook page controverts or challenges the user's claims or defenses in the pending litigation. To that extent, the resolution of social media discovery disputes pursuant to existing Rules of Procedure is simply new wine in an old bottle.

(C.C.P. Lackawanna April 22, 2013) (Nealon, J.).

Moreover, in at least in one case, the court held that it was not necessary for a party to have a public profile before the opposing party is given access to the private portion of a party's social media profile. In *Arcq v. Fields*, No. 11-4637 (C.C.P. Franklin Dec. 7, 2011) (Herman, J.), the defendants' Motion to Compel information about the plaintiff's social networking sites was denied due to the defendants' failure to show any reasonable basis for believing access to the plaintiff's profiles would yield any relevant information. Despite the denial of the Motion, the court took a broad view of what the defendants had to show prior

to being given access to the plaintiff's private profile stating: "[w]hile it is not an absolute necessity that a plaintiff have a public profile before a defendant can be given access to the private portion, it is necessary that defendant have some good faith belief that the private profile may contain information." *Arcq v. Fields*, No. 11-4637 (C.C.P. Franklin Dec. 7, 2011) (Herman, J.).

PRIVACY SETTINGS

Privacy considerations are typically the main argument against disclosure of a litigant's "private" social media information as based on the individual's privacy rights. While the privacy argument has been rejected by Pennsylvania trial courts in some circumstances, most litigants will continue to push back when discovery seeks specific information that is contained on a litigant's "private" social media platforms.

When discovery seeks information contained within a litigant's private social media platforms, Pennsylvania trial level courts have implemented a balancing test that balances the need for relevant "private" social media information and the parties' privacy concerns. In *Hunter v. PRRC, Inc.*, 2013 WL 9917150 (York C. C. P. Nov. 4, 2013) (Linebaugh, J.), the court determined that a party making the request for social media information must make:

[A] threshold showing that otherwise available information leads to the reasonable probability that relevant information is contained with the private portions of the account. The hypothetical possibility that relevant information may exist in any account held privately is not sufficient to meet this showing. Actual facts must be shown...

A "threshold showing" is the standard for Pennsylvania Courts in deciding whether private social media information should be disclosed in discovery; however, the analysis does not end at this showing. In *Trail v. Lesko*, 2012 WL 2864004 (Allegheny C. C. P. July 3, 2012) (Wettick, J), the court analyzed the approaches taken by nine earlier Pennsylvania trial courts and recognized that discovery of private social media information is inherently intrusive and, relying on Pa.R.C.P. No. 4011, noted a court should consider the "level of the intrusion and the potential value of the discovery to the party seeking discovery." Most recently in *Allen v. Sands Bethworks Gaming, LLC*, 2018 WL 4278941 (Northampton C. C. P. Aug 6, 2018) (Dally, J) the court found that in order to obtain the private portions of a litigant's social media information, the requesting party must show discrepancies between the public portions of the litigant's social media platforms and what the litigant is claiming in the lawsuit. These considerations as to whether your case will cross the threshold should be considered in any motion to compel.

It is evident that social media discovery exploration is a necessary component to ensure that you are properly defending your clients. Preparing discovery that is geared toward the opposing party's use of various social media platforms helps to maintain the most effective use of your and your client's time. Understanding the court's parameters of what is permissible and whether your case will meet the privacy threshold will help you successfully navigate the inevitable discovery disputes.



AN UNUSUAL RESPONSE TO THE “UNUSUAL STIPULATIONS”

By Elise DiGuseppe, Esquire and Stephen Gray, Esquire, Horst, Krickstein & Runyon

BACKGROUND

“The usual stipulations?” A question asked 100s of times a day, at 100s of depositions a day. However, if you ask 100 different attorneys to define the “usual stipulations,” you will likely get 100 different answers.

Attorneys have grown accustomed to agreeing to this simple ask without knowing what they are agreeing to. There is no universally agreed-upon approach as to what the usual stipulations are. Better yet, is there an advantage to refusing to agree to the usual stipulations? If so, when and how does the attorney make that decision? What are the advantages and disadvantages to employing that aggressive tactic?

Practice guides and law firm blogs have try to provide clarity on defining the usual stipulations, but with no statutory definition, or uniform case law interpreting the phrase, attorneys must make sure they know what the usual stipulations are before agreeing to them.

While it may seem uncomfortable or awkward, spending a extra few minutes at the beginning of a deposition can save attorneys from surprises later on at trial, or lengthier arguments in front of a judge. This topic is beginning to gain more discussion throughout the Pennsylvania legal community, and awareness of the dangers can help promote better practice and better depositions.¹

With a better understanding of what the usual stipulations are, attorneys can better prepare to weaponize the procedure and, at times, strategically refuse to agree to the usual stipulations.

While there is no Pennsylvania case law interpreting the phrase “usual stipulations,” or addressing the issue raised here, other courts have commented on the phrase and its implications. For example, a California federal court in a footnote addressed the exact issue, how “everyone purports to know without asking the content

of the ‘usual stipulations.’”² A New Mexico Court of Appeals found when an attorney asked for usual stipulations and was met with silence, that silence did not constitute assent to the “usual stipulations.”³ We will consider some of the competing positions below to define, then weaponize this procedural tool.

DEFINING DISTINCTIONS - PENNSYLVANIA V. FEDERAL COURT

Pennsylvania and the Federal Rules both have rules governing waiver of objections at depositions. They vary slightly in language, but primarily are the same. It is important to note the differences in the rules and know the differences when defending a deposition in either venue, to ensure you are not accidentally waiving any crucial objections. While Pennsylvania’s rules are almost identical to the Federal Rules, a brief overview is given below. If practicing in another state court, the rules should be read closely to identify any discrepancies.

The Federal Rule of Civil Procedure 32 discusses the use of depositions in Court proceedings and discusses potential waiver of objections. Rule 32(d)(3)(B) addresses waiver of objections to an error or irregularity at a deposition.⁴ The rule requires any objection involving an error or irregularity to be made during the deposition in a timely manner, and relate to the “manner of taking the deposition, the form of the question or answer, the oath or affirmation, a party’s conduct” or other correctable action, or else, it is waived.⁵

The Federal Rules also address non-waiver of objections during a deposition.⁶ Under the same rule, any objection to a deponent’s competence, “or to the competence, relevance, or materiality of testimony” is not waived by an attorney’s failure to object during the deposition.⁷ An objection to this type of testimony or witness is waived only if it “might have been corrected at that time” of the deposition.⁸

Pennsylvania has similar rules. Pennsylvania does not waive objections to the competency of a witness or to the competency, relevancy, or materiality of the testimony if not raised at the deposition, unless the grounds of the objection were known to the objecting party and could have been removed at that time, similar to the Federal Rule.⁹ Further, like the Federal Rule, Pennsylvania considers objections relating to errors and irregularities occurring at the deposition, which could have been cured if an objection was made, as waived, unless an objection was made at the deposition.¹⁰ Pennsylvania also considers an objection to the taking of a deposition due to disqualification as waived unless raised before the deposition begins, or soon after the disqualification is made known or “could be discovered with reasonable diligence.”¹¹

SO WHAT ARE “THE USUALS?”

The usual stipulations can mean many different things to each person. Stipulations used in a deposition context typically involve agreements on procedural matters but can also impact admissibility and use of testimony from depositions at trial. Below are some of the common stipulations discussed when the usual stipulations are mentioned. It is recommended that when opposing counsel proposes the usual stipulations, instead of agreeing, you ask for clarification and discuss your preferred usual stipulations, which may or may not include those discussed below.

- **Agreement to reserve all objections except to form.**

This stipulation is commonly agreed upon by attorneys. This stipulation promotes efficiency of the deposition, allowing a witness to answer even if the question is considered flawed. However, allowing these objections gives the attorney a chance to re-ask their question and correct any mistake made. While reserving all other objections can keep

the deposition moving along smoothly, it can also allow for an opposing attorney to later come up with surprising objections when the deposition testimony is used at trial.

- **Agreement to waive reading and signing the transcript.**

This is another common usual stipulation, where a witness agrees to both forgo her right to review and sign the transcript taken of their testimony. This, essentially, has them accept the accuracy of the deposition without reading it first. This type of stipulation also promotes efficiency, allowing transcripts to be provided quicker. However, this can create great harm to the witness and your case if they said something inaccurate, and did not get the chance to correct their statement. By agreeing to the usual stipulations, you may waive this important right to review the transcript, and your witness may implicitly verify inaccurate statements made in their deposition, not discovered until later on.

ADVANTAGES OF CLARIFYING THE USUAL STIPULATIONS

Because different attorneys have different interpretations of the usual stipulations, taking a few minutes at the beginning of a deposition to clarify and agree on what the usual stipulations entail is an effective strategy to avoid surprises at trial, especially for the attorney taking the deposition. Since many attorneys have grown accustomed to automatically agreeing to the usual stipulations, sometimes without even having a proper understanding of what the usual stipulations are, this could seem like an uncomfortable conversation.

A fear of asking for clarification could stem from many places:

- the fear of sounding unknowledgeable about the topic;
- the fear of causing a disagreement or hostility before lines of questioning even begin; or,
- the lack of desire to debate the topic before a lengthy deposition.

An uncomfortable interaction at the beginning of a deposition that may

prevent a dispute over testimony or other argument at time of trial or motion practice is well worth any short-term awkwardness. Although most attorneys refer to the usual stipulations, it is extremely common for attorneys to provide different answers when asked exactly what the usual stipulations entail. Knowing this, attorneys should not feel uncomfortable asking to define the usual stipulations.

Attorneys taking the depositions should embrace any momentary discomfort, because if the usual stipulations are not specified, the attorney defending the deposition has the ability to argue that the “usual stipulations” include holding all objections until motion practice or time of trial.

The most important takeaway is the need to clarify what is included in the usual stipulations at the beginning of the deposition. There is uncertainty surrounding the phrase usual stipulations and this uncertainty could lead to unexpected issues during motion practice or at trial. The better practice is to make sure the attorneys outline the stipulations so there will not be any confusion.

This is particularly important for the taking attorney, who risks the defending attorney withholding her objections during the deposition and then asserting them later. In every day life, an attorney would not sign a contract with hidden terms.

HOW FAILURE TO CLARIFY THE USUAL STIPULATIONS CAN BACKFIRE ON THE TAKING ATTORNEY

As outlined above, the Federal Rules require that certain objections concerning correctable errors must be made at deposition or else they are waived. If two attorneys at a deposition have a different interpretation of what the usual stipulations entail, and the usual stipulations are not clarified at the outset of the deposition, the defending attorney may operate under the belief that all objections other than form are reserved until the time of trial.

As a result, the defending attorney would not object to a party’s conduct or the manner of taking the deposition

at the deposition but would expect to be able to assert her objections come time of trial if the transcript of the deposition is introduced into evidence. At best, the taking attorney would have an unexpected argument to make at trial concerning the application of the usual stipulations and at worst, the deposition testimony may not be allowed to come in based on the judge’s interpretation of the usual stipulations. This entire predicament could have been avoided if the taking attorney took one minute at the beginning of the deposition to clarify what the usual stipulations included.

Similarly, most attorneys would say that the usual stipulations include agreeing to waive the witness’ reading and signing of a transcript. After an attorney’s first few depositions, this waiver may begin to feel straightforward and routine. After all, it will speed up the process of getting the transcript and allow both sides to move forward with their respective litigation plans. However, it is a good idea to discuss this waiver with a client before the deposition. While the deposition process becomes routine for litigators, many witnesses may be unfamiliar and uncomfortable with depositions.

Allowing a witness to read the transcript allows them to correct any potential inaccuracies stated during the deposition. If you have a nervous witness, or a longer deposition, a witness may grow tired, and you want to ensure the witness is testifying truthfully and accurately throughout the entire proceeding. Waiving this review and certification could lead to inaccurate testimony that may be detrimental to the case down the line. Some clients may want to review the deposition transcript for accuracy even if they have undergone many depositions, so it is important to consult them. Again, while waiving the reading and signing of the transcript seems innocuous and routine, it is important to know exactly what the stipulation is and the client’s wishes.

NOT AGREEING TO THE USUAL STIPULATIONS

The seasoned attorney taking a deposition may decide to refuse to agree to usual stipulations reserving objections until the time of trial; instead, forcing all

objections at the time of the deposition. Why?

Most attorneys seem very confused as to what the usual stipulations are, let alone come into a deposition ready to vigorously defend their witness - - ready to assert each and every objection necessary to combat potential evidentiary and waiver issues posed by the taking attorney's deposition questions. The taking attorney is targeting potential testimony that speaks to credibility, pattern-and-practice evidence, other claims/incidents that could drastically change the complexion of the remaining investigation and discovery. Is the defending attorney properly prepared yet at this stage of the litigation?

By employing this tactic, the taking attorney also smokes out potential objections that would later be asserted at the time of trial. The taking attorney seemingly has nothing to lose by refusing to agree to usual stipulations.

There is one (1) strong consideration before adopting the taking attorney's aggressive approach, above. Remember the old proverb, "[live] by the sword, die by the sword." The taking attorney should expect that their opponent to use this same tactic back against the taking attorney when the roles shift. The taking attorney, when later defending their respective client(s)' depositions must then be prepared to assert the objections necessary to avoid potential waiver or

evidentiary issues that would come up.

Deciding to refuse the usual stipulations requires that the attorney have fairly-detailed knowledge and familiarity with the defending attorney at the deposition. Will it be the seasoned partner or a senior associate, or an appearance lawyer less familiar with the merits of the case? Are the pleading allegations detailed, or more general? Have counsel discussed the affirmative defenses and supports? All of this information will factor into the attorneys' decision to use or refuse the usual stipulations.

CONCLUSION

All litigators are familiar with the phrase the "usual stipulations." Agreeing to the usual stipulations is how the vast majority of depositions begin. Just because every litigator is familiar with that phrase, however, does not mean that every litigator has the same understanding of what the usual stipulations entail. While speaking up to clarify what is included in the usual stipulations may be intimidating, especially for newer attorneys who are dealing with much more seasoned opposing counsel, it is important to specify what the attorneys are agreeing to in order to avoid any unforeseen issues during motion practice or at trial. Despite what seems like a potentially uncomfortable conversation, clarifying what is meant by the usual stipulations, provides clarity for all attorneys involved, and can help ease any

later disputes when motions are made involving deposition transcripts, or a transcript is used at trial. Once attorneys have mastered the concept of simply defining and understanding the use of the usual stipulations, these attorneys should be constantly considering and reconsidering when to potentially refuse them to gain a later advantage at trial where their opponents are potentially not prepared to tackle the evidentiary and waiver issues posed by a particular case.

ENDNOTES

¹ James M. Beck, *What Are the "Usual Stipulations" for Discovery Depositions, Anyway?* Drug and Device Law Blog, <https://www.druganddevicelawblog.com/2023/03/what-are-the-usual-stipulations-for-discoverydepositions-anyway.html>; The Legal Intelligencer's Young Lawyer Editorial Board, *Let the Record Reflect There Are No "Usual Stipulations,"* reprinted by Pietragallo Gordon Alfano Bosick & Raspanti, LLP <https://www.pietragallo.com/publications/let-the-record-reflect-there-are-no-usual-stipulations/>.

² *United States v. Liquid Sugars, Inc.*, 158 F.R.D. 466, 473 n.8 (E.D. Cal. 1994).

³ *Garcia v. Co-Con, Inc.*, 629 P.2d 1235 (N.M. Ct. App. 1980).

⁴ Fed. R. Civ.P. 32(d)(3)(B).

⁵ *Id.*

⁶ Fed. R. Civ. P. 32(d)(3)(A).

⁷ *Id.*

⁸ *Id.*

⁹ 231 Pa. Code. R. 4016(b).

¹⁰ 231 Pa. Code. R. 4016(b).

¹¹ *Id.* at 4016(a).



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