

FACTUAL BACKGROUND

The following facts are alleged in the Complaint. Luzerne County maintains a pension plan for employees (hereinafter the Plan). The Plan is administered by the Board. The present action focuses on the events leading up to and surrounding the investment contracts made by the Board and Board members during the period of 1988 to 2002. During this period, the Board retained ASCO Financial Group, Inc. (hereinafter ASCO) as an investment advisor to the Plan. During the course of the relationship with ASCO, various Board members approved contracts to invest the Plan's money. Plaintiffs allege that various Board members engaged in a pay-to-play scheme in which contracts to invest or manage pension plan assets were awarded in exchange for campaign contributions to various Board members' reelection campaigns. The Board members allegedly involved are Thomas A. Makowski, Thomas P. Pizano, Frank Crossin, and Joseph Jones.³

PROCEDURAL BACKGROUND

On October 9, 2003, Plaintiffs filed a ninety-eight page Complaint raising eight claims against twenty-six Defendants. (Doc. 1.) Nearly all of the original Defendants filed motions to dismiss. (Docs. 46, 91, 93, 95, 96, 98, 100, 104, and 108.) I granted the motions in part and denied the motions in part. Since then, several parties have settled their disputes. At the present time, the remaining claims include: breach of fiduciary duty (Defendants Makowski, Pizano, Crossin, Jones, ASCO, and Donald Williamson); RICO

³ The Complaint also alleges that Board members Joseph S. Tirpak, Jim Phillips, and Frank Trinisewski acted with the aforementioned Board members in approving certain contracts (see, e.g., Doc. 1 ¶ 46), but they are not named as defendants.

violations for conducting and participating in an enterprise by engaging in a pattern of racketeering activity (Defendants Makowski, Pizano, Crossin, Jones, ASCO, Donald Williamson, Maria Williamson, *et al.*); conspiring to commit RICO violations (all Defendants); violating the Investment Advisors Act (Defendants Donald Williamson and ASCO); and unjust enrichment (Defendants ASCO, Donald Williamson, *et al.*). Defendants then filed answers which included counterclaims, cross-claims, and affirmative defenses.

The current Motion to Treat Counterclaims as Affirmative Defenses and Dismiss [sic] of Stephen D. Flood and the Luzerne County Retirement Board Pursuant to Fed.R.Civ.P. 8(c) and 12(b)(b) (Doc. 256.1) relates to Answer, Affirmative Defenses and Counterclaims of Defendants ASCO Financial Group, Inc., Donald P. Williamson, Maria Williamson, Joseph C. Perfilio, Michael Joyce and Devonshire Capital Management, LLC (Doc. 201), in which they raise three counterclaims, one for contribution, one for indemnity, and one against Stephen Flood for intentional interference with contract.

The Motion to Treat the Counterclaim of Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossin and Joseph Jones' Against the Luzerne County Retirement Fund as an Affirmative Defense Pursuant to Fed.R.Civ.P. 8(c) (Doc. 259.1) relates to Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossin, and Joseph Jones' Answer to Complaint, with Counterclaims (Doc. 203), in which they raise a single counterclaim for indemnity against the Fund. Both motions have been fully briefed and are ripe for disposition.

DISCUSSION

Both motions argue that the counterclaims of indemnity and contribution are improperly identified as counterclaims when they are merely affirmative defenses. Mr. Flood also contends that the counterclaim for intentional interference with contract must be dismissed because it fails to state a claim upon which relief may be granted. I will address each of these arguments in turn.

1) **Classification of Counterclaims**

“When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.” Fed. R. Civ. P. 8(c); *see also Horsford v. Romeo*, 407 F.2d 1302, 1303 (3d Cir. 1969). “Whether an assertion is truly a defense, an affirmative defense, or a counterclaim is a question courts are competent to answer . . . a claim (or a counterclaim) is essentially an action which asserts a right to payment.” *Nat’l Union Fire Ins. Co. v. City Savings, F.S.B.*, 28 F.3d 376, 394 (3d Cir. 1994). Unfortunately, there is very little case law to guide the Court in how to determine whether a particular claim is an affirmative defense or a counterclaim.

In *National Union Fire Insurance Co.*, the Court of Appeals for the Third Circuit looked to general definitions in a law dictionary, and concluded that a defense is “a *response to a plaintiff’s claim* which attacks the plaintiff’s [legal] right to bring an action.” *Id.* at 393 (alterations and emphasis in original) (quoting Black’s Law Dictionary 419 (6th ed. 1990)). A counterclaim is described as “a claim presented by a defendant *in opposition to or deduction from* the claim of the plaintiff.” *Id.* at 394 (emphasis added)

(quoting Black's Law Dictionary 419 (6th ed. 1990)).

A) Indemnity

Pennsylvania courts define indemnity as an affirmative defense. See *City of Wilkes-Barre v. Kaminski Bros., Inc.*, 804 A.2d 89, 94 n.9 (Pa. Commw. Ct. 2002) (citing PA. R. CIV. P. 1030). However, several federal district courts have treated indemnity as both an affirmative defense and a counterclaim. *Davis v. Browning-Ferris, Inc.*, No. CIV.A. 97-8114, 1998 WL 964790, at * 4 (E.D. Pa. Dec. 2, 1998) (referring to the affirmative defense and counterclaim of indemnity); *Kaiser Aluminum & Chem. Corp. v. Mellon Bank, N.A.*, No. CIV.A. 96-399, 1997 WL 361354, at * 1 (W.D. Pa. June 24, 1997) (referring to the affirmative defense and claim of indemnity). But see *United States v. Union Gas Co.*, 743 F. Supp. 1144, 1149 (E.D. Pa. 1990) (referring to the affirmative defense of indemnity).

Applying the principles discussed in *National Union Fire Insurance Co.*, I find that indemnity is a counterclaim. This is based on the fact that the right to indemnity is separate from the claims Plaintiffs filed against Defendants, and Defendants could bring the claim as a separate cause of action if they so choose. Moreover, because indemnity rights can include the right to recover the costs of defending a legal action, in theory, the indemnity claim could exceed the value of the claims brought by Plaintiffs. Thus, I will deny the motions' requests to treat the counterclaims of indemnity as affirmative defenses.

B) Contribution

Similar to indemnity, contribution is a claim that can stand on its own. It is a claim

for money to compensate a plaintiff for liability he paid to a third party for injuries resulting in part from tortious conduct of the defendant. That is just the claim that has been raised here. Despite Mr. Flood and the Board's contentions that the contribution claim is raised against Plaintiffs in this action, the answer filed by ASCO *et al.* makes clear that the claim for contribution is against "Stephen L. Flood, both individually and in his representative capacity, and the Luzerne County Retirement Board. . . ." (Doc. 201 ¶ 270.) As such, the claims against ASCO *et al.* brought by Mr. Flood and the Board on behalf of the Plan are not identical to the contribution claim brought against Mr. Flood and the Board by the ASCO *et al.* While Mr. Flood and the Board are correct that the counterclaim may have the same practical effect as an affirmative defense, it is not for the Court to prohibit the ASCO *et al.* from asserting a claim to which they have a legal right. Thus, I will deny the motion to treat the contribution claim as an affirmative defense.

2) Interference with Contract

In addition to the counterclaims for indemnity and contribution, Defendants ASCO *et al.* filed a counterclaim against Stephen Flood for intentional interference with contract. Mr. Flood now moves for dismissal on the grounds that the answer fails to state a claim upon which relief can be granted.

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides for the dismissal of a complaint, in whole or in part, for failure to state a claim upon which relief can be granted. Dismissal is appropriate only if, accepting all factual allegations in the complaint as true and "drawing all reasonable inferences in the plaintiff's favor, no relief could be granted under any set of facts consistent with the allegations in the complaint." *Trump*

Hotels & Casino Resorts, Inc. v. Mirage Resorts Inc., 140 F.3d 478, 483 (3d Cir. 1998).

When considering a Rule 12(b)(6) motion, the Court's role is limited to determining whether the plaintiff is entitled to offer evidence in support of the claims. See *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In order to survive a motion to dismiss, the plaintiff must set forth information from which each element of a claim may be inferred. See *Kost v. Kozakiewicz*, 1 F.3d 176, 183 (3d Cir. 1993). The defendant bears the burden of establishing that the plaintiff's complaint fails to state a claim upon which relief can be granted. See *Gould Elecs. v. United States*, 220 F.3d 169, 178 (3d Cir. 2000).

Intentional interference with contract requires the following elements: "(1) the existence of a contractual relationship; (2) an intent on the part of the defendant to harm the plaintiff by interfering with that contractual relationship; (3) the absence of a privilege or justification for such interference; and (4) damages resulting from the defendant's conduct." *Hennessy v. Santiago*, 708 A.2d 1269, 1278 (Pa. Super. Ct. 1998) (citing *Triffin v. Janssen*, 626 A.2d 571, 574 (1993)). A fundamental requirement of interference with contract is the existence of a contract between the plaintiff and a third party. *E.g.*, *Nix v. Temple Univ. Of Commw. Sys. Of Higher Educ.*, 596 A.2d 1132, 1137 (Pa. Super. Ct. 1991) ("The tort of interference with contract is defined in terms of unprivileged interference with a contract with a third party. Essential to the right of recovery on this theory is the existence of a contractual relationship between plaintiff and a party other than the defendant."); *Glenn v. Point Park Coll.*, 272 A.2d 895, 898 (Pa. 1971); see generally RESTATEMENT (SECOND) OF TORTS § 766.

"An agent cannot tortiously interfere with its principal's contract when acting within

the scope of his agency.” *Werther v. Rosen*, No. 1078 MAY.TERM 2002, 2003 WL 1848570, at *2 (Pa. Com. Pl. Feb. 13, 2003) (citing *Nix*, 596 A.2d at 1137; *Rutherford v. Presbyterian-Univ. Hosp.*, 612 A.2d 500 (1992); and *Daniel Adams Assocs. v. Rimbach Publ’g, Inc.*, 519 A.2d 997 (Pa. Super. Ct. 1987)). Because corporate and other legal entities can only act through its employees or officers, persons acting in those functions are treated as the same entity for purposes of actions for interference with contract. *Daniel Adams Asscs.*, 519 A.2d at 1000 (citing *Raab v. Keystone Ins. Co.*, 412 A.2d 638, 639-40 (Pa. Super. Ct. 1980)).

Because the allegations of contractual interference in the present action all relate to actions of Mr. Flood while he was acting in his capacity as either a Board member or agent of the Plan, as a matter of law, there was no third party interfering with the contractual relations, and the counterclaim fails to state a claim upon which relief may be granted. Although ASCO *et al.* allege that Mr. Flood was acting *ultra vires* when he interfered with the contract, the allegation in the counterclaim actually alleges a breach of his fiduciary duties, rather than actions made outside of those authorized by law. Recourse for such an act would be through an action for breach of his fiduciary duties, not an interference with contract claim, because the actions he took were within the authority he held as a member of the Board. Thus, I will grant the portion of Mr. Flood’s motion as it relates to dismissing the intentional interference with contract claim.

CONCLUSION

I will deny the Motion to Treat Counterclaims as Affirmative Defenses and Dismiss [sic] of Stephen D. Flood and the Luzerne County Retirement Board Pursuant to

Fed.R.Civ.P. 8(c) and 12(b)(b) (Doc. 256.1) as it relates to reclassifying the contribution and indemnity claims because they are properly classified as counterclaims. I will grant the portion of the motion requesting dismissal of the counterclaim against Stephen Flood for intentional interference with contract because all of the alleged actions by Mr. Flood were while he was acting as an agent of a party to the contract.

I will deny the Motion to Treat the Counterclaim of Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossion and Joseph Jones' Against the Luzerne County Retirement Fund as an Affirmative Defense Pursuant to Fed.R.Civ.P. 8(c) (Doc. 259.1) because indemnity is properly identified as a counterclaim.

An appropriate order follows.

April 6, 2005

Date

/s/ A. Richard Caputo

A. Richard Caputo

United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

STEPHEN L. FLOOD, :
Luzerne County Controller, and :
THE LUZERNE COUNTY :
RETIREMENT BOARD o/b/o :
THE LUZERNE COUNTY :
EMPLOYEE RETIREMENT SYSTEM, :

Plaintiffs, :

v. :

THOMAS A. MAKOWSKI, *et al.*, :

Defendants. :

CIVIL ACTION NO. 3:CV-03-1803

(JUDGE CAPUTO)

ORDER

NOW, this 6th of April, 2004, **IT IS HEREBY ORDERED that:**

- (1) Motion to Treat Counterclaims as Affirmative Defenses and Dismiss of Stephen D. Flood and the Luzerne County Retirement Board Pursuant to Fed.R.Civ.P. 8(c) and 12(b)(b) (Doc. 256.1) is **GRANTED in part** and **DENIED in part:**
 - (a) The counterclaim against Stephen Flood for intentional interference with contract is **DISMISSED**.
 - (b) The motion is otherwise **DENIED**.
- (2) Motion to Treat the Counterclaim of Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossion and Joseph Jones' Against the Luzerne County Retirement Fund as an Affirmative Defense Pursuant to Fed.R.Civ.P. 8(c) (Doc. 259.1) is **DENIED**.

/s/ A. Richard Caputo _____
A. Richard Caputo
United States District Judge