No.

IN THE

Supreme Court of the United States

SPECIAL RISK INSURANCE SERVICES, INC., PETITIONER

v.

GLAXOSMITHKLINE, LLC, TRADING AS GLAXOSMITHKLINE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL LAROSA

LaRosa Law Firm
959 West Chester Pike
Havertown, PA 19083
ml@larosalawfirm.com
(610) 924-0999

DENNIS P. DERRICK
Counsel of Record

7 Winthrop Street
Essex, MA 01929-1203
dennisderrick@comcast.net
(978) 768-6610

CURRY & TAYLOR ♦ 202-350-9073

QUESTION(S) PRESENTED

1. The law of Pennsylvania gives an insurance broker the vested right to commissions for as long as the policies it procured for the insured remain in effect, even when the insured tries to switch brokers to avoid paying commissions. Did the court of appeals exercising its diversity jurisdiction nullify this settled state law by allowing an insured to switch brokers while keeping the same policies in place, denying the original broker commissions it would otherwise be awarded in State court?

2. By extinguishing the vested rights of insurance brokers in Pennsylvania to their earned commissions for as long as the policies they procure remain in effect, the Panel encourages insureds state-wide to switch brokers with impunity to avoid paying earned commissions, denies brokers the property rights they would otherwise possess in State court, and undermines the federalism principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

RULE 29.6

Petitioner Special Risk Insurance Services, Inc. is a Pennsylvania corporation. It has no parent company and no publicly held company owns 10% or more of its stock.

STATEMENT OF RELATED CASES

None.

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The unpublished Opinion of the United States Court of Appeals for the Third Circuit in *Special Risk Insurance Services, Inc. v. GlaxoSmithKline, LLC*, C.A. Docket No. 22-1891, decided and filed May 25, 2023, and reported at 2023 WL 3644476 (3rd Cir. 5/25/2023), affirming the district court's entry of summary judgment in favor of respondent, is set forth in the Appendix hereto (App. 1-7).

The unpublished Memorandum Opinion of the United States District Court for the Eastern District of Pennsylvania in *Special Risk Insurance Services, Inc. v. GlaxoSmithKline, LLC*, Civil Action No. 2-19-cv-03002, decided and filed April 12, 2022, and reported at 2022 WL 1093129 (E.D. Pa. 4/12/2022), granting respondent's motion for summary judgment, is set forth in the Appendix hereto (App. 8-24).

The unpublished Order of the United States Court of Appeals for the Third Circuit in *Special Risk Insurance Services, Inc. v. GlaxoSmithKline, LLC*, C.A. Docket No. 22-1891, decided and filed July 28, 2023, denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc,* is set forth in the Appendix hereto (App. 25).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit affirming the district court's entry of summary judgment in favor of respondent, was entered on May 25, 2023; and its Order

denying petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* was decided and filed on July 28, 2023 (App. 1-7;25).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc*. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1332(a)(1) (Diversity of citizenship; amount in controversy; costs):

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States....

28 U.S.C. § 1441(a) & (b)(1) (Removal of civil actions):

(a) Generally.—

Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Removal Based on Diversity of Citizenship.—

(1) In determining whether a civil action is removable on the basis of the jurisdiction under section 1332(a) of this title, the citizenship of defendants sued under fictitious names shall be disregarded.

40 Pa. Stat. § 310.72 (Payment of commissions):

(a) Limitation.--An insurance entity may pay a commission, brokerage fee, service fee or other compensation to a licensee for selling, soliciting or negotiating a contract of insurance. A licensee may pay a commission, brokerage fee, service fee or other compensation to a licensee for selling, soliciting or negotiating a contract of insurance. Except as provided in subsection (b), an insurance entity or licensee may not pay a commission, brokerage fee, service fee or other compensation to a person that is not a licensee for activities related to the sale, solicitation or negotiation of a contract of insurance.

(b) Exception.--An insurance entity or licensee may pay:

(1) a renewal or other deferred commission to a person that is not a licensee for selling, soliciting or negotiating a contract of insurance if the person was a licensee at the time of the sale, solicitation or negotiation; or

(2) a fee to a person that is not a licensee for referring to a licensee persons that are interested in purchasing insurance if the referring person does not discuss specific terms and conditions of a contract of insurance and, in the case of referrals for insurance that is primarily for personal, family or household use, the referring person receives no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a sale.

An insurance entity or licensee shall not pay a commission or fee to a person under this subsection if the person is a licensee under suspension or a former licensee whose insurance producer license was revoked.

40 Pa. Stat. § 310.73 (Receipt of commissions):

(a) Limitation.--A licensee may accept a commission, brokerage fee, service fee or other compensation from an insurance entity or licensee for selling, soliciting or negotiating a contract of insurance. Except as provided in subsection (b), a person may not accept a commission, brokerage fee, service fee or other compensation from an insurance entity or licensee if the person is not a licensee and the

compensation is for activities related to the sale, solicitation or negotiation of a contract of insurance.
(b) Exception.--A person may accept:
(1) a renewal or other deferred commission for selling, soliciting or negotiating a contract of insurance if the person was a licensee at the time of the sale, solicitation or negotiation; or
(2) a fee for referring persons to a licensee that are interested in purchasing insurance provided they do not discuss specific terms and conditions of a contract of insurance and, in the case of referrals for insurance that is primarily for personal, family or household use, they receive no more than a one-time, nominal fee of a fixed dollar amount for each referral that does not depend on whether the referral results in a sale.

A person may not accept a commission or fee under this subsection if the person is a licensee under suspension or a former licensee whose insurance producer license was revoked.

40 Pa. Stat. § 471 (Rebates and inducements prohibited):

(a) Except as otherwise provided in this section, no insurance company, association, or exchange, by itself or by its officers or members, attorney-in-fact or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy or agent's commission thereon, or

earnings, profit, dividends, or other benefit founded, arising, accruing, or to accrue thereon or therefrom, or any special advantage in date of policy or age of issue, or any paid employment or contract for services of any kind, or any other valuable consideration or inducement, to or for insurance on any risk in this Commonwealth, now or hereafter to be written, which is not specified in the policy contract of insurance; nor shall any such company, association, or exchange, personally or otherwise, offer, promise, give, option, sell, or purchase any stocks, bonds, securities, or property, or any dividends or profits accruing or to accrue thereon, or other thing of value whatsoever, as inducement to insurance or in connection therewith, which is not specified in the policy. Nothing in this section shall be construed to prevent the taking of a bona fide obligation, with legal interest, in payment of any premium.

(b) An insurance company, association or exchange, by itself, its officers, members or attorney-in-fact or any other party may offer or give to an insured or a prospective insured, on an annual aggregate basis, any favor, advantage, object, valuable consideration or anything other than money that has a cost or redeemable value of less than or equal to one hundred dollars ($100). The Insurance Commissioner may increase this amount upon publication of notice in the Pennsylvania Bulletin.

(b.1) Notwithstanding any other provision of this section to the contrary, an insurance company, association or exchange, by itself, its officers,

members or attorney-in-fact or any other party may not make receipt of anything of value contingent on the purchase of insurance.
(c) Nothing in this section shall be construed as:
(1) Preventing a company transacting industrial life insurance on a weekly payment plan from returning to policyholders, who have made a premium payment for a period of at least one year, the percentage of premium which the company would otherwise have paid for the weekly collection of such premium;
(2) Permitting any unfair method of competition or an unfair or deceptive act or practice under the act of July 22, 1974 (P.L. 589, No.205), known as the "Unfair Insurance Practices Act"; or
(3) Prohibiting an insurance company, association or exchange, by itself or by its officers or members, attorney-in-fact or by any other party from offering or giving to an insured or a prospective insured, for free or at a discounted price, services or other offerings that relate to loss control of the risks covered under the policy.

18 U.S. C. § 1954 (Offer, acceptance, or solicitation to influence operations of employee benefit plan):

Whoever being—
(1) an administrator, officer, trustee, custodian, counsel, agent, or employee of any employee welfare benefit plan or employee pension benefit plan; or

(2) an officer, counsel, agent, or employee of an employer or an employer any of whose employees are covered by such plan; or
(3) an officer, counsel, agent, or employee of an employee organization any of whose members are covered by such plan; or
(4) a person who, or an officer, counsel, agent, or employee of an organization which, provides benefit plan services to such plan receives or agrees to receive or solicits any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be fined under this title or imprisoned not more than three years, or both: Provided, That this section shall not prohibit the payment to or acceptance by any person of bona fide salary, compensation, or other payments made for goods or facilities actually furnished or for services actually performed in the regular course of his duties as such person, administrator, officer, trustee, custodian, counsel, agent, or employee of such plan, employer, employee organization, or organization providing benefit plan services to such plan.

STATEMENT

Petitioner Special Risk Insurance Services, Inc. ("petitioner" or "SRIS") is a duly licensed Pennsylvania insurance broker specializing for over thirty (30) years in identifying group employee insurance benefits for large businesses such as respondent GlaxoSmithKline, LLC ("respondent" or "GSK"), a Delaware pharmaceutical company. In brokering insurance coverage, SRIS is *not* an agent or employee of any particular insurance company. Instead it sells insurance products of various insurers, depending on which coverage best suits the needs of its clients, i.e., those businesses like GSK who retain it to procure the most suitable insurance for its employees in the circumstances.

As GSK's so-called "broker of record" from 1991 to July 1, 2015, petitioner brokered for GSK's employees two group life insurance policies from ACE American Insurance, a group life insurance policy underwritten by Met Life, and a Liberty Mutual group disability policy, the last two policies effective January 1, 2014, replacing prior policies GSK had with a different insurer.

In brokering these four insurance policies, petitioner's relationship with GSK was defined *not* by a written agreement but rather by a contract implied by established standards of practice in the insurance industry, i.e., that if petitioner was unable to procure insurance coverage acceptable to GSK, it received nothing for its efforts. But if petitioner locates coverage acceptable to GSK, absent a writing to the contrary,

petitioner will be paid a commission as a percentage of the premiums paid by the insured to the insurers for as long as those policies remain in effect, with the insurers paying petitioner its commissions directly.

As the insured in this arrangement, GSK had no say in the amount of commissions petitioner earned for locating insurance for its employees' group benefits plans. Instead, petitioner and the insurers negotiate the amount of those commissions due petitioner and it comprised a part of the premium charged GSK. Thus whatever compensation petitioner received for obtaining insurance coverage for GSK—whether as commissions, supplemental compensation or administrative fees— it came from the insurers, *not* GSK.

After petitioner negotiated with the insurers about the amount of its commissions, it comprised a percentage of the monthly premium charged GSK by each insurer. Since petitioner's yearly compensation for brokering GSK's group insurance coverage for its employees was reported directly to GSK in accordance with ERISA's annual public reporting requirements (see 29 U.S.C. §§ 1021;1023(a)(1);1024), GSK was fully aware of petitioner's commissions earned monthly upon GSK paying premiums due. For 2014, petitioner received from the three insurers identified above between $850,000 and $1.2 million in compensation for brokering the four insurance policies for GSK.

Even though satisfied with petitioner's brokering services over the years, GSK's newly appointed benefits manager in late 2014 asked

petitioner and seven other brokers for proposals about the cost of brokerage services going forward. It also asked whether any of them would share commissions with GSK, a presumptive violation of insurance anti-rebate laws described in 40 Pa. Stat. § 471 and 18 U.S. C. § 1954(4). In response, petitioner, as well as five (5) of six (6) responding brokers, advised GSK that sharing commissions with an insured is a violation of anti-rebate statutes.

In June of 2015, GSK notified petitioner that as of July 1, 2015, it was no longer GSK's "broker of record." It replaced petitioner with Mercer Health & Benefits, LLC ("Mercer"), the one broker that did not warn GSK of the anti-rebating violation. It agreed to accept appointment as broker of record "net of commissions," agreeing to receive *no* commissions at all on the four policies petitioner brokered, *only* supplemental income from each insurance company (insurer payments to a broker based on a book of business). Thus despite terminating petitioner as its"broker of record," *GSK kept in place the insurance policies petitioner had procured for GSK's benefit*. But because petitioner was no longer GSK's "broker of record," the insurers no longer included petitioner's commissions in the premiums billed to GSK even though the policies petitioner procured were still in effect; and petitioner no longer received commissions from the insurers at the instruction of GSK.

By replacing petitioner with Mercer in 2015 as its "broker of record" while keeping in place the insurance policies petitioner had procured, GSK avoided over $6 million in premium payments otherwise

due petitioner over the years. These premium reductions—an unbargained-for windfall for GSK—were *not* part of the contract implied by insurance industry custom and practice between petitioner and GSK when petitioner first set about procuring insurance coverage for GSK, i.e., that if petitioner located insurance coverage acceptable to GSK, absent a writing to the contrary, petitioner would be paid a commission as a percentage of the premiums paid by GSK to the insurers for as long as those policies remained in effect, with the insurers paying petitioner its commissions directly.

On January 1, 2019, GSK terminated one of the two group life insurance policies underwritten by ACE American Insurance and transferred it to MetLife Insurance Company. The three other insurance policies procured by petitioner for GSK remained in effect.

Because there was no precedent in the insurance industry for a broker like petitioner being deprived of its commissions by an insured when the insurance policies it procured for the insured still remained in effect, petitioner on May 30, 2019, began this civil action against GSK in the Court of Common Pleas for Philadelphia County. Seeking to recover the commissions it lost since 2015 on policies it had brokered for GSK, three of which were still in effect, petitioner alleged claims for breach of contract, unjust enrichment, promissory estoppel and tortious interference with its contractual relations (App. 3;8).

As damages for its breach of contract claim against GSK, petitioner was *not* seeking the actual

earned commissions which the insurers had not paid it since July 1, 2015, when GSK no longer designated petitioner its "broker of record." Instead, petitioner was seeking as damages the commissions *it lost* as the proximate result of GSK's breach of their implied agreement that if GSK accepted petitioner's proffered insurance coverages, petitioner would be paid a commission as a percentage of the premiums paid by GSK to the insurers for as long as those policies remain in effect.

GSK removed the case to the federal district court for the Eastern District of Pennsylvania based on diversity of citizenship (App. 3;8). Following discovery, GSK moved for summary judgment on all petitioner's claims. Petitioner filed a cross-motion for partial summary judgment on its breach of contract claim (App. 8-9;14). On April 12, 2022, the district court, Quiñones Alejandro, J., issued a Memorandum Opinion granting GSK's summary judgment motion and denying petitioner's partial summary judgment motion (App. 8-24).

After reciting the undisputed facts described above and applying Pennsylvania law, the district judge first concluded that no contract—either written, oral, or implied-in-fact—existed between petitioner and GSK which obligated GSK to pay petitioner commissions after GSK terminated petitioner as its "broker of record" in 2015 (App. 9-12;14-16). She found no evidence of a written contract; and she rejected petitioner's claim that under established insurance industry custom and practice, as explicated by the substantive law of Pennsylvania, a broker's commission is earned when

the brokered policy is accepted and entered into by the insured and continues for as long as the policy remains in effect, i.e., as long as the insured continues to pay premiums and has not cancelled the policy (App. 17-18).

The district court found no record evidence from which to imply such an obligation on GSK's part to pay petitioner its commissions for as long as the policies remained in effect (App.18). It relied upon petitioner's "admission" that it never charged GSK for a payment related to the policies it procured and that GSK never promised such a payment to petitioner (App. 17-18).It rejected petitioner's argument that industry custom and practice imposed a duty on GSK upon terminating petitioner as its "broker of record" either to cancel the policies petitioner had brokered or, if these policies remained in place, to pay petitioner the commissions it earned procuring same (App. 18).

The motion judge ruled that the Pennsylvania law cited by petitioner to support this claim of an implied contract between petitioner and GSK was inapposite; and because petitioner could not point to statements or circumstances supporting the proposition that GSK "agreed to pay [petitioner] any loss of income in the event [GSK] did not terminate the insurance policies when changing brokers...," no such contract exists and therefore no breach occurred (App. 18-20).

Finally, the district judge ruled that petitioner failed to show it had a reasonable expectation of being paid by GSK, the party benefitted, or that GSK's retention of benefits was unconscionable so as to support a claim of unjust enrichment; that GSK never

promised petitioner to pay it any commissions or fees, undermining its promissory estoppel claim; and that its tortious interference claim was time-barred (App. 20-23). Petitioner's civil action was accordingly dismissed.

Petitioner appealed the dismissal of its breach-of-contract and unjust enrichment claims. On May 25, 2023, a Panel of the court of appeals issued an Opinion affirming the district court's rulings in both respects (App. 1-7). As for breach of contract, the Panel ruled that petitioner had not made a sufficient showing of an implied promise by GSK to pay petitioner continuing commissions for as long as it remained GSK's designated "broker of record" or for so long as the insurance policies petitioner procured remained in effect (App. 4-5). Specifically, it found that "there [was no] evidence of an industry custom or practice of implying such a promise" (App. 5).

The Panel rejected petitioner's argument that it has a vested right under Pennsylvania law to a brokerage commission upon the writing of the policies and for so long as those policies remained in effect (App. 5). Even if it were a correct statement of substantive Pennsylvania law, the Panel thought that "it would concern only the timing of when a commission becomes due" (*Id.*). It concluded that there is no legal rule, as petitioner suggested, that an insured by designating a broker as its insurance "broker of record," is liable for that broker's commission (*Id.*). As such, the district court did not err in rejecting petitioner's claim for breach of an implied contract (*Id.*).

As for unjust enrichment, even if GSK knowingly benefitted by its retention of the group insurance policies brokered by petitioner, the Panel thought it was not unconscionable (App. 6-7). As it wrote, petitioner had already received millions of dollars in commissions for several years for brokering these policies; and it was the insurance carriers—not GSK—who paid the commissions for those policies (*Id.*). Thus the "degree of unfairness...does not rise to the level required for an unjust enrichment claim"(App. 7).

On July 28, 2023, the Panel and the court of appeals, respectively, denied petitioner's timely filed petition for Panel rehearing or for rehearing *en banc* (App. 25).

REASONS FOR GRANTING THE PETITION

The Panel's Decision Allowing Insureds In Pennsylvania To Terminate Their Insurance Broker Solely To Avoid Paying It Commissions While Keeping In Place The Insurance Policies The Broker Procured Gives An Unbargained-For Windfall To Insureds, Encourages "Broker Poaching"And Violations Of Insurance Anti-Rebate Laws, Denies Brokers The Rights And Remedies They Would Otherwise Possess Under State Law, And Undermines The Federalism Principles Of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

The substantive law of Pennsylvania—which the Panel as a federal court sitting in diversity was bound to apply to this controversy—gives insurance brokers like petitioner the vested right to commissions as a percentage of the premiums paid by the insured to the

insurer from the inception of the insurance policy for as long as the policy remains in effect, i.e., for as long as the insured continues to pay premiums and does not cancel the policy. Consistent with this vested right, Pennsylvania contract law imposes a duty on a party who seeks to retain the work product of a non-breaching party to pay compensation to that non-breaching party for as long as it reaps a financial benefit from that work product.

Acting upon a fundamental misunderstanding of how insurance industry custom and practice in Pennsylvania protects the compensation of insurance brokers when they are called upon to procure coverage for clients in the insurance marketplace, the Panel ratified GSK's intentional sabotage of these insurance industry norms by allowing it to switch to another broker who charges no commissions at all while keeping in place these valuable, irreplaceable policies, all procured by petitioner. This result is directly at odds with substantive Pennsylvania law which as a matter of law, equity and public policy prohibits an insured from engineering a switch in brokers solely to avoid paying commissions which the original broker earned and continues to earn upon each annual renewal of the policy by the insured.

Bedrock decisional law in Pennsylvania, buttressed by decisions in other jurisdictions as well as an authoritative insurance treatise, support the proposition that there is an implied agreement between the broker and the insured that the broker will be paid its commissions for obtaining those policies found acceptable by the insured for as long as the insured

keeps those policies in effect and does not cancel them. The Panel's decision otherwise nullifies this Pennsylvania jurisprudence by creating contradictory federal common law which denies brokers throughout Pennsylvania this vested right to the commissions they have earned and which they would otherwise be awarded in State court.

The Panel's decision produces a windfall for insureds by allowing them to unilaterally reduce their premiums without bargaining for that reduction with the broker; and it incentivizes insureds to accept brokered coverage and then switch brokers, i.e., "broker poaching," denying the original broker the compensation it earned, solely to reduce premiums. It also encourages insureds to engage in conduct, typified by this case, which offers new business to brokers who would "kick back," share or otherwise reduce their commissions, all presumptive violations of state and federal anti-rebate laws or those laws proscribing abuses by plan fiduciaries of ERISA plans, as provided in 18 U.S.C. § 1954. Finally, it contravenes public policy and notions of equity and fair dealing which allow a non-breaching party like petitioner to recover compensation for its work product for as long as the breaching party seeks to benefit from that work product, i.e.,for as long as the insured receives the benefit of the policies which the broker procured.

As a matter of federal jurisdiction, the Panel sitting in diversity was obligated to apply this substantive law of Pennsylvania. By not doing so, by nullifying bedrock State jurisprudence, it denied petitioner—as well as every other insurance broker in

the State— the rights and remedies it would otherwise possess in State court, exposing them, working as agents for insureds, to being stripped of compensation for their work product without recourse. The result is not only at odds with Pennsylvania law but also contravenes the federalism principles of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

This exceptionally important question addressing the vested rights of Pennsylvania insurance brokers when seeking coverage for their clients in the insurance marketplace comes within Rule 10(c)'s guidance about the considerations which support the Court's granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." The Court should grant certiorari, identify the Panel's error, apply the substantive law of Pennsylvania to this controversy, and remand the matter to the district court for a trial on petitioner's claim for breach of contract.

The Panel concluded that petitioner has no vested right under Pennsylvania law to commissions as a percentage of the premiums paid by the insured to the insurer from the inception of the insurance policy for as long as the policy remains in effect. It found no evidence of an insurance industry custom or practice implying such a promise on the part of the insured (App. 5). Moreover, even if this were a correct statement of the law, the Panel confusingly observed that "it would concern only the timing of when a

commission becomes due;" and that there is no legal rule in Pennsylvania obligating an insured to pay commissions to its "broker of record" even when it renews annually those policies which the broker procured (*Id.*).

These conclusions by the Panel are wrong as a matter of law. In Pennsylvania, an insurance broker is "a person who acts on behalf of another person to obtain insurance." *Antimary v. Workmen's Comp. Appeal Bd.*, 655 A.2d 659, 662 n. 6 (Pa. Cmwlth. 1995). See 31 Pa. Code § 37.1 (defining the terms "agent" and "broker" in the Pennsylvania Administrative Code). In securing an insurance policy for a client like GSK, the general rule in Pennsylvania is that the insurance broker is an agent of its client, the putative insured GSK, *not* the insurer. *Taylor v. Crowe*, 282 A.2d 682, 683 (Pa. 1971) ("...a long line of decisions has declared the broker to be the agent of the insured, not of the insurer") (quotations and citation omitted). Accord, 3 *Couch on Insurance 3d* § 45:3 (2011) and cases cited.

Having engaged petitioner beginning in 1991 and thereafter as its "broker of record" to locate acceptable group coverage for its employees, GSK was not acting in a legal vacuum. Even without a written contract governing their collaboration, an implied contract arising from long established custom and practice in the insurance industry describes the dimensions of their business relationship: in the absence of an agreement otherwise, if petitioner locates coverage acceptable to GSK and brings about a relationship of insurer and insured between GSK and the insurer(s), petitioner has then and there earned its commission which is a

percentage of the premiums paid by GSK to the insurer(s) for as long as those policies remain in effect, with the insurers paying petitioner its commissions directly.

This implied contract between petitioner and GSK is soundly anchored in Pennsylvania law. An insurance broker's commission is vested and fully earned as soon as the policy is written, i.e., as soon as the broker brings about the relationship of insurer and insured and it continues for as long as that policy remains in effect. *Com. Ins. Dept. v. Safeguard Mut. Ins. Co.*, 336 A.2d 674, 685 (Pa. Commw. Ct. 1975). *Schlesinger v. Star Ins. Co.*, 100 Pa. Super. 584, 585 (Pa. Super. Ct. 1931). *Loomis Co. v. KEYW Corp.*, 2015 WL 2237046 at *3 (E.D. Pa. May 13, 2015) (applying Pennsylvania law) (an implied contract by insured to pay broker's commission arises only when the insurance policy procured by the broker is written). See 3 *Couch on Insurance 3d, supra*, § 45.3 ("Absent an agreement to the contrary, a broker earns its commission when it brings about the relationship of insurer and insured...."). See also *Cockrell v. Grimes*, 740 P.2d 746, 749 (Okla. App. 1987) (broker's "right to a percentage of the premium on a policy is a property right which becomes fixed as soon as the policy is taken out and then is realized when the premiums are actually paid from time to time.").

If the Panel doubted the existence or nature of this implied contract existing between petitioner and GSK from and after 1991, the undisputed facts of this summary judgment record provide conclusive proof on both scores. Absent express terms of a contract determining when commissions are to be computed and

paid, the courts of Pennsylvania look to the parties' course of performance "as significant and substantial evidence of their intention." *Fenestra, Inc. v. John McShain, Inc.*, 248 A.2d 835, 836 (Pa. 1969). *Atlantic Richfield Co. v. Razumic*, 390 A.2d 736, 741 (Pa. 1978). Regardless of whether the terms of a contract, implied or otherwise, are ambiguous, the course of conduct of the parties "is *always* relevant...and may be the strongest indication of the intention of the parties." *Pennsylvania Engineering Corp. v. McGraw-Edison Co.*, 459 A.2d 329, 332 (Pa. 1983) (emphasis supplied). See *Astenjohnson v. Columbia Cas. Co.*, 483 F. Supp.2d 425, 467 (E.D. Pa. 2007), *aff'd in part, rev'd on other grounds*, 562 F.2d 213 (3rd Cir. 2009), *cert. denied*, 558 U.S. 991 (2009), citing Restatement (Second) of Contracts § 202, cmt. g (1981).

It is undisputed that once petitioner brought about the relationship of insured and insurer between GSK and the three insurers beginning in 1991, its right to a commission as broker on each policy vested pursuant to authoritative Pennsylvania law as well as insurance industry custom and practice. After petitioner negotiated with the insurers about the amount of its commissions, it comprised a percentage of the annual premium charged GSK by each insurer. Given ERISA's reporting requirements, GSK not only was aware of this implied-in-fact contract by which petitioner was paid its earned commission on each policy *but also agreed to its terms* by not cancelling those policies and by continuing to pay the premiums (which included petitioner's commissions) charged by the insurers for over twenty-three years.

Accordingly, GSK's own course of performance—undisputed on this summary judgment record—proves the elements of the parties' implied contract sued upon by petitioner. It did not require guesswork by the Panel to identify the existence or nature of this implied-in-fact bargain. That GSK's newly appointed benefits manager in 2015 sought to avoid paying petitioner's commissions by switching to a broker who charged no commissions at all—while keeping in place all the policies petitioner procured—does *not* extinguish the parties' implied contract or petitioner's vested right to commissions thereunder.

As long as the policies procured by petitioner remained in effect, benefitting GSK, petitioner "had an iron-clad right to full payment of its brokerage fee." *Guy Carpenter & Co., LLC v. Lockton RE, LP*, 2010 WL 4449048 at *12 (S.D.N.Y. 11/4/2010) citing *XL Specialty Ins. Co. v. Carvill Am.*, Inc., 2007 WL 1748157 at *10 (Conn. Super. Ct. 5/31/2007). While GSK was free to switch brokers, it was *not* free to shirk its contractual obligation to pay petitioner its brokerage commission. *Id.* citing *Benfield, Inc. v. Moline*, 2006 WL 452903 at *41 (D. Minn. 2/22/2006). That GSK switched from petitioner to another so-called "broker of record" does not disturb the fact that petitioner was and is *still* "broker of record" for those policies it procured for GSK, as long a GSK did not cancel them; and it was entitled to its commissions for as long as those policies continued to benefit GSK.

In this regard, petitioner was *not* seeking as damages the actual commissions the insurers would have paid it as GSK's "broker of record" for those

policies GSK kept in place after July 1, 2015. See 40 Pa. Stat. §§ 310.72 &73 (authorizing the payment of commissions by "insurance entit[ies]" and their receipt by "licensees"). Instead, it was seeking as damages the commissions *it lost* as the proximate result of GSK's breach of their implied agreement that if GSK accepted petitioner's proffered insurance coverages, petitioner would be paid a commission as a percentage of the premiums paid by GSK to the insurers for as long as those policies remain in effect.

In *Clinchy v. Grandview Dairy, Inc.*, 27 N.Y.Y.2d 793, 793 (Sup. Ct. 1941), the Court made the point that where, as here, the insured retained the broker and the broker was not the agent of the insurance company, the insurance company was required to follow insured's instructions not to pay the broker its commissions despite his work in procuring the policies. *Id.* Thus there was no viable claim against the insurance company. *Id.* However, in breaching its contract with the broker, the insured (like GSK) became liable to the broker (like petitioner) for breach of their contract with the measure of damages being "the amount of commissions [the broker] would have earned from the insurance company had the [insured] performed the contract." *Id.* See also *Hammond & Co., Inc. v. Risk Specialists Co. of New York, Inc.*, 619 N.Y.S.2d 744, 745 (App. Div. 1994).

In the face of this breach of contract by GSK, Pennsylvania law is crystal clear that a broker's vested right to earned commissions will not be terminated or otherwise compromised when an insured continues to accept the benefits of its agreement with the broker

while at the same time repudiating the obligations it assumed and recognized for over twenty-three years. *Linn v. Employers Reinsurance Corp.*, 153 A.2d 483, 485-486 (Pa. 1959). "So long as the fruits of this agreement are enjoyed, the consideration agreed upon must be paid in accordance with the contract under which it was given." *Id.* at 486. *Chaflin v. Manufacturers' Club of Philadelphia*, 158 A. 575, 576 (Pa. Super. Ct.1932) (broker's right to earned commissions is not forfeited upon his termination where the sales upon which his commissions are based were completed and accepted by his principal). Accord, *Flowers v. Connect America.com, LLC*, 2014 WL 4762643 at *9-10 (E.D. Pa. 9/24/2014) (applying Pennsylvania law) (broker will continue to receive its commission as long as its principal continues to receive a benefit from the business procured by broker); *Little v. Usse Group, Inc.*, 404 F. Supp.2d 849, 854 (E.D. Pa. 2005) (applying Pennsylvania law) (same); *Levan v. Royal Paper Prods., Inc.*, 185 A.2d 801, 803 (Pa. Super. Ct. 1962) (same).

Other jurisdictions and the most learned insurance treatise available agree with Pennsylvania law that while an insured like GSK is free to cancel its insurance policies or even switch brokers, as long as it continues to accept the benefits of the policies petitioner procured, it may not terminate petitioner's vested right to commissions on those policies. See, e.g., *Benfield, Inc. v. Moline, supra*, 2006 WL 452903 at *41(fact that insured decides to replace broker after policies went into effect does not affect broker's right to commission); *Hammond & Co., Inc. v. Risk Specialists Co. of New York, Inc., supra* (broker's right to

commission is not affected by the cancellation of its agency when policy it procured was not cancelled); *Stevenson v. Benefit*, 27 N.W.2d 104, 106 (Mich. 1947) (insured cannot confect reason to deprive broker of commission); *Smyth v. Missouri-Kansas-Tex. R. Co.*, 72 F.2d 216, 218-219 (2d Cir. 1934) (Hand, A., J.) (broker's right to commission is not defeated by insured's willful refusal to accept delivered policy). See also 3 *Couch on Insurance 3d, supra*, § 45.3 (that the insured decides to replace an agent, after policies went into effect, does not affect the broker's right to the agreed upon commission."); §46:76 (where broker has completed its work in securing insurance, it cannot be deprived of its earned commission by the "whim of the insured"). As the Supreme Court of North Carolina observed, any other rule would allow the insured to profit by its own wrong or default, a principle "so clear that no citation is necessary." *Bro v. Union Fire Ins. Co.*, 83 S.E. 241, 242 (N.C. 1914).

All this substantive Pennsylvania law, if the Panel had applied it, would have conjoined to support the conclusion that petitioner was entitled to judgment as a matter of law on its breach of contract claim against GSK. This refusal by the Panel to follow the substantive law of Pennsylvania repeals a crucial part of insurance broker law formulated by the State courts to thwart an insured's effort to avoid paying brokers their earned commissions for the work they perform, depriving petitioner of a remedy it would otherwise possess in State court. It undermines Pennsylvania's bedrock public policy of settling broker commission disputes by resorting to jurisprudence—founded on notions of fairness, equity and sound public policy—

which recognizes that a broker's right to commissions vests when the insurance policy it procures is accepted by the insured; and that vested right of the broker remains viable as long as the procured policies remain in effect.

As a matter of Supreme Court law, the Panel's refusal to hew to this established State law abrogates the federalism concepts enunciated in *Erie*. Under *Erie*, when a federal court exercises its diversity jurisdiction over State law claims, "the outcome in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988), quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945). Avoiding judge-made rules in federal court which undermine a litigant's rights which it otherwise would possess under State law promotes comity and federalism, discourages forum shopping and acknowledges that the pronouncements of State courts on the substantive rights of its citizens are expressions of their own sovereignty. *Bush v. Gore*, 542 U.S. 692, 740-742 (2000) (Rehnquist, C.J., concurring). See Friendly, H., *In Praise of Erie—And the New Federal Common Law*, 39 N.Y.U.L. Rev. 383, 408 n.122 (1964).

As the Court wrote in *Day Zimmerman, Inc. v. Challoner*, 423 U.S. 3, 4 (1975), "[a] federal court in a diversity case is *not* free to engraft onto those state rules [and decisions] exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.* (emphasis supplied). Accord, *In re Ford Motor Co.*, 483 F. Supp. 3d 838, 849-

850 (C.D. Cal. 2020) (federal court sitting in diversity must honor the contours of State law as set forth by the State's highest court and "is not free to create new exceptions to it.").

By rejecting any notion of an implied contract between the parties, by ruling that there was no evidence of an insurance industry custom or practice of implying a promise by GSK to pay petitioner's commissions for as long as it benefitted from the policies petitioner procured, the Panel refused to apply bedrock State law holding that petitioner is entitled to its lost commissions as the result of GSK's inequitable, unfair and wrongful conduct in switching brokers solely in order to avoid paying petitioner its earned commissions while, at the same time, keeping in place those policies petitioner procured.

Finally, the Panel could have certified the question to the Pennsylvania Supreme Court *sua sponte* if it had any doubts on this score. See, e.g., *Lehman Brothers, v. Schein*, 416 U.S. 386, 390-391 (1974); *Clay v. Sun Insurance Office*, 363 U.S. 207, 210-212 (1960).

In the course of obtaining group insurance coverage for its employee, GSK could have changed the coverage petitioner procured for it by cancelling those policies and replacing them with new policies with new carriers. It could also have terminated those policies and requested new policies by the same carriers; or it could have sought amendments to those policies so drastic that they constituted new policies of insurance by the same carriers. All of these changes would have

been sufficient to break the causal chain from petitioner, the vesting broker.

Yet GSK did none of these things. Instead, satisfied with petitioner's brokering services over the years but seeking to avoid paying it the commissions it has earned, GSK's newly appointed benefits manager decided to sabotage their agreement by switching to a broker who charges no commissions at all while keeping in place the policies petitioner procured. This it cannot do under settled Pennsylvania law.

This Court has not hesitated to reverse the court of appeals when it ignores well established law. See, e.g., *Kisela v. Hughes*, 584 U.S. ___; 138 S.Ct. 1148 (2018) (*per curiam*). It should do so here.

CONCLUSION

For all of the reasons stated herein, a writ of certiorari should issue to review and vacate the judgment of the court of appeals, apply the substantive law of Pennsylvania to this controversy, remanding the matter to the district court for the Eastern District of Pennsylvania for a trial on the merits of the petitioners' claim for breach of contract; or provide petitioner with such other relief as is fair and just in the circumstances.

Respectfully submitted,

Dennis P. Derrick
Counsel of Record
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610
dennisderrick@comcast.net

Michael LaRosa
LaRosa Law Firm
959 West Chester Pike
Havertown, PA 19083
(610) 924-0999
ml@larosalawfirm.com

APPENDIX

2023 WL 3644476
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

SPECIAL RISK INSURANCE SERVICES, INC.,

Appellant

v.

GLAXOSMITHKLINE, LLC, trading as GlaxoSmithKline

No. 22-1891
Submitted Pursuant to Third Circuit L.A.R. 34.1(a) March 21, 2023(Opinion filed: May 25, 2023)

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. No. 2-19-cv-03002), District Judge: Honorable Nitza I. Quiñones Alejandro

Attorneys and Law Firms

Michael D. Larosa, Esq., Havertown, PA, for Appellant.
Kristofor T. Henning, Esq., Alison Morrissey, Esq., McCarter & English, Philadelphia, PA, for GlaxoSmithKline, LLC, trading as GlaxoSmithKline.

Before: RESTREPO, PHIPPS, and ROTH, Circuit Judges.

OPINION*

PHIPPS, Circuit Judge.

An insurance broker sued to recover commissions for policies that it brokered for a pharmaceutical company

with three insurance companies. The insurance companies paid the commissions on the policies for several years, until the pharmaceutical company terminated the broker as its designated broker of record. After that, although the pharmaceutical company continued to use the policies, the insurance companies ceased paying commissions. Now, in seeking post-termination commissions, the broker sues the pharmaceutical company – not the insurance companies that previously paid the commissions.

The District Court rejected the broker's claims and entered summary judgment for the pharmaceutical company. Through this timely appeal of that final order, *see* 28 U.S.C. § 1291, the broker argues that its claims for breach of contract and unjust enrichment should have proceeded to trial. For the reasons below, on *de novo* review, we will affirm the judgment of the District Court.

BACKGROUND

This dispute is between citizens of different states. Special Risk Insurance Services, Inc., ('Special Risk') is an insurance broker incorporated in Pennsylvania with a principal place of business in Blue Bell, Pennsylvania. GlaxoSmithKline, LLC, engaged primarily in the pharmaceutical business, is a citizen of Delaware. It is a limited liability company with a single member, a holding company that is incorporated in Delaware and has a principal place of business in Delaware. *See Johnson v. SmithKline Beecham Corp.*, 724 F.3d 337, 360 (3d Cir. 2013) (holding that GlaxoSmithKline Holdings is a citizen of Delaware); *see also Zambelli Fireworks Mfg. Co. v. Wood*, 592 F.3d 412, 420 (3d Cir. 2010).

From 1991 through 2015, GlaxoSmithKline designated Special Risk as its group insurance broker of record. In that role, Special Risk helped negotiate and purchase group insurance policies for GlaxoSmithKline's employees. Those included GlaxoSmithKline's group life insurance policies with Liberty Mutual Insurance Company and with ACE American Insurance Company as well as its disability insurance policy with Metropolitan Life Insurance Company. For several years, these insurance companies paid Special Risk annual commissions – ranging from $850,000 to $1.2 million in total each year – on GlaxoSmithKline's policies. *See* 40 Pa. Cons. Stat. §§ 310.1, 310.72–.73 (authorizing insurance entities to pay commissions to brokers).

In 2015, GlaxoSmithKline terminated Special Risk as its broker of record, but continued to use the group insurance policies that Special Risk had previously brokered. When GlaxoSmithKline terminated Special Risk, the three insurance companies stopped paying commissions to Special Risk – even though GlaxoSmithKline continued to use the policies.
To recover those commissions, Special Risk sued GlaxoSmithKline in the Court of Common Pleas, Philadelphia County. Special Risk raised claims for breach of contract, unjust enrichment, promissory estoppel, and tortious interference with contractual relations.

In response, GlaxoSmithKline removed the action to the United States District Court for the Eastern District of Pennsylvania, *see* 28 U.S.C. § 1441, due to diversity jurisdiction, *see* 28 U.S.C. § 1332. After discovery, GlaxoSmithKline moved for summary judgment. In applying Pennsylvania law, the District Court granted summary judgment to GlaxoSmithKline

on every claim. *See Special Risk Ins. Servs., Inc. v. GlaxoSmithKline, LLC*, 2022 WL 1093129, at *4–7 (E.D. Pa. Apr. 12, 2022). In this appeal, Special Risk disputes the rejection of its claims for breach of contract and unjust enrichment.

DISCUSSION

A. The District Court Did Not Err in Granting Summary Judgment to GlaxoSmithKline on the Claim for Breach of Contract.

The District Court did not find evidence of either an express or an implied-in-fact contract between Special Risk and GlaxoSmithKline for the payment of commissions. *See id.* at *5 (explaining that there is "no evidence" that GlaxoSmithKline "agreed—either orally, in writing, or by any inference" to compensate Special Risk for lost commissions); *see also Solis-Cohen v. Phoenix Mut. Life Ins. Co.*, 198 A.2d 554, 555–56 (Pa. 1964) (explaining that any right to commissions "is a matter of contract either express or implied"); 3 Steven Plitt et al., *Couch on Insurance* § 46:76 (3d ed. 2022) ("The insured ... is not liable to compensate an agent or broker unless there is an express or implied agreement to pay compensation."). And on that basis, it rejected Special Risk's breach-of-contract claim. *See Special Risk*, 2022 WL 1093129, at *5.

On appeal, Special Risk does not dispute the District Court's ruling that there was no express contract for a commission. Instead, Special Risk argues that GlaxoSmithKline – by designating Special Risk as its broker of record – impliedly promised continuing commissions on any brokered contracts to Special Risk. But Special Risk does not make a sufficient showing of

such an implied promise. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (explaining that summary judgment properly issues where "the nonmoving party has failed to make a sufficient showing on an essential element of her case"); *Gardiner v. V.I. Water & Power Auth.*, 145 F.3d 635, 645 (3d Cir. 1998) (affirming grant of summary judgment on implied-in-fact contract claim for want of a triable issue of material fact). The record does not indicate that GlaxoSmithKline ever paid commissions to Special Risk – not even when Special Risk was its broker of record. Nor is there any evidence of an industry custom or practice of implying such a promise.

Without such facts, Special Risk argues that, as a matter of law, it has a vested right to a brokerage commission upon the writing of a policy. Even if that is a correct statement of Pennsylvania law (an issue not addressed here), it would concern only the timing of when a commission becomes due. And for Special Risk to succeed on the law alone, it needs a legal rule that an entity, by designating a broker as its insurance broker of record, is liable for that broker's commissions. Yet Special Risk offers nothing in that respect. *Cf.* 40 Pa. Cons. Stat. §§ 310.1, 310.72–.73 (authorizing the *insurer* to pay commissions to a broker); *Solis-Cohen*, 198 A.2d at 554–56 (holding that a real estate broker could not recover commissions from a landlord, where the landlord's tenant – but not the landlord – had promised the commissions). Thus, the District Court did not err in rejecting Special Risk's claim for breach of an
implied contract.

B. The District Court Did Not Err in Rejecting Special Risk's Claim for Unjust Enrichment.

To succeed on its alternative claim for unjust enrichment, Special Risk must demonstrate that GlaxoSmithKline knowingly benefitted from the insurance companies' non-payment of the commissions such that GlaxoSmithKline's retention of such a benefit would be not just unfair, but unconscionable. *See Torchia v. Torchia*, 499 A.2d 581, 582 (Pa. Super. Ct. 1985) ("To sustain a claim of unjust enrichment, a claimant must show that the party against whom recovery is sought either 'wrongfully secured or passively received a benefit that it would be unconscionable for her to retain.' " (quoting *Roman Mosaic & Tile Co. v. Vollrath*, 313 A.2d 305, 307 (Pa. Super. Ct. 1973))); *see also Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 179 A.3d 1093, 1102 (Pa. 2018) (articulating three elements for an unjust enrichment claim); *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 180 (3d Cir. 2008) (same). Here, GlaxoSmithKline has knowingly benefitted through its retention of the group insurance policies brokered by Special Risk. But that is not sufficiently unjust under these circumstances. *See State Farm Mut. Auto. Ins. Co. v. Jim Bowe & Sons, Inc.*, 539 A.2d 391, 393 (Pa. Super. Ct. 1988) ("[T]he most significant requirement for recovery is that the enrichment is unjust."); *cf.* Restatement (Third) of Restitution and Unjust Enrichment § 1 cmt. d (2011) ("The third element ... referring to 'circumstances making it inequitable for the defendant to retain the benefit,' incorporates the whole of the question presented, making the rest of the formula superfluous."). Special

Risk already received millions of dollars in commissions for several years in return for brokering those policies. And it was the insurance carriers – not GlaxoSmithKline as the purchaser of the group insurance policies – who paid the commissions for those policies. Also, Special Risk, in negotiating with GlaxoSmithKline to be its broker of record, could have insisted that GlaxoSmithKline be liable for its commissions, but Special Risk did not do so. *See* Restatement (Third) of Restitution and Unjust Enrichment § 2 cmt. d (explaining that no claim for unjust enrichment exists when "the claimant neglects an opportunity to contract" for compensation for the benefit conferred). Thus, the degree of unfairness here does not rise to the level required for an unjust enrichment claim.

* * *

For the foregoing reasons, the judgment of the District Court will be affirmed.

Footnotes

*This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

2022 WL 1093129
Only the Westlaw citation is currently available.
United States District Court, E.D. Pennsylvania.

SPECIAL RISK INSURANCE SERVICES, INC.,
Plaintiff

v.

GLAXOSMITHKLINE, LLC, Defendant

CIVIL ACTION NO. 19-3002
Filed 04/12/2022

Attorneys and Law Firms

Michael D. Larosa, Larosa & Nastasi, Havertown, PA, for Plaintiff.
Kristofor T. Henning, Alison Morrissey, McCarter & English, LLP, Philadelphia, PA, for Defendant.

MEMORANDUM OPINION

NITZA I. QUIÑONES ALEJANDRO, District Judge

INTRODUCTION

This matter commenced in state court and was removed to this Court on the basis of diversity jurisdiction. In its complaint, Plaintiff Special Risk Insurance Services, Inc. ("Plaintiff"), asserts claims against Defendant GlaxoSmithKline, LLC, t/a GlaxoSmithKline ("Defendant"), for breach of contract, unjust enrichment, promissory estoppel, and tortious interference with contractual relations. [ECF 8-1].

Before this Court are Defendant's motion for summary judgment on all claims, [ECF 34], and

Plaintiff's response in opposition, [ECF 36], as well as Plaintiff's motion for partial summary judgement *only* on the breach of contract claim, [ECF 35], and Defendant's response in opposition, [ECF 37]. The issues raised in the motions have been fully briefed and are ripe for disposition. For the reasons set forth herein, Defendant's motion for summary judgment is granted, and Plaintiff's motion for partial summary judgment is denied.

BACKGROUND

When ruling on a motion for summary judgment, a court must consider all record evidence and supported relevant facts in the light most favorable to the non-movant. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Galena v. Leone*, 638 F.3d 186, 196 (3d Cir. 2011). The facts set forth herein are primarily drawn from the parties' statement of undisputed material facts, [ECF 34-4, and 35-4]. To the extent any fact is disputed, this Court has construed it in favor of Plaintiff. *See Transp. Ins. Co. v. Heathland Hosp. Grp., LLC*, 2017 WL 5593363, at *1 n.3 (E.D. Pa. Nov. 20, 2017), *aff'd*, 783 F. App'x 186 (3d Cir. 2019) (construing facts in favor of non-prevailing party where parties filed cross-motions for summary judgment). The facts relevant to the cross-motions are summarized as follows:

> Defendant is a pharmaceutical company incorporated in the State of Delaware. Plaintiff is an insurance broker incorporated in the Commonwealth of Pennsylvania. Plaintiff acted as Defendant's group insurance broker of record from 1991 until July 1, 2015, primarily to

negotiate employee group benefit insurance policies on behalf of Defendant.

Plaintiff negotiated four employee insurance policies on behalf of Defendant: two life insurance policies issued by Ace American Insurance Company ("Ace") that became effective in 2009, one life insurance policy issued by Metropolitan Life Insurance Company ("MetLife") that became effective on January 1, 2014, and one disability policy issued by Liberty Mutual that became effective on January 1, 2014. Plaintiff's president and Federal Rule of Civil Procedure ("Rule") 30(b)(6) representative, Anthony Liberatore ("Mr. Liberatore"), testified at a deposition that Plaintiff's yearly combined income from these four insurance policies was between approximately $850,000 and $1 million. After each policy was negotiated and accepted, Defendant paid each respective insurance company its insurance premiums. In turn, the insurance companies made payments to Plaintiff. Specifically, Ace paid Plaintiff base commissions though it had no written agreement with Plaintiff; MetLife paid Plaintiff base commissions consistent with a Non-Standard Commissions Agreement and supplemental compensation pursuant to a Supplemental Compensation Brochure; and Liberty Mutual paid Plaintiff base commissions and supplemental compensation without a written agreement and annual service fees pursuant to a two-page Service Fee Disclosure Agreement signed by Liberty Mutual, Plaintiff, and Defendant. The two-page Service Fee Disclosure Agreement provided, in

> part, for an annual fee of $125,000 paid by Liberty Mutual to Plaintiff, and it explicitly provided that Defendant would not be held liable for the payment of any fees. Outside of this two-page Service Fee Disclosure Agreement, the parties have not identified any writing signed by both Plaintiff and Defendant.

On July 1, 2015, Defendant terminated Plaintiff as broker of record, and the four insurance companies stopped making payments to Plaintiff. Defendant hired Mercer Health & Benefits, LLC, a Marsh and McLennan Company ("Mercer"), as its new broker of record "net of commissions," meaning Mercer did not receive broker commissions. Mercer, however, received supplemental compensation from each insurance company. On January 1, 2019, Defendant terminated one of the Ace life insurance policies and transferred it to MetLife. The other three insurance policies remain in effect.

In his deposition, Mr. Liberatore acknowledged that Defendant had the right to change broker of record whenever it wanted and that Plaintiff would not be paid if it was no longer broker of record. The MetLife Non-Standard Commissions Agreement mirrors that acknowledgement—noting that the payment of commissions was conditional on Plaintiff acting as broker of record. According to Mr. Liberatore, Defendant never promised to pay Plaintiff any type of payment, and Plaintiff has never been paid by any insured but rather has only been paid by the insurance company. Mr. Liberatore further testified that Defendant told him multiple times that Plaintiff would remain the broker of record as long as the policies were

the best and Plaintiff's services continued to meet Defendant's needs.

LEGAL STANDARD

Federal Rule of Civil Procedure ("Rule") 56 governs summary judgment motion practice. Fed. R. Civ. P. 56. Specifically, Rule 56 provides that summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Id.* at 56(a). A fact is "material" if proof of its existence or nonexistence may affect the outcome of the litigation, and a dispute is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248.

Under Rule 56, the movant bears the initial burden of informing the court of the basis for the motion and identifying those portions of the record that the movant "believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). This burden can be met by showing that the nonmoving party has "fail[ed] to make a showing sufficient to establish the existence of an element essential to that party's case." *Id.* at 322. After the movant has met its initial burden, summary judgment is appropriate if the nonmoving party fails to rebut the moving party's claim by "citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations ..., admissions, interrogatory answers, or other materials" that show a genuine issue of material fact or by "showing that the materials cited do not establish the absence or presence of a genuine dispute." Fed. R. Civ. P. 56(c)(1)(A)–(B).

The nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The nonmoving party may not rely on "bare assertions, conclusory allegations or suspicions," *Fireman's Ins. Co. of Newark v. DuFresne*, 676 F.2d 965, 969 (3d Cir. 1982), nor rest on the allegations in the pleadings, *Celotex*, 477 U.S. at 324. Rather, the nonmoving party must "go beyond the pleadings" and "designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* (citations omitted).

In deciding cross-motions for summary judgment, courts apply the same standards as those applied when only one party has filed a summary judgment motion. *Cincinnati Ins. Co. v. Devon Intern., Inc.*, 924 F. Supp. 2d 587, 589 n.3 (E.D. Pa. 2013). "When confronted with cross-motions for summary judgment, the 'court must rule on each party's motion on an individual and separate basis, determining, for each side, whether a judgment may be entered in accordance with the Rule 56 standard.' " *Anderson v. Franklin Inst.*, 185 F. Supp. 3d 628, 635 (E.D. Pa. 2016) (quotations and citations omitted).

Generally, "where the facts are in dispute, the question of whether a contract was formed is for the jury to decide." *Quandry Sols. Inc. v. Verifone Inc.*, 2009 WL 997041, at *5 (E.D. Pa. Apr. 13, 2009) (quoting *Ingrassia Constr. Co. v. Walsh*, 486 A.2d 478, 482 (1984)). "However, '[t]he question of whether an undisputed set of facts establishes a contract is a matter of law.' " *Id.* (quoting *Mountain Props., Inc. v. Tyler Hill Realty Corp.*, 767 A.2d 1096, 1101 (Pa. Super. Ct. 2001)); *see also Legendary Art, LLC v. Godard*, 888 F. Supp. 2d 577, 585 (E.D. Pa. 2012) (citing *Szymanski*

v. Sacchetta, 2012 WL 246249, at *4 (E.D. Pa. Jan 26, 2012)). As noted, while most of the facts that are material to the parties' cross-motions are undisputed, where disputed, this Court has construed the facts in favor of Plaintiff.

DISCUSSION

Here, Defendant moves for summary judgment on all claims—breach of contract, unjust enrichment, promissory estoppel, and tortious interference—on various grounds, including that no contract existed between Plaintiff and Defendant; that Plaintiff's claims are contrary to Pennsylvania insurance law; and that Plaintiff has failed to point to any facts or law requiring Defendant, upon the termination of Plaintiff as broker of record, to either terminate the Plaintiff-negotiated insurance policies or assume liability for the payments the insurance companies were no longer making to Plaintiff. In response, Plaintiff argues that a contract between the parties exists and that precedent supports its claims for relief.

This Court will address the parties' cross-motions jointly as they relate to the breach of contract claim and then address the remaining arguments in Defendant's motion.

I. Breach of Contract

To prevail on a claim of breach of contract, there must be proof of: "(1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract[,] and (3) resultant damages." *Ware v. Rodale Press, Inc.*, 322 F.3d 218, 225 (3d Cir. 2003) (quoting *CoreStates Bank, N.A. v.*

Cutillo, 723 A.2d 1053, 1058 (Pa. Super. Ct. 1999)). Generally, for a valid contract to exist, there must be an offer, an acceptance, and consideration. *Muhammad v. Strassburger, McKenna, Messer, Shilobod & Gutnick*, 587 A.2d 1346, 1349 (Pa. 1991). The parties to the agreement must manifest an intent to be bound by the terms of the agreement, which must be sufficiently definite to be enforced. *Channel Home Ctrs., Div. of Grace Retail Corp. v. Grossman*, 795 F.2d 291, 298–99 (3d Cir. 1986) (citing *Lombardo v. Gasparini Excavating Co.*, 123 A.2d 663, 666 (Pa. 1956)). "For a contract to be enforceable, the nature and extent of the mutual obligations must be certain, and the parties must have agreed on the material and necessary details of their bargain." *Lackner v. Glosser*, 892 A.2d 21, 30 (Pa. Super. Ct. 2006). That is, the parties must reach a "meeting of the minds" as to the essential terms, such as the price and contract duration. *See Brisbin v. Superior Valve Co.*, 398 F.3d 279, 293 (3d Cir. 2005) (agreeing with magistrate judge that no contract was formed because there was no agreement on essential terms); *Refuse Mgmt. Sys., Inc. v. Consol. Recycling & Transfer Sys., Inc.*, 671 A.2d 1140, 1146 (Pa. Super. Ct. 1996).

Contracts may be express and formed through oral statements or writings, or they may be implied-in-fact and formed based on behavior and circumstances. "[A] contract may be manifest orally, in writing, or as an inference from the acts and conduct of the parties." *Meyer, Darragh, Buckler, Bebenek & Eck, P.L.L.C. v. Law Firm of Malone Middleman, P.C.*, 137 A.3d 1247, 1258 (Pa. 2016) (quoting *J.F. Walker Co., Inc. v. Excalibur Oil Grp., Inc.*, 792 A.2d 1269, 1272 (Pa. Super. Ct. 2002)).

As noted, a central issue in the cross-motions for summary judgment is whether a contract—either written, oral, or implied-in-fact—exists that obligates Defendant to pay Plaintiff the alleged loss of income incurred after Defendant terminated Plaintiff's position as the broker of record.

A. Written Contract

Based on the undisputed facts, including Mr. Liberatore's deposition testimony, there is no question that Plaintiff was Defendant's broker of record for many years. During those years, Plaintiff, as the broker of record, obtained various insurance policies for Defendant to provide its employees benefits. Defendant paid the premiums directly to the insurance companies, and these insurance companies directly paid Plaintiff commissions, compensation, and fees. Plaintiff admits that no written contract existed between Plaintiff and Defendant obligating Defendant to pay Plaintiff commissions, compensation, or fees on the various insurance policies. Plaintiff also admits that Defendant had the right to terminate Plaintiff as the broker of record at any time. (Dep. of Anthony Liberatore, ECF 34-5, at p. 105).

Based on these operative and undisputed facts, this Court finds that no written contract existed between the parties obligating Defendant to compensate Plaintiff for its alleged loss of income following its termination as broker of record.

B. Oral Contract or Implied-in-Fact Contract

Plaintiff argues that an oral contract or an implied-in-fact contract existed between the parties

that required Defendant, upon termination of Plaintiff as broker of record, to either terminate the Plaintiff-negotiated insurance policies or pay Plaintiff for the alleged lost income derived from the insurance companies. Plaintiff's overarching contention is that "inherent in insurance law is the legal axiom that a broker's commissions are earned when the brokered policy is accepted and entered into by the insured for *as long as the policy remains in effect*," meaning as long as "the insured continues to pay premiums and has not cancelled the policy." (Pl.'s Mot. for Partial Summ. J., ECF 35, at p. 8) (emphasis added). As explained below, based on the facts and the law, Plaintiff's contention is unsupported.

The distinction between express and implied contracts lies "in the mode of manifesting assent." Restatement (Second) of Contracts § 4 (Am. Law Inst. 1981). "A contract implied in fact is an actual contract which arises where the parties agree upon the obligations to be incurred, but their intention, instead of being expressed in words, is inferred from acts in the light of the surrounding circumstances." *Elias v. Elias*, 428 Pa. 159, 161 (Pa. 1968). The elements necessary to form a contract implied-in-fact are identical to those necessary to form an express contract. *Penn. Cent. Transp. Co.*, 831 F.2d 1221, 1227 (3d Cir. 1987).

Plaintiff's claim for breach of an implied-in-fact or oral contract fails for the same reasons its breach of contract fails—there is no evidence that any contract giving rise to any payment obligation existed between Plaintiff and Defendant. As noted, Plaintiff admits that it never charged Defendant for any payment related to the insurance policies negotiated on behalf of Defendant and, further, that Defendant never promised to pay Plaintiff any such payment. Plaintiff's income was paid

directly by the various insurance companies when Plaintiff was the broker of record, and such payments continued to be made by those insurance companies for as long as Plaintiff remained the broker of record.

To be clear, Plaintiff does not argue that it did not receive income from when the policies were brokered until the time it ceased being the broker of record. Instead, Plaintiff argues that once Defendant changed the broker of record, Plaintiff ceased receiving compensation from the insurance companies, and, therefore, Defendant either had to terminate the policies brokered by Plaintiff or pay Plaintiff the income it had been receiving from the insurance companies. Plaintiff's argument is misguided.

Plaintiff cites to no evidence in the record that establishes that Defendant agreed—either orally, in writing, or by any inference—that in the event Defendant chose to change the broker of record, Defendant would either terminate the insurance policies or compensate Plaintiff for lost income. Nor does Plaintiff cite any law that supports such a proposition. Notably, the case law that Plaintiff cites is distinguishable. For example, Plaintiff cites to *Schlesinger v. Star Insurance Co. of America*, in which the Superior Court of Pennsylvania held:

> ***An insurer*** who agrees with an agent that the latter shall receive a percentage of money or commissions to be paid upon a contract secured through such agent for the benefit of both cannot, without the agent's expressed consent, dispose of his own right to receive the fund and thereby deprive the agent of his right to compensation as stipulated in the agency contract. The principal [***insurer***] cannot by such

> act obtain the full benefit of the agent's labor and so deprive him of all compensation or reward for his service.

100 Pa. Super. 584, 587 (1931) (emphasis added). The defendant in *Schlesinger* was an insurance company, not an insured, and the defendant therein had entered into a contract with the plaintiff to pay the plaintiff commissions.

Other cases cited by Plaintiff are similarly inapposite. In *Commonwealth of Pennsylvania, Insurance Department v. Safeguard Mutual Insurance Co.*, the plaintiff was not a broker, the defendant was not an insured, the action was brought by the government to determine whether an insurance company should be closed, and the broker's commission was not indefinite in nature but rather an up-front payment that the broker could waive its right to. 336 A.2d 674, 679, 685 (Pa. Commw. Ct. 1975). In *Sheppard v. Old Heritage Mutual Insurance Co.*, the plaintiff was not a broker, the defendant was not an insured, and the government brought the action to liquidate the insurance company. 405 A.2d 1325, 1328 (1979). In *Pennsylvania Association of Life Underwriters v. Foster*, the defendant was not an insured, and the issues in the case related to license revocation, liquidation, and an unauthorized insurer. 645 A.2d 907, 908 (Pa. Commw. Ct. 1994). Finally, in *Keim v. O'Brien*, the defendant was not an insured, and the proceedings were related to a bankruptcy. 46 F. Supp. 729, 729–30 (E.D. Pa. 1942).

Plaintiff and Defendant both cite to *Loomis Co. v. KEYW Corp.* as instructive.[1] There, the plaintiff was an insurance broker, and the defendant was an insured that decided to renew an insurance policy with the

same insurance company but with another broker, the policy having previously been negotiated by the plaintiff. 2015 WL 2237046, at *1–2 (E.D. Pa. May 13, 2015). The *Loomis* court held that "[a]n insured party is not liable to compensate an insurance broker unless there is an express or implied agreement to pay compensation," and the court found that the "record contain[ed] no evidence that [the insured] had agreed to pay [the broker]." *Id.* at *3 (citing Couch on Insurance 3d § 46:76). Likewise, here, Plaintiff has not established any obligation by Defendant to pay Plaintiff's alleged loss of commission, compensation, or fees. Given that none of the case law Plaintiff cites supports its position and Plaintiff cannot point to any statements or circumstances that support the proposition that Defendant agreed to pay Plaintiff any loss of income in the event Defendant did not terminate the insurance policies when changing brokers, and based on the operative facts of record, this Court finds that no contract—either express or implied-in-fact—exists that requires Defendant to pay Plaintiff its alleged loss of income or terminate the policies. Because no such contract exists, this Court concludes that no breach of contract occurred. Accordingly, Defendant's motion for summary judgment on Plaintiff's breach of contract claim is granted, and Plaintiff's partial motion for summary judgment is denied.

II. Unjust Enrichment

In support of its claim for unjust enrichment, Plaintiff argues that it conferred the benefit of advantageous insurance policies upon Defendant and argues that Defendant continues to enjoy that benefit as well as a reduction of premiums as Plaintiff's

expense. For the reasons stated below, Plaintiff's unjust enrichment claim fails.

"To establish a claim for unjust enrichment under Pennsylvania law, a plaintiff must present facts that establish '(1) a benefit conferred on the defendant by the plaintiff; (2) appreciation of such benefits by the defendant; and (3) acceptance and retention of such benefit under circumstances such that it would be inequitable for defendant to retain the benefit without payment to the plaintiff.' " *EBC, Inc. v. Clark Bldg. Sys., Inc.*, 618 F.3d 253, 273 (3d Cir. 2010) (quoting *AmeriPro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. Ct. 2001)). The most important consideration in the unjust enrichment analysis is whether the enrichment is "unconscionable;" simply benefitting a party does not allow recovery. *Id.* at 273–74. A plaintiff must show that the defendant "either wrongfully secured or passively received a benefit that ... would be unconscionable for [it] to retain." *Sovereign Bank v. BJ's Wholesale Club, Inc.*, 533 F.3d 162, 180 (3d Cir. 2008). An unjust enrichment claim can only survive if the claiming party has a reasonable expectation of being paid by the party benefitted. *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 228 F.3d 429, 447 (3d Cir. 2000) (affirming dismissal of unjust enrichment claim where plaintiffs "did not have a reasonable expectation of payment" from defendants); *Burton Imaging Grp. v. Toys "R" Us, Inc.*, 502 F. Supp. 2d 434, 441 (E.D. Pa. 2007) (granting summary judgment because plaintiff failed to submit any evidence that it expected payment or that such payment was reasonable).

Here, there is no dispute that Defendant had the right to change its broker of record. Applying the unjust enrichment definition used by Pennsylvania

courts, this Court finds that Plaintiff has failed to show that it had a reasonable expectation of being paid by the party benefitted—here, Defendant. The evidence further negates that expectation, as Defendant never paid Plaintiff any commission, compensation, or fees. Additionally, such an outcome would "disrupt the ability of an insured party to change brokers when it so desires." *Loomis*, 2015 WL 2237046, at *4. Far from being unconscionable, the ability of an insured to use discounts negotiated by one broker to further negotiate an insurance policy with another broker is "standard practice in procurement." *Id.* Defendant's retention of the benefit provided to it by the Plaintiff-negotiated insurance policies is not inequitable. Under these circumstances, Plaintiff's claim for unjust enrichment fails. Accordingly, Defendant's motion for summary judgment on this claim is granted.

III. Promissory Estoppel

In the complaint, Plaintiff asserts a claim for promissory estoppel. Under Pennsylvania law, a plaintiff asserting a promissory estoppel claim bears the burden of proving the following elements: (1) the promisor made a promise reasonably expected to induce action or forbearance by the promisee, (2) the promise induced action or forbearance by the promisee, and (3) injustice can only be avoided by enforcing the promise. *Ankerstjerne v. Schlumberger, Ltd.*, 155 F. App'x 48, 51 (3d Cir. 2005) (citing *Carlson v. Arnot-Ogden Mem'l Hosp.*, 918 F.2d 411, 416 (3d Cir. 1990)). A commitment that is a vague or broad implied promise is not enough; the promise must be an express one. *C & K Petroleum Prod., Inc. v. Equibank*, 839 F.2d 188, 192 (3d Cir. 1988).

Plaintiff argues that Defendant promised that Plaintiff would remain the broker of record as long as the policies were the best and Plaintiff's services continued to meet its needs. Defendant disputes this contention. Considering that Defendant was able to negotiate lower premiums under the new broker of record, it is apparent that Defendant's needs were not being fully met. Nonetheless, because Plaintiff admits that Defendant never promised to pay Plaintiff any commissions, compensations, or fees, Defendant's motion for summary judgment on Plaintiff's claim for promissory estoppel is granted.

IV. Tortious Interference

Defendant argues that Plaintiff's claim for tortious interference was untimely filed. This Court agrees. Under Pennsylvania law, a claim of tortious interference with contractual relations must be brought within two years of the alleged tortious conduct. 42 Pa. Cons. Stat. § 5524; *CBG Occupational Therapy, Inc. v. RHA Health Servs. Inc.*, 357 F.3d 375 (3d Cir. 2004). Defendant terminated Plaintiff as broker of record effective July 1, 2015. Shortly thereafter, Plaintiff stopped receiving compensation related to the various insurance policies. Plaintiff's complaint, which included the claim of tortious interference with contractual relations, was filed in 2019. Because more than two years passed between Plaintiff's termination and the filing of the complaint, Defendant's motion for summary judgment on this claim is granted.

CONCLUSION

For the reasons set forth, this Court finds that Plaintiff cannot maintain its claims for breach of contract, unjust enrichment, promissory estoppel, or tortious interference. Accordingly, Defendant's motion for summary judgment on all of Plaintiff's claims is granted, and Plaintiff's motion for partial summary judgment is denied. Orders consistent with this Memorandum Opinion follow.[2]

Footnotes

1*Loomis* discusses a specific provision, § 46:76, from a treatise titled *Couch on Insurance*. To the extent Plaintiff relies on Couch's § 46:76 generally, outside of what is cited in *Loomis*, such reliance is not supported by the relevant cases cited by Couch in § 46:76 or in the case law of the United States Court of Appeals for the Third Circuit or the Commonwealth of Pennsylvania.

2Because this Court finds for Defendant on all of Plaintiff's claims for the reasons herein stated, this Court need not address Defendant's arguments based on 40 Pa. Cons. Stat. § 310.72–73, payment and receipt of insurance commissions, or 33 Pa. Cons. Stat. § 3, promise to answer for debt of another.

7/28/23

SPECIAL RISK INSURANCE SERVICES, INC.,
Appellant

v.

GLAXOSMITHKLINE, LLC, trading as
GlaxoSmithKline

D.C. No. 2-19-cv-03002

SUR PETITION FOR REHEARING Present: JORDAN, SHWARTZ, RESTREPO, BIBAS, PORTER, MATEY, PHIPPS, FREEMAN, MONTGOMERY-REEVES, CHUNG and ROTH* , Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,
s/ Peter J. Phipps Circuit Judge

Footnote

* Judge Roth's vote is limited to panel rehearing only.