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NATIONAL UNION FIRE INSURANCE COMPANY
OF PITTSBURGH, PA AND LIBERTY MUTUAL
FIRE INSURANCE COMPANY



Christy Settle
Trust Officer

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717.339.5062
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Christy Settle
Trust Officer
717.339.5058
csettle@acnb.com

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Trust Officer
717.339.5218
dlittle@acnb.com

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MILLER CHEMICAL & FERTILIZER, LLC VS. NATIONAL
UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA
AND LIBERTY MUTUAL FIRE INSURANCE COMPANY

1. Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement.

2. Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning. The task of interpreting a contract is generally performed by a court rather than by a jury.

3. The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured. In determining the reasonable expectations of the insured, courts must examine the totality of the insurance transaction involved.

4. The hostile fire exception includes the phrase “*arising out of* heat, smoke or fumes from a ‘hostile fire.’” “‘Arising out of’ means casually connected with, not proximately caused by.”

5. ‘But for’ causation is a “cause and result relationship.”

6. Clearly the phrase “arising out of” “is reasonably susceptible to more than one construction and meaning.”

7. Because the Liberty Mutual policy does not define “arising out of” in its definitions section and the fact that the definitions section defines several other terms used in the policy, this Court must rule that the parties intended the plain language meaning under Pennsylvania law.

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY,
PENNSYLVANIA, CIVIL 2016-S-174, MILLER CHEMICAL &
FERTILIZER, LLC VS. NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA AND LIBERTY MUTUAL
FIRE INSURANCE COMPANY.

Paul W. Minnich, Esq., Attorney for Plaintiff

Andrew R. Running, Esq., Attorney for Plaintiff

Philip D. Priore, Esq., Attorney for Defendant National Union

Richard W. Bryan, Esq., Attorney for Defendant National Union

John C. Sullivan, Esq., Attorney for Defendant Liberty Mutual

Campbell, J., November 15, 2016

OPINION

Before this Court is Plaintiff Miller Chemical & Fertilizer, LLC's Motion for Partial Summary Judgment filed June 13, 2016. For the reasons stated herein, the attached Order granting in part, denying in part Plaintiff's Motion for Partial Summary Judgment is entered.

This cause of action arises from the June 8, 2015 fire that occurred at the Miller Chemical Plant in Hanover, Adams County, Pennsylvania. The entire plant was destroyed by the fire and over three million gallons of water were required to extinguish the flames. As a result, runoff water, which contained ash, soot, fire suppression chemicals, and remnants of the Miller Chemical plant, flowed onto Miller Chemical's property and surrounding third-party properties. To prevent further pollution of surrounding third-party properties, Miller Chemical had Environmental Products & Services of Vermont, Inc. (EPS) perform emergency cleanup procedures to control and minimize both the on-site and off-site surface water pollution. EPS's efforts mitigated but did entirely prevent the third-party property damage that ensued.

Under the Pennsylvania Rules of Civil Procedure, a court may enter summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. **Pa. R. Civ. P. 1035.2; *Strine v. Commonwealth***, 894 A.2d 733, 737 (Pa. 2006). Summary judgment is only appropriate where the pleadings, depositions, answers to interrogatories, omissions and affidavits, and other materials demonstrate that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. ***Roche v. Ugly Duckling Car Sales, Inc.***, 879 A.2d 785, 789 (Pa. Super. 2005) (quotations and citations omitted). The burden of demonstrating the lack of any genuine issue of material fact falls upon the moving party, and, in ruling on the motion, the court must consider the record in the light most favorable to the non-moving party. ***Id.*** However, where a motion for summary judgment has been supported with depositions, answers to interrogatories, or affidavits, the non-moving party may not rest on the mere allegations or denials in its pleadings. ***Accu-Weather, Inc. v. Prospect Commc'ns Inc.***, 644 A.2d 1251, 1254 (Pa. Super. 1994). Rather, the non-moving party must by affidavit or in some other way provided for within the Rules of Civil Procedure, set forth specific facts showing that a genuine issue of

material fact exists. *Id.* Summary judgment is only appropriate in those cases which are free and clear from doubt. *McConnaughey v. Bldg. Components, Inc.*, 637 A.2d 1331, 1333 (Pa. 1994).

Plaintiff alleges that this Court should grant partial summary judgment for the following issues: (1) the pollution exclusion in the Liberty Mutual Policy does not apply to bar coverage for the off-site third-party property damage caused by the June 8, 2015 fire; (2) Sub-part (2) of the pollution exclusion does not apply to limit Miller's recovery under the Liberty Mutual Policy; (3) the costs Miller expended to prevent, mitigate, and restore third-party properties as a direct result of the June 8, 2015 fire water runoff are recoverable under the Liberty Mutual Policy; (4) the National Union Policy provides coverage for third-party property damage liability arising from the June 8, 2015 fire; (5) the National Union Policy provides time element pollution coverage regardless of whether there is available scheduled underlying insurance; and (6) the National Union Policy covers the costs of preventing, mitigating, and restoring third-party property damage caused by the June 8, 2015 fire water runoff regardless of whether these actions are also the subject of a government request or statutory requirement. Miller Chemical and National Union have since settled their lawsuit. Accordingly, Plaintiff's issues related to the National Union Policy (issues 4, 5, & 6) will not be addressed.

Here, issues 1 and 3 are interrelated and will be addressed together. In issue 1, Plaintiff alleges that the pollution exclusion in the Liberty Mutual Policy does not apply to bar coverage for the off-site third-party property damage caused by the June 8, 2015 fire. The policy's pollution exclusion states that this insurance does not apply to

f. Pollution

(1) 'Bodily injury' or 'property damage,' which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release, or escape of 'pollutants' at any time. This exclusion does not apply to 'bodily injury' or 'property damage' arising out of heat, smoke, or fumes from a 'hostile fire'...¹

In order to determine whether or not the policy covers damage to third-party properties as a result of a hostile fire, this Court must

¹ Liberty Mutual Policy Total Pollution Exclusion with a Hostile Fire Exception, Exclusion f (1).

analyze the language of the applicable insurance policy. “Where a provision of a policy is ambiguous, the policy provision is to be construed in favor of the insured and against the insurer, the drafter of the agreement.” *Standard Venetian Blind Co. v. American Empire Ins. Co.*, 469 A.2d 563, 566 (Pa. 1983). “Where, however, the language of the contract is clear and unambiguous, a court is required to give effect to that language.” *Id.* at 566. “Contract language is ambiguous if it is reasonably susceptible to more than one construction and meaning.” *Pennsylvania Nat. Mut. Cas. Ins. Co. v. St. John*, 106 A.3d 1, 24 (Pa. 2014) (citing *Lititz Mut. Ins. Co. v. Steely*, 785 A.2d 975, 978 (Pa. 2001)). “The task of interpreting a contract is generally performed by a court rather than by a jury.” *Id.* at 566. See also *Graham v. Harleysville Ins. Co.*, 632 A.2d 939, 942 (Pa. Super. 1993). “In interpreting the language of a policy, the goal is to ascertain the intent of the parties as manifested by the language of the written instrument.” *Wagner v. Erie Ins. Co.*, 801 A.2d 1226, 1231 (Pa. Super. 2002) (internal quotations and citations omitted)).

The plain language of the pollution exclusion *supra* indicates that in order for the Liberty Mutual Policy to cover property damage to third-party properties, Plaintiff must show that the June 8, 2015 fire was a hostile fire, that the water run-off contained pollutants which caused property damage to third-party properties, and that the pollution from the hostile fire arose out of heat, smoke, or fumes. Plaintiff does not argue that the language of the Liberty Mutual Policy is ambiguous but argues that “the Court can resolve this dispute without going beyond the four corners of the insurance contract[.]”² Plaintiff argues that the proper analysis of the plain language of the policy should be construed to the insured’s reasonable expectations of the policy’s coverage. “The proper focus regarding issues of coverage under insurance contracts is the reasonable expectation of the insured.” *Britamco Underwriters, Inc. v. Weiner*, 636 A.2d 649, 651 (Pa. Super. 1994). “In determining the reasonable expectations of the insured, courts must examine the totality of the insurance transaction involved.” *Id.* at 651. “However, while reasonable expectations of the insured are the focal points in interpreting the contract language of insurance policies, an insured may not complain that his or her reasonable expectations were

² Plaintiff’s Motion for Partial Summary Judgement, p. 2.

frustrated by policy limitations which are clear and unambiguous.” *Id.* at 651 (citing *Bateman v. Motorists Mut. Ins. Co.*, 590 A.2d 281, 283 (Pa. 1991) (internal citations omitted)).

The Liberty Mutual policy acknowledges that a hostile fire is “a fire that becomes uncontrollable or breaks out from where it was intended to be.”³ The policy also defines pollutants as “any solid, liquid, gaseous, or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste.” *Id.* The hostile fire exception includes the phrase “arising out of heat, smoke, or fumes from a ‘hostile fire.’”⁴ “[A]rising out of” means causally connected with, not proximately caused by.” *Manufacturers Cas. Ins. Co. v. Goodville Mut. Cas. Co.*, 170 A.2d 571, 573 (Pa. 1961). See also *Madison Const. Co. v. Harleysville Mut. Ins. Co.*, 735 A.2d 100, 110 (Pa. 1999); *McCabe v. Old Republic Ins. Co.*, 228 A.2d 901, 903 (Pa. 1967). ‘But for’ causation is “a cause and result relationship.” *Manufacturers Cas. Ins. Co.*, 170 A.2d at 573.

Both parties agree that the June 8, 2015 fire was a hostile fire. Three million gallons of water were required to extinguish the flames that engulfed the Miller Chemical plant. The hostile fire exception contained in the Liberty Mutual Policy ambiguously says that it covers property damage “arising out of heat, smoke, or fumes from a ‘hostile fire.’” The policy fails to unambiguously specify what the phrase “arising out of” is intended to mean despite the fact that the phrase is used numerous times in the policy. This Court also notes that at Oral Argument held on October 26, 2016, both parties articulated different interpretations of what the phrase “arising out of” means. Clearly, the phrase “arising out of” “is reasonably susceptible to more than one construction and meaning.” *Pennsylvania Nat. Mut. Cas. Ins. Co.*, 106 A.3d at 24. The hostile fire exception does not say, “caused by heat, smoke, or fumes...” If Liberty Mutual had intended the hostile fire exception to apply only to damages caused by heat, smoke, or fumes, it could have written the exception with that language. Instead, Liberty Mutual chose to accept damages “arising out of heat, smoke, or fumes...”

This Court is tasked with interpreting what the parties intended as

³ Liberty Mutual Policy TB2-631-510142-035, Section V Definitions

⁴ Liberty Mutual Policy Total Pollution Exclusion with a Hostile Fire Exception, Exclusion f. (emphasis added)

manifested by the language of the policy. Because the Liberty Mutual Policy does not define “arising out of” in its definitions section, and the fact that the definitions section defines several other terms used in the policy, this Court must rule that the parties intended the plain language meaning under Pennsylvania law. The runoff water that resulted from extinguishing the flames contained pollutants that arose out of the fire. But for the fire i.e. heat and smoke, the three million gallons of water would not have been sprayed onto the plant, the runoff water would not have been created, and pollutants would not have contaminated Plaintiff’s property or surrounding third-party properties. This is clearly a cause and result relationship. The ambiguous language used in the hostile fire exception to the pollution exclusion must be construed in favor of the insured, the Plaintiff. Therefore, the pollution exclusion does not preclude coverage for the off-site third-party property damage.

Plaintiff, in issue 3, alleges that the costs associated with the prevention and mitigation of contamination, and the restoration of third-party properties resulting from the June 8, 2015 fire are covered under the Liberty Mutual insurance policy. The Liberty Mutual Policy has a damage to property exclusion that reads as follows:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration, or maintenance of such property for any reason, including prevention of injury to a person or damage to another’s property.⁵

The damage to property exclusion *supra* unambiguously states that the Liberty Mutual Policy excludes coverage for damage to property of the insured, even when that damage resulted from an attempt to prevent or mitigate damage to third-party properties. The policy clearly and unambiguously states that it excludes prevention and mitigation costs and expenses, so this Court must give effect to that language. Plaintiff may not complain its “reasonable expectations were frustrated by policy limitations which are clear and unambiguous.” *Britamco Underwriters*, 636 A.2d at 651. The Liberty Mutual Policy does not, however, exclude the costs associated with the restoration of third-party property damage caused by

⁵ Liberty Mutual Policy Damage to Property Exclusion, j (1)

pollutants arising from a hostile fire as discussed supra.⁶ Therefore, the damage to property exclusion unambiguously excludes costs and expenses related to the work done on Plaintiff's property to mitigate or prevent damage to third-party properties.

Lastly, in issue 2, Plaintiff alleges that sub-part (2) of the pollution exclusion does not apply to limit its recovery under the Liberty Mutual Policy. Sub-part (2) of the pollution exclusion reads as follows:

This insurance does not apply to:

(2) Any loss, cost, or expense arising out of any:

(a) Request, demand, order or statutory, or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify, or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(b) Claim or suit by or on behalf of a government authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of "pollutants."⁷

Plaintiff argues that sub-part (2) does not preclude coverage for third-party property damage caused by a hostile fire even though sub-part (2) excludes "any loss, cost, or expense arising out of..." *Id.* As Plaintiff points out, construing sub-part (2) to prevent coverage for any loss, cost, or expense is inconsistent because sub-part (2) is a part of the Total Pollution Exclusion with a Hostile Fire Exception. The intent of the parties could not have been to have a hostile fire exception under sub-part (1) and then say that any loss, cost, or expense to test for, monitor, clean up, etc. third-party property damage is excluded under sub-part (2). If that was the intent of the parties, then there would be no hostile fire exception to provide relief for property damage in sub-part (1); there would merely be a total pollution exclusion. This inconsistency in the Total Pollution Exclusion renders the language of sub-part (2) ambiguous. Accordingly, this Court must construe the language in favor of the

⁶ This Court notes that to date, discovery has not begun and that Defendant raises the argument that Plaintiff has failed to produce any evidence of third-party property damage. Although formal discovery has not yet begun, this Court is tasked with interpreting the language of the policy to determine its coverage. After this Court determines the policy's coverage and discovery has been completed, Defendant may then argue that Plaintiff has failed to produce evidence of third-party property damage if appropriate.

⁷ Liberty Mutual Policy Total Pollution Exclusion with a Hostile Fire Exception, Exclusion f (2).

insured. Therefore, sub-part (2) of the Total Pollution Exclusion does not bar Plaintiff from recovering for expenses and costs to restore third-party properties.

In considering the evidence in the light most favorable to the non-moving party, the Defendants, this Court finds that Plaintiff, the moving party, has demonstrated that the damage to and restoration of third-party properties is covered under the Liberty Mutual Policy and that sub-part (2) of the Total Pollution Exclusion with a Hostile Fire Exception does not limit recovery. Plaintiff has failed to demonstrate that the costs and expenses related to the prevention and mitigation of damage to third-party properties is covered under the policy.

Therefore, for the reasons stated herein, Plaintiff's Motion for Partial Summary Judgment is granted in part and denied in part, and the attached Order is entered.

ORDER

AND NOW, this 15th day of November, 2016, upon consideration of Plaintiff Miller Chemical & Fertilizer, LLC's Motion for Partial Summary Judgment filed June 13, 2016, Defendant Liberty Mutual Fire Insurance's Answer to Plaintiff's Motion for Partial Summary Judgment, and all supporting briefs, Plaintiff's Motion for Partial Summary Judgment is Granted in part, Denied in part.

Plaintiff's Motion for Partial Summary Judgement for Issue 1 is **Granted.**

Plaintiff's Motion for Partial Summary Judgement for Issue 2 is **Granted.**

Plaintiff's Motion for Partial Summary Judgement for Issue 3 is **Granted in part, Denied in part.** Only the costs that Plaintiff incurred to restore third-party properties as a direct result of the June 8, 2015 fire are recoverable under the Liberty Mutual policy. The costs expended to prevent and mitigate damage to third-party properties as a direct result of the June 8, 2015 fire are not recoverable under the Liberty Mutual Policy.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary or of administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION**ESTATE OF LEANDER H. ANSKE, JR., DEC'D**

Late of the Borough of Fairfield, Adams County, Pennsylvania

Executrix: Cheryl Harding, 2225 Hull Neck Road, Heathsville, VA 22473

Attorney: Matthew R. Battersby, Esq., Battersby Law Office, P.O. Box 215, Fairfield, PA 17320

ESTATE OF ROLAND L. BOLLINGER, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Roland F. Bollinger, Sr., 975 Wayne Avenue, PMB 355, Chambersburg, PA 17201

Attorney: Arthur J. Becker, Jr. Esq., Becker & Strausbaugh, P.C., 544 Carlisle Street, Hanover, PA 17331

ESTATE OF FRED W. FRAM JR., DEC'D

Late of Huntington Township, Adams County, Pennsylvania

Attorney: John C. Zepp, III, Esq., P.O. Box 204, 8438 Carlisle Pike, York Springs, PA 17372

ESTATE OF JEAN M. RACER, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

David E. Racer, 2925 Centennial Road, Hanover, PA 17331

Attorney: Arthur J. Becker, Jr. Esq., Becker & Strausbaugh, P.C., 544 Carlisle Street, Hanover, PA 17331

ESTATE OF LORENE M. WALKER, DEC'D

Late of the Borough of New Oxford, Adams County, Pennsylvania

Alan S. Walker, 6317 Tamarind Drive, Spring Grove, PA 17362

ESTATE OF NORMAN H. ZEPP, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Miriam P. Zepp, 810 Beaver Run Road, New Oxford, PA 17350

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

SECOND PUBLICATION**ESTATE OF IRENE R. DIVVER, DEC'D**

Late of Union Township, Adams County, Pennsylvania

Norine D. Henrie, 1094 Fox Run Terrace, Hanover, PA 17331

Attorney: Timothy J. Shultis, Esq., Shultis Law, LLC, 1147 Eichelberger Street, Suite F, Hanover, PA 17331

ESTATE OF HEATHER SUSAN MCCULLER, DEC'D

Late of the Borough of Abbottstown, Adams County, Pennsylvania

Executrix: Wade McCuller, 380 West King Street, Abbottstown, PA 17301

Attorney: Jillian A.S. Roman, Esq., Cohen, Placitella & Roth, P.C., Two Commerce Square, 2001 Market Street, Suite 2900, Philadelphia, PA 19103

ESTATE OF RICHARD G. SAVIDGE, DEC'D

Late of Mount Joy Township, Adams County, Pennsylvania

Executrix: W. Todd Savidge, 15 Spring Creek Circle, Gettysburg, PA 17325

Attorney: Gary E. Hartman, Esq., Hartman & Yannetti, 126 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ARTHUR WARREN STARNER, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Benedict A. Kuhn, 706 Baer Avenue, Hanover, PA 17331

Attorney: David K. James, III, Esq., 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF ROLLA RICHARD STERBUTZEL, DEC'D

Late of Cumberland Township, Adams County, Pennsylvania

David Sterbutzel, 6022 Boyette Road, Wesley Chapel, FL 33545

Attorney: David K. James, III, Esq., 234 Baltimore Street, Gettysburg, PA 17325

THIRD PUBLICATION**ESTATE OF MILDRED P. DANNER, DEC'D**

Late of Mount Joy Township, Adams County, Pennsylvania

Executrix: Bryan D. Danner, c/o Kevin G. Robinson, Esq., Gates & Gates, P.C., 60 E. Middle Street, Gettysburg, PA 17325

Attorney: Kevin G. Robinson, Esq., Gates & Gates, P.C., 60 E. Middle Street, Gettysburg, PA 17325

ESTATE OF VALEDA J. HUGHES, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Donald P. Winter, 14775 SE Avenue, Summerfield, FL 34491

Attorney: Gregory R. Reed, Esq., 4303 Derry Street, Harrisburg, PA 17111

ESTATE OF PETER A. KOUFUS, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Administrator: Peter N. Koufus, 150 Myers Road, York Springs, PA 17372

Attorney: John C. Zepp, III, Esq., P.O. Box 204, 8438 Carlisle Pike, York Springs, PA 17372

ESTATE OF BARBARA A. LAWRENCE, DEC'D

Late of Mt. Pleasant Township, Adams County, Pennsylvania

Executrix: Belinda R. Arnold, 603 Main Street, McSherrystown, PA 17344

Attorney: James T. Yingst, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

ESTATE OF FRANCIS J. NEVINS, DEC'D

Late of Mount Joy Township, Adams County, Pennsylvania

Co-Executors: Francis Joseph Nevins, 27 Jackson Road, Gettysburg, PA 17325; James John Nevins, 151 Center Street, Hanover, PA 17331

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF MARY L. OYLER, a/k/a MARY G. OYLER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Ralph D. Oyler, 754 Maple Street, Lake Oswego, OR 97034

Attorney: David K. James, III, Esq., 234 Baltimore Street, Gettysburg, PA 17325

ESTATE OF DANIEL J. SCHMIDT, a/k/a DANIEL JOHN SCHMIDT, DEC'D

Late of the Borough of McSherrystown, Adams County, Pennsylvania

Gerald Ste-Marie, 531 Wilson Avenue, Hanover, PA 17331

Attorney: Ann C. Shultis, Esq., Shultis Law, LLC, 1147 Eichelberger Street, Suite F, Hanover, PA 17331

THIRD PUBLICATION (CONTINUED)

ESTATE OF JOSEPH W. WILSON,
DEC'D

Late of Freedom Township, Adams
County, Pennsylvania

Executor: Gerald S. Miller, 4231
Emmitsburg Road, Fairfield, PA
17320

Attorney: Robert E. Campbell, Esq.,
Campbell & White, P.C., 112
Baltimore Street, Gettysburg, PA
17325

ESTATE OF M. ROMAIN WIRTZ, a/k/a
MARGUERITE ROMAIN WIRTZ,
DEC'D

Late of Straban Township, Adams
County, Pennsylvania

Galen C. Krebs, 1058 Pickett Drive,
Gettysburg, PA 17325

Attorney: Crabbs & Crabbs, 202
Broadway, Hanover, PA 17331