

**IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**COMMUNITY CARE OF
WEST VIRGINIA, INC.,**

Plaintiff,

vs.

**Civil Action No. 17-C-318
Presiding Judge: Farrell
Resolution Judge: Carl**

**FRONTIER COMMUNICATIONS OF
AMERICA, INC.,
its parents, subsidiaries, and affiliates,
FRONTIER WEST VIRGINIA, INC.,
CITIZENS TELECOM SERVICES COMPANY, LLC,
CITIZENS TELECOMMUNICATIONS OF
WEST VIRGINIA,
TAMCO CAPITAL CORPORATION,
its parents, subsidiaries, and affiliates,
ANTHONY ROME, and
MICHAEL SHAFFER,**

Defendants.

8-1-19
B.C.D. Berkeley Co
A. Spitz
M. Shaffer
T. Dumire
K. Bamhart
H. Parr
M. Dellinger

ORDER DENYING INTELISYS COMMUNICATION INC.'S MOTON TO DISMISS

This matter came before the Court this 29 day of July 2019 upon Third-Party Defendant Intelisys Communications, Inc.'s Motion to Dismiss. The Plaintiff, Community Care of West Virginia, Inc., by counsel Dan Earl, Esq., and Third-Party Defendant Intelisys Communications, Inc., by counsel Charles F. Johns, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. Therefore, the hearing set for September 9, 2019 is hereby CANCELLED. So, upon the full

consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced with the filing of the Complaint on October 12, 2017, seeking Declaratory Judgment on Contracts Signed by Mr. Shaffer (Count I); Declaratory Judgment on Contracts Approved of Due to the Influence of Mr. Shaffer (Count II); Fraud Via Mr. Shaffer (Count III); Breach of Contract by Mr. Shaffer (Count IV); Fraudulent Billing (Count V); Breach of Contract (Count VI); Negligence (Count VII); and Civil Conspiracy (Count VIII). *See Compl.*, ¶¶35-77.
2. On February 2, 2018, the Circuit Court of Harrison County filed a Judicial Motion to Refer Case to the Business Court Division, seeking to refer the instant civil action to the West Virginia Business Court Division. Subsequently, this case was assigned to the Business Court Division by the West Virginia Supreme Court of Appeals by Administrative Order dated April 9, 2018, and was assigned to the undersigned by Order entered May 8, 2018.
3. On December 6, 2018, Defendants Frontier Communications of America, Inc., Frontier West Virginia Inc., Citizens Telecom Services Company, L.L.C., Citizens Telecommunications of West Virginia, and Anthony Rome (hereinafter “Defendants” or “Frontier”) filed a Third-Party Complaint against Third-Party Defendant Intelisys Communications, Inc. (hereinafter “Intelisys” or “Third-Party Defendant”), alleging that although Plaintiff did not bring any causes of action against Intelisys in the Complaint, “the allegations, claims and damages asserted by [Plaintiff] implicate Intelisys”. *See Th. Pty. Compl.*, p. 3. Frontier’s Third-Party Complaint against

Intelisys alleges causes of action for “Contractual Obligations” (Count I), Indemnification (Count II), and Contribution (Count III). *Id.* at 5-6. Thereafter, on February 26, 2019, Frontier asserted an Amended Third-Party Complaint against Intelisys, alleging the same causes of action. *See* Am. Th. Pty. Compl.

4. On March 29, 2019, Intelisys filed the instant Intelisys Communications, Inc.’s Motion to Dismiss, arguing all of Frontier’s claims against it should be dismissed as the Third-Party Complaint “fails to state facts sufficient to provide a basis for third-party liability under any theory of indemnity or contribution”. *See* Th. Pty. Def.’s Mot., p. 2.
5. On May 6, 2019, Defendants, Counterclaimants, and Third-Party Plaintiffs Frontier filed their Response in Opposition to Third-Party Defendant Intelisys, Communications, Inc.’s Motion to Dismiss, averring the instant motion is “fundamentally flawed for several reasons” and urging the Court to deny said motion. *See* Frontier’s Resp., p. 1.
6. On May 20, 2019, Intelisys filed its Reply Brief in Support of Intelisys Communications, Inc.’s Motion to Dismiss, rebutting the response arguments and reiterating its request to have Frontier’s claims against it dismissed. *See* Reply.
7. A scheduling conference was held in this civil action on July 16, 2019, wherein a hearing on the instant motion was set for September 9, 2019.
8. The Court now finds the instant Motion is ripe for adjudication.

STANDARD OF LAW

West Virginia Rule of Civil Procedure 8(1)(a) requires that a complaint must contain a short plain statement of the claims showing that the pleader is entitled to relief. W. Va. R. Civ.

P. 8(1)(a). West Virginia Rule of Civil Procedure 12(b)(6) allows a defendant to seek dismissal of a plaintiff's complaint for failure to state a claim upon which relief can be granted.

The Supreme Court of Appeals of West Virginia has explained that the purpose of a motion made pursuant to subsection (b)(6) of West Virginia Rule of Civil Procedure 12 is to test the formal sufficiency of the plaintiff's complaint. *J.F. Allen Corp. v. Sanitary Bd. Of City of Charleston*, 237 W.Va. 77, 785 S.E.2d 627 (2016). Also, the Supreme Court of Appeals of West Virginia has held that the singular purpose of a motion under subsection (b)(6) is to seek determination of whether the plaintiff is entitled to offer evidence to support the claims made in the complaint. *Dimon v. Mansy*, 198 W. Va. 40, 479 S.E.2d 339 (1996).

West Virginia Rule of Civil Procedure 12(b)(6) enables a trial court to weed out unfounded suits. *Harrison v. Davis*, 197 W. Va. 651, 478 S.E.2d 104 (1996). A motion to dismiss should only be granted when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Murphy v. Smallridge*, 196 W. Va. 35, 36, 468 S.E.2d 167, 168 (1996).

In West Virginia jurisprudence, motions to dismiss are viewed with disfavor, and trial courts should rarely grant such motions. *Forshey v. Jackson*, 222 W. Va. 743, 671 S.E.2d 748 (2008) (internal citations omitted). When reviewing a motion to dismiss, the Supreme Court of Appeals of West Virginia has instructed trial courts that complaints must be "construed in the light most favorable to the plaintiff, and its allegations are to be taken as true." *John W. Lodge Distrib. Co., Inc. v. Texaco, Inc.*, 161 W. Va. 603, 605, 245 S.E.2d 157, 158 (1978); *Forshey v. Jackson*, 222 W. Va. 743, 671 S.E.2d 748 (2008).

Therefore, a trial court may only grant a proposed motion to dismiss when, in viewing the facts alleged in the light most favorable to the non-moving party, "it appears beyond doubt that

the plaintiff can prove no set of facts in support of his [or her] claim which would entitle him [or her] to relief” against the moving party. Syl. pt. 3, *in part*, *Chapman v. Kane Transfer Co., Inc.*, 160 W. Va. 530, 236 S.E.2d 207 (1977); *see also*, *Forshey*, 222 W.Va. 743, 671 S.E.2d 748.

CONCLUSIONS OF LAW

In this matter, Third-Party Defendant has filed a Motion to Dismiss pursuant to West Virginia Rule of Civil Procedure 12(b)(6), arguing Frontier failed to plead the requisite facts and elements of any of the three causes of action contained in Counts 1-3 of the Amended Third-Party Complaint against Intelisys. *See* Th. Pty. Def.’s Mot., p. 2; *See also* Th. Pty. Def’s Mem., p. 6.

Frontier’s Amended Third-Party Complaint against Intelisys alleges causes of action for “Contractual Obligations” (Count I), Indemnification (Count II), and Contribution (Count III). *See* Am. Th. Pty. Compl., p. 5-6. The Court will take Intelisys’s arguments up in turn.

“Contractual Obligations” (Count I) and Indemnification (Count II)

First, Intelisys argues Frontier’s cause of action for “Contractual Obligations” (Count I) must fail as it is based on the indemnity provision in the parties’ contract, and Frontier failed to state a claim under said provision pursuant to the contract’s terms. *See* Th. Pty. Def’s Mem., p. 6.

The indemnity provision contained within the contract between Frontier and Intelisys is contained in Section 16.1 of said contract and states as follows:

[Intelisys] shall defend, indemnify and hold harmless Frontier, its parents, subsidiaries and affiliates, and its and their respective directors, officers, partners, employees, agents, successors and assigns (“Indemnified Parties”) from and against any claims, demands, lawsuits, damages, liabilities, loss, costs or expenses (including, but not limited to, reasonable fees and disbursements of counsel and court costs), judgments, settlements and penalties of

every kind (“Claims”), arising from or in connection with: (a) injuries (including death) to persons or damage to property, including theft, resulting in whole or in part from the acts or omissions of [Intelisys] or its Network; (b) any violation, by [Intelisys] or its network, of this Agreement or any law, statute, regulation or governmental order, (c) any actual or alleged infringement or misappropriation of any patent, trademark, copyright, trade secret or any actual or alleged violation of any other intellectual property or proprietary rights in connection with the Services, (d) any worker’s compensation or similar claim by [Intelisys] and/or its Network. [Intelisys] further agrees to bind its Network to indemnify, hold harmless, and defend the Indemnified Parties as outlined herein.

See Th. Pty. Def’s Mem., p. 6-7.

First, Intelisys argues that Frontier did not plead specific facts to support how this provision applies to the claims against them. *Id.* at 7. In the Amended Third-Party Complaint, Frontier specifies that it is utilizing the second option (option “(b)”) in this indemnity provision, which requires indemnification for claims “arising out of or in connection with...any violation by [Intelisys] or its network, of this Agreement or any law, statute, regulation, or governmental order”. *See* Am. Th. Pty. Compl., ¶22. Although Intelisys argues that because Frontier did not specify in the Amended Third-Party Complaint which provision of Agreement, law, statute, or governmental order that it alleges Intelisys violated, it has not pled a claim for express indemnity. *See* Th. Pty. Def’s Mem., p. 6-7.

However, the Court considers the liberal pleading standard of Rule 8 (West Virginia Rule of Civil Procedure 8(1)(a) requires that a complaint must contain a short plain statement of the claims showing that the pleader is entitled to relief. W. Va. R. Civ. P. 8(1)(a)). A review of the Amended Third-Party Complaint in this light causes the Court to conclude that Frontier’s pleading in Count I is sufficient. The Court notes Frontier’s Amended Third-Party Complaint narrowed down which option in the indemnity provision out of four it was seeking to enforce.

The Court also notes that Frontier alleges in the Amended Third-Party Complaint that Intelisys accepted full responsibility for the acts and members of its Network, including, it alleges, Defendant Shaffer. *See* Th. Pty. Compl., ¶¶18-21. In the Complaint, many claims were asserted against Mr. Shaffer, including fraud. *See* Compl., ¶48. Discovery will flesh out what laws, statutes, regulations, and/or governmental orders Intelisys or its Network may have violated, if any. Accordingly, the Court finds Frontier has met its pleading burden and dismissal at this stage would be premature and inappropriate.

Next, Intelisys alleges “Contractual Obligations” (Count I) should be dismissed because Plaintiff’s claims are based upon Frontier’s own misconduct. *See* Th. Pty. Def’s Mem., p. 8. Specifically, Intelisys argues that if the claims in the Complaint are successful against Frontier, namely that Frontier and its employee, Mr. Rome, bribed Plaintiff’s employee, Mr. Shaffer (a named Defendant in this matter), to order equipment and services from Frontier that Plaintiff did not need and to ignore Frontier’s wrongful billing practices, then this would necessarily require a finding a fault against Frontier. *Id.* Thus, Intelisys argues the indemnity provision does not require indemnification when Intelisys is not responsible for the existence of the claim. *Id.* at 9.

On the other hand, Frontier argues that the “central allegation” in the Complaint which “forms the basis for most of the claims” is that Intelisys was the “mechanism” used to pay Defendant Shaffer bribes and commissions in return for Shaffer increasing Plaintiff’s purchases of Frontier equipment and services. *See* Def’s Resp., p. 5. Frontier alleged in the Amended Third-Party Complaint that the Complaint’s allegations implicate Intelisys. *Id.*; *see also* Th. Pty. Compl., ¶13. The Court also considers that Defendant Shaffer, who appears to be one of the central bad actors surrounding the alleged bribery in this litigation, was employed by Intelisys. *See* Def’s Resp., p. 5.

Further, it has been proffered that the contract between Frontier and Intelisys states that “Intelisys will perform its obligations through its ‘Network’ of employees, affiliates or contractors, but will remain responsible for all performance pursuant to the [contract].” *Id.* at 3. As an employee of Intelisys, Defendant Shaffer was part of its “Network”. *Id.* at 6. Further, it has been alleged that Defendant Shaffer was paid commissions for sales he made by Intelisys. *Id.* at 9.

The Court finds that at this stage, dismissal would not be appropriate. Although Intelisys claims that it “is not responsible for the existence of the claim” (*See* Th. Pty. Def’s Mem., p. 9), the Court finds making this finding would be premature at this stage in the litigation. The nature of the parties’ business relationships is complex. The Court cannot make a finding that Intelisys is not responsible for the existence of the claims as a matter of law at this time. Discovery will reveal more about Defendant Shaffer’s role as an employee of both Plaintiff and Intelisys. It will also reveal more about Intelisys’s Network members, including their relation to the indemnity provision which requires Intelisys to indemnify Frontier for the acts of its Network members.

Third, Intelisys argues that the indemnity provision does not apply because Frontier did not promptly notify Intelisys of any claims covered by the indemnity provision as required by the parties’ contract. *See* Th. Pty. Def’s Mem., p. 9.

Paragraph 16.4 of the contract between Frontier and Intelisys states, in pertinent part:

Each party shall promptly notify the other in writing of any Claims covered by an indemnity obligation. Promptly after receipt of such notice, the indemnifying Party shall assume the defense of such Claim with counsel reasonably satisfactory to the indemnified Party (which includes the right to compromise or settle any such Claim)...

See Am. Th. Pty. Compl., Ex. 2.

Intelisys proffers it did not receive any notification of Frontier's claim prior to being served with the Third-Party Complaint in this matter, which was filed December 6, 2018. *See* Th. Pty. Def's Mem., p. 9, 10. Intelisys notes the filing of the Third-Party Complaint on December 6, 2018 occurred over a year after this action began. *Id.* at 10. For this reason, Intelisys argues the delay precludes the claim brought pursuant to the contract's indemnity provision. *Id.* at 9. In support of this argument, Intelisys provides two New York state cases holding that an indemnity claim was barred pursuant to similar prompt notification clauses. *See Gutierrez v. State*, 58 A.D.3d 805, 807, 871 N.Y.S.2d 729, 731 (2009), *Infilco Degremont, Inc. v. Carland Const. Co.*, 180 A.D.2d 538, 539, 579 N.Y.S.2d 405, 406 (1992); *see also Id.* at 9.

Frontier, on the other hand, argues that the Third-Party Complaint is sufficient to provide notice of the claim to Intelisys. *See* Def's Resp., p. 11. Frontier further argues that its notice was timely, and that the cases cited by Intelisys do not preclude a finding of timeliness. *Id.* at 11-13.

Here, the Court considers the cases cited by Intelisys and notes that they are out-of-state cases. Intelisys provided no West Virginia authority on the issue of prompt notice provisions.

Infilco held that a delay of notice by more than a year barred the claim under the prompt notification provision. *Infilco*, at 539, 406. The Court notes *Infilco* did not deal with indemnity notification, but instead, dealt with acceptance of performance and notification of non-conformity provisions of a construction contract. *See* Def's Resp., p. 13.

Further, *Gutierrez* involved a contract that expressly provided for a thirty-day prompt-notice provision in a contract. In that case, it was plain that the party had not complied within the thirty-day window identified by the parties as prompt notice. The Court notes that here, the

parties' contract has no specific timeframe; instead, the contract provides for "prompt" notification. *See* Def's Resp., p. 10-11.

The Court declines to find Frontier did not provide "prompt" notice of the claim arising from the indemnity provision based upon two out-of-state, non-controlling cases. The Court considers the fact that parties did not contract to a specific date range, unlike the thirty-day prompt notice deadline described in *Gutierrez*. The Court notes that the Third-Party Complaint was brought within applicable scheduling order deadlines¹. Further, there were no statute of limitations issues with the Third-Party Complaint in this matter.

Finally, the Court notes Intelisys also cites to paragraph 27.4 of the parties' contract, urging the Court to find that the Third-Party Complaint should have been brought more than one (1) year after the cause of action has arisen. Section 27 of the parties' contract governs dispute resolution. Paragraph 27.1 provides, in pertinent part:

27.1 With the exclusion of payment disputes, the Parties desire to resolve certain disputes, controversies and claims arising out of this Agreement without litigation. Accordingly, except in the case of...(b) a suit, action or proceeding to compel [Intelisys] or Frontier to comply with its obligations to indemnify the other Party pursuant to the Agreement...the parties agree to use the following alternative dispute procedure as their sole recourse with respect to any dispute, controversy, or claim arising out of or relating to this Agreement or its breach.

See Am. Th. Pty. Compl., Ex. 2.

Next, Paragraph 27.4 provides, in pertinent part that "no Dispute or other action, regardless of form, arising out of this Agreement...may be brought more than one (1) year after the cause of action has arisen". *Id.*

¹ The Court notes Frontier filed its Motion for Leave to File Third-Party Complaint on October 5, 2018.

Although Frontier claims the one-year dispute resolution provision is applicable, the Court need not decide that issue, as Frontier filed its Motion for Leave to File Third-Party Complaint on October 5, 2018, less than a year after the Complaint was filed in this action on October 12, 2017. For this reason, the Court finds that this provision does not preclude the Court from declining to make a finding that Frontier did not act timely or in a prompt manner in providing notice to Intelisys.

Accordingly, the Court finds that Frontier's Third-Party Complaint is sufficiently pled to provide Intelisys of Frontier's claim for indemnification against Intelisys. The Court has not been provided sufficient evidence to make a finding that the filing of the Third-Party Complaint did not constitute prompt notice of this claim.

For these reasons, the Court denies the instant motion as it seeks dismissal of "Contractual Obligations" (Count I).

Implied Indemnity

The Court next addresses Intelisys's arguments that Frontier asserts indemnity based on the allegation that "Intelisys is liable for any and all losses Frontier may incur in connection with this matter" (*See* Am. Th. Pty. Compl., ¶24), and that "[i]f this is an attempt to assert...a theory of implied indemnity", the claim fails for failure to state a claim. *See* Th. Pty. Def's Mem., p. 10. Intelisys dedicates four (4) pages of its motion to this argument.

However, Frontier has averred, and the Court's review of the pleadings has confirmed, that Frontier did not plead a claim for implied indemnity. It appears Intelisys only made these arguments in the event that Frontier had made an implied indemnity claim. *See* Th. Pty. Def's Mem., p. 10("[i]f this is an attempt to assert...a theory of implied indemnity..."). As it has been

determined that Frontier did not assert a claim for implied indemnity, the Court need not analyze Intelisys's arguments as they relate to a claim of implied indemnity.

Contribution (Count III)

Finally, Intelisys argues Frontier fails to allege sufficient facts for its claim of Contribution (Count III). *See* Th. Pty. Def's Mem., p. 14. Specifically, Intelisys argues that: (1) Frontier cannot state a claim for contribution because the basis of the claim is fraud and bribery, and (2) contribution only arises when persons having a common obligation either in contract or tort, are sued on that obligation and one party is forced to pay more than his share. *Id.* at 14, 15.

In Response, Frontier discusses the 2015 legislative change to the tort liability system, wherein West Virginia Code §55-7-24, our state's joint and several liability statute, was repealed, and a modified comparative fault system was enacted (West Virginia Code §55-7-13c). *See* Def's Resp., p. 14. Frontier argues that our pure several liability statute allows exceptions for defendants who conspire and pursue a common plan to commit a tort, citing West Virginia Code §55-7-13a. *Id.*

First, the Court considers Intelisys's argument that Frontier cannot state a claim for contribution because the basis of the claim is fraud and bribery, a *malum in se* act. *See* Th. Pty. Def's Mem., p. 14. "In West Virginia one joint tort-feasor is entitled to contribution from another joint tort-feasor, except where the act is *malum in se*." *Erickson v. Erickson*, 849 F. Supp. 453, 458 (S.D.W. Va. 1994)(quoting *Haynes v. City of Nitro*, 161 W. Va. 230, 240 S.E.2d 544 (1977)).

The *Erickson* Court discussed the definition of *malum in se*, finding:

An act *malum in se* has been defined as, "[a] wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law." *Black's Law*

Dictionary 959 (6th Ed.1991). It is clear a fraudulent conveyance is *malum in se*. *Van Iderstine v. National Discount Co.*, 227 U.S. 575, 33 S.Ct. 343, 57 L.Ed. 652 (1913); *Congress & Empire Spring Co. v. Knowlton*, 103 U.S. (13 Otto) 49, 57, 26 L.Ed. 347 (1880); *Davis v. Woolf*, 147 F.2d 629, 635 n. 2 (4th Cir.1945); *Crum v. Appalachian Electric Power Co.*, 29 F.Supp. 90, 92 (S.D.W.Va.1939) (construing West Virginia law); *In re Savage*, 112 Vt. 89, 22 A.2d 153, 156 (1941).

Id.

Because of this, the *Erickson* Court concluded that “an action for contribution does not appear to be available for a tortfeasor accused of fraud”. *Id.*

The essential elements in an action for fraud are: “(1) that the act claimed to be fraudulent was the act of the defendant or induced by him; (2) that it was material and false; that plaintiff relied upon it and was justified under the circumstances in relying upon it; and (3) that he was damaged because he relied upon it.” *Horton v. Tyree*, 104 W.Va. 238, 242, 139 S.E. 737 (1927).

Fraud can be either in the inducement of a contract or in the execution of a contract. *Tolley v. Poteet*, 62 W.Va. 231, 57 S.E. 811 (1907).

Moreover, West Virginia Code § 55-7-13c provides:

(a) In any action for damages, the liability of each defendant for compensatory damages shall be several only and may not be joint. Each defendant shall be liable only for the amount of compensatory damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against each defendant for his or her share of that amount. However, joint liability may be imposed on two or more defendants who consciously conspire and deliberately pursue a common plan or design to commit a tortious act or omission. Any person held jointly liable under this section shall have a right of contribution from other defendants that acted in concert.

W. Va. Code Ann. § 55-7-13c (West).

The Court considers the fact that Plaintiff's claims against Frontier are for fraudulent billing and bribery, as well as for negligence and civil conspiracy. In the Complaint, Plaintiff asserted causes of action for declaratory judgment (Counts I and II), "Fraud via Mr. Shaffer" (Count III), breach of contract by Mr. Shaffer (Count IV), fraudulent billing (Count V), breach of contract (Count VI), negligence (Count VII), and civil conspiracy (Count VIII). *See* Compl., ¶¶35-77.

The Court finds that each of the tort claims in the Complaint relate to an alleged civil conspiracy. The civil conspiracy cause of action explains the allegation, stating, "the Defendants worked together in order to fraudulently cause [Plaintiff] to purchase or lease services or equipment that it did not need and to improperly bill [Plaintiff]." *Id.* at ¶75. Because one of the exceptions which allows joint and several liability to still apply to "defendants [who] consciously conspire to commit a tortious act", the Court finds dismissal of Frontier's contribution claim (Count III) would be inappropriate at this stage. *See* W. Va. Code § 55-7-13c.

At this stage, the Court finds the underlying acts which involve the alleged conspiracy are intertwined. The Court notes that Intelisys acknowledges that one of the counts Frontier potentially seeks contribution for is negligence, but simply brings up a different argument in a footnote, that Intelisys did not have a contract with Plaintiff, to support the idea that contribution should fail as to this non-*malum in se* tort. *See* Th. Pty. Def's Mem., p. 15. The Court finds this assertion is unpersuasive at this stage.

In all, the allegations, as pled, may implicate statutory joint liability and contribution. The Court finds the instant motion must be denied as to this argument at this stage in the case.

Next, Intelisys also argues that Frontier's contribution claim should be dismissed because Frontier did not plead that Intelisys had a common duty toward Plaintiff that was breached, or any facts that such a duty existed. *See* Th. Pty. Def's Mem., p. 15.

Syllabus Point 4 of *Sydenstricker v. Unipunch Prod., Inc.* states as follows:

The doctrine of contribution has its roots in equitable principles. The right to contribution arises when persons having a common obligation, either in contract or tort, are sued on that obligation and one party is forced to pay more than his *pro tanto* share of the obligation. One of the essential differences between indemnity and contribution is that contribution does not permit a full recovery of all damages paid by the party seeking contribution. Recovery can only be obtained for the excess that such party has paid over his own share.

169 W. Va. 440, 441, 288 S.E.2d 511, 513 (1982).

The touchstone of the right of inchoate contribution is this inquiry: Did the party against whom contribution is sought breach a duty to the plaintiff which caused or contributed to the plaintiff's damages? *Bd. of Educ. of McDowell Cty. v. Zando, Martin & Milstead, Inc.*, 182 W. Va. 597, 603, 390 S.E.2d 796, 802 (1990). The fundamental purpose of inchoate contribution is to enable all parties who have contributed to the plaintiff's injuries to be brought into one suit. *Id.*

The Court finds that any finding that no duty exists at this stage would be premature. Further factual development is necessary as to the relationships and obligations of the parties in this matter, especially with regard to Mr. Shaffer's alleged acts while acting as an employee of both Plaintiff and Intelisys. Further, it is alleged in the Amended Third-Party Complaint that Intelisys paid Mr. Shaffer commissions and other compensation for his services during this time. *See* Am. Th. Pty. Compl., ¶¶13, 19.

Further, under the parties' contract, it is alleged that Intelisys accepted the full responsibility for members of its "Network", or Intelisys's employees, contractors and anyone else performing services on its behalf. *Id.* at ¶20. Discovery is needed in this matter to determine who exactly is in the "Network".

The information pled in the Amended Third-Party Complaint must be viewed in the light most favorable to the Third-Party Plaintiff. The Court must conclude that Frontier is entitled to discovery on this issue, and that in this stage of the litigation, dismissal is not appropriate. Accordingly, the instant motion is denied on this ground.

Accordingly, Third-Party Defendant Intelisys Communications, Inc.'s Motion to Dismiss shall be DENIED. Further, the hearing on this Motion currently set for September 9, 2019 shall be CANCELLED.

CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Third-Party Defendant Intelisys Communications, Inc.'s Motion to Dismiss is DENIED. It is hereby further ADJUDGED and ORDERED that the hearing on this Motion currently set for September 9, 2019 shall be CANCELLED.

The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.



JUDGE PAUL T. FARRELL
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION

STATE OF WEST VIRGINIA
COUNTY OF HARRISON, TO-WIT

I, Albert F. Marano, Clerk of the Fifteenth Judicial Circuit and the 18th Family
Court Circuit of Harrison County, West Virginia, hereby certify the foregoing
to be a true copy of the ORDER entered in the above styled action on the
30 day of July, 2019.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the
Seal of the Court this 1 day of August, 2019.

Albert F. Marano
Fifteenth Judicial Circuit & 18th
Family Court Circuit Clerk
Harrison County, West Virginia