

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Michael Humphreys, Acting Insurance :
Commissioner of the Commonwealth :
of Pennsylvania in his capacity as the :
Statutory Rehabilitator of Senior :
Health Insurance Company of :
Pennsylvania, :
Plaintiff :

DOCKET NO.: 1 SHP 2022

v. :

Brian Wegner :
12862 Tuskany Boulevard :
Carmel, IN 46032 :

Paul Lorentz: :
214 Wellington Parkway :
Noblesville, IN 46060 :

JURY TRIAL DEMANDED

Barry Staldine :
6789 South Foster Branch Court :
Pendleton, IN 46064 :

Protiviti Inc. :
2884 Sand Hill Road :
Menlo Park, CA 94025 :
Defendants. :

COZEN O’CONNOR
Michael J. Broadbent, PA ID 309798
Dexter R. Hamilton, PA ID 50225
Eric D. Freed, PA ID 39252
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*Counsel for Michael Humphreys,
Acting Insurance Commissioner of the Commonwealth of Pennsylvania,
as Statutory Rehabilitator of Senior Health Insurance Company of Pennsylvania*

NOTICE TO DEFEND

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this complaint and notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the complaint or for any other claim or relief requested by the plaintiff. You may lose money or property or other rights important to you.

You should take this paper to your lawyer at once. If you do not have a lawyer or cannot afford one, go to or telephone the office set forth below to find out where you can get legal help.

**Central Pennsylvania Legal
Services,
Inc.
213 North Front Street
Harrisburg, Pennsylvania 17101
(717) 232-0581**

and

**Public Services and Lawyers
Referral Committee
Dauphin County Bar
Association
213 North Front Street
Harrisburg Pennsylvania
17101
(717) 232-7536**

AVISO

Le han demandado a usted en la corte. Si usted quiere defenderse de estas demandas expuestas en las paginas siguientes, usted tiene veinte (20) dias de plazo al partir de la fecha de la demanda y la notificacion. Hace falta ascantar una comparencia escrita o en persona o con un abogado y entregar a la corte en forma escrita sus defensas o sus objeciones a las demandas en contra de su persona. Sea avisado que si usted no se defiende, la corte tomara medidas y puede continuar la demanda en contra suya sin previo aviso o notificacion. Ademias, la corte puede decidir a favor del demandante y requiere que usted cumpla con todas las provisiones de esta demanda. Usted puede perder dinero o sus propiedades u otros derechos importantes para usted.

Lleve esta demanda a un abogado inmediatamente. Si no tiene abogado o si no tiene el dinero suficiente de pagar tal servicio. Vaya en persona o llame por telefono a la oficina cuya direccion se encuentra escrita abajo para averiguar donde se puede conseguir asistencia legal.

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JURY TRIAL DEMANDED

**REHABILITATOR’S PRELIMINARY OBJECTION TO DEFENDANT
PROTIVITI INC.’S PRELIMINARY OBJECTION 1**

Michael Humphreys, Acting Insurance Commissioner of the Commonwealth of Pennsylvania, in his capacity as the Statutory Rehabilitator (“Rehabilitator”) of Senior Health Insurance Company of Pennsylvania (“SHIP”), by and through his undersigned counsel, hereby asserts the following Preliminary Objection to Defendant Protiviti Inc.’s (“Protiviti”) Preliminary Objection 1 improperly raising the affirmative defense of statute of limitations.¹ In support hereof, the Rehabilitator respectfully avers as follows:

THE PARTIES AND JURISDICTION

1. Michael Humphreys is the Acting Insurance Commissioner of the Commonwealth of Pennsylvania (the “Commissioner” or “Acting Commissioner”). The prior Commissioner, Jessica K. Altman, was appointed as the Statutory Rehabilitator of SHIP on January 29, 2020. Former Commissioner Altman and Acting Commissioner Humphreys have appeared in this action in the capacity of Statutory Rehabilitator of SHIP. (Am. Compl. ¶¶ 1, 2.)

¹ This Preliminary Objection to Defendant Protiviti’s Preliminary Objection 1 addresses Protiviti’s Preliminary Objection 1 improperly raising the affirmative defense of statute of limitations, and the facts and argument herein are limited to that issue. In addition, the Rehabilitator is filing a response to Defendant Protiviti’s Preliminary Objections as well as a Brief in Opposition to Defendant Protiviti’s Preliminary Objections. To the extent necessary, the Rehabilitator incorporates the recitation of facts set forth in those documents.

2. SHIP is a Pennsylvania stock limited life insurance company that administers a closed block of long-term care insurance policies. SHIP is domiciled in the Commonwealth of Pennsylvania with its principal place of business in Carmel, Indiana. (Am. Compl. ¶ 3.)

3. Defendant Protiviti is a global consulting firm that provides consulting on a range of topics including internal audit, risk and compliance. Defendant Protiviti's principal place of business is 2884 Sand Hill Road in Menlo Park, California, 94025. Protiviti served as SHIP's internal auditor from 2013 through 2016. (Attached hereto as Exhibit A is the Master Services Agreement between Protiviti and SHIP dated May 19, 2009 ("Protiviti MSA")). (Am. Compl. ¶ 7.)

4. The Commonwealth Court of Pennsylvania has jurisdiction over this matter pursuant to 42 Pa. C.S. § 761(a) and Sections 504 and 516 of the Pennsylvania Insurance Department Act, 40 P.S. §§ 221.4(d) and 221.16(c). Venue is proper in this Court under 40 P.S. § 221.4(b) in that SHIP is a Pennsylvania domiciled insurance company.

RELEVANT BACKGROUND

5. The Rehabilitator's claims against Defendant Protiviti arise out of services provided to SHIP, an insurer domiciled in Pennsylvania and now within the Court's jurisdiction and supervision through rehabilitation proceedings docketed at

In re Senior Health Insurance Company of Pennsylvania in Rehabilitation, 1 SHP 2020.

6. The Rehabilitator initiated this action by filing a Complaint against Defendant Protiviti and others on January 28, 2022.²

7. The Rehabilitator filed the operative Amended Complaint against Defendant Protiviti and others on June 22, 2022.

8. Defendant Protiviti filed its Preliminary Objections to the Amended Complaint on August 26, 2022.

9. In its first Preliminary Objection, entitled “Preliminary Objection 1,” Defendant Protiviti raises the affirmative defense of statute of limitations.

10. This Preliminary Objection to Defendant Protiviti’s Preliminary Objection 1 raises the Rehabilitator’s procedural objection to the improper assertion of the affirmative defense of statute of limitations.

**REHABILITATOR’S PRELIMINARY OBJECTION
TO DEFENDANT PROTIVITI’S PRELIMINARY OBJECTION 1**
Failure to Conform to Law and Rule of Court
Pursuant to Pa. R.C.P. 1028(a)(2)

11. The Rehabilitator incorporates the foregoing paragraphs as though fully set forth herein.

² The Rehabilitator is filing separate Preliminary Objections to Preliminary Objections for each defendant, as well as separate responses to Preliminary Objections and briefs in opposition to Preliminary Objections for each defendant.

12. Pennsylvania Rule of Civil Procedure 1028(a)(2) authorizes a preliminary objection for “failure of a pleading to conform to law or rule of court.”

13. Defendant Protiviti’s Preliminary Objection 1 improperly asserts the affirmative defense of statute of limitations by way of Preliminary Objections, and thus Defendant Protiviti’s Preliminary Objection 1 fails to conform to the rules of this Court.

14. The affirmative defense of statute of limitations must be raised in a “New Matter” pleading, not preliminary objections. *See* Pa. R.C.P. 1030(a) (“all affirmative defenses including but not limited to . . . statute of limitations . . . shall be pleaded in a responsive pleading under the heading ‘New Matter.’”).

15. In addition, Rule 1028—the rule authorizing and governing preliminary objections—provides that “[t]he defense of the bar of a statute of frauds or statute of limitations can be asserted only in a responsive pleading as new matter under Rule 1030” rather than by Preliminary Objection. Pa. R.C.P. 1028(a)(4), *Note*.

16. Accordingly, Defendant Protiviti’s Preliminary Objection 1 raising the affirmative defense of statute of limitations as grounds for a demurrer must be overruled at this time.

17. Defendant Protiviti’s Preliminary Objection 1 contains no analysis of the limits of Rule 1028 and Rule 1030. Instead, to justify its disregard for the Rules of Civil Procedure, Defendant Protiviti declares that the Court could decide now that

Plaintiff's causes of action are barred by the statute of limitations because that result is apparent on the face of the Amended Complaint, citing *Baney v. Fisher*, No. 752 M.D. 2018, 2020 WL 5033421 (Pa. Commw. Ct. 2020). (*See* Preliminary Objection 1 p.6 n.3.)

18. Defendant Protiviti does not explain—and indeed fails to establish—how the purported exception described in *Baney* would apply here such that it may assert its statute of limitations defense at this stage.

19. *Baney* is an unpublished Memorandum Opinion without precedential value under Internal Operating Procedure 414. Defendant Protiviti notes that *Baney* “cit[ed] cases” in support of the purported exception allowing consideration of a statute of limitations defense at the preliminary objections stage, but the decisions cited in *Baney* all suggest that the exception Defendant Protiviti invokes is too narrow to permit consideration of its statute of limitations defense at this stage, even if that exception exists.

20. Four of the five cases cited in *Baney* involve affirmative defenses other than the statute of limitations defense, which appears not only in Rule 1030 as an affirmative defense but also in the notes to Rule 1028 as an *excluded* preliminary objection. *See Greenberg v. Aetna Ins. Co.*, 427 Pa. 511, 515, 517-18 (1967) (permitting consideration of the litigation privilege affirmative defense on preliminary objections because the complaint “was defective on its face” by seeking

defamation damages based solely on an absolutely privileged statements made in the course of litigation and for which no liability could ever attach); *Feldman v. Hoffman*, 107 A.3d 821, 835 (Pa. Commw. Ct. 2014) (permitting immunity defense on preliminary objections where defense was question of law and plaintiff could not show additional facts were needed); *Iudicello v. Commonwealth Dep't of Transp.*, 34 Pa. Cmwlth. 361, 362-63 (1978) (permitting immunity defense on preliminary objections where plaintiff admitted that the case law supported defendant's position and immunity was "transparently clear on the face of the complaint, as it is here from plaintiffs own allegations"); *Pelagatti v. Cohen*, 370 Pa. Super. 422, 439-440 (1987) (defense of truth permitted on preliminary objections to defamation claim where statements "were discernibly true from the face of the complaint").

21. *Cooper v. Downingtown School District*, the remaining case cited in *Baney*, involved the statute of limitations defense on appeal. *See Cooper v. Downingtown School Dist.*, 238 Pa. Super. 404, 407 (1976). *Cooper* stands only for the proposition that an appellate court may overlook the trial court's procedural error in the interests of judicial economy if the issue is fully briefed *and* the right to dismissal is clear, neither of which is the case here. Moreover, *Cooper* involved consideration of Rule 1017, in which certain statute of limitations defenses were permitted and others were not—unlike current Rule 1028, which states that statute

of limitation defenses should not be considered on preliminary objections. *See Cooper*, 238 Pa. Super. at 407 n.2 (quoting text of prior version of Rule 1017).

22. The non-binding decision in *Baney* itself is not persuasive authority here, as it arose on unique facts and extended the purported exception for affirmative defenses beyond the existing circumstances in which the statute of limitations defense could be considered at the preliminary objections stage. In *Baney*, the Commonwealth Court entertained a statute of limitations defense on preliminary objections where the complaint was filed two years after the expiration of the statute of limitations, and the plaintiff's tolling defense of fraudulent concealment was disproven by his own complaint, in which the inmate-plaintiff himself described filing suit for the wrongdoing at issue in his complaint, and by law, which prohibited the Commonwealth from disclosing the documents the inmate-plaintiff claimed had been concealed. *Baney*, 2020 WL 5033421, at *6.

23. Thus, even if *Baney* were binding here (and it is not), and even if *Baney* properly applied the existing law regarding preliminary objections (and it did not), the *Baney* analysis would not permit this Court to consider the statute of limitations defense in violation of Rules 1028 and 1030.

24. Defendant Protiviti's arguments assert that SHIP and the Rehabilitator had inquiry notice of the injuries and their causes before the filing of the Amended Complaint on January 28, 2022, thus making the claims untimely. (*See Preliminary*

Objection 1 ¶¶ 20, 23.) Even assuming this Court follows the non-binding and unpersuasive authority in *Baney*, Defendant Protiviti can assert its statute of limitations defense now only if it can cite allegations in the Complaint which disprove the Rehabilitator’s tolling allegations and arguments by showing that SHIP learned the truth even as Defendants concealed it.

25. Defendant Protiviti cannot meet this burden. In *Baney*, for example, the inmate-plaintiff alleged in his Complaint filed in 2019 that it had filed prior litigation “seeking to vindicate his rights upon learning of the illegality of the initial pen register in 2014,” five years before the matter at bar, in which the inmate-plaintiff “contend[ed] that the initial investigatory pen register . . . was used illegally by Commonwealth respondents....” 2020 WL 503342, at *6. Thus, the inmate-plaintiff alleged and admitted that the claims filed in 2019 asserting the illegality of the initial pen register were based on information it personally obtained in 2014 showing the illegality of the initial pen register.

26. *Baney* is an outlier case, in which an inmate-plaintiff admitted to the very knowledge it alleged had been concealed. In contrast, Defendant Protiviti does not highlight any admissions even remotely similar to the admissions in *Baney*, and certainly no admissions of the Rehabilitator himself. Instead, Defendant Protiviti asks this Court to piece together and draw negative inferences from a set of disparate allegations related to information that was potentially available to SHIP prior to the

rehabilitation order, when Protiviti was still working with the co-defendants and concealing information from SHIP itself and from regulators.

27. Defendant Protiviti's Preliminary Objection 1 is, essentially, a trial argument that ignores or mischaracterizes the allegations in the Amended Complaint, injuring SHIP and the Rehabilitator should this Court resolve Defendant Protiviti's statute of limitations defense before the issue is ripe for decision.

28. Protiviti's statute of limitation defenses are not apparent on the face of the Amended Complaint because SHIP has alleged facts and made arguments in reliance of the discovery rule, which tolls the statute of limitations "until a plaintiff could reasonably discover the cause of his action, including in circumstances where the connection between the injury and the conduct of another are not readily apparent." *In re Risperdal Litig.*, 665 Pa. 649, 661 (Pa. 2019) (citing *Wilson v. El-Daief*, 964 A.2d 354, 365 (Pa. 2009)). Under the rule, a claim accrues only when the plaintiff would have discovered both the injury and its cause at the hands of the defendant through reasonable diligence. *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (Pa. 2011). Reasonable diligence is a question for the *jury at trial*, and not one for the Court to resolve at preliminary objections. *Id.* It is well settled that "under the law of Pennsylvania . . . if through fraud *or concealment* the defendant causes the plaintiff to relax vigilance or deviate from the right of inquiry, the defendant is estopped from invoking the bar of limitation of action." (emphasis

added) (internal citations omitted). *Ciccarelli v. Carey Canadian Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1985).

29. Here, SHIP has alleged it was prevented from discovering its claims against the Defendants until after the Rehabilitator was appointed on January 29, 2020, and these allegations must be accepted as true. The Amended Complaint avers in detail how each of the Defendants, and Protiviti in particular, concealed the true facts relating to the Beechwood Re investments in particular, but also relating to other areas of malfeasance by Wegner, Lorentz, and Staldine described in the Amended Complaint.

30. With regard to Protiviti, it had a fiduciary duty as SHIP's internal auditor to accurately provide its material findings to SHIP's Board and Audit Committee, particularly where those findings concerned improper conduct by SHIP's officers. Instead of complying with that duty, Protiviti concealed its findings. It did not provide the Protiviti memo to the Board or Audit Committee, but provided it only to Defendant Lorentz, whose own conduct and performance were at issue. Representatives of Protiviti attended quarterly meetings with SHIP's Audit Committee and met with the Audit Committee on several other occasions. SHIP's Audit Committee specifically organized some meetings to exclude Wegner, Lorentz, and Staldine to allow Protiviti to openly discuss its findings. Despite all of these meetings and opportunities, Protiviti never informed SHIP of its findings regarding

Beechwood or other concerns it uncovered during its work. Instead, Protiviti aligned itself with Wegner, Lorentz, and Staldine, and agreed with them to conceal Protiviti's findings and obtain approval for additional Beechwood investments based on misrepresentations. (Am. Compl., ¶ 182-183.)

31. Against this clear application of the discovery rule, Protiviti essentially alleges that SHIP failed to exercise reasonable diligence because it was aware of certain facts prior to January 29, 2020, including having knowledge in November 2016 of a report authored by Protiviti. This argument is not proper at the preliminary objection stage, which requires the Court to accept the facts pled as true and to make all reasonable inferences in favor of SHIP. Indeed, the Pennsylvania Supreme Court has instructed trial courts to avoid resolving the question of reasonable diligence at any stage and instead advised them to leave the question for the jury. *See Gleason v. Borough of Moosic*, 15 A.3d 479, 484-88 (Pa. 2011) (reasonable awareness of injury and cause of injury are to be decided by jury unless “facts are so clear that reasonable minds cannot differ”).

32. Thus, even if Protiviti properly invokes the purported exception to Rule 1030, this Court cannot consider Protiviti's statute of limitations argument regarding SHIP's knowledge or understanding because that argument relies heavily upon disputing or misreading (rather than accepting) the allegations in the Amended

Complaint that SHIP had not discovered its claims.³ Protiviti claims that SHIP's allegations regarding its knowledge of a specific Protiviti report "cannot be squared," but, even if this were true, it is SHIP, not Protiviti, which is entitled to the benefit of all inferences in its favor. Moreover, Protiviti appears to be misreading and adopting less-than-favorable inferences from the Amended Complaint: SHIP did not allege that the report in question was circulated to the Board in 2016 or that the report was delivered to the right people in 2016; instead, SHIP alleges that the report was not provided to anyone other than Protiviti's co-conspiring management until November 2016 at the earliest, and that, more importantly, the report did not circulate amongst the Board members until April 2018. (Am. Compl. ¶ 184.) Questions of how the report was shared, who received it and when, the impact of receipt of the report, and SHIP's decisions related to that report are all factual issues for summary judgment or trial, not resolution at the preliminary objections phase based on an alleged inconsistency in the Amended Complaint. The statute of limitations defense simply cannot be resolved on the face of the Amended Complaint, even if the Court ignores the requirements of Rule 1030.

³ In the brief opposing Protiviti's preliminary objections, SHIP explains that its claims are also timely because, in this case, the public policy surrounding the rehabilitation process weighs heavily in favor of a finding that SHIP's claims did not accrue until the order of rehabilitation was entered on January 29, 2020.

33. In addition, SHIP argues in its brief opposing Protiviti's preliminary objections that SHIP's claims are also timely because, in this case, the public policy surrounding the rehabilitation process weighs heavily in favor of a finding that SHIP's claims did not accrue until the order of rehabilitation was entered on January 29, 2020. SHIP's arguments invoke equitable analyses requiring the consideration of competing facts, and the Court should not resolve these public policy considerations at the preliminary objection stage, before SHIP has an opportunity to respond by way of Reply to New Matter or following discovery.

34. The purpose of Pennsylvania's insurance receivership statutory scheme "is to protect the general public against the substantial costs and exigencies related to a major commercial insolvency." *Foster v. The Mutual Fire, Marine & Inland Ins. Co.*, 614 A.3d 1086, 1084 (Pa. 1992), *cert denied sub nom. Allstate Ins. Co. v. Maleski*, 113 S. Ct. 1047 (1993). Accordingly, the Commissioner is afforded broad powers to "effectuate equitably the intent of the Rehabilitation statutes, i.e., to minimize the harm to all affected parties." *Id.* The Commissioner has a fiduciary duty to "marshall [sic] and preserve all assets of the insolvent entity," and due to the exigent circumstances surrounding a major insolvency, it may be necessary to compromise "individual interests...to avoid greater harm to a broader spectrum of policyholders and the public." *Id.* at *19-20 (citing *Vickodil v. Commonwealth Ins. Dep't*, 559 A.2d 1010, 1013 (1989)).

35. *Foster* is strikingly on point. In materially identical circumstances – where the Pennsylvania insurance company plaintiff brought claims under the direction of Rehabilitator – the *Foster* court found that the plaintiff’s claims did not accrue until it requested supervision from the PID and was further tolled until the Order of Rehabilitation pursuant to 40 P.S. § 221.17(b). In so doing, the court rejected the very same argument that Defendant Protiviti raises here—that the plaintiff and the PID were aware of the losses resulting from the defendant’s alleged misconduct prior to requesting supervision by PID. *Id.* The court noted that “indeed, [the insurer] must have been aware of its losses, as it sought supervision from the Insurance Department.” *Id.* But the insurer did not know who was responsible for those losses, and reasonable diligence did not include discovering the defendants’ wrongdoing because the defendants had fiduciary obligations to the plaintiff. *Id.*

36. Here, the Defendants owed fiduciary duties to SHIP; they used those fiduciary duties to conceal their wrongdoing from the Trustees and the PID; while SHIP (and, to a lesser extent, PID) had some indication that it had suffered financial losses, it did not know – and had no reason to investigate – that those losses were caused by malfeasance and deception by the Defendants; and, the Defendants were officers of SHIP who controlled the company until supervision by the PID was requested. Pursuant to *Foster*, public policy considerations dictate that Defendants – who were the officers and consultants in control of SHIP until its entry into

Rehabilitation – be precluded from avoiding liability for the extraordinary financial losses caused by their malfeasance by virtue of their coordinated concealment. The fact that control of the company rested with these Defendants is undisputed. Multiple Pennsylvania legal doctrines are designed specifically to avoid such an unjust result, particularly at the pleading stage.

37. SHIP and the Rehabilitator must be permitted to address the factual components of this argument; deciding the statute of limitations argument on preliminary objections, rather than by way of Reply to New Matter or at summary judgment or trial, deprives SHIP and the Rehabilitator of that opportunity to their detriment.

38. For these reasons, Defendant Protiviti fails to show that it would fall within the scope of the alleged exception to the prohibition on asserting a statute of limitations defense on preliminary objections, as set forth in Rule 1028 and 1030, even if that exception exists.

WHEREFORE, Plaintiff respectfully requests that the Court sustain the Rehabilitator's Preliminary Objection to Defendant Protiviti's Preliminary Objection 1, and overrule and deny Defendant Protiviti's Preliminary Objection 1 improperly raising the affirmative defense of statute of limitations in violation of Pennsylvania Rules of Civil Procedure 1028 and 1030.

Dated: October 17, 2022

Respectfully submitted,

COZEN O'CONNOR

/s/ Michael J. Broadbent

Michael J. Broadbent, PA ID 309798

Dexter R. Hamilton, PA ID 50225

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	:	
Brian Wegner, Paul Lorentz:	:	
Barry Staldine, and Protiviti Inc.	:	JURY TRIAL DEMANDED
Defendants.	:	

[PROPOSED] ORDER

AND NOW, this ____ day of _____, 202__, upon consideration of the Rehabilitator’s Preliminary Objection to Defendant Protiviti Inc.’s Preliminary Objection 1, it is hereby ORDERED, ADJUDGED and DECREED that the Rehabilitator’s Preliminary Objection is SUSTAINED, and Defendant Protiviti Inc.’s Preliminary Objection 1 is OVERRULED and DENIED.

MARY HANNAH LEAVITT, President Judge Emerita

CERTIFICATE OF SERVICE

I, Michael J. Broadbent, hereby certify that on October 17, 2022, I caused to be filed the foregoing REHABILITATOR'S PRELIMINARY OBJECTION TO DEFENDANT PROTIVITI INC.'S PRELIMINARY OBJECTION 1 through the Court's PACFile system, and that notice was provided to all parties entering an appearance in this matter and listed on the Master Service List associated with 1 SHP 2020. Each of the parties associated with 1 SHP 2022 was served by electronic means through the Court's PACFile system. In addition, I hereby certify that electronic copies of the foregoing documents will be posted on SHIP's website at <https://www.shipltc.com/courtdocuments>.

By: /s/ Michael J. Broadbent
Michael J. Broadbent