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& HAFER<sub>LLP</sub>

eNotes – Summary of Significant Liability Defense Cases  
November 2006

**LEGISLATIVE UPDATE**

**Pennsylvania Supreme Court upholds lower court opinions  
declaring Fair Share Act of 2002 unconstitutional**

Joint and several liability is back (or, in reality, never was gone). In 2002, the Legislature enacted the Fair Share Act, which required joint tortfeasors to pay only their fair share of a verdict (as long as they were less than 60 percent responsible). In 2005, the Pennsylvania Commonwealth Court, in DeWeese v. Weaver, 880 A.2d 54 (Pa.Cmwlt. 2005), declared the Fair Share Act unconstitutional, because it was tacked onto the end of another, unrelated piece of legislation and because the state constitution requires that unrelated pieces of legislation be enacted separately. A Philadelphia County Court of Common Pleas ruling, Hicks v. Dana Corporation, similarly held that the Fair Share Act violated the state constitution. Proponents of the Act appealed both cases to the Pennsylvania Supreme Court, which recently affirmed both decisions per curiam, without opinion. See DeWeese v. Cortes, 906 A.2d 1193 (Pa., decided September 28, 2006) and Hicks v. Dana Corporation, 2006 Pa. LEXIS 1832 (Pa., decided September 27, 2006). Consequently, the Fair Share Act of 2002 is void as enacted.

Efforts to enact a new version of the Fair Share Act failed early this year, when the Governor vetoed a new version of the Act, which was essentially similar in content to the 2002 Act. It was believed that the Governor would have approved a version of the Act wherein joint and several liability would apply only if a joint tortfeasor is found to be 50 percent or more responsible--as opposed to the 60 percent threshold in the 2002 Act. There is talk of new legislation, but it is not expected to be enacted in the near future.

With the invalidation of the Fair Share Act, Pennsylvania remains a pure joint and several liability jurisdiction. For example, if a joint tortfeasor is found to be 1 percent responsible, he or she would be responsible for satisfying the entire verdict, and would be left with the potentially futile prospect of collecting contribution from his or her judgment-proof co-joint-tortfeasor, who was found to be 99 percent responsible. This rule of law will continue, unless and until new legislation is enacted and signed into law.

Any questions, contact Todd B. Narvol at 717-237-7133 or [tnarvol@tthlaw.com](mailto:tnarvol@tthlaw.com).

Recent Decision Highlights:

Grayer v. Twp. of Edison,  
2006 U.S. App. LEXIS 19471  
(Third Circuit, Aug. 1, 2006)

Thomas v. Independence Township,  
463 F.3d 285, 2006 U.S. App. LEXIS  
23685 (Third Circuit Sept. 14, 2006)  
Page 2

The Hartford Ins. Co. v. O'Mara  
2006 Pa. Super. 236 (2006)  
Page 2

Nationwide Mut. Ins. Co. v. Merdjanian  
2006 U.S. App. LEXIS (3d Cir. 2006)  
Page 3

Kvaerner Metals v. Commercial Union  
Ins. Co.  
\_\_\_\_ A.2d \_\_\_\_ (Pa. Sup. 2006)  
Page 3

Excavation Technologies v. Columbia  
Gas  
2006 PA Super. 164 (2006)  
Page 4

Firm News & Announcements  
Page 5



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## RECENT DECISIONS - CASE SUMMARIES

### The Qualified Immunity Defense in Civil Rights Cases

#### Grayer v. Twp. of Edison

2006 U.S. App. LEXIS 19471

(Third Circuit, Aug. 1, 2006)

#### Thomas v. Independence Township

463 F.3d 285, 2006 U.S. App. LEXIS 23685

(Third Circuit Sept. 14, 2006).

In two recent decisions, the Court of Appeals for the Third Circuit addressed the issue of qualified immunity for governmental employees and officials in civil rights actions. These cases have a substantial impact on this type of litigation and the procedures for asserting this important defense.

A qualified immunity defense is often difficult to assert in a motion to dismiss, because the notice pleading requirements under federal court rules minimize the facts contained in the pleadings. In the Thomas v. Independence Township decision, the Court, in the context of an unlawful taking claim, provided guidelines for defense counsel to use to raise this issue at an earlier stage of the proceedings and potentially avoid unnecessary discovery. Although the Court refused to require a plaintiff to specifically plead facts sufficient to avoid a qualified immunity defense, the Court did declare that district courts should pursue certain options:

First, a district court may order the plaintiff to reply to the defendant's answer pleading qualified immunity. Second, a district court may grant a defense motion for a more definite statement under Rule 12(e) with respect to the conduct of which the plaintiff complains. The district court should avail itself of these options before addressing the immunity question, which sometimes requires complicated analysis of legal issues. If the plaintiff's action survives these hurdles, the plaintiff ordinarily will be entitled to some discovery, but the district court may limit the timing, sequence, frequency, and extent of that discovery under Rule 26.

The Thomas Court vacated the lower court's decision denying the motion to dismiss and directed the lower court to proceed in accordance with these guidelines. Accordingly, these procedural devices should be considered early in any civil rights case in which the qualified immunity defense may have merit.

Grayer v. Twp. of Edison involved an appeal from the denial of a motion for summary judgment asserting the qualified immunity defense. The Court pointed out that a denial of such a motion is subject to an immediate appeal under the collateral order doctrine. In addition, the Court indicated that its review was limited to a review of the facts identified by the district court and not a review to determine whether the lower court identified the correct facts. Based on these principles, the Third Circuit reversed the denial of summary judgment filed by two police officers. Since the police officers had been chasing an individual for whom they had an arrest warrant and had reason to believe he was in the plaintiff's apartment, the Court concluded "based on the facts identified by the District Court, that an objectively reasonable police officer could believe that the pursuit of Raiford into Grayer's home, even in the absence of the owner's consent, was constitutional." In addition, the other officer was entitled to qualified immunity, because the plaintiff admitted that she had attempted to interfere with the officer's attempt to detain the suspect. The officer "was permitted to use a reasonable amount of force to get to the door if necessary. Similarly, the force used by Wheeler in the moment before and while cuffing Grayer does not move his conduct outside the protection of qualified immunity. 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates the Fourth Amendment.'"

Any questions regarding this case can be directed to Dave Schwalm at 717-255-7643 or [dschwalm@tthlaw.com](mailto:dschwalm@tthlaw.com).

#### The Hartford Ins. Co. v. O'Mara

2006 Pa. Super. 236 (2006)

Decided: August 29, 2006

Pennsylvania Superior Court concludes that a UM/UIM selection form for limits lower than liability limits complies with Section 1734 of the MVFRL.

**Background:** After choosing to reduce the amount of UM/UIM coverage limits below the liability limits in an automobile policy, the insured was involved in an accident and claimed that the selection form was invalid. The issue went to arbitration, and the arbitration panel not only decided damages, but also reformed the coverage limit to the same amount as the liability limit, finding that the selection form did not evidence a knowing waiver by the insured. The trial court declined to review the arbitration decision. Hartford appealed.

**Holding:** The Pennsylvania Superior Court first holds that the trial court erred in declining to review the arbitration decision, as the arbitration decision was based on the conclusion that the UM/UIM form did not comply with section 1734 of the MVFRL, and that form is inextricably linked to the contract of insurance. Turning to the merits of the coverage selection form, the Court notes that to constitute a valid request under section 1734, the named insured must sign the "writing" which must contain an express designation of the amount of UM/UIM coverage requested. The court finds that the form utilized by Hartford sufficient, rejecting the arbitrator's decision that the form could have contained more specific language. Section 1734 does not dictate the particular language to be used. To comply, the language need only convey an insured's desire to purchase UM/UIM coverage in amounts less than or equal to bodily injury liability limits.

Any questions regarding this case can be directed to Paul Walker at 717-441-7061 ([pwalker@tthlaw.com](mailto:pwalker@tthlaw.com)).

**Nationwide Mut. Ins. Co. v. Merdjanian**

2006 U.S. App. LEXIS (3d Cir. 2006)

Decided: September 20, 2006

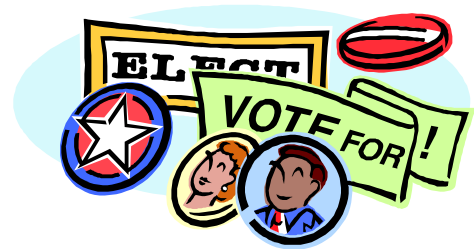
Third Circuit Court of Appeals holds that an insurer need *not* obtain from its insured a new signed reduction of benefits form for UM/UIM benefits when there are subsequent changes to the policy -- namely, an increase in bodily injury liability limits.

**Background:** The insured purchased a personal automobile insurance policy from Nationwide in 1990. The policy provided bodily injury liability limits of \$25,000/\$50,000. During the application process, the insured signed a form, in which he selected UM/UIM coverage in the amount of \$15,000/\$30,000. Eight years later, the insured increased his bodily injury

liability coverage from \$25,000/\$50,000 to \$100,000/\$300,000. The insured did not change the amount of his UM/UIM coverage at that time, although he was given the opportunity to do so. The insured's wife was killed, and his two sons injured, when an uninsured motorist struck one of the vehicles covered under the Nationwide policy. The insured and his two sons made a claim to Nationwide for UM benefits, claiming that the amount of UM/UIM benefits available under the policy was \$100,000/\$300,000 (stacked times 3 vehicles). Nationwide disagreed and commenced a declaratory judgment action against the insured. Both parties moved for summary judgment. The District Court granted summary judgment in favor of Nationwide, holding that the UM/UIM coverage under the policy was limited to \$15,000/\$30,000 (stacked). The insured took an appeal.

**Holding:** On appeal, the insured argued that while he signed a reduction of coverage form for UM/UIM benefits at the inception of the policy, his subsequent alteration of the policy, whereby he increased his bodily injury liability coverage to \$100,000/\$300,000, triggered an obligation on the part of Nationwide to obtain a new signed confirmation that he wished to continue to have UM/UIM benefits lower than his bodily injury liability limit. Citing the minimal requirements of Section 1734 (relating to selections of lower limits) and other pertinent provisions of the Motor Vehicle Financial Responsibility Law (MVFRL), the Court ruled that, "[n]othing in the statute requires an insurer to obtain a new writing under 1734 each time an insured chooses to increase liability coverage or otherwise alter the policy." Importantly, the Court held further that even if new forms were required, when there are subsequent changes to the policy, the MVFRL contains no penalty (or remedy) for violation of 1734's requirement that requests for reduction be in writing. For these reasons, the decision of the District Court was affirmed.

Any questions regarding this case can be directed to Brooks Foland at 717.255.7626 or [bfoland@tthlaw.com](mailto:bfoland@tthlaw.com).



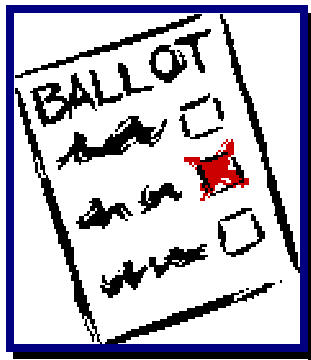
**Kvaerner Metals v. Commercial Union Ins. Co.**

\_\_\_\_ A.2d \_\_\_\_ (Pa. Sup. 2006)

Decided: October 25, 2006

The Pennsylvania Supreme Court holds that the definition of “accident” required to establish an “occurrence” under liability policies cannot be satisfied by claims based upon faulty workmanship. It does not matter that the insured did not intend for the damage to occur. Such claims do not present the degree of fortuity required by the policies and to hold otherwise would turn the policy into a performance bond. Further, only “workmanship-related irregularities” were alleged from poor workmanship to the work product itself (apparently including subcontractor work) and did not constitute active malfunctioning causing damage to other property. Only the factual allegations of the complaint can trigger coverage, not extrinsic evidence.

**Background:** Kvaerner Metals was sued for breaches of contract and warranty arising out of the design and construction of a coke oven battery. Alleged damage included cracking of battery bricks, subsidence, spalling of walls, and bowing of tie rod housings. Kvaerner sued National Union who brought a motion for summary judgment under its CGL policies arguing there was no “occurrence” and that “business risk/work product” exclusions applied. Kvaerner argued that an occurrence existed due to an unintended and unexpected event (roof movement caused by heavy rains and early grouting). Kvaerner argued that the damage arose out of subcontractor work and was covered under completed operations coverage. The trial court ruled in favor of National Union. The Superior Court found triable issues of fact, looking at extrinsic evidence (expert opinions). National Union appealed.



**Holding:** The Pennsylvania Supreme Court initially states that coverage can be triggered solely by the language of the complaint and not evidence outside of the complaint. If National Union has no duty to defend, it has no duty to indemnify. The Court then states that an “occurrence” requires an “accident” (an undefined term). Based on dictionary definitions, the key term in the ordinary definition of “accident” is “unexpected”, which “implies a degree of fortuity that is not present in a claim for faulty workmanship.” The Court cites Snyder Heating (contractual claims of poor workmanship were not active malfunctioning of the insured’s work or product, causing injury or damage to another’s property, required to find coverage). The Court also cites as “instructive” a 2005 Supreme Court of South Carolina decision, where after roads deteriorated, the insured was sued for breach of contract and negligence. The South Carolina court held that there was no occurrence, even for the claims of negligence, as faulty workmanship was not an accident (stating that it could be if it caused bodily injury or damage to other property, but not in cases where only the insured’s work product was damaged). The complaint against Kvaerner only alleged poor workmanship resulting in “workmanship-related irregularities” to the work product itself (apparently including the subcontractor work performed by the insured). The Court found it unnecessary to address the business risk/work product exclusions. National Union did not have a duty to defend or indemnify Kvaerner.

**Special Note:** Kvaerner had been consolidated with Freestone v. New England Log Homes, and the Supreme Court has directed the parties to brief the appropriate test for whether the action sounds in contract or tort for purposes of insurance coverage (and as such, requiring the parties to address the gist of the action doctrine). Freestone settled while on appeal, and in footnote 6 of Kvaerner, the Supreme Court states: “we see no need to address this issue and shall therefore leave it for another day.” As such, the Supreme Court does not specifically embrace a strict view that all breach of contract claims can never be an “occurrence”, focusing instead on faulty workmanship not constituting an “occurrence.”

Any questions regarding this case can be directed to Paul Walker at 717-441-7061 or [pwalker@tthlaw.com](mailto:pwalker@tthlaw.com)

The information contained in this update is intended for general information purposes only, and does not constitute legal advice or options on any specific facts or circumstances. No action should be taken without consultation with legal counsel.

If you have any questions or comments, or would like further information, please contact an attorney in the General Liability Practice Group at Thomas, Thomas & Hafer LLP. Visit us at [www.tthlaw.com](http://www.tthlaw.com) for more information on members of our General Liability Practice Group.

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#### Excavation Technologies v. Columbia Gas 2006 PA Super. 164 (2006)

**Update:** In the September 2006 edition of the eNotes, a report had been made on *Excavation Technologies v. Columbia Gas*, 2006 PA Super. 164 (2006). In that case, the Superior Court had held that the economic loss doctrine does not preclude a claim for negligent misrepresentation under the One Call Act. Recently, the Superior Court granted a Petition for Reargument and withdrew its decision. The Court requested that the Opinion and Dissenting Statement be destroyed. The Court further requested that the Opinion and Dissenting Statement be removed from all websites.

Any questions regarding this case can be directed to Joseph A. Holko at 610-332-7005 or [jholko@tthlaw.com](mailto:jholko@tthlaw.com)

#### FIRM NEWS & ANNOUNCEMENTS

Thomas, Thomas & Hafer LLP congratulates our Law Clerk, **Corey J. Adamson**, on his admission to the Pennsylvania Bar and welcomes him as an Associate in the Harrisburg office. He is a graduate of The Dickinson School of Law of the Pennsylvania State University and will focus his practice in general liability and insurance defense.

Congratulations to **Peter J. Speaker** who has recently been elected to the Board of Directors of the Pennsylvania Defense Institute.