



THOMAS, THOMAS
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eNotes - Summary of Significant Liability Defense Cases
September 2007

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In Memorium

Robertson B. Taylor, Esquire (1936-2007)

We regret to advise that Robertson B. Taylor lost his life in a motor vehicle accident on August 3, 2007. His love for life and family and his dedication to his clients and this law firm will be greatly missed.

Robertson was born in Bethany, West Virginia in 1936 and moved to Pennsylvania in 1947, where he attended both college and law school. After his admission to the Pennsylvania Bar in 1965, Robertson engaged in civil litigation, specializing in casualty and products liability defense. At the trial court level, he represented his clients in twenty-seven (27) different counties in Eastern and Central Pennsylvania, as well as in the United States District Courts for the Eastern, Middle and Western Districts of Pennsylvania. At the appellate level, he argued cases before the Commonwealth, Superior and Supreme Courts of Pennsylvania, as well as the Third Circuit Court of Appeals.

Robertson served as Secretary, Vice-President and President of the Northampton County Bar Association and was a member of the Judge Clinton Budd Palmer Inn of Court, serving as President in 1997-98. He was also a frequent guest lecturer for the Pennsylvania Bar Institute and was on the faculty of the Academy of Advocacy.

A memorial and celebration of Robertson B. Taylor and his contributions to the law and community will be held on Monday, September 10, 2007 from 5:00 p.m. to 8:00 p.m., at the Hotel Bethlehem.

Inquiries may be directed to James J. Dodd-o, Esquire, at 610-332-7000 or jdoddo@tthlaw.com.

CLIENT ADVISORY

INSURANCE DEPARTMENT URGES RECONSIDERATION OF SACKETT V. NATIONWIDE

The Insurance Department has filed a brief urging the Supreme Court to reconsider the Court's decision in Sackett v. Nationwide. The Department argues forcefully that the Court was uninformed of the practical impact of the decision and that the Court's rationale for it was mistaken. The Department advises the Court that the decision would have great adverse consequences for consumers, resulting in premium increases and possible deletion of newly-acquired vehicle coverage, potentially devastating impact on insurers and widespread confusion and uncertainty about coverage and premiums. The Department persuasively challenges the Court's statutory analysis and suggests that the Court defer to the Department's implementation and regulation of the Motor Vehicle Financial Responsibility Law in accordance with "Act 6" (which, among many other things, gave policyholders the right to purchase unstacked coverage)—"which has worked successfully since Act 6's inception 17 years ago."

As discussed in the previous issue of TTH enotes: Liability, on June 27, 2007, the Supreme Court of Pennsylvania, on the Court's own initiative, had issued an order inviting the Insurance Commissioner to submit an amicus curiae ("friend of the court") brief regarding whether the Court should reconsider the Sackett decision. That unusual development,

and the Department's emphatic advocacy for reconsideration, are seen by many as indicators that the Court probably will reconsider the decision—an extremely rare procedural step in itself. Many believe that it greatly increases the likelihood that the Court ultimately will "reverse itself"—which is without precedent in recent memory.

As discussed in prior enotes, Sackett v. Nationwide, decided on April 17, 2007, has had major repercussions in the motor vehicle insurance industry in Pennsylvania. In Sackett, the Pennsylvania Supreme Court held that insureds are entitled to stack the UM/UIM coverages on all vehicles, despite an otherwise valid rejection of stacking, if the first named insured did not sign a new rejection form upon the addition of vehicles that increases the number of vehicles under the policy. Insurers immediately began studying ways to deal with the Court's ruling—ranging from payment of substantial additional benefits on recent claims, to mass mailings of updated selection forms, to withdrawal from motor vehicle insurance business in the state.

Any questions regarding this case can be directed to Peter Speaker at 717-237-7644 or pspeaker@tthlaw.com.

RECENT DECISIONS - CASE SUMMARIES

Toy v. Metropolitan
2007 Pa. LEXIS 1463
(July 18, 2007)

Although Bad Faith Statute Does Not Apply To Unfair Or Deceptive Practices In Soliciting The Purchase Of An Insurance Policy, Supreme Court Permits Claim Under Consumer Protection Law To Proceed.

This decision involving the bad faith statute arises out of the issuance of a life insurance product. As with many Supreme Court decisions, the questions that the Court does not answer continue to leave substantial issues for the insurance industry.

First, the Court does conclude that Section 8371 does not apply to unfair or deceptive practices in soliciting the purchase of an insurance policy. However, the Court expressly fails to decide:

1. The role of the Unfair Insurance Practices Act in determining what constitutes bad faith conduct;
2. Whether an insurer's conduct in litigating the bad faith claim may be considered in determining whether an insurer acted in bad faith;
3. What standard of conduct should be applied in determining whether an insurer acted in bad faith; and
4. Whether the bad faith statute creates an independent cause of action or is just an additional form of relief under a cause of action.

Second, insureds alleging a violation of the Consumer Protection Law must prove the common law fraud element of justifiable reliance. However, unlike claims alleging fraud in the inducement in which the parol evidence rule bars use of terms outside of the agreement, claims alleging fraud in the execution (in which "a party alleges that he was mistaken as to the terms and actual contents of the agreement he executed due to the other's fraud") is excepted from the operation of the parol evidence rule.

Finally, the Court concludes that failure to read the policy is not a defense to a claim based upon an intentional fraud. "In that Toy asserts that Martini told her that the Metropolitan Life product she was purchasing included a life insurance component, we conclude that it is for the jury to decide whether the falsity of Martini's alleged misrepresentation about the Policy's content was obvious to Toy and whether her reliance was unjustified." The result is puzzling in that it leaves unclear how the insured's reliance on alleged statements that are made could ever be considered unjustified, if an insured is not required to read the policy.

Any questions regarding this case can be directed to Dave Schwalm at 717-255-7643 or dschwalm@tthlaw.com.

Integrated Project Services v. HMS Interiors, Inc., et al.
2007 PA Super 246
Decided: August 16, 2007

The Pennsylvania Superior Court holds that a pass-through indemnification clause does not clearly and unequivocally demonstrate that a subcontractor intended to indemnify a general contractor for injuries to the subcontractor's employee caused by the general contractor's own negligence.

Background: The general contractor's superintendent directed the subcontractor's employee to clean debris off of a roof at a construction project. The employee slipped on ice and fell. Barred under workers' compensation from suing his employer (the subcontractor), the employee sued the owner and the general contractor. The employee was ultimately found 10% negligent. The trial judge concluded the owner was 20% negligent for the verdict and the general contractor was 80% negligent. It allowed the owner contractual indemnity from the general contractor under the prime contract's indemnification provisions. The general contractor sued the subcontractor for declaratory judgment, arguing that the subcontract incorporated the prime contract between the general contractor and the owner, requiring the subcontractor to indemnify the general contractor for its own negligence and liability. After initially concluding that the pass-through clause was sufficiently clear and that the subcontractor was required to indemnify the general contractor based on the prime contract's indemnification clause, the trial court reversed its decision. This reversal came after the Pennsylvania Supreme Court decided Bernotas v. Super Fresh Food Markets, Inc., 863 A.2d 478 (Pa. 2004), in which the Pennsylvania Supreme Court held that a pass-through clause must clearly and unequivocally show the intent to indemnify for a general contractor's own negligence. General Contractor appealed.

Holding: The general contractor argued that the pass-through clause's use of the phrase "shall be bound" was clear and unequivocal under the Bernotas standard. The Superior Court disagreed. The Superior Court also held that that there was not a sufficient waiver in the contract by the subcontractor of its workers' compensation immunity.

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

Holt v. Navarro
2007 PA Super. 243 (Pa. Super. 2007)
Decided August 16, 2007

Background: A mental patient being transferred by ambulance between psychiatric facilities escaped during the transfer. The patient ran to a shopping center, got a manicure at a salon, and then asked for someone to call him a cab. When no one assisted him, he took a phone book and went to a supermarket in search of a phone. The patient then saw a car with its engine running, struck the owner with the phone book, and attempted to steal the car. The patient was able to drive approximately sixty feet before uniformed officers arrived and he was arrested. After a non-jury trial in which the court rejected his insanity defense, the patient was convicted of robbery and simple assault. The patient then filed a civil suit against the ambulance company, hospital, and several employees, on the theory that those entities were negligent in transporting him between facilities, and due to his criminal conviction, he suffered a reduced earning potential. The patient received a verdict of \$350,000.00. The ambulance company appealed, alleging a lack of proximate cause.

Outcome: The Superior Court agreed with the ambulance company that the patient's reduced earning potential was a remote and unforeseeable consequence of the company's failure to restrain him during transport. It found the alleged injury (reduced earning potential) was not the natural and probable result of the company's failure. The Court discussed proximate cause and stated that it does not exist where a defendant's negligence was so remote that the

defendant cannot be held legally responsible as a matter of law for the harm done. A court must determine whether the injury would have been foreseen by an ordinary person as the natural and probable outcome of the act complained of. The ambulance company's failure to restrain the patient did not create a force or series of forces that were in a continuous and active operation up to the time of the lost income potential, and the patient's assault on the car owner, attempted carjacking, and subsequent criminal conviction had a far greater affect on the patient's earning potential than the company's failure to restrain him during transport. Finally, the Court recognized that the patient did not commit the crimes immediately upon escape and the facts above indicated the criminal offenses resulted from the patient's rational decision to commit criminal conduct. The Court also ruled that as a matter of law, the "no felony conviction recovery rule" barred the patient from benefiting in a civil suit flowing from his criminal convictions, and the ambulance company could not be liable for the collateral consequences (the patient's reduced earning potential) of the patient's criminal convictions.

Any questions regarding this case can be directed to Corey J. Adamson at 717-255-7639 or cadamson@tthlaw.com.

Foremost Insurance Co. v. Eric Erickson,
2007 U.S. Dist. LEXIS 58017
(E. D. Pa. August 7, 2007)

No Insurance Coverage For Misrepresentations In Sale Of Home

This decision is a good coverage opinion concluding that there was no coverage for claims asserted under the Pennsylvania Unfair Trade Practices and Consumer Protection Law for fraudulent misrepresentation and negligent misrepresentation, and claims under the Pennsylvania Real Estate Seller Disclosure Laws for failure to acknowledge known defects. Since the complaint generally alleged that the insured acted "with an evil motive in failing to make proper and adequate disclosures" and that the insured "knew the true condition of the property at all times relevant" to the dispute, the insurance company had "no duty to defend against those allegations because intentional conduct is not a fortuitous or unexpected happening and therefore does not constitute an accident."

Any questions regarding this case can be directed to Dave Schwalm at 717-255-7643 or dschwalm@tthlaw.com.

Bombar v. The West American Ins. Co., et al.
2007 PA Super 222
Decided: July 26, 2007

The Pennsylvania Superior Court held that a cause of action for the breach of physician-patient confidentiality is not merely a "re-labeling" of the tort of invasion of privacy, which is governed by a one-year statute of limitations, and is instead governed by a two-year statute of limitations.

Background: Bombar was injured by a forklift and sued Upright, who negligently installed an alarm on the forklift, which easily allowed the alarm to be disabled. Upright was insured through First Insurance, an agency which obtained a policy from West American, an Ohio casualty company. The CGL form included an exclusion for products-completed operations and defense and indemnity were denied. Bombar obtained a verdict of approximately 2.4 million dollars. Upright filed a declaratory judgment action, but assigned all rights to Bombar. Bombar's motion for summary judgment for coverage and bad faith was granted and after a hearing, a judgment was entered against West American for over 12 million dollars, including punitive damages, attorneys' fees and costs. West American appealed.

Holding: West American argued that Bombar's injuries arose from Upright's product or work. Bombar contended that her injuries were due to the negligent disconnection of the alarm by Upright's employee, and that negligent failure to warn or provide instructions is covered despite the exclusion. The Superior Court agreed with Bombar, despite the exclusion's inclusion of the failure to provide warnings or instructions. The Court held that such warnings or instructions must be complete for the exclusion to apply, and were not complete here. As Upright negligently installed the backup alarm, and as the installation was both faulty and negligent, the alarm installation was not completed. West American argued that it acted reasonably in processing the claim, as it did not learn of the claim until the underlying complaint was filed. It also argued that Upright never tendered the defense to West American. The Court rejected West American's argument that there is a common law remedy in Pennsylvania for bad faith and also rejected the argument that there were triable issues of fact under 42 Pa.C.S.A. § 8371. The Court further rejected the argument that West American's duty only included a review of the "four corners" of the complaint, holding that

section 8371 was designed to remedy all instances of bad faith conduct, whether before, during or after litigation, under Hollock v. Erie Ins. Exch., 842 A.2d 409 (Pa. Super. 2004).

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

Carbis Walker, LLP v. Hill, Barth and King, LLP,
2007 PA Super 221
(filed July 23, 2007)

Pennsylvania Superior Court Holds That The Attorney-Client Privilege Can Be Waived By The Attorney's (Not The Client's) Inadvertent Disclosure Of An Otherwise Privileged Letter To Opposing Counsel.

In what appears to be the first Pennsylvania appellate court opinion addressing this issue, a three-judge panel of the Superior Court held that the Defendant's lawyer waived the Defendant's (i.e., his own client's) privilege, when he inadvertently faxed to Plaintiff's lawyer a letter that was written to and intended for the Defendant. Some states have a bright line rule that does not permit a waiver of the attorney-client privilege by the attorney. Those states hold that it is the client's privilege and only the client can waive it. The Superior Court held in Carbis Walker that the attorney himself or herself may waive the privilege for the client, and the Court adopted a five-part test to determine whether in any given case an inadvertent disclosure by counsel will amount to a waiver of the privilege.

Applying that test in Carbis Walker, the Court focused on: the additional precautions Defendant's counsel could have taken to avoid faxing privileged documents to opposing counsel; the fact that Defendant's counsel waited 18 days after being notified by opposing counsel that the letter was inadvertently sent to the wrong address before requesting that the letter be returned; and the conclusion that justice did not require that the contents of the letter be protected, because the letter contained only general legal opinion regarding the issues in the case. Thus, Plaintiff's counsel was allowed to keep and make whatever use of Defendant's counsel's analysis letter.

While the lessons of such a mistake by counsel are self-evident, the Superior Court's opinion in Carbis Walker addresses some additional important legal points. One is that a trial court's rulings on discovery issues--involving the waiver of the attorney-client privilege--likely may be pursued in an interlocutory appeal, under the "collateral order doctrine." Another point concerns waiver of the attorney-client privilege generally, and should serve as a refresher course on when in other instances the privilege will be deemed to be waived. These instances include: (1) when the privileged communication is revealed to a third party, to the Court, or in the presence of a third party; (2) when the client relies on the attorney's advice as an affirmative defense (such as in a bad faith insurance practices case); and (3) when the confidential information is placed at issue in the case by the party who would assert the privilege.

If you wish to discuss these issues further, please contact Todd Narvol at 717-237-7133 or at tnarvol@tthlaw.com.

Snead v. SPCA
2007 PA Super 204
Decided July 11, 2007

Background: Plaintiff's dogs were removed from her home by the SPCA after the SPCA received a complaint about a dead dog at Plaintiff's residence, and she was charged with dog-fighting. The charges against Plaintiff were dropped, and she was mistakenly told that her twelve dogs were euthanized, when they were actually not euthanized until three days later. Plaintiff filed suit, asserting negligence, conversion, and Section 1983 claims. Plaintiff argued that had she been told the dogs were available to be redeemed, she would have taken them back and complied with any conditions the SPCA imposed. After a jury found for Plaintiff on all claims, it awarded her both compensatory and punitive damages. Plaintiff also requested counsel fees, which was denied by the court. The SPCA appealed, and Plaintiff cross-appealed.

Outcome: The SPCA argued that it had sovereign immunity from the negligence and conversion claims, both torts, because it was a Commonwealth agency. The Court disagreed, finding that the SPCA was a private, not-for-profit corporation, electing its own directors and officers, and its operations were not controlled by the Commonwealth. For the same reasons, the SPCA was not entitled to immunity pursuant to the Political Subdivision Tort Claims Act, which shelters local agencies and authorities from suit, with certain exceptions. It was conceded that the SPCA was acting under color of state law when it seized Plaintiff's dogs, so the Court had only to examine whether the seizure violated the Fourth Amendment. The Court ruled that there was sufficient evidence to find that the killing of the dogs was unreasonable because there was evidence that Plaintiff had been to the shelter three days prior to the killing and was told the dogs were already dead. Plaintiff had a property interest in the dogs, and was entitled to due process. The Court found that the SPCA's policies did not adequately protect Plaintiff's property interest in the dogs, particularly where no attempt was made to contact Plaintiff prior to euthanizing the dogs. Finally, the court concluded that the evidence was sufficient to support the jury's verdict on the negligence and conversion counts, but was insufficient to support an award of punitive damages because there was no evidence that the SPCA acted with intent or malice. The Court also held that Plaintiff was entitled to an award of counsel fees because she prevailed on her civil rights claim.

Any questions regarding this case can be directed to Corey J. Adamson at 717-255-7639 or cadamson@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 for more information on members of our General Liability Practice Group.



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FIRM NEWS & ANNOUNCEMENTS

USLaw Fall 2007 Client Conference

TT&H attorneys will attend the USLaw Fall Conference scheduled for October 4-6 2007 in Washington, DC. The keynote speaker for the conference is political columnist, George F. Will.

Speaking Engagements

James J. Dodd-o and Joseph A. Holko will be speakers at the Pennsylvania Institute of Certified Public Accountants Insurance Conference to be held on November 16, 2007, at Penn State Great Valley, Malvern, Pennsylvania. They will be presenting on recent developments in insurance defense litigation and coverage, including an update on tort reform and recent court decisions.

Articles/Publications

An article by Brooks R. Foland titled "Summer Associate Programs That Work" will be published in the September, 2007 edition of the American Bar Association Young Lawyer Magazine.

TT&H In Our Community

On September 21, TT&H will host a blood drive for the Central Pennsylvania Blood Bank. Other local law firms have been invited to participate.

On September 27, TT&H staff will participate in The Leukemia & Lymphoma Society's Light the Night® Walk. For more information, visit www.lightthenight.org/cpa.

