



THOMAS, THOMAS
& HAFFER_{LLP}

eNotes – Summary of Significant Liability Defense Cases
September 2006

Recent Decision Highlights:

Egger v. Gulf Ins. Co.

(Aug. 23, 2006)

Repko v. Chichester School District

(Aug. 10, 2006)

Page 2

Wisniski v. Brown & Brown Ins.
Co. of Pa.

(Aug. 15, 2006)

Wirth v. Aetna U.S. Healthcare.

(Aug. 22, 2006)

Wheeler v. Nationwide Mut. Fire Ins. Co.

(July 31, 2006)

Page 3

Beck-Hummel and Hummel v. Ski
Shawnee, Inc.

(June 30, 2006)

Creazzo v. Medtonic

(June 27, 2006)

Page 4

Prudential Property and Cas. Ins.
Co. v. Sartno

(Aug. 21, 2006)

Touloumes v. E.S.C., Inc.

(July 19, 2006)

Excavation Technologies, Inc. v

Columbia Gas Company of Pennsylvania

(July 7, 2006)

Page 5

Loughren v. United Services Automobile
Association

(July 28, 2006)

Hollock v. Erie Insurance Exchange

(Aug. 22, 2006)

Page 6

General Refractories Co. v. Insurance
Co. of North America

(Aug 18, 2006)

Page 7

Firm News & Announcements

Page 8

LEGISLATIVE NEWS

**New Federal e-Discovery Rules To Increase
Scope and Cost of Litigation**

On December 1, 2006, amendments to Federal Court discovery rules that specifically relate to disclosure of “**electronically stored information**” go into effect. These amendments in combination with similar local rules adopted by District Courts, such as Local Rule 26.1 for the Middle District of Pennsylvania, will effect litigation significantly. For example, Local Rule 26.1(b) requires parties to “**disclose information and files stored within their computerized information-management systems**” just as they would other documents. In addition, lawyers are required to advise their clients that they are required to “**preserve information stored in computerized information-management systems so that the information relevant to the claims or defenses in the case is not in any way destroyed.**” Local Rule 26.1(a).

This focus on discovery of computer-based data storage systems will undoubtedly **increase the costs associated with discovery**. Although this discovery was available in the past, the changes require a party to make initial disclosures of relevant computerized information in their possession, custody or control. To avoid disclosure of such information, a party must demonstrate that the information is not reasonably accessible because of undue burden or cost. Courts may nevertheless compel production if good cause is shown regardless of expense. As a result, lawyers will need to work closely with clients, or their employees responsible for the computer systems, and inquire into the information-management system used, what information is available, how information is stored and how it can be retrieved. Any questions regarding these e-discovery amendments can be directed to Dave Schwalm at 717-255-7643 or dschwalm@tthlaw.com and Evan Black at 717-441-7051 or eblack@tthlaw.com.

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RECENT DECISIONS - CASE SUMMARIES

Egger v. Gulf Ins. Co.

2006 Pa. LEXIS 1553 (Pa. 2006)

Decided: August 23, 2006

Pennsylvania Supreme Court decides assignee has standing to sue an insurer where the insured assigned its interest in an insurance policy without the prior consent of the insurer, contrary to policy condition.

Background: Egger sustained injuries in a workplace accident and bled to death due to insufficient response by Foulke, the emergency responder. Gulf provided excess insurance to Foulke, and a policy condition provided that Foulke's rights and duties could not be transferred without prior written consent. Shortly before verdict in the suit brought by Egger's widow (Egger), Gulf denied coverage. Egger settled with Foulke for an assignment of rights under the Gulf policy. The next day, the jury verdict implicated the Gulf limits. Egger brought suit against Gulf for breach of contract and bad faith in denying coverage. The trial court upheld the assignment, granted summary judgment to Egger on coverage and entered judgment in favor of Gulf on the bad faith claim. On appeal, a panel of the Superior Court held that Egger had standing to sue.

Holding: On appeal to the Pennsylvania Supreme Court, Gulf argued the assignment was invalid as no written consent was obtained. It also argued that the assignment failed because it took place prior to the "loss" which Gulf argued did not occur until verdict. Gulf conceded that a post-loss assignment was proper because it could not increase the risk to an insurer.

The Pennsylvania Supreme Court rejects the reasoning of two Superior Court cases from the 1990's which rejected assignments, and reaches back to a 1946 Pennsylvania Supreme Court case involving a life insurance policy. It looks to the insuring agreement of the Gulf policy, which extends to "bodily injury" caused by an "occurrence", defined as an "accident". Payment is required "by reason of liability imposed by law" which Foulke "shall become legally obligated to pay." The court finds this language ambiguous as it could mean: a judgment (Gulf's argument); when all appeals are exhausted or collection efforts begin; or the time of the occurrence upon which liability is based

(Egger's argument). The court accepts Egger's argument and finds the risk to Gulf was established when the accident occurred, despite the subsequent fixing of the precise amount of damages for that loss. Although the assignment is subject to whatever claims or defenses Gulf would otherwise have against Foulke, the assignment here changed only the identity of the party who was entitled to recover under the Gulf policy.

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

Repko v. Chichester School District

2006 Pa. Commw. LEXIS 439

August 10, 2006

Commonwealth Court holds that the real property exception to immunity under the Political Subdivision Tort Claims Act does not apply to negligent placement of personal property on real property.

Background: Plaintiff Kelly Repko was injured when a table in the school's gymnasium fell on her. The Plaintiff argued that the alleged failure to remove a dangerous condition on real property was subject to the real property exception to immunity under the Political Subdivision Tort Claims Act, which applies to negligence arising from the care, custody or control of real property. The trial court held that the alleged negligent placement of the table was subject to the real property exception.



The Fall 2006 Membership Meeting and Client Conference is scheduled for September 13-16, 2006 in San Diego, California. The theme of the Fall conference is "Smart Business Begins with Diversity."

Stephen E. Geduldig and Todd B. Narvol are scheduled participants in the Transportation Law presentations.

Visit www.uslaw.org for more information.

Disposition: The Commonwealth Court reversed the trial court, finding that the alleged negligent placement of personal property on real property does not constitute negligent care of real property. An injury caused by an item of personal property, even when located on real property, does not fall within the real property exception to immunity. To hold otherwise would defeat the purpose of immunity.

Any questions regarding this case can be directed to Tom Brumbaugh at 717-441-7060 or tbrumbaugh@tthlaw.com.

Wisniski v. Brown & Brown Ins. Co. of Pa.,
2006 Pa.Super. 216
Decided: August 15, 2006

Holding: Superior Court affirms trial court decision that an insurance broker has no duty to inspect business premises and advise clients based on that inspection.

Background: The Wisniskis sustained substantial business inventory damage when their commercial premises were flooded on September 7, 1999. At the time of the flood, the Wisniskis' business was insured by a commercial liability policy which specifically excluded coverage for losses due to flood. The Wisniskis had obtained the policy through the general insurance agency of Brown & Brown, which provided some of the Wisniskis' insurance needs. The Wisniskis claimed that Brown & Brown, and its agents, failed to properly inspect the Wisniskis' property, prior to the issuance of the policy, and failed to recommend flood coverage.

The Brown & Brown Defendants filed a Motion for Summary Judgment, asserting that no duty to inspect the premises or advise of the need or existence of flood coverage existed under the law, and the trial court granted the motion. The Superior Court reversed. The Pennsylvania Supreme Court held that the issue of whether a duty existed turned on the factors listed in the Althaus v. Cohen, 756 A.2d 1166 (Pa. 2000) and remanded the case to the Superior Court. The Superior Court then examined the Althaus factors and affirmed the trial court decision.

On remand, the Superior Court applied the Althaus five factor test including: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3)

the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall interest in the proposed solution. The Superior Court found that the Althaus factors did not weigh in favor of recognizing a broker's duty to inspect a business premises and advise clients based on that inspection. Therefore, the court held that no such duty existed as a matter of law. In the absence of a duty of care, the court found that Brown & Brown could not be held liable for negligence and affirmed the decision of the trial court.

Any questions regarding this case can be directed to Michele Thorp at mthorp@tthlaw.com.

Wirth v. Aetna U.S. Healthcare
2006 Pa. LEXIS 1537
August 22, 2006

Supreme Court holds that an HMO is exempt from the anti-subrogation provisions of the MVFRL.

Background: Plaintiff Jonathan Wirth received medical care for injuries sustained in a motor vehicle accident. His medical bills were covered under an HMO with Aetna. After Wirth settled with the tortfeasor, Aetna asserted a lien against the settlement for its costs. Wirth paid Aetna, then filed suit against it alleging unjust enrichment and that the lien violated Section 1720 of the MVFRL. The action was removed to federal court. The Third Circuit certified the question to the Pennsylvania Supreme Court.

Disposition: The Pennsylvania Supreme Court found that the anti-subrogation provisions of the MVFRL do not "specifically and in exact terms" apply to HMO plans, as required under the HMO Act, 40 P.S. §1560(a). Therefore, Aetna had a right of subrogation for benefits paid for treatment of injuries arising from the motor vehicle accident.

Any questions regarding this case can be directed to Tom Brumbaugh at 717-441-7060 or tbrumbaugh@tthlaw.com.

Wheeler v. Nationwide Mut. Fire Ins. Co.
2006 Pa. Super. 197 (Pa. Super. 2006)
Decided: July 31, 2006

Superior Court affirms trial court decision that the claimant, whose own policy does not contain income

loss benefits, cannot recover under another policy which does provide such benefits.

Background: Wheeler was injured while driving a vehicle insured under his mother's policy, which provided income loss benefits, although his own policy under which he was a named insured did not. Nationwide filed preliminary objections which were upheld by the trial court.

Holding: The Pennsylvania Superior Court affirms the trial court decision. Wheeler argued that Section 1713 of the MVFRL, which specifies priority, supported his claim of benefits at an alternate priority level, as his policy did not provide such benefits, allowing him to proceed to the next priority level. The Superior Court holds that an insured is not entitled to obtain benefits from multiple sources under policies at different priority levels.

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

Beck-Hummel and Hummel v. Ski Shawnee, Inc.
2006 Pa. Lexis 159
Decided June 30, 2006

Background: In January, 2000, Plaintiffs and their two children went to Ski Shawnee, where Plaintiff-husband purchased four snow tubing tickets for his family's use. Language in small print on back of ticket disclaimed liability on the part of Ski Shawnee and included an agreement not to sue Ski Shawnee in the event of injury. Plaintiff-wife injured her ankle and filed suit for negligence; husband filed for loss of consortium. Trial court granted summary judgment to Ski Shawnee, finding that language on the back of the ticket constituted a binding contract which precluded Plaintiffs from filing suit.

Holding: The Pennsylvania Superior Court reversed summary judgment granted in favor of Ski Shawnee, Inc., because disclaimer language printed on back of snow tubing ticket may not have been enforceable as a matter of law where neither ticket-buying husband nor ticket-using wife read the language nor knew they were entering into a contract with Defendant. The court noted that neither Plaintiff admitted reading the language on the back of the ticket, the language was not so conspicuous as to put Plaintiffs on notice of the

contract, and Ski Shawnee made no other attempt, verbally or through signage, to inform Plaintiffs that the purchase of a ticket constituted a contract. The matter was remanded to the trial court for further proceedings.

Any questions regarding this case can be directed to Bret Keisling at 717-441-7054 (bkeisling@tthlaw.com).

Creazzo v. Medtronic
2006 Pa. Super. 152
Decided June 27, 2006

An electrical stimulator designed and manufactured by Medtronic was implanted into Plaintiff's spinal cord in 1998 to relieve pain. Plaintiff began experiencing problems with the stimulator and commenced suit against Medtronic. Some ten months *after* commencing suit, the stimulator was removed from Plaintiff's body. Counsel for Plaintiff had apparently asked the hospital to preserve the stimulator after its removal, but for reasons unknown the stimulator was not preserved. Prior to its removal, counsel for Medtronic had also requested that the device be preserved.

In the lawsuit, Plaintiff claimed design and manufacturing defects and failure to warn. Plaintiff also asserted a strict products liability claim under 402A of the Restatement Second of Torts. Medtronic filed a Motion for Summary Judgment based on spoliation of the evidence, among other grounds. The trial court granted the motion and dismissed the case. The Superior Court affirmed holding that, because a manufacturing defect was claimed, Plaintiff had an affirmative duty to preserve the stimulator, so that Medtronic and/or its experts could inspect and examine the device. The Court noted, "The fact that the actual loss [of the device] occurred while the device was in the custody of a third party [the hospital] does not ameliorate that responsibility, given [Plaintiffs'] knowledge of their own pending claim and the nature of their claim as one based on a manufacturing defect."

Just as important was the Court's treatment of Plaintiff's strict liability claim under 402A. Looking to prescription drug cases for comparison, the Superior Court ruled that strict liability could not be applied to medical devices such as the electrical stimulator in this case. While not specifically addressed in the opinion, the ruling presupposes that, as in the prescription drug cases, the medical device is accompanied by or

provided with adequate warnings of the device's potential risks.

Any questions regarding this case can be directed to Brooks Foland at (717) 255-7626 or bfoland@tthlaw.com

Prudential Property and Cas. Ins. Co. v. Sartno
2006 Pa. LEXIS 1535
August 21, 2006

Pennsylvania Supreme Court holds that delivering pizza is not an excluded activity under automobile liability policy's "cars for hire" exception.

Background: Robert Sartno worked part-time at a pizzeria and restaurant. His duties included cleaning the restaurant, preparing food and delivering pizza. The pizzeria offered free delivery of pizza, which Sartno delivered in his personal vehicle. Sartno was paid an hourly rate, regardless of the number of pizzas he delivered. On February 13, 1998, he left the restaurant to deliver pizzas. As he prepared to exit his parking space, he struck Michele Hebal, who was carrying her infant daughter. A lawsuit was filed against Sartno for personal injuries arising from the accident. Sartno reported the suit to his personal auto insurer, Prudential, who filed a Declaratory Judgment Action seeking a judgment that coverage was excluded under the "Cars for Hire" exclusion of the policy. The trial court granted summary judgment in favor of Sartno, finding that the exclusion did not apply. Prudential filed an appeal to the Superior Court, which, in a split decision, reversed and held that the exclusion applied.

Disposition: The Supreme Court reversed the Superior Court's decision. The Supreme Court held that the exclusion could reasonably be interpreted to apply only when a specific fee was charged for the use of a vehicle. Since the "Cars for Hire" exclusion was susceptible to more than one reasonable interpretation, it was ambiguous. Since the exclusion was ambiguous, it was construed against the insurer.

Any questions regarding this case can be directed to Tom Brumbaugh at 717-441-7060 or tbrumbaugh@tthlaw.com

Touloumes v. E.S.C., Inc.
899 A.2d 343 (Pa. 2006)
Decided: July 19, 2006

Pennsylvania Supreme Court concludes that delay damages are not available in a breach of contract action involving damage to property.

Background: Suit was filed arising out of a roofing contract. Water intrusion occurred, resulting in property damage, with a judgment obtained by Touloumes against the roofing contractor for improper workmanship. Delay damages were sought and denied by the trial court. The Superior Court affirmed.

Holding: On appeal, delay damages were sought under Pennsylvania Rule of Civil Procedure 238, because the express language of the Rule provides for delay damages in actions involving property damage. Touloumes argued that application of this Rule depends on the nature of the relief involved, not the underlying cause of action. Noting differing approaches by the Commonwealth and Superior Courts, the Pennsylvania Supreme Court looks to legislative history and holds that the Rule is applicable to tort actions and is not applicable to breach of contract actions, even where damages are measured by actual property damage. Pre-judgment interest is the appropriate vehicle to secure damages for delayed relief.

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

Excavation Technologies, Inc. v. Columbia Gas Company of Pennsylvania
2006 Pa. Super. 164
Decided July 7, 2006.

Economic Loss Doctrine does not preclude a claim for negligent misrepresentation under the One Call Act.

In this case, Plaintiff appealed from an Order sustaining Defendant's Preliminary Objections based on the Economic Loss Doctrine that "no cause of action exists for negligence that results solely in economic damages unaccompanied by physical injury or property damage." The facts of the case concerned Plaintiff's excavation work for a water line project. Defendant had been asked to mark any gas lines in the vicinity. According to Plaintiff, the Defendant had marked several of its lines improperly and some were not

marked at all. Plaintiff alleged that it struck Defendant's lines on several occasions and had to search for their gas lines in other instances. This extra work allegedly cost Plaintiff approximately \$75,000 for down time of personnel and equipment.

In reversing, the Superior Court held that the Economic Loss Doctrine does not automatically apply when only economic losses are alleged and that in this situation, a utility company is considered to be in the business of supplying information when it acts in compliance with the Pennsylvania One Call System (One Call Act) 73 P.S. §1777(5)(i) (which provides, inter alia, that facility owners must mark the position of their underground lines when requested by a contractor). In addition, the Court adopted Restatement §552 (3) for negligent misrepresentation cases that arise under the One Call Act. The Court cited at length from the Supreme Court's 2005 decision in Bilt-Rite Contractors, Inc. v. Architectural Studio, dealing with a general contractor's claims based for reliance upon an architect's designs and plans in submitting a winning bid, and noted, like Bilt-Rite, the factors weighed in favor of permitting a claim for only economic losses under a negligent misrepresentation theory depend upon 1) the relationship between the parties; 2) the social utility of the actor's conduct; 3) the nature of the risk imposed and the foreseeability of the harm incurred; 4) the consequences of imposing a duty upon the actor; and 5) the overall public interest in the proposed solution.

A dissent filed by Judge Orié Melvin noted that the Superior Court was expanding the Bilt-Rite Contractor's case beyond that intended by the Supreme Court.

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

Loughren v. United Services Automobile Association, Pa.Super. July 28, 2006 (Memorandum Opinion)

In a non-published Opinion, the Superior Court affirmed the entry of summary judgment in favor of United Services Automobile Association based on the expiration of the statute of limitations in an insurance bad faith claim.

Background: Plaintiff was injured while a passenger in a one car accident. He recovered the full amount of

available liability limits of \$500,000.00. He then notified his insurance carrier, United Services Automobile Association of a potential underinsured motorist (UIM) claim and also advised that the value of his UIM claim exceeded the available UIM limits of \$1,200,000.00. USAA offered \$200,000.00 to settle the claim. Plaintiff rejected the offer and reiterated that the value of his claim far exceeded the available UIM coverage. After an arbitration panel awarded \$4 million to Plaintiff, USAA tendered its limits in coverage. Thereafter, Plaintiff initiated an insurance bad faith claim against USAA based on the handling of the UIM claim. USAA's position was that the statute of limitations had expired at the time of the filing of the bad faith claim.

Holding: The Superior Court affirms the trial court decision. Under Pennsylvania law, the statute of limitations for a claim under the bad faith statute is two years. The court reiterated the well settled standard that the statute of limitations begins to run as soon as the right to institute and maintain suit arises. Therefore, the court found that the statute of limitations for a bad faith claim accrues when an insured first has a right to sue for bad faith, that is, when the insurer had first allegedly acted in bad faith toward the insured. In this case, USAA had demonstrated alleged bad faith no later than when USAA rejected the offer to settle the claim for the policy limits and instead offered \$200,000.00 in an attempt to settle the matter. At that point, the statute of limitations began to run. Plaintiff commenced the action more than 2 years after that date and, consequently, the bad faith claim was barred by the statute of limitations.

Any questions regarding this case can be directed to Michele Thorp at mthorp@tthlaw.com.

Hollock v. Erie Insurance Exchange

J-82-2006
Filed August 22, 2006

The Pennsylvania Supreme Court, in a one-sentence order, determined that an appeal of a Superior Court decision was improvidently granted. Thus, the Superior Court decision stands, which held that insurers can commit bad faith during the course of bad faith litigation.

Background: Plaintiff was injured in a 1992 vehicle accident and filed a UIM claim with Erie after settling the first-party claim. The claim adjuster told Plaintiff's counsel that the UIM policy limit was \$80,000; it was actually \$500,000. Erie set a \$30,000 reserve, but did not make an offer until more than one year later. In handling the UIM claim, Erie challenged the causation of Plaintiff's injuries, but had not done so earlier while settling Plaintiff's first-party claim for the same accident. Plaintiff was awarded \$500,000 at arbitration, and subsequently filed a bad faith claim against Erie, under 42 Pa.C.S. § 8371. The trial court found that while litigating the bad faith claim, the insurer engaged in "an intentional attempt to conceal, hide or otherwise cover-up the conduct of Erie employees" that itself constituted bad faith. The fact-finder permissibly considered Erie's conduct, during litigation, in finding Erie acted in bad-faith. The Superior Court affirmed.

Holding: By deciding that the appeal was improvidently granted, the Supreme Court let stand a Superior Court affirmation of a trial court decision that an insurer's conduct, during the course of bad faith litigation, was properly considered in finding bad faith. Chief Justice Cappy, joined by Justice Castille, dissented, stating that the court had a well-developed trial record and should address the merits of the case. The dissent also opined that 42 Pa.C.S. §8371 does not allow insurer's conduct during bad faith litigation to be considered in establishing bad faith.

Any questions regarding this case can be directed to Bret Keisling at 717-441-7054 (bkeisling@tthlaw.com).

General Refractories Co. v. Insurance Co. of North America

**2006 Pa. Super. 224 (Pa. Super. 2006)
Decided: August 18, 2006**

Superior Court rejects claim that a one month extension of an excess policy operated to create an additional year's coverage limit.

Background: In the context of underlying asbestos litigation, insured argued that a one month extension of an excess policy in the 1970's created an additional limit, where the policy provided that the limit of liability applied separately to each consecutive policy year. The trial court denied the claim, and the insured appealed.

Holding: On appeal, the insured argued that neither the policy nor related binder contained any language specifically limiting the insurer's liability. The Superior Court held that the declaration page's identification of policy periods controlled, and not the endorsement which simply extended the duration but did not create a new policy term. The extension meant only that the policy year, and with it the original monetary limit, was protracted to encompass liability which arose during that period, not to increase the amount available to respond to such liability.

Any questions regarding this case can be directed to Paul Walker at 717-441-7061 (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 for more information on members of our General Liability Practice Group.

OFFICE LOCATIONS:

HARRISBURG

305 North Front St., 6th Floor
Harrisburg, PA 17101
(717) 237-7100 Phone
(717) 237-7105 Fax

BETHLEHEM

3400 Bath Pike, Suite 302
Bethlehem, PA 18017
(610) 868-1675 Phone
(610) 868-1702 Fax

PITTSBURGH

One Oxford Centre
301 Grant Street, Suite 1150
Pittsburgh, PA 15219
(412) 697-7403 Phone
(412) 697-7407 Fax

FIRM NEWS & ANNOUNCEMENTS

TT&H will host a booth at the West Shore Chamber of Commerce "Business and Industry Night" to be held at the Radisson Penn Harrisburg in Lemoyne, Pennsylvania.

125 exhibitors are expected to participate in the event, which draws more than 1,000 guests every year. The event is scheduled for September 28, 2006 from 3:30 to 7:00 p.m. For tickets, contact the West Shore Chamber (www.wschamber.org).

Be sure to stop by and see us there!



SPEAKING EVENTS & SEMINARS

Daniel L. Grill, Hugh P. O'Neill III and Gerryanne A. Cauler will be presenters at the PHCA Annual Convention on Monday, September 25, 2006. Their topic is "Professional Licensing Issues in Long Term Care".



Paul R. Walker was a featured speaker at the PBI Annual Animal Law Seminar in Philadelphia, Mechanicsburg and Pittsburgh on August 1, 23 and 30, 2006. His topic was insurance and liability issues relating to dog breeds and dog bite claims.

The annual *Workers Compensation in Pennsylvania Today* seminar presented by TT&H is scheduled for October 25 (Harrisburg) and October 27 (Pittsburgh). If you, or someone you know, would benefit from attending, please contact Katherine Bavoso, Esquire at kbavoso@tthlaw.com for more information.
