HARRISBURG
BETHLEHEM
PITTSBURGH

THOMAS, THOMAS
& HAFER LLP

ATTORNEYS AT LAW
www.tthlaw.com

eNotes – Summary of Significant Liability Defense Cases
July 2007

Recent Decision Highlights:

Sackett v Nationwide Mutual Insurance Company
2007 Pa. Lexis 835
Decided April 17, 2007
Page 1

Burger v Blair Medical Associates, Inc.
2007 Pa. Super. 164
Decided June 6, 2007
Page 2

Attix v Lehman
2007 Pa. Super 153,
2007 Pa.Super. LEXIS, 1542
Decided May 31, 2007
Page 2

Fidelity National Title Insurance Company of New York v United Settlement Services, Inc.
2007 Pa.Super. 147
Decided May 24, 2007
Page 3

Zappile v. Amex Assurance Company
2007 Pa.Super. 171
Decided June 8, 2007
Page 3

Firm News & Announcements
Page 4

CLIENT ADVISORY

Signs of Possible Reconsideration of Sackett v. Nationwide

On June 27, 2007, the Supreme Court of Pennsylvania, on the Court's own initiative, issued an order inviting the Insurance Commissioner to submit an *amicus curiae* ("friend of the court") brief regarding whether the Court should reconsider the recent decision in Sackett v. Nationwide. That unusual development is a strong sign that the Court will reconsider the Court's prior decision—an extremely rare procedural step.

Sackett v. Nationwide, decided on April 17, 2007, has had major repercussions in the motor vehicle insurance industry in Pennsylvania. 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.

On April 30, 2007, Nationwide applied for reargument, basically on the grounds that the Court was mistaken or uninformed as to the enormous impact of the decision. Reargument of a Supreme Court decision is rarely granted—reportedly, it has been allowed only a handful of times throughout the Court's 285 year history. PDI, the Insurance Federation and PaTLA have asked the Court for permission to file briefs. The recent order inviting the insurance Commissioner to file a brief is, at the least, an indication that the Court is giving serious consideration to reconsideration—at best it is an indication that the Court will give the issue a fresh look, in light of better information, as to its impact.

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

RECENT DECISIONS - CASE SUMMARIES

Burger v. Blair Medical Associates, Inc.
2007 Pa.Super. 164
Decided: June 6, 2007

The Pennsylvania Superior Court holds an action for the breach of physician-patient confidentiality is not merely a "re-labeling" of the tort of invasion of privacy (governed by a one-year statute of limitation), and instead is governed by a two-year statue of limitation.

Background: Burger treated with Blair Medical Associates for a work-related injury from 1996 to 2001 and authorized Blair to release medical records to her employer's workers compensation consultant "for the purposes of review for payment of medical expenses incurred due to work-related injury or illness." Burger alleged that Blair breached physician-patient confidentiality by releasing records revealing Burger's marijuana and prescription medication use, although these records allegedly had no relationship to the work injury. Her employer, then terminate her employment, based on the drug use information in the records.

Blair asserted that the one-year statute of limitations for privacy actions barred Burger's lawsuit. The trial court held that Pennsylvania recognizes a separate action for breach of physician-patient confidentiality which is governed by a two-year limitations period applicable to tortious conduct in general.

Holding: The Superior Court holds that there is a cause of action for breach of physician-patient confidentiality which is separate from an invasion of privacy claim. However, the court then considers whether each cause of action can be sufficiently distinguished in a substantive manner such that different statutory periods of limitation should apply. The court reviews the different species of invasion of privacy and concludes that breach of physician-patient confidentiality is not merely a "re-labeling" of the tort of invasion of privacy, and is governed by a two-year statue of limitation.

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

Attix v. Lehman
2007 Pa.Super. 153, 2007 Pa.Super. LEXIS, 1542
Decided: May 31, 2007

Pennsylvania Rule of Civil Procedure 237.3(b), pertaining to relief from a Judgment of Non Pros or by Default, does not require the litigant seeking relief to provide a reasonable excuse for the late filing, as long as the proposed Complaint or Answer states a meritorious claim or defense.

This Philadelphia County case involved an accident between Plaintiff Jeffrey Attix, who was riding a bicycle, and Defendant Patricia Lehman who was operating a motor vehicle. The case was instituted by a Writ of Summons, with a Complaint filed on October 27, 2005. On April 17, 2006, Plaintiffs served Defendant with a Notice of Intention to Take Default Judgment (10 day notice) if Defendant did not answer the Complaint within 10 days. Thereafter, on June 27, 2007, Plaintiffs filed a Praecipe for Entry of Default Judgment, which was entered by the Trial Court the same day. On July 6, 2006, Defendant filed a Petition to Open the Default Judgment, which was denied by the Trial Court.

On appeal to the Superior Court, Plaintiffs argued that Defendant failed to provide a reasonable excuse for her delay in timely answering the Complaint and that the Default should stand. In reversing the denial of the Petition to Open the Default Judgment, the Superior Court held that Pennsylvania Rule of Civil Procedure 237.3(b) eliminates the common law "reasonable excuse" requirement, as long as the Petition to Open Default Judgment is filed within 10 days of the Entry of Default Judgment, and the Petition to Open Default Judgment states a meritorious claim or defense.

Any questions regarding this case can be directed to Jody Mooney at (610) 332-7013 or jmooney@tthlaw.com.

Fidelity National Title Insurance Company of New York v. United Settlement Services, Inc.
2007 Pa.Super. 147
Decided: May 24, 2007

A discovery order compelling a wife to answer questions pertaining to an alleged fraud involving her husband, which may impinge on spousal privilege, is not an appeallable order where the court would have to determine the merits of the underlying fraud claim to determine if the claimed privilege applies.

In an underlying fraud action, a wife appealed the Trial Court's order compelling her to answer questions regarding communications between her and her husband. The wife argued that the spousal immunity privilege applied because any fraud had ceased as of a certain date, and any communications after that date were protected by the privilege. The Plaintiff asserted that the alleged fraud continued beyond that date, and communications after that date included efforts to conceal the alleged fraud. The Superior Court noted that spousal privilege does not apply to communications made to perpetuate a fraud. Thus, the Court would have to examine the merits of the fraud allegations and the date the fraud allegedly ceased, in order to determine whether the privilege applied. Accordingly, the issue of whether the privilege applied was not separable from the underlying claim and the Trial Court's order was not appeallable as a collateral order.

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

Zappile v. Amex Assurance Company
2007 Pa.Super. 171
Decided: June 8, 2007

Pennsylvania Superior Court reverses bad faith verdict against insurer that arguably undervalued an underinsured motorist claim.

Background: Mr. Zappile was struck and injured by a car while walking his dog. He settled his underlying claim with the driver for her coverage limit and presented a claim to Amex demanding the full limit of his underinsured motorist coverage, $150,000. Amex evaluated the total claim value as $32,000, which was offered promptly, but no further offers were made prior to arbitration. The arbitration award was $105,000.

Mr. Zappile and his wife then sued Amex alleging that the company undervalued the case and forced them into arbitration instead of negotiating in good faith. The Zappiles retained an insurance expert who offered several opinions at trial with respect to the insurer's conduct, including that Amex unnecessarily treated this "first party" case as adversarial litigation, that Amex should have tendered un-reimbursed lost wages and its reserve as undisputed amounts due, and that Amex did not make a partial payment despite the fact that its claims manual dictates that partial payments should be made.

The Trial Court accepted the Zappile's position and found that they had proven bad faith by clear and convincing evidence. The judge awarded the Zappiles $75,000 in damages.

Holding: The Superior Court reversed, holding that the Plaintiffs' expert was wrong in several key respects, including each of the areas mentioned above. The Court chastised the parties for not communicating better and remarked that the case had been undervalued by Amex, but not out of ill will or without reasonable basis. This case dispels the myth that UM/UIM claims are non-adversarial in nature and clarifies when partial payments are due and not due on disputed claims.

Any questions regarding this case can be directed to Kevin McNamara at (717)237-7132 or kmcnamara@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

TT&H IN COURT

Defense Verdict in Premises Liability Trial

Kent Price (Harrisburg) recently obtained a defense verdict on behalf of his clients in a slip-and-fall case June 11-12, 2007 before a jury of twelve in York, York County, Pennsylvania. This is Mr. Price's fifth defense verdict this year including three jury trials, a non-jury trial, and a compulsory arbitration.

This case involved a slip-and-fall accident resulting in a non-displaced fracture of the femoral neck of the 49 year old female Plaintiff's left leg. The Plaintiff underwent percutaneous pinning of the fracture utilizing two cannulated screws. She subsequently developed irritation and pain at the site of the screw heads requiring a second surgery to remove the screws. Thereafter, Plaintiff continued to complain of pain and tightness in the area of the fracture, with significant limitations involving her pre-accident activities. She incurred recoverable medical expenses in excess of $12,000.00. The pre-trial demand was $120,000.00.

Plaintiff alleged that she fell when her foot slipped on an accumulation of cinders and/or gravel on the macadam entrance/exit driveway at the Defendants' convenience store, which was most likely from anti-skid materials placed on the parking lot and/or adjacent public road during winter snow storms. Plaintiff asserted that Defendants had violated internal policies and procedures which required cleaning of the parking areas daily.

The defense focused on Plaintiffs failure to produce any evidence of the specific nature of the condition that allegedly caused the fall, other than the fact that there was an accumulation of black cinders and/or stones in the area of the accident. Although Plaintiffs obtained photographs of the accident site the following day, none of the photographs were close-up pictures revealing the specific conditions at the time of the accident. Additionally, the Plaintiffs failed to obtain a sample of the stones as evidence. Finally, the Plaintiffs were unable to verbally describe the size, shape, depth or density of the stones. Consequently, the defense argued that the Plaintiffs had failed to meet their burden of proof and the jury had no basis to determine whether the condition posed an "unreasonable risk of harm" to persons lawfully on the premises. The jury deliberated 45 minutes and returned a verdict that Defendants were not negligent.

FIRM NEWS & ANNOUNCEMENTS

Welcome New Attorneys!
TT&H welcomes Thomas F. Merrick to the Pittsburgh office. Tom, formerly a prosecutor in the Allegheny County District Attorney office, will focus his practice in litigation, professional licensure, health care, white collar and general criminal defense.

TT&H In Our Community - On September 27, 2007, members of TT&H staff will participate in the Leukemia & Lymphoma Society's *Light the Night® Walk*. For more information, visit www.lightthenight.org/cpa.