



Gibley and McWilliams, P.C.

NEWS AND UPDATES

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PA SUPREME COURT CLARIFIES DUTY OF CONSTRUCTION MANAGER

In *Farabaugh v. Pennsylvania Turnpike Commission*, 911 A.2d 1264 (Pa. 2006), the Pennsylvania Supreme Court clarified the duty owed by a construction manager to a worker.

While driving a dump-truck on a haul road at a construction site, the operator of the truck was killed when the truck went off the road. Trumball, the construction manager on the project, did not contract with subcontractors but instead

acted to oversee the construction for the owner. The trial court granted summary judgment for Trumball, holding that it owed no duty to the decedent, and the Commonwealth Court affirmed.

The Supreme Court reversed the order, concluding that a review of the record in the light most favorable to plaintiff revealed that Trumball had contractually undertaken a responsibility for safety on the project and thus may have owed a duty

to the decedent. The Court refused to adopt a rigid standard and instead found that “a construction manager’s duty is defined by the intent of the contracting parties as reflected by their contractual designation of responsibilities.” In the case before it, the Supreme Court concluded that Trumball owed a duty of care based upon its contractual obligation to perform safety inspections and other safety monitoring

functions.

A second issue presented in the appeal related to whether plaintiff had properly stated a cause of action against PennDOT. The Supreme Court concluded that plaintiff had failed to present a common-law cause of action against PennDOT for obvious or non-obvious hazards created by the general contractor sufficient to meet an exception for sovereign immunity.

A LOOK ON THE INSIDE...

- > PA Supreme Court to hear a case dealing with the privilege of in-house communications
- > Court allows piercing of corporate veil of a subcontractor where no fraud found.
- > Construction defect not an “occurrence” on a standard CGL policy
- > Victim restitution may constitute “damages”
- > Statute of limitations bars action where writ not timely served.

FRAUD SUFFICIENT TO TRIGGER TREBLE DAMAGES UNDER PA UTPCPL

Sellers of a home who failed to disclose recent basement flooding to purchasers could be liable for treble damages under the Unfair Trade Practices and Consumer Protection Law (UTPCPL), even if there was no outrageous or egregious conduct on the part of the seller. So held the Supreme Court in *Schwartz v. Rocky*, 932 A.2d 885 (2007), an October 17, 2007 decision.

Finding the issue to be “a very close one,” the

Court looked at the plain language of the statute and found that it did not require outrageousness to allow for the award of treble damages. Nevertheless, the Court stated that a court considering a claim for treble damage should focus on “the presence of intentional or reckless, wrongful conduct, as to which an award of treble damages would be consistent.”

In a footnote, the Court seemed to call into question the application of the con-

sumer fraud statute to the purchase of real estate, but did not address the issue because it had not been properly raised on the appeal. This is an interesting statement by the Court as there have been a number of intermediate appellate court decisions in Pennsylvania where the consumer fraud statute has been applied to real estate claims. In the future, the Court most likely will find the statute applicable if the issue is before it.



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COURT TO CONSIDER PRIVILEGE FOR IN-HOUSE COMMUNICATION

The Pennsylvania Supreme Court has now accepted review of a decision that may have significant ramifications for attorney-client communications, particularly with regard to corporate communications with in-house counsel.

In *Nationwide v. Fleming*, 924 A.2d 1259 (Pa. Super. 2006), the Superior Court had found that a memo written by Nationwide's in-house lawyer relative to a plan for dealing with broker defections was not privileged from disclosure. The Court found that the trial court had erred in finding

that the privilege had been waived by disclosure by the insurer of two similar memos. However, after stating that "attorney-client privilege protects from disclosure only those communications made by a client to his or her attorney which are confidential and made in connection with providing legal services or advice," the Court found that the memo in question did not contain confidential disclosures by Nationwide to the attorney and thus was not privileged.

The Supreme Court accepted review on Oc-

tober 31, 2007, on the issue of whether the Superior Court erred in holding that the privilege did not apply to a confidential memo written by in-house counsel to its senior executives and attorneys which related to pending and future litigation and reflects confidential information previously shared by the client with the attorney as well as the attorney's legal advice. The results of the decision will likely have a drastic impact on inter-company communications and will dictate a review of policies in this area.

PA SUPERIOR COURT ALLOWS PIERCING OF CORPORATE VEIL OF SUBCONTRACTOR

Finding that a showing of fraud is not necessary to allow for the piercing of the corporate veil of a concrete subcontractor, the Superior Court in the case of *Fletcher-Harlee Corp. v. Szymanski*, 2007 PA Super 310, has made it a little easier to recover against a corporate shareholder.

In an October 15, 2007, decision, the Court considered whether the trial judge had erred in denying a contractor's request to pierce the veil of a corporate subcontractor. At trial, the contractor had shown

that the subcontractor was undercapitalized as evidenced by its seeking bankruptcy protection once AAA entered a substantial award against the subcontractor. The court likewise found that the owner of the company failed to adhere to corporate formalities and intermingled corporate and personal affairs. Nevertheless, because the trial court found that there was no use of the corporate form to perpetrate fraud, it rejected the bid to pierce the corporate veil to allow

recovery from the sole shareholder.

On appeal, the Court noted the strong presumption against piercing the corporate veil. Noting that there has never been a clear statement of the law in this area, the Court applied the four "considerations" set forth in the case of *Lumax Industries v. Aultman*, 669 A.2d 893 (Pa. 1995), but then went beyond those considerations. The Court found that it was not necessary to prove fraud

in the use of the corporate form in order to pierce the veil. Instead, the veil may be pierced "whenever justice or public policy require and the rights of innocent parties are not prejudiced nor the theory of the corporate entity rendered useless."

We anticipate that this decision may have an impact in the area of residential construction litigation where separate corporations are frequently established for separate developments.

VICTIM RESTITUTION RULED 'DAMAGES' ON LIABILITY POLICY

The insured under a policy of homeowner's insurance was covered for funeral expenses she was required to pay as restitution in a criminal proceeding. So held the Superior Court in its November 1, 2007, decision in *Brethren Mutual v. McKernan*, 2007 PA Super 325.



Plan to attend our seminar on Construction Injury Litigation in February 2008.

The case involved the stabbing death of the man with whom the insured had been living. The stabbing was found to be accidental, but the insured was convicted of reckless endangerment and ordered to pay the funeral expenses as restitution. She then sought to recover those expenses from her insurer.

The Court first rejected the insurer's contention that restitution is not a "claim" under the policy. The Court looked to Black's Law Dictionary for the definition of claim, and found that restitution is considered a claim as it is

a means by which the victim of the crime obtained possession of money.

The Court then addressed the question of whether restitution is in the nature of "damages" under the policy. Looking at 18 Pa. C.S. § 1106, the statute requiring the payment of restitution, the Court found that restitution is in the nature of damages awarded to the victim because it is intended to compensate the victim for his loss. The Court considered whether requiring an insurer to reimburse its insured would undermine one of the goals of restitution, that is, to promote

rehabilitation of the criminal. Finding that there was another public policy consideration at play, the Court ruled that the vested contractual right that the insured had to coverage outweighed this other public policy in the circumstances presented by this case.

This holding clearly opens the door to broader coverage than previously thought and may lead to more clearly defined policy exclusions in the future.

FAILURE TO TIMELY SERVE ACTION INVOKES STATUTE OF LIMITATIONS BAR

In *Englert v. Fazio Mechanical Services*, 932 A.2d 122 (Pa. Super. 2007), the Superior Court found that the failure of plaintiff to timely serve the defendant barred the action. Plaintiff's counsel had instituted the action by writ of summons five months before the statute of limitations was to run, but provided the sheriff with an incorrect address at which to serve the defendants. The sheriff's return provided the correct address, but counsel did nothing prior to the running

of the limitations period to attempt service at the correct address. After the pleadings were closed, the defendants moved for summary judgment which was granted.

Gibley and McWilliams has been nominated by one of its Fortune 500 clients as a "Go To Law Firm" for Litigation in 2008 and will appear in American Law Media's Corporate Lawyer Directory.

On remand of the case from the Supreme Court, the Superior Court was asked to consider its affirmation of the trial court's order in light of more flexible standard set forth in *McCreech v. Philadelphia*, 888 A.2d 664 (Pa. 2005). The Superior Court again affirmed, finding that prejudice need not be shown where the actions of plaintiff served to stall the judicial process in its tracks and defendants did not receive actual notice of the action within the limitations period.

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COURTS FIND FAULTY WORKMANSHIP NOT COVERED UNDER CGL POLICY

Last October, the Supreme Court decided, in *Kvaerner Metals Division v. Commercial Union*, 908 A.2d 888 (Pa. 2006), that a claim of property damage from faulty workmanship did not constitute an “occurrence” under a commercial general liability policy. Since then, several lower courts have followed suit, making it more difficult for insureds to obtain coverage for defective work.

In *Kvaerner*, the Court stated that a court should look no further than the complaint to determine

whether coverage is triggered. Where only breach of contract for poor workmanship is alleged, the occurrence policy, which covers the insured for “accidents,” is not triggered.

The Court in *Kvaerner* did not reach the question of whether “business risk/work product” exclusions under the policy likewise barred coverage. That issue was more recently addressed in *Plasticert v. Westfield Insurance*, 923 A.2d 489 (Pa. Super. 2007). In that case, the purchaser of plastic wheels used in a

gravity flow product line filed suit when the wheels began to break in the field. The supplier sought coverage from its CGL carrier which denied coverage on several bases.

The Superior Court in *Plasticert* did not address the issue central to *Kvaerner*, and stated that for purposes of its discussion, it would assume that the damage to the wheels constituted an “occurrence.” Instead, the Court looked to the business risk exclusion which barred coverage to “your

product” arising out of it or any part of it. Noting that the underlying complaint alleged only damage to Plasticert’s wheels and did not allege personal injury or damage to other property, the Court found that the coverage was clearly barred by the exclusion.

The *Plasticert* decision, in conjunction with *Kvaerner*, will no doubt make it more difficult for insureds to obtain coverage for claims of faulty workmanship, including claims against builders for defects in construction.