

Welcome to the latest edition of the firm's bi-annual newsletter, *Your Best Defense*.

This edition provides a careful look at a number of key appellate court decisions that could have profound impact on the liability exposure of many businesses and professionals in Pennsylvania, including insurance carriers, rental car/truck businesses, licensed engineers and other design professionals and players in the real estate mortgage business.

James Creenan examines the impact of the recent Pennsylvania Supreme Court decision in *Toy v. Met Life*, which held that the Bad Faith Statute does not apply to pre-policy representations or conduct during the solicitation of sales, as well as addressed the issue of an insured's reliance on representations outside of the letter of the written insurance agreement. The recent finding by a district court in Florida, in *Vanguard Car Rental USA, Inc.*, that the Graves Amendment to a landmark transportation bill was unconstitutional, may result in further appellate decisions that could open the door to vicarious liability to rental entities across the nation. Richard McMillan looks at the Graves Amendment, the



Vanguard decision, and its implications. I have written an article for this issue which studies a recent district court opinion discussing the vicarious liability of a lender for actions of a mortgage broker, in the context of a loan rejection. The decision in the *Hawthorne* case could have major ramifications as the sub-prime crisis continues to roil. Finally, Jeffrey Kubay examines possibly contradictory opinions by separate panels of the Superior Court in the recent *Gondek* and *Merlini* cases, as to the interpretation and implementation of the certificate of merit requirements in the

professional liability arena. How the appellate courts decide these issues will be of major import to all professionals practicing within the Commonwealth, as well as the attorneys handling those cases.

We hope that the articles in this edition prove both informative and useful. As always, if you have any questions or are in need of any further service, please contact the authors or any of our attorneys. Please visit our Web site, www.waymanlaw.com, for a complete look at the firm's capabilities and professional staff.



TOY OPINION IMPACTS BAD FAITH LAW

By: James W. Creenan, Esq.

Trade Practices and Consumer Protection Law in the context of the sale of life insurance policies. *Toy v. Metropolitan Life Insurance Co.*, 2007 Pa. LEXIS 1463 (Jul. 18, 2007).

Background

In 1992, plaintiff contacted MetLife's sales representative with the stated purpose of planning for retirement. The sales representative presented Toy with proposals for a "50/50 Savings Plan", and plaintiffs claimed they were told the plan would require \$50.00 monthly payment and result in "savings" of \$100,000.00 at age 65. The agent also stated life insurance was included with the plan. Toy completed an "Application for Life Insurance", answering many health and lifestyle questions typical of an insurance application. The following month, Toy received a policy of insurance from MetLife, which included the policy's life insurance details and the statutory 10 day free-look notice. Plaintiff husband claimed he only looked at the cover. Over a two year period, he paid MetLife \$1,400 in premiums. In

Recently, the Pennsylvania Supreme Court considered the application of both the Bad Faith Statute and the Unfair

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1994, Toy became aware of a class action against MetLife, became concerned about the 1992 transaction, and decided to stop making payments to MetLife.

In 1995, Toy commenced a civil action by writ against MetLife and its sales agent and eventually filed a complaint in 1999. The complaint alleged MetLife's agent induced Toy to purchase the insurance by making various false representations concerning the nature and terms of the plan and the policy. The complaint purported to state numerous causes of action, including claims under the Unfair Trade Practices and Consumer Protection Law ("CPL"), 73 P.S. § 201-3, and the bad faith statute, 42 Pa. C.S. § 8371, relating to unlawful conduct under the Unfair Insurance Practices Act ("UIPA"), 40 P.S. § 1171.1.

Defendants filed motions for summary judgment seeking dismissal of all claims, focusing on Toy's inability to prove justifiable reliance on any of the agent's alleged misrepresentations and on the inapplicability of the bad faith statute to sales of insurance. As the court had made certain rulings applicable to all related case against defendants in a case captioned *Ihnat v. MetLife*, the defendants relied on the trial court's prior ruling on the scope of the bad faith statute. The *Ihnat* ruling established two requirements on the bad faith claims against defendants: (1) the insured must establish the insurer breached a known duty, which can be established by proving common law fraud or a UIPA violation, and (2) the insured must establish that the insurer acted out of a motive of self-interest or ill-will.

In considering the defendants' motions for summary judgment, the trial court agreed that justifiable reliance was a necessary element of both the bad faith and CPL claims. The trial court granted the motions for summary judgment on the claims requiring proof of justifiable reliance, as the record demonstrated a vast discrepancy between the policy's cover sheet and the alleged misrepresentations. Additionally, the trial court also held the parol evidence rule barred all plaintiff's misrepresentation-based claims. As a result, the trial court granted in part the motions for summary judgment and dismissed with prejudice plaintiffs' bad faith and CPL claims.

Plaintiff filed an appeal to the Superior Court. The intermediate appellate court affirmed the dismissal of the bad faith claim but ruled the trial court's *Ihnat* decision improperly construed the necessary elements of a bad faith claim in this context. In essence, the Superior Court maintained the bad faith claim required proof of a denial of benefits and that it knew or recklessly disregarded that it lacked a reasonable basis for the denial.

Yet, the Superior Court found error in the trial court's

parol evidence ruling, finding that plaintiffs could proceed under the rule's fraud in the execution exception.

Although the court ruled justifiable reliance to be a prerequisite of the CPL claim, the appellate court ruled that plaintiffs' failure to review the policy, which never mentions a "savings plan", did not prohibit her from demonstrating justifiable reliance on the agent's representation as to the extent of benefit she would receive.

Supreme Court's Review of Bad Faith and CPL Claims

Both parties filed Petitions for Review to the Pennsylvania Supreme Court, which granted review on the following issues:

- (1) whether the Superior Court's decision that a claim under § 8371 is limited to the unreasonable refusal by an insurance company to pay a valid claim conflicts with Pennsylvania law and the reasoned decisions of other appellate courts, and
- (2) whether the Superior Court's interpretation of the Consumer Protection Law to require justifiable reliance conflicts with the rules of statutory construction and contradicts the reasoned decisions of appellate courts in other jurisdictions that require a lesser standard of reliance to bring a claim under those states' consumer protection statutes.

On the first issue, the Supreme Court's opinion provides a detailed review of Pennsylvania's enactment of the bad faith statute and rejected Toy's assertion that a mere violation of the UIPA necessarily establishes a bad faith claim. The Supreme Court concluded Toy's claim arose from the solicitation of insurance and not from a demand for benefits under a policy. Indeed the statutory language controlled the decision to affirm the trial court's grant of summary judgment:

"Thus, when § 8371, which provides a remedy in an action "arising under an insurance policy" as to a claim an insured has made of his insurer, is read with this meaning of bad faith in mind, we can only conclude on the question before us, that the words of the statute are clear and explicit, and that the Legislature intended not to give relief under the bad faith statute to an insured who alleges that his insurer engaged in unfair or deceptive practices in soliciting the purchase a policy. 42 Pa.C.S. § 8371. Accordingly, we hold that Metropolitan Life was entitled to summary judgment on Toy's § 8371 claim as a matter of law."

Therefore, an insured cannot raise claims under the bad faith statute for misrepresentations made prior to the purchase of insurance.

On the second issue, the Supreme Court rejected Toy's assertion that the CPL does not require justifiable reliance

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but requires a mere causal connection between the statutorily prohibited conduct and her loss. The level of reliance, according to Toy, need not be justifiable as the CPL's interpretive case law never established the required element for claims under the CPL's "catch-all" provision at Section 201-2(4)(xvii). As Toy's "catch-all" claim essentially restated a common law fraud cause of action based on the alleged misrepresentations, Toy was required to prove justifiable reliance.

MetLife argued that plaintiff could not prove justifiable reliance on a misrepresentation because Toy's assertions were rebutted by a clearly written and fully integrated contract, and MetLife further argued Toy should be required to read the contract. The courts should not reward a policyholder that neglects to read writings that would establish differences between the policy as represented by the agent and the policy as delivered. The Supreme Court declined to adopt a rule requiring a policyholder to investigate the representations made in the sale of a policy and further concluded the reasonableness of an insured's reliance would normally be measured by a jury.

Going Forward

The *Toy* holding represents a sigh of relief for insurers facing increasing policyholder attacks. The remedies available under the bad faith statute will not apply to representations or conduct occurring in the context of a sales solicitation. Moreover, CPL claims under the commonly used "catch-all" provision will require the policyholder to establish justifiable reliance on any misrepresentation made concerning the nature and terms of insurance benefits.

While the case did not go so far as to hold that Section 8371 would never apply to sales practices litigation or that the policyholder has an affirmative duty to read a policy, the net result is that the courts must require policyholders proceeding under the CPL to prove the reasonableness of their reliance on statements made during the sales process.

Attorney Creenan will be happy to discuss these or related issues further if you would like. Please contact him at jcreenan@waymanlaw.com.



AGENCY IN CONTEXT OF MORTGAGE BROKER RELATIONSHIP

By: Dale K. Forsythe, Esq.

In this era of sub-prime lending trouble and the higher scrutiny over the practices of all participants in the home loan arena, the expectation is that suits against the key players - lenders, mortgage brokers and appraisers - will see a dramatic increase. Pennsylvania law is curiously silent on many of the liability issues that can arise in these situations, however the District Court for the Eastern District of Pennsylvania has shed some welcome light on at least one of these issues, namely the potential agency relationship between a lender and a mortgage broker in the context of a loan or sale gone bad. In the May 2007 decision in *Hawthorne v. American Mortgage, Inc.*, 489 F.Supp. 2d 480 (E.D. Pa, 2007), the federal district court predicted that Pennsylvania law would essentially follow the dictates of fundamental agency law and found that the mortgage company, American Mortgage, Inc. (American), was not acting as the agent for the lender, Countrywide Home Loans, Inc (Countrywide).

In this case, plaintiff purchasers put a bid on their "dream home" July 2004, and the bid was accepted. Mr. Hawthorne submitted a mortgage application to American. American, on August 3, sent a letter to purchasers confirming "pre-approval" for a mortgage in the necessary amount. As a result, purchasers entered into a Agreement of Sale. Thereafter, on August 9, purchasers submitted a Universal Residential Loan Application to American. Purchasers also signed a Loan Origination Agreement which described American as an independent contractor and not their agent, and stated that they have entered into separate independent contractor agreements with various lenders. On August 29, American sent a letter to purchasers stating that the application had been "conditionally approved with Countrywide...with all conditions to be finalized by Underwriting." Mr. Hawthorne thereafter continually sought assurances that the financing would be in place by the closing, as they would otherwise lose the opportunity to buy the property. American also advised the sellers' real estate agent that they did not anticipate any problems. 489 F.Supp. 2d at 482-83.

On September 10, American accessed Countrywide's approval software to assess the status of the financing. The automatically generated notice advised that American approved the request but that an application needed to be submitted. It also stated that approval is based on accuracy of the data that is provided in the application, further

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review and branch verification and that approval could be withdrawn if there were material differences between the electronic data and the loan package submitted to the branch. On September 14, the completed application was received from purchasers, with the closing set for September 22. On September 20, purchaser advised American that they rejected another buyer's offer of \$350,000 to walk away from the deal, based upon assurances that their deal would close. Just before closing, Countrywide determined that the application did not meet their underwriting conditions, due to some of the financial and credit information that was submitted, and that it would need further review. After several hours into the closing the next day, American admitted it could not provide the financing, and the deal fell through. Sellers sold to a different purchaser. *Id.*, at 483-84.

Purchasers' filed a lawsuit against the defendant lender and broker and included claims for breach of contract, fraud, violation of the Unfair Trade Practices Act, and negligent misrepresentation. All of the claims as to Countrywide were based upon American acting as Countrywide's agent. Countrywide filed a motion for summary judgment. As discussed below, the court found no issue of material fact that American was not acting as Countrywide's agent, and Countrywide's motion was granted. *Id.*, at 484

The arguments that the Hawthornes set forth in favor of a showing of an agency relationship were each rejected by the court. Although Countrywide allowed American access to its internal approval software, Countrywide provided evidence that the system was just a tool to allow a broker to analyze if Countrywide would approve funding under a hypothetical set of facts, and that the site itself explains that approval is based on the accuracy of the data and subject to receipt of the application and branch verification. In addition, the argument that Countrywide left all of the communications with lenders to its brokers was unavailing, as there was no authority that this made the brokers agents. Purchasers also argued that since American was "correspondent bank" that could close mortgages itself and subsequently place those loans with Countrywide, this weighed in favor of an agency relationship. The court rejected this argument, as this status only meant that the broker had sufficient wherewithal to finance a loan. Although Countrywide could buy a loan from American, it would still be subject to Countrywide's conditions. This correspondent designation in fact helped solidify American's independent status, the court opined. Finally, the assertion that Countrywide's use of the word "partner" in referring to American had no legal significance at all. *Id.* at 485.

Moreover, convincing evidence demonstrated the non-existence of any agency relationship, the court noted. Countrywide's Broker Agreement with American clearly identified the independent nature of the parties and the lack of any agency. It further made clear that American did not have to submit all funding requests to Countrywide alone, that it was a non-exclusive agreement. *Id.* at 485.

On the issue of apparent authority to act on behalf of Countrywide, put forth by the purchasers, the court also disagreed with the purchasers' assertions. Apparent authority could bind a principal where there is no actual authority to act granted, where it leads a person with whom the agent deals to believe that the authority has been granted. This was a closer call, according to the court, as Pennsylvania had apparently never addressed this issue in the context of the broker relationship, however the argument must still ultimately fail. The court looked at the Hawthorne's analogy of this relationship to an insurance broker situation, where the general rule is that the broker is the agent of the purchaser, not the insurer. The *Hawthorne* court looked, however, to an earlier Superior Court discussion of an insurance broker agency relationship, where the broker "is the agent of the insured when selecting and negotiating with the insurer, but is normally paid by and may become the agent of the insurer for the delivery of the policy." See *Nationwide Mut. Ins. Co. V. Starlight Ballroom Dance Club, Inc.*, 175 Fed. Appx. 519, 523, n.4 (3d Cir. 2006) (quoting *Taylor, et. al. v. Crowe*, 444 Pa. 471, 282 A.2d 682, 683 (Pa. 1971) (quoting *Taylor v. Liverpool & L & G Ins. Co.*, 68 Pa. Superior Court 302, 304(1971)), cited at 489 F.Supp. 2d at 486. Thus, the court reasoned, this analogy actually works against the Hawthornes here, as American was free to shop the application around to different lenders. According to the court, "if mortgage brokers are like insurance brokers, as the Hawthornes suggest, they are the agents of the mortgagors and not the mortgagees." Further, there is no affirmative act consistent with the agency relationship, as collecting premiums might be for an insurance broker, *Id.* at 486 -87. The court noted that collection of payments on behalf of Countrywide might create agency, but its scope would be limited, and would not extend into entering agreements on Countrywide's behalf. Also, the court noted legal precedence to the notion that the authority to solicit business for a principal does not create authority to bind the principal in contract. *Id.* at 487, citing *Rich Maid Kitchens, Inc. V. Pennsylvania Lumbermens Mutual Ins. Co.*, 641 F.Supp. 297, 305 (E.D.Pa., 1986).

Finally, the court easily dismissed the plaintiffs' theories of agency by estoppel and agency by ratification, as the facts simply did not create issues here. Summary Judgment was granted to Countrywide. *Id.*, at 487-88.

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This decision, to the extent applied by Pennsylvania courts, has significant implications for those involved in the lender/broker/purchaser relationship, particularly as these types of cases become more prevalent. It is a very helpful opinion for those wearing the lender hat, however note that the decision is dependent upon the specific factual background of the case and the particular language of the documents involved. Had the facts demonstrated that American had more power to act on behalf of Countrywide, or had taken affirmative steps to suggest a relationship, the door is left open by the decision to still allow a finding of agency or apparent agency. Again, while *Hawthorne* can be seen as a victory for the lender, one must remain wary of the potential for a different decision under another set of facts.

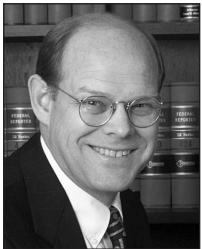
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deemed the owner of the motor vehicle for the purposes of determining liability for the operation of the vehicle or the acts of the operator in connection therewith” up to \$100,000 per person and up to \$300,000 per incident for bodily injury and up to \$50,000 for property damage. Furthermore, if the lessee of the automobile has insurance with limits less than \$500,000 or is uninsured, the lessor of the vehicle shall be liable for up to an additional \$500,000 in economic damages arising out of the use of the leased or rented vehicle. (That statute was enacted to supplant Florida’s common law “dangerous instrumentality doctrine” which had imposed strict vicarious liability upon an owner of an automobile who entrusted that automobile to someone whose negligent operation caused damage to another.)

Similar statutes exist in many other states; however, the provisions and the history of the Florida statute are unique, and it would be rash to jump to the conclusion that Judge Moore’s rationales will be applied to the statutes of other states and that other federal district courts or federal appeals courts will go along with Judge Moore’s ruling. In fact, another federal district court in Ocala, Florida has upheld the Grave’s Amendment constitutionality. Ultimately, these contradictory rulings from various district courts will have to be resolved in the circuit courts of appeals or, quite possibly, in the U.S. Supreme Court.

The truck and car rental industry had lobbied for years to have the federal government override state laws which had imposed vicarious liability upon them for the negligent driving of those who rented vehicles from them. The vehicle rental industry asserts that increased rental rates resulting from large insurance premiums would result in increased rental rates costing consumers over \$100 million per year. Even vehicle rental companies located in states without vicarious liability laws had to buy supplemental insurance out of a concern that a renter would drive the vehicle to a state where a vicarious liability law existed. The rental industry saw no logic to holding the rental agencies vicariously responsible for a rental driver’s negligence in the same manner as an employer is held liable for the acts of an employee.

Supporters of state statutes imposing vicarious liability counter that to override such state laws would be to benefit a prosperous industry at the expense of seriously injured victims. In 1996 President Clinton vetoed the first piece of legislation Congress had passed in an effort to override such state statutes. The stances of politicians have generally split along party lines, and in 2005 President Bush signed the Graves Amendment that had been attached to a 900 page, \$284 million transportation bill. Under the provisions of Representative Sam Graves’ amendment to the aforementioned transportation bill, vehicle rental and



GRAVES AMENDMENT TO THE GRAVEYARD?

By: Richard L. McMillan, Esq.

Plaintiffs’ attorneys across the nation are applauding a recent decision issued on September 14, 2007 by U.S. District Judge K. Michael Moore in the U.S. District Court for the Southern District of Florida. Meanwhile, defense attorneys for the vehicle rental industry are sharpening their knives for the appellate court battles which are sure to follow. In the case of *Vanguard Car Rental USA, Inc., et al. v. Jean Francois Hunchon*, Judge Moore held that the Graves Amendment, 49 U.S.C. Section 30106(b), is an unconstitutional exercise of Congressional authority which attempted to preempt the Florida statute establishing vicarious liability on the part of car and truck rental agencies for the damages caused by the negligence of drivers who merely rented a vehicle from them.

Florida, like many other states, has a statute that creates vicarious liability on the part of those entities which rent or lease a motor vehicle. Florida statute 324.021 states that one who rents or leases a motor vehicle to another “shall be

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leasing companies were only required to carry basic liability insurance and could only be held liable if the company itself were found to have been at fault for an accident, rather than simply being vicariously liable for the operator's negligence under state vicarious liability statutes.

Not surprisingly, the primary battle fields on this issue have been in the states of New York and Florida. New York was the first state in which a judge held the Graves Amendment unconstitutional. In New York, millions of city dwellers do not own cars and simply rent cars when they go on a trip. As a tourist destination state, many of the cars on the Florida highways are rental cars.

In addition to the ideologic and public policy divide, there are competing principles of federal law involved. On the one hand, there is the doctrine of federal preemption by which a federal statute overrides a state statute pursuant to the Supremacy Clause of the U.S. Constitution. On the other hand, there is the matter of state's rights which are preserved by the Constitution to prevent the accumulation of excessive power in the federal government and to create a healthy balance of power between the various states and the federal government.

The proponents of the Graves Amendment argue that the Commerce Clause of the U.S. Constitution grants the federal government the power to regulate the channels of interstate commerce; however, Judge Moore's opinion held that the Florida vicarious liability statute simply regulates tort liability and does not directly regulate the use of channels of interstate commerce.

It will be interesting and important to follow this developing area of law as it makes its way through the appellate courts. Presently, there is no uniformity as to whether the Graves Amendment still pre-empts state vicarious liability statutes in the area of vehicle rentals. Indeed, even federal district courts in different sections within the state of Florida have come to diametrically opposed results on this issue. The battle has been joined and the ultimate outcome difficult to predict, but it is too early to bury the Graves Amendment.

Attorney McMillan will be happy to discuss these or related issues further if you would like. Please contact him at rmmillan@waymanlaw.com.



PROFESSIONAL LIABILITY/CERTIFICATE OF MERIT UPDATE

By: Jeffrey A. Kubay, Esq.

This year has brought significant developments in the law of professional liability and the certificate of merit requirement under Pennsylvania procedural rules for the prosecution for such claims. In the case of *Gondek v. Bio-Medical Applications of Pennsylvania, Inc.*, *infra*, the Superior Court of Pennsylvania held that a plaintiff may not avoid the certificate of merit requirement by attempting to disguise a professional negligence claim as one sounding in "ordinary" negligence. There the Court reinforced the underlying purpose of the certificate of merit requirement to require a plaintiff who is asserting a professional liability claim to specifically demonstrate on the record at an early stage of the litigation that said claim has merit. In *Gondek*, the Court effectively precluded a plaintiff's efforts to circumvent the application of the rules by improperly re-characterizing the nature of a lawsuit as simply ordinary negligence. On the other hand, the Superior Court restricted the application of the certificate of merit requirement in *Merlini v. Gallitzin Water Authority*, *infra*. There, the Superior Court seemingly redefined Pennsylvania statutory law by narrowly interpreting what is considered the exercise of professional judgment under the Engineer, Land Surveyor and Geologist Registration Law.

In *Gondek v. Bio-Medical Applications of Pennsylvania, Inc.*, 919 A.2d 83 (Pa. Super. 2007), the plaintiff was injured in a vehicle accident while a passenger in that vehicle. Just before the accident, the plaintiff had accompanied the driver to his dialysis treatment at defendant Bio-Medical Applications of Pennsylvania, Inc., (Bio-Medical), and the two had then gone to lunch. After eating lunch, the driver, with the plaintiff as his passenger, was driving the vehicle when he lost control, crossed the center line, and struck two retaining walls. The plaintiff-passenger brought suit against Bio-Medical to recover damages for the injuries she suffered in the accident. Her claims were based on a theory that Bio-Medical was negligent in the administration of dialysis to the driver, and that, as a result, the driver was not capable of safely operating a vehicle on the day of the accident. Specifically, the plaintiff claimed that Bio-Medical: (1) failed to adequately monitor the driver's physical condition; (2) failed to warn him of the challenges in operating the vehicle after dialysis treatments; (3) failed to warn him of the risks inherent in eating shortly after dialysis treatment; and, (4) released him from care when he was not capable of safely operating his vehicle.

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Bio-Medical obtained a judgment of *non pros* pursuant to Pennsylvania Rule of Civil Procedure 1042.3 against the plaintiff, and the trial court denied the plaintiff's petition to open the judgment. On appeal to the Superior Court, the plaintiff argued that the certificate of merit rules were not applicable to her claim because she raised "ordinary negligence" claims against Bio-Medical, and she did not allege that a licensed professional had deviated from a professional standard of care. The Court rejected this argument, finding that the claims against Bio-Medical were premised upon allegations that Bio-Medical had breached the applicable standard of care by providing inadequate monitoring and warning with respect to the dialysis treatment rendered to the driver. The plaintiff also argued that, because her complaint did not specifically identify any licensed professionals, the claim against Bio-Medical could not be construed as a claim for professional liability. The Court likewise rejected this argument, reasoning that the supervision of employees to assist in caring for patients is a part of providing medical services.

The case of *Merlini v. Gallitzin Water Authority*, 207 Pa. Super. 274 (filed August 29, 2007), involved a lawsuit by a property owner against a water authority, its engineer, and its contractor relative to a water line project in the vicinity of the plaintiff's property. Therein, plaintiff alleged that the contractor, while working under contract with the Authority and under the supervision and direction of its engineer, came upon her property bordering State Route 4001 in Cambria County and, without right of way or easement, constructed a water line on that property, impairing its use. The defendant engineer, licensed with the Commonwealth, obtained a judgment of *non pros* for the plaintiff's failure to file a certificate of merit pursuant to the Pennsylvania Rules of Civil Procedure, and the trial court denied the plaintiff's petition to open the judgment.

On appeal, the plaintiff asserted that no certificate of merit was required in this case because her suit was not in the nature of a professional liability claim, but rather was based on common law principle that one cannot come on another's land and install a water line without a right of way or easement. By contrast, the engineer argued that the allegations of the complaint demonstrate that the case involved whether the engineer properly designed the placement of the water line within the existing right of way along State Route 4001 and whether the engineer correctly directed the contractor where exactly to install the water line with reference to the plans designed by the engineer. The engineer further argued that the determination of the right of ways and the design and placement of the water lines within the right of ways were an integral part of the professional services that the engineer rendered to the Authority as engineer for the water line project.

In reversing the trial court's denial of the plaintiff's petition to open the judgment of *non pros*, the Superior Court considered the distinction between ordinary and professional negligence and whether the alleged activities of the engineer required professional judgment. The Court recognized that the engineer had a duty to her to determine the position of the right of ways and/or easements applicable to the project. The Court held that such conduct does not require the professional judgment of an engineer; "it requires only an understanding of the location of Merlini's property, the location of any applicable easements or right of ways, and how these intersect with the installed water line." The Court recognized that expert testimony may be required to interpret the applicable state, county, and municipal records which evidence the property rights at issue, and thus allow a factual determination in that regard. However, the Court concluded that once that factual issue is determined, no expert will be required to opine regarding whether the engineer breached a duty to the plaintiff not to trespass on her property.

It should be noted the apparently inconsistent decisions in the *Gondek* and *Merlini* cases were decided by two entirely different panels of the Superior Court. In the *Merlini* case, an Application for Reargument is pending with the Court. Therein, the engineer argues that the Court overlooked controlling and directly relevant authority, namely the Engineer, Land Surveyor, and Geologist Registration Law relating to the practice of land surveying, a branch of the profession of engineering. That Law provides that the "practice of land surveying" involves the "location, relocation,...of any property line or boundary of any parcel of land or any road right of way, easement or alignment." The decision in the *Merlini* case will likely have a significant impact on claims asserted against both land surveyors and engineers involving any type of dispute over the location of property, easements, and/or right-of-ways. The *Merlini* court has held that the determination of the location of property, easements, and/or right-of-ways is not a matter of professional judgment of an appropriate, duly licensed individual. The potential result of this decision is to effectively permit unlicensed individuals, without the requisite knowledge, training, and experience, to perform professional activities of engineers and land surveyors. The primary purpose of the Engineer, Land Surveyor and Geologist Registration Law is to protect the public by assuring that a licensed engineer, with the requisite qualification and competency, will be retained when a client requires his or her services. *Rosen v. Bureau of Professional and Occupational Affairs*, 763 A.2d 962 (Pa. Cmwlth. 2000). The *Merlini* decision appears to be contrary to the purpose of The Engineer, Land Surveyor and Geologist Registration Law of protecting the public, as



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Wayman Watch...

- *Congratulations to Kristen L. Lunz, Esquire and Jonathan M. Gesk, Esquire. Both have recently passed the Pennsylvania Bar exam and have been added as associate attorneys with the firm.*
- *Jeffrey Kubay, author of one of the articles in this issue of Your Best Defense, was invited to speak on November 8 to the Pittsburgh Business Alliance Network, on the topic of estate planning.*
- *Dale Forsythe, also one of this issue's authors, presented at the November 5 national meeting of CNA's real estate division in Phoenix on the topic of mortgage broker liability and defense approaches.*
- *Warren Siegfried served as a member of the seminar committee and addressed more than 900 attendees at the recent national meeting of the Trucking and Insurance Defense Association (TIDA), discussing the topic of eliminating juror bias.*
- *Kate Fagan is now serving as the vice-president of the prestigious Academy of Trial Lawyers of Allegheny County.*
- *Mark Gesk has recently been elected as a member of the Academy of Trial Lawyers of Allegheny County, being installed at their Nemaocolin Woodlands retreat this past October.*
- *Mark Gesk also, along with Paul Mannix, recently presented seminars to design professionals on Green Design and LEEDS Certification.*
- *Michael Magulick, along with Dale Forsythe, also addressed the annual convention of the Pennsylvania Association of Mutual Insurance Companies in August, at the Rocky Gap resort in Maryland, leading a round table discussion on the topic of preservation of electronic documents and e-discovery as well as providing an update on bad faith law in Pennsylvania.*

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well as the purpose of the certificate of merit procedural rules requiring a plaintiff to preliminarily demonstrate the merit of a claim against a professional involving his or her use of professional judgment.

Attorney Kubay will be happy to discuss these or related issues further if you would like. Please contact him at jkubay@waymanlaw.com.