

BINDING AUTHORITY

Insurance Coverage Decisions: Issued Today - Impact Tomorrow



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Stalled Lang Syne: Policyholders Scuttled in Attempt to Have *Gambone* Reviewed by Pennsylvania High Court

Gambone remains as well-preserved as Dick Clark

Ordinarily a decision by a supreme court, declining to hear an appeal, is just too inside baseball to get the attention of *Binding Authority*. Even *Binding Authority* has a limit on wonkishness. But when the denial of appeal involves Pennsylvania's "*Gambone*" issue – which continues to be the single most talked-about subject in Pennsylvania coverage circles – an exception can easily be justified.

On Wednesday the Supreme Court of Pennsylvania denied Allowance of Appeal from the Superior Court's May 13, 2009 decision in *Erie Insurance Company v. Abbott Furnace Company* (See *Binding Authority*, May 14, 2009).

Most of the *Gambone* chatter in these parts has involved its impact on coverage (*i.e.*, the lack thereof) for consequential damages caused by an insured's defective construction work. *Abbott Furnace* involved an expansion of *Gambone* -- coverage for consequential damages caused by a defective product (an insured's very specialized furnace).

While the Superior Court in *Abbott Furnace* admittedly did not cite *Gambone*, it just as easily could have. Instead, the Superior Court resolved the issue based on the Pennsylvania Supreme Court's decision in *Kvaerner* (which is frequently discussed in tandem with *Gambone*). However, since *Abbott Furnace* was denied coverage by the Superior Court, notwithstanding the purchaser's allegations that the defective furnace had caused damage to property other than the furnace itself, *Abbott Furnace* is a "*Gambone* case," whether the decision was specifically cited or not.

In general, the Superior Court decided *Abbott Furnace* by concluding that the underlying action did not involve a negligence claim. Although "negligence" was plead, the court concluded that the "gist of the action" was really breach of contract.

The Superior Court stated: "Specifically, before ordering a furnace from Appellant, IMI advised Appellant of its specific needs and intended use. The damage to IMI's laminations resulted from Appellant's contractual breach in failing to design the furnace

in accordance with IMI's requested needs and intended use. This is not a situation in which the tortious conduct was the 'gist' of the action and the contract was merely collateral to the conduct." *Abbott Furnace*, 972 A.2d 1232, 1239 (Pa. Super. Ct. 2009).

Policyholders are clearly looking for an opportunity to have *Gambone* reassessed. *Abbott Furnace* is not going to be it.

A copy of the Supreme Court of Pennsylvania's December 29 Order denying Allowance of Appeal in *Abbott Furnace* can be accessed here.

<http://www.courts.state.pa.us/OpPosting/Supreme/out/278wal2009.pdf>

Please let me know if you have any questions.

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