Ricci Tyrrell Johnson & Grey

Attorneys who have joined Ricci Tyrrell Johnson and Grey this past year:

(From left to right) Brian Scanlon, Mary Grace Maley, Sam Mukiibi and Tom Grammer

Quarterly Newsletter

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It has been a busy few months at Ricci Tyrrell Johnson & Grey. Three new associates have joined our firm: Brian Scanlon, Samuel Mukiibi and Thomas Grammer. In April, Ricci Tyrrell celebrated its one year anniversary and welcomed Mary Grace Maley as a Member of the Firm. We grew out of our original space and expanded into what we refer to as the "west wing" of the 7th floor.

Mary Grace Maley is a trial attorney with almost 30 years of experience and has been lead trial counsel throughout the United States in catastrophic injury cases including crashworthiness trials. Prior to joining Ricci Tyrrell Johnson & Grey, Mary Grace was a Shareholder at Lavin O'Neil Cedrone & DiSipio where her specialized practice focused on defending major automobile manufacturers and suppliers, drug companies, aviation companies and insurers in products liability, premises liability, and general insurance defense matters.

Even with our continued growth, Ricci Tyrrell Johnson & Grey continues to be a tight knit group of dedicated attorneys and support staff, actively involved in each other's practices. We participate in monthly "RTJG University" training sessions, and attend case presentations to discuss and brainstorm strategies for upcoming trials.

Bill Ricci was the co-author of an article appearing in the Pennsylvania Defense Institute publication Counterpoint entitled, "Tincher: The Death of Azzarello". Our firm remains at the forefront of issues developing from the Pennsylvania Supreme Court landmark products liability decision Tincher v. Omega Flex, Inc. Ricci Tyrrell has a committee in place to evaluate and vet all firm filings affected by Tincher. Bill Ricci represents the firm on a broad-based committee of experienced practitioners collaborating on post-Tincher issues such as jury instructions, Motions in Limine and appellate issues.

On June 6, 2015, John E. Tyrrell addressed the Lackawanna County Pro Bono Association, speaking on the subject of "Ethical Considerations Affecting Claims of Confidentiality in Litigation Involving Professional and College Teams".

Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

In this Issue:

SUMMARY JUDGMENT GRANTED IN ALLEGED FAILURE TO WARN SUIT

Ricci Tyrrell client NACCO Material Handling Group, Inc. (NMHG) recently obtained Summary Judgment on all claims in *International Paper Company, et al. v. Deep South Equipment Company, et al.*, United States District Court Western District of Louisiana Shreveport Division, Civil Action No. 5:11-cv-00017.

The *International Paper* case arose out of a fire that destroyed a warehouse containing recycled paper product owned by the plaintiffs. In the moments before the fire spread, a warehouse employee smelled smoke and discovered that a fire had broken out near a Hyster fork lift truck, made by NMHG. and rented to the warehouse facility by an authorized Hyster dealer. Cause and origin was highly disputed. Plaintiffs attributed the cause of the fire to the Hyster lift truck, claiming that the fire occurred because paper ignited from heat generated by the lift truck's unprotected exhaust manifold, an event they claim would not have happened if the lift truck had been equipped with the Paper Package, a collection of optional features offered by NMHG for lift trucks used in a paper handling environment. The truck allegedly involved in the fire was rented to the warehouse only a few weeks before by the local Hyster dealer and it was not equipped with the Paper Package.

Plaintiffs alleged that under the Louisiana Products Liability Act, NMHG should have warned the Hyster lift truck dealer, that at paper storage warehouses, loose paper can be drawn into the forklift truck's engine compartment and come into contact with exhaust components, resulting in a significant fire risk. Further, Plaintiffs alleged that NMHG's warnings to the dealer were not forceful enough to impress upon them the availability of – and the dangers of not using – the Paper Package. According to Plaintiffs, if NMHG had stronger warnings about the Paper Package, the dealer would never have rented the lift truck to the warehouse.

Relying on Louisiana's Sophisticated User Doctrine, NMHG filed a Motion for Summary Judgment arguing that a product manufacturer has no duty to warn a sophisticated user of the dangerous propensities of a product. The Court agreed and deemed the dealer a sophisticated user since it was "highly familiar" with lift trucks and has sold and maintained them for over twenty years. Additionally, NMHG proved that its warnings were more than adequate as the dealer representatives testified that they were actually aware of the Paper Package availability and NMHG's recommendation it be used in a paper handling environment. Indeed, the dealer had sold lift trucks equipped with the Paper Package to the operator of the warehouse less than a year before the fire.

The Court granted NMHG's Motion for Summary Judgment and dismissed all of Plaintiffs' remaining claims against NMHG. The decision - which came on the heels of the Court's order precluding plaintiff's expert against NMHG pursuant to *Daubert v. Merrill Dow*, 509 U.S. 579, 113 S.Ct. 2786 (1983) – is a victory for NMHG and for product manufacturers defending the always amorphous failure to warn claim in Louisiana.

Francis J. Grey, Jr. was lead counsel on the International Paper Company matter, assisted by Sean L. Corgan.

SUMMARY JUDGMENT GRANTED IN PHILADELPHIA COUNTY SUIT ALLEGING INADEQUATE SECURITY

Long-time Ricci Tyrrell client the Philadelphia Eagles was granted Summary Judgment on all claims in *Moore v. Philadelphia Eagles, et al.*, Philadelphia County Court of Common Pleas, September Term 2014, No. 1354.

Plaintiff alleged that he was assaulted in a parking lot following the conclusion of a Philadelphia Eagles football game and brought suit against multiple defendants alleging negligence for the inadequate provision of security. The assault was alleged to have taken place in a parking lot which was not possessed and controlled by the Philadelphia Eagles.

One of the hurdles that exist in cases such as this one, where rightfully dispositive facts exist, is to obtain dismissal for a client early before extensive fees and costs are expended. This hurdle is made more difficult to traverse by language in Pennsylvania Rule of Civil Procedure 1035.2 which invites Courts to defer ruling on Summary Judgment Motions until the allotted discovery period expires.

Ricci Tyrrell took an aggressive approach in the instant case. It provided plaintiff with documentary evidence of its client's non-involvement at the outset. When Plaintiff did not agree to voluntarily dismiss the Philadelphia Eagles, Ricci Tyrrell followed with detailed Requests for Admissions and then a successful Motion to have the Requests deemed admitted. A Summary Judgment Motion then followed which was supported by the deemed admissions. By approaching the case in this

matter, our client was extricated from the litigation only five months after it was commenced and almost a year prior to the Court's discovery deadline.

John E. Tyrrell was lead counsel in the Moore litigation with assistance provided by Patrick J. McStravick.

EASTERN DISTRICT OF PENNSYLVANIA JUDGE PREDICTS THAT PENNSYLVANIA SUPREME COURT WILL APPLY THE BARE METALS DEFENSE IN ASBESTOS LITIGATION HOWEVER NEGLIGENCE CLAIMS MAY STILL SURVIVE

By Nancy D. Green

For years, Pennsylvania asbestos defendants have argued that they cannot be liable under a failure to warn theory for injuries resulting from products used on their equipment that they did not manufacture, supply or place into the stream of commerce. In support of this defense, Pennsylvania defendants would largely have to rely on case law from other jurisdictions and the Pennsylvania Superior Court case of *Toth v. Economy Forms*, 571 A.2d 420 (Pa. Super. 1990), a non-asbestos case which held that Pennsylvania law does not permit the imposition of liability on a party for the failure to warn of dangers inherent in products it did not supply. This defense, known as the "bare metals defense" was with a few exceptions, unsuccessful at the trial court level.

When the Supreme Court looked to California law in support of its decision in *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014), it gave hope to Pennsylvania asbestos defendants' argument that the bare metal defense should apply in Pennsylvania asbestos litigation as it does in California. Relying in part on reasoning found in *Tincher,* in *Schwartz v. Abex Corp.*, 2015 U.S. Dist. LEXIS 68074 (May 27, 2015), Judge Eduardo C. Robreno of the Eastern District of Pennsylvania predicted that the Pennsylvania Supreme Court would rule that under Pennsylvania law, a manufacturer is not liable in strict liability for after-market asbestos-containing component parts (such as gaskets, packing or insulation) that it neither manufactured nor supplied, even if used in connection with that manufacturer's product. But, the Court held that the manufacturer can be held liable in negligence if (1) it knew its product would be used with an asbestos-containing component part of the type at issue; (2) knew at the time it placed its product into the steam of commerce that asbestos was hazardous; and (3) failed to provide a warning that was adequate and reasonable under the circumstances. The Court further concluded that as a matter of law, a manufacturer or supplier of a product who knows of the hazards of asbestos and places its product into the stream of commerce with an asbestos-containing component part already installed (or accompanying the product) always has a duty to warn of asbestos-related hazards associated with aftermarket replacement component parts of that type.

In his decision, Judge Robreno recognized at the outset that the Supreme Court of Pennsylvania had never addressed the issue of the bare metals defense in the context of asbestos litigation. He examined various sources of authority to inform the Court's prediction of Pennsylvania law including application of Section 402A of the Restatement (Second) of Torts to the bare metals defense by different courts considering the issue including Pennsylvania trial courts, and the courts of Washington, California and New York. He also considered the policy considerations outlined in *Tincher* of (1) imposing financial liability on those entities best situated to prevent harm from products; (2) providing punishment and deterrence of future misconduct from those entities; and (3) consumer protection and compensation. He noted inconsistencies in Pennsylvania case law as to whether and when Pennsylvania law imposed liability on a product manufacturer for asbestos-containing aftermarket component parts. He commented, however, that these decisions were all prior to *Tincher* which warranted some adjustments to the rules of Pennsylvania law to conform to the policies and legal principles set forth therein. At the same time, the Court was mindful of trying to reconcile the new guidance with existing case law in order to maximize consistency and continuity while establishing clear guidance for future litigants based on sound principles and reasoning.

After considering the unusual factual scenario presented by asbestos cases, and having weighed the competing policy considerations outlined in *Tincher,* the Court ultimately held that under Pennsylvania law while a product manufacturer or supplier may be insulated from a strict liability cause of action, a product manufacturer has a duty to warn about the asbestos-related hazards of component parts it neither manufactured nor supplied where the manufacturer knew its product would be used in connection with a particular hazardous asbestos-containing component and knew at the time it placed its

product into the stream of commerce that there were hazards associated with asbestos exposure.

Nancy D. Green is a Member of Ricci Tyrrell Johnson & Grey who concentrates her practice in the areas of toxic tort and environmental coverage and litigation, products liability, premises liability and general civil litigation defense.

COVERAGE CORNER

Recent appellate decisions have made significant contributions to bad faith jurisprudence and the interpretation of common policy exclusions. First, the highlights regarding bad faith:

- A statutory bad faith claim (42 Pa.C.S. §8371) may be assigned by an Insured to a tort judgment creditor. **Allstate Property & Casualty Ins. Co. v. Wolfe**, 105 A.3d 1181 (Pa 12/15/2014).
- Punitive damages awarded against an Insured for its own outrageous conduct are not insurable and for that reason may not be sought as compensatory damages against an Insurer as part of a claim for breach of contract or bad faith failure to settle a third party tort claim. As a corollary proposition, an Insurer is not obliged to consider uninsurable punitive damages when evaluating a third party tort claim for settlement. **Wolfe v. Allstate Property & Casualty Insurance Co**., 2015 U.S. App. LEXIS 9876 (3d Cir. 06/12/2015).
- Payment of a verdict within policy limits does not insulate an Insurer from a claim of bad faith failure to settle because actual damages are not a necessary element of a claim for either breach of an insurance contract or statutory bad faith. The focus of a bad faith claim is on the *manner* in which it is handled. **Wolfe v. Allstate Property & Casualty Insurance Co**., 2015 U.S. App. LEXIS 9876 (3d Cir. 06/12/2015).

Adding to the variable process of construing policy language are decisions which hold that:

- An employer liability exclusion that withholds coverage for a claim made by an employee of "the insured" does not negate coverage for an action against an Additional Insured (landlord) brought by an employee of the Named Insured (tenant). **Mutual Benefit Insurance Company v. Politsopoulos**, 2015 Pa. LEXIS 1126 (Pa. 05/26/2015)
- A motor vehicle use exclusion that applies to the direct proximate cause of injury precludes coverage for a social host charged with antecedent negligence rooted in service of alcohol to a minor. **Wolfe v. Ross**, 2015 Pa. Super. LEXIS 246 (Pa. Super. 2015).

A. An Insured may assign its claim for statutory bad faith under 42 Pa.C.S. §8371.

In **Allstate Property & Casualty Ins. Co. v. Wolfe**, 105 A.3d 1181 (Pa 12/15/2014) the Pennsylvania Supreme Court addressed this issue on a certification petition by the Third Circuit Court of Appeals.

Wolfe arose from a motor vehicle accident. Allstate's Insured was inebriated when he rear-ended the vehicle operated by Mr. Wolfe; consequently, Mr. Wolfe sought compensatory and punitive damages. The case could have been settled for less than $25,000 – the limits were $50,000, but the adjuster refused to deviate from a $1,200 offer based on a set of medical records provided early in the case, and prior to an amendment of the Complaint seeking punitive damages. The adjuster refused to take into account the Insured's exposure to punitive damages when evaluating the suit for settlement. The jury awarded $15,000 in compensatory and $50,000 in punitive damages. Allstate paid the compensatory award but refused to make any payment for punitive damages. The Insured assigned his rights in exchange for a promise not to seek payment of the judgment from his assets.

In federal court a jury found Allstate breached its contract, acted in bad faith and awarded damages equal to the punitive award in the underlying action. Allstate argued the claim was one for un-liquidated tort damages that cannot be assigned and, therefore, Wolfe lacked standing to sue. The Supreme Court found no impediment to the assignment and held a bad faith claim may be assigned to a tort judgment creditor such as Mr. Wolfe. The case was returned to the Third Circuit for resolution of other issues. It is to those we turn next.

B. Punitive damages awarded against an Insured are not recoverable in an action for breach of the insurance contract and bad faith under 42 Pa.C.S. §8371.

Prior to commencement of the bad faith trial Allstate moved to exclude evidence related to the punitive

damages awarded in state court. It argued the evidence was barred because indemnification for punitive damages is not permitted as matter of public policy. The District Court held that if the jury concluded Allstate had failed to negotiate in good faith then the exposure to punitive damages would be relevant as a consequence flowing from the breach. The Third Circuit disagreed. **Wolfe v. Allstate Property & Casualty Insurance Co**., 2015 U.S. App. LEXIS 9876 (3d Cir. 06/12/2015). Pennsylvania's long-standing rule is that a claim for punitive damages against a tortfeasor personally guilty of outrageous misconduct [as distinct from vicarious liability for punitive damages] is excluded from insurance coverage as a matter of law. The court predicted that "the Pennsylvania Supreme Court would conclude that, in an action by an insured against his insurer for bad faith, the insured may not collect as compensatory damages the punitive damages awarded against it in the underlying lawsuit. Therefore, the punitive damages award was not relevant in the later suit and should not have been admitted." The court also held that "[i]t follows from our reasoning that an insurer has no duty to consider the potential for the jury to return a verdict for punitive damages when it is negotiating settlement of the case."

C. Actual damages are not a necessary element of a cause of action for breach of an insurance contract or a claim for statutory bad faith.

Allstate also urged the Third Circuit to rule that an Insurer does not breach its contract or act in bad faith, as a matter of law, if the jury awards compensatory damages within the policy limits because there is no harm to the Insured. The Third Circuit rejected that proposition. **Wolfe v. Allstate Property & Casualty Insurance Co**., *supra*.

The court noted that Pennsylvania recognizes a claim in contract for an Insurer's breach of its fiduciary obligation when defending a claim and an Insured may recover compensatory damages for injuries caused by a breach. Further, an Insurer must consider the interest of the Insured in deciding whether to settle a claim and the Insured is entitled to recover the known and/or foreseeable compensatory losses that reasonably flow from the conduct of the Insurer.

If a bad faith claimant is able to prove breach of contract but can show no damages flowing from the breach nominal damages are recoverable. Therefore, even without proof of actual damages, an Insurer may be found liable for violating its contractual duty of good faith by failing to settle a claim. The court held that removing punitive damages as a recoverable category of loss did not undermine the bad faith claim as matter of law. 42 Pa.C.S. §8371 provides that if an insurer has "acted in bad faith toward the insured," the court may: (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%. (2) Award punitive damages against the insurer. (3) Assess court costs and attorneys fees against the insurer. (emphasis added).

Section 8371 does not provide for the award of compensatory damages which, if sought, must be recovered based on some other theory. The focus of a Section 8371 claim is not on whether the Insurer ultimately fulfilled its policy obligations. If that were so then an Insurer could act in bad faith but avoid liability by eventually paying the claim. The issue is the *manner* in which an Insurer discharges its duties of good faith and fair dealing regardless of whether the claim is ultimately paid. The statute is designed to deter bad faith practices and its purpose is served by allowing a bad faith claim to proceed even where the Insured has alleged or can prove only nominal damages. Accordingly, carving out the uninsurable $50,000 punitive damage award had no bearing on Mr. Wolfe's ability, as assignee, to attack the manner in which Allstate negotiated or failed to negotiate his underlying tort claim.

D. An employer liability exclusion in a commercial liability policy was found ambiguous and does not apply to a bodily injury claim against an Additional Insured (landlord) made by an employee of the Named Insured (tenant).

In **Mutual Benefit Insurance Company v. Politsopoulos**, 2015 Pa. LEXIS 1126 (Pa. 05/26/2015) the Pennsylvania Supreme Court held that an exclusion that withholds coverage for a claim made by an employee of "the" insured, for injury "arising out of and in the course of employment by the insured", is ambiguous and applies only to a claim by an employee of the specific Insured seeking coverage.

An employee of a restaurant fell from an outside set of stairs. She filed suit against the property owners, her employer's landlords, asserting they were negligent because the stairs were not properly maintained. The property owners sought coverage under an umbrella policy purchased by the restaurant. The lease required the property owners be named as additional insured parties.

An employer's liability exclusion provided that there was no coverage for injury to "[a]n 'employee' of the insured

arising out of and in the course of... [e]mployment by the insured [.]" The policy also included a "Separation of Insureds" clause which provided, subject to certain exceptions not relevant to the court's decision, that "this insurance applies... [s]eparately to each insured against whom claim is made or suit is brought." The property owners were not designated by name on the declarations page as Insureds but the policy extended coverage to unidentified persons doing business with the restaurant and for whom the restaurant had agreed in writing to provide insurance.

Mutual Benefit argued the claimant was an employee of "the insured" and it would be incongruous to provide greater coverage for an additional insured than for the Named Insured who purchased the policy. The property owners countered that the language of the exclusion was unclear and coverage should be negated only for injury to an employee of "the" specific insured seeking coverage, not to a claim by an employee of "any insured." The definite article "the" and the indefinite article "any" were found in other provisions of the policy. For example, "the insured" was utilized to articulate the insurer's indemnity obligations for bodily injury, and "any insured" was used in a pollution exclusion.

The Supreme Court found the exclusion ambiguous in the context of the claim at issue. The Court was persuaded that, "at least where a commercial general liability policy makes varied use of the definite and indefinite articles, this, as a general rule, creates an ambiguity relative to the former, such that 'the insured' may be reasonably taken as signifying the particular insured against whom a claim is asserted." The court left open the possibility that the same exclusion could be unambiguous in a different policy providing clarifying context. While not assigning controlling import to the separation-of-insureds clause the court also found further support for its holding there. In a concurring opinion Mr. Justice Eagen argued the separation-of-insureds provision should control.

E. A motor vehicle use exclusion negated coverage for a claim based on serving alcohol to a minor.

Wolfe v. Ross, 2015 Pa. Super. LEXIS 246 (Pa. Super. 2015)(en banc), involved a motor vehicle use exclusion in a homeowner's policy. Theresa Wolfe commenced an action for wrongful death and survival following the death of her son who was fatally injured when he lost control of a dirt bike owned by the son of the defendant homeowner, the adult host of a graduation party where alcoholic beverages were served. The decedent was not of legal age, was served or allowed access to alcohol, became impaired and left the party driving the dirt bike. The fatal accident did not take place on the homeowner's property. Allegations against the Insured sounded in negligence and were based solely on the alleged furnishing of alcohol to the minor.

State Farm, the homeowner's carrier, refused to defend based on an exclusion for injuries arising out of use of a motor vehicle owned by an insured. The Insured filed a pro se answer to the complaint denying that he provided alcohol to the decedent. Prior to trial, the parties entered into a consent judgment for $200,000 and assigned all rights under the policy, including the right to sue for breach of contract and bad faith. In return, the Insured received protection against execution on his assets. After the consent judgment was entered, Mrs. Wolfe proceeded by way of garnishment against State Farm which had issued a policy with limits of $100,000. The trial court held the exclusion was not ambiguous in the context of the underlying facts and entered summary judgment for State Farm.

While acknowledging policy exclusions are to be strictly construed and that the phrase "arising out of" could be reasonably construed to apply to either an injury "proximately caused" by use of the motor vehicle or simply "causally connected" with it, the Superior Court agreed that the minor decedent's injuries were proximately caused by *and* causally connected to use of the dirt bike; therefore, the motor vehicle exclusion was applicable.

The more contentious issue was whether the exclusion should be read to negate coverage for the explicitly pleaded alcohol-related claim. Mrs. Wolf argued the defendant's non-vehicle related conduct was at least a concurrent proximate cause of her son's accident and the basis for the lawsuit; therefore, the vehicle use exclusion should not apply to negligence for serving alcohol to a minor. Like the trial court, the Superior Court disagreed: "The fact that the serving of alcohol to a minor subjected [the Insured] to liability even without the involvement of a motor vehicle does not change the fact that the policy language excludes coverage for injuries arising out of use of a motor vehicle." Injury was directly and proximately caused by use of a motor vehicle, and claims of antecedent negligence for failure to prevent the accident were held to be within the reach of the exclusion.

The Superior Court's reasoning warrants some added comment. First, the decision may be read as confined to cases where only the duty to indemnify is at issue. Secondly, the court found the phrase "arising out of" must be strictly construed in an exclusion to mean "proximately caused by" but did not analyze two

Supreme Court decisions that have construed the phrase within an exclusion as unambiguously meaning "causally connected."

Francis P. Burns, III is a Member of Ricci Tyrrell Johnson & Grey whose practice includes an emphasis on all dimensions of insurance coverage including coverage opinions, declaratory judgment actions and bad faith.

INTELLECTUAL PROPERTY: PATENTS, TRADEMARKS, AND COPYRIGHTS

By Stuart M. Goldstein

During the course of my practice, clients frequently ask how they can "patent their trademark" or "copyright their inventive idea." In fact, a name cannot be patented and you can not copyright a product or trademark an invention. However, this confusion is understandable, since most people, including many non-intellectual property attorneys, do not know the differences between the various types of intellectual property. It is the purpose of this article to address the fundamentals of patents, trademarks, and copyrights, the tools which form the basic tenets for what is known as intellectual property.

Patents – A patent is granted, in accordance with federal statute, by the United States Patent and Trademark Office (USPTO), to inventions which are new, useful, and are not obvious modifications of existing products or technologies. A patent grants to the patent owner the right to exclude others from making, using, and selling the invention for a limited term of years. There are three types of patents. Utility patents cover novel and unobvious processes (e.g. a method of 3D product fabrication; a process for deep sea oil drilling), machines (e.g. televisions; product conveyor systems), articles of manufacture (e.g. hammers; cleaning implements), and compositions of matter (e.g. plastics; medicinal drugs). Design patents cover new, original and ornamental designs for articles of manufacture (e.g. ornamentation of jewelry; the design of an iPhone®). Plant patents cover new varieties of cultivated asexually-reproduced plants.

A patent is obtained by filing a formal patent application with the USPTO. The application is thoroughly reviewed and examined by a patent examiner who has expertise in the particular area of the invention, in order to determine whether the invention is patentable. If ultimately allowed, utility and plant patents generally have a term which begins on the date the patent issues and ends on the date that is twenty years from the initial filing date of the patent applications. Design patents last fourteen years from the date they are issued by the USPTO. Patents can not be renewed. After patent terms lapse, the inventions disclosed in the patents become part of the public domain, that is the public is free to make, use, and sell the inventions.

Trademarks – A trademark is a word, a name, a design, a symbol, or a combination thereof, designating a manufacturer's or merchant's goods or services, in order to distinguish them from the goods and services of others. Trademarks include brand names that identify goods, like Apple® for computers or Coca-Cola® for soft drinks. Service marks identify entities which provide a service, like Chipotle® for restaurant services or AAMCO® for vehicle repair services.

Unlike patents, which are strictly statutory in nature, common law trademarks arise when a mark is actually used in commerce. Rights to the mark exist immediately upon use, as long as there are no prior marks in use which are the same or which are confusingly similar. Common law trademarks are generally designated with a small ™, adjacent to the mark.

While limited rights exist for common law marks, there are substantial advantages in obtaining a federally registered trademark, which offer rights under the trademark statutes. A registered trademark is obtained by filing a formal trademark registration application with the USPTO. If the trademark is not yet being used in commerce, an "intent to use" application is filed. When allowed by the trademark examiner, the formal registration will be issued when the mark is actually used in commerce and the appropriate proof of use is submitted to the USPTO. If the mark is currently being used in commerce, a "use" application can be filed and, again, upon the submission of the appropriate proof of use, the mark will be registered. A trademark which is federally registered is displayed with an ® adjacent to the mark.

Trademark rights can last forever, as long as the mark is continually used in commerce and, if the mark has obtained formal federal registration, the registration is renewed periodically.

Copyrights – A copyright protects the particular expression of an idea, not the idea itself. A copyright covers an original work of authorship fixed in a tangible medium of expression. Works which can be copyrighted

include: literary, musical, choreographic, and dramatic works; pictorial, graphic, and sculptural works; computer programs, motion pictures and other audio-visual works, and compilations of works.

A common law copyright arises as soon as the copyrightable work is created and fixed in a tangible medium. This copyrightable work is owned by the author. Although a common law copyright comes into effect by the simple creation of the work, a copyright may be federally registered by submitting the appropriate application and a copy of the work with the United States Library of Congress. Like federally registered trademarks, federal copyright registration provides substantial advantages under the copyright statutes. Copyrights are often designated on a created work by a ©, the date of creation, the name of the owner and the phrase, "All rights reserved." For instance, for this article, the appropriate copyright notice would be: "© 2015 Ricci Tyrrell Johnson & Grey. All rights reserved."

The term of a copyright is basically the lifetime of the author plus seventy years after the author's death. There are other copyright terms determined by the type of copyright which is ultimately obtained.

Subsequent newsletter articles will address the different aspects of intellectual property in further detail.

Stuart M. Goldstein has over 35 years experience with expertise in the area of intellectual property, specifically patents, trademarks, and copyrights. He oversees all of the firm's patent, trademark and copyright application prosecution and litigation.

LIMITING IMPLIED WARRANTIES

By Thomas W. Grammer

A business that deals in a particular sort of product will often, as a matter of sound business judgment, extend warranties offering to repair or replace defective goods. However, even if the business determines not to make such promises, it can still be subject to a warranty. This is so because the Uniform Commercial Code imposes special duties on a seller if the seller is a "merchant." *i.e.*, one that either deals in goods of the sort involved in the sale, or that holds itself out as, or is deemed to be, knowledgeable or skilled regarding the goods at issue.[1] In such a case, the law implies warranties of "merchantability" and "fitness for particular purpose." If found in breach of those implied warranties, the seller can potentially be held liable for not only any decreased value of the product, but also expenses, charges, and losses incurred by the buyer.[2] Thus, a "merchant" can be held liable for having breached warranties it did not explicitly make and subject to damages it did not anticipate.

Pennsylvania's Uniform Commercial Code (UCC) provides "merchants" means of limiting their potential liabilities from breaches of implied warranties. Perhaps the simplest solution is to disclaim any implied warranty. The UCC allows a merchant to do so by employing a sales agreement that uses a phrase such as, "as is," or "with all faults." *See* 13 Pa.C.S. § 2316(c)(1). A merchant can also use other wording of its choosing and will achieve the same goal so long as it is in plain English. In the words of the UCC, disclaiming language "in common understanding calls the attention of the buyer to the exclusion of warranties and makes plain that there is no implied warranty." *Id.* To disclaim all implied warranties of fitness, the UCC provides that it is sufficient for the sales agreement to state, "There are no warranties which extend beyond the description on the face hereof." 13 Pa.C.S. § 2316(b).

Most businesses, however, will not want to go so far as to disclaim all implied warranties and will instead seek to generate goodwill by standing behind their products. A business may cultivate a good business reputation and still control its exposure by using appropriate language to limit the remedies for breaches of implied warranties. As a general rule, a sales agreement may limit or exclude remedies otherwise available under the UCC, as by limiting the remedies of the buyer to return of the goods and repayment of the price or to repair and replacement of nonconforming goods or parts. 13 Pa.C.S. § 2719(a)(1).

The agreement may also limit or exclude consequential damages, except where the limitation or exclusion is unconscionable. 13 Pa.C.S. § 2719(c). Consequential damages are: (1) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or

[1] *See* 13 Pa.C.S. § 2104 (defining "merchant" as "[a] person who:(1) deals in goods of the kind; or (2) otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.").

[2] *See* 13 Pa.C.S. §§ 2714, 2715.

otherwise; and (2) injury to person or property proximately resulting from any breach of warranty. 13 Pa.C.S. § 2715(b). It is considered *prima facie* unconscionable, however, to limit consequential damages for injury to the person in the case of "consumer goods" - *i.e.*, goods used or purchased for personal, family or household purposes. 13 Pa.C.S. § 2719(c); 13 Pa.C.S. § 9102. A limitation on damages in the case of commercial goods is not. *Id.*[3]

To make any limitations on remedies fully effective, the seller must be certain to include a provision in the sales agreement that the remedies under the agreement are the sole remedies for breach of warranty. 13 Pa.C.S. § 2719(a)(2). Including such a statement is important because otherwise, all of the remedies the UCC offers remain available. *Id.* Such a provision has its limits, however, as all remedies under Pennsylvania's UCC, including consequential damages, are available if the exclusive remedy provision fails of its essential purpose. *Honey Creek Stone Co. v. Telsmith, Inc.*, 11 Pa. D. & C.5th 33, 44 (C.P. 2009); 13 Pa C.S. § 2719(b). An exclusive or limited remedy "fails of its essential purpose" where circumstances cause it to fail in its purpose, or to operate to deprive either party of the substantial value of the bargain. *See Atwell v. Beckwith Mach. Co.*, 872 A.2d 1216, 1224 (Pa. Super. Ct. 2005) (citing Section 2719, comment 1).

A seller attempting to limit or exclude implied warranties must also be sure to do so in a way that is sufficiently noticeable. This is because the UCC imposes requirements on the manner in which implied warranties may be excluded or modified; the requirements vary depending on the implied warranty affected. Exclusion of or modification of the implied warranty of merchantability must explicitly mention merchantability and must be conspicuous. 13 Pa.C.S. § 2316(2). Similarly, to exclude or modify the implied warranty of fitness for a particular purpose, the language must be conspicuous; however, it need not explicitly mention fitness. Id. In contrast, a limitation on the *remedy* for breach of warranty does not have to appear conspicuously nor name explicitly the remedy limited or excluded. 13 Pa.C.S. § 2719. Language is deemed conspicuous when it is so written that a reasonable person against whom it is to operate ought to have noticed it. 13 Pa.C.S. § 1201(10).

Pennsylvania law includes many provisions intended to protect buyers, and takes especial care to protect consumers. However, by taking a few simple steps and using carefully crafted language, a seller can also protect itself.

Thomas W. Grammer is an Associate at Ricci Tyrrell Johnson & Grey.

[3] The seller, of course, remains potentially responsible for personal injuries under the Res

tatement (Second) of Torts §402A.

PUNITIVE DAMAGES CLAIMS FOR INADEQUATE SECURITY

By Samuel Mukiibi

Punitive damages add complexity to litigation, increasing the difficulty in estimating the value of a claim. An example comes from a recent trial result involving wrongful death and survival claims on the behalf of two deceased employees, based on claims of improper security. *See Wilson, et al vs. U.S. Security Associates, Inc.*, *et al.,* Philadelphia CCP Civil Action October Term, 2011, No. 0971. At first it appeared that the issue of punitive damages was resolved as a stipulation early in ligation was filed to dismiss without prejudice the claim for punitive damages. However, a motion on the eve of trial to amend the *ad damnum* clause of the complaint to include a request for punitive damages led to a bifurcated trial, after a finding of liability, simply on the issue of punitive damages. In all, a Philadelphia jury awarded more than $38.5 million in punitive damages for claims stemming from unarmed USSA employees failing to warn and allowing a person with a gun onto the third floor of a Kraft Foods plant where she killed two co-workers known to the USSA employees as likely targets.

Under Pennsylvania law, punitive damages may be awarded for conduct that is outrageous because of the defendant's evil motive or his reckless indifference to the rights of others.[4] Punitive damages are proper only in cases where the defendant's actions are so outrageous as to demonstrate willful, wanton or reckless conduct.[5]

In the USSA matter, Plaintiffs initially pleaded a separate cause of action for punitive damages, but after USSA challenged their legal sufficiency, Plaintiffs withdrew them. Two and a half years later, Plaintiffs argued that

[4] Feld v. Meriam, 506 Pa. 383, 485 A.2d 742, 747 (1984)(quoting Restatement (Second) of Torts, §908(2)(1979)

[5] SHV Coal, Inc. v. Continental Grain, Co. 526 Pa. 489, 587 A.2d 702, 704 (1991)

Pennsylvania law allowed them the right to amend the *ad damnum* clause of the complaint to include a request for punitive damages. Plaintiffs argued that the determination of whether a person's actions rose to the level of outrageous conduct lies within the sound discretion of the fact-finder and that the amendment was appropriate because it would not prejudice the Defendant because it did not bring any additional causes of action. USSA responded asserting: (1) the Court's limited discretion is permitting the amendment of pleadings after the statute of limitations has run, or when it will surprise or prejudice a party; (2) the allegations not supporting a claim for punitive damages against USSA; and (3) the Court already having determined that a late proposed amendment would prejudice Plaintiffs, when USSA attempted to file a joinder motion against Plaintiff decedents' employer, Kraft.

The security surveillance footage and police report confirmed that the two USSA employees contacted 911 and alerted Kraft workers in the building of the gunman's presence less than two (2) minutes after the gunman's reentry through the guard shack. However, Plaintiffs supported their claim for punitive damages alleging that the two onsite USSA employees failed to utilize three obvious options. First, use their radios to alert Kraft supervisors of the presence of the person with a gun. Second, use the Kraft intercom/telephone system to contact the third floor and warn people, and third, a failure to speak to every Kraft employee via a public address system located in the security guard booth. Plaintiffs further argued that liability was imputed to USSA as a principal because of its failure to train its employees on the Kraft intercom and public address systems. USSA maintained that a general announcement broadcast to all Kraft workers over the public address system would have engendered mass panic and placed hundreds of workers in the gunman's line of fire as she walked through the facility to carry out her targeted shooting of the Plaintiff-decedents.

The Court eventually granted Plaintiffs' motion to amend the complaint to add a request for punitive damages. The trial jury found in favor the Plaintiffs in the amount of $8 million, followed by the $38.5 million dollar award by the punitive damages jury. Post-Trial motions are currently pending.

The procedural posture of Plaintiffs' motion to amend the complaint raises a number of concerns. For instance, given the limited time before the commencement of trial, it does not seem that USSA was given a right to conduct additional discovery on the basis of Plaintiffs' punitive damages claim, as well the facts and circumstances. Furthermore, a review of the motions does not reveal that it was ever discussed why Plaintiffs delayed in seeking the amendment to their complaint.

Punitive damages involve different elements and standards of proof and potentially subject a defendant to far greater and different dimensions of liability than would have otherwise been the case. If the consequences of punitive damages were contemplated earlier in this litigation, it is possible that settlement/litigation strategies could have differed.

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POTENTIAL EFFECTS OF THE FAIR SHARE ACT AND *TINCHER V. OMEGA* FLEX ON APPORTIONMENT ISSUES BETWEEN PRODUCTS LIABILITY DEFENDANTS

In Pennsylvania, under the jurisprudence before the passage of the Fair Share Act amendments to the Comparative Negligence Act, and the Supreme Court decision in *Tincher v. Omega Flex, Inc.* 104 A.3d 388 (Pa. 2014), products liability defendants are liable for the entire percentage of liability allocated to strict liability defendants, with no-fault based allocation permitted between them. This was the holding of *Walton v. Avco*, 530 Pa. 568, 610 A.2d 454 (1992), and later affirmed in *Baker v. AC&S*, 562 Pa. 290, 755 A.2d 664 (2000).

The basis for this determination was two fold. First, the law of strict products liability in Pennsylvania, based on *Azzarello v. Black Brothers Co., Inc.*, 480 Pa 547, 391 A.2d 1020 (1978), precluded concepts of fault in strict liability actions. As a result, the Supreme Court in *Walton* found that fault could not be considered between strict products liability defendants in determining percentages of liability:

> We … conclude that the Superior Court's introduction of "comparative fault" in allocating the damage award between strictly liable defendants was erroneous. When this Court adopted Section 402A of the Restatement in *Webb v. Zern*, 422 Pa. 424, 220 A.2d 853 (1966), we provided the citizens of this Commonwealth with an equitable

> avenue of recovery based on damage-causing defects without regard to fault. **Manufacturers are held as guarantors upon a finding of defect and causation**. See, e.g., *Azzarello v. Black Brothers Co., Inc*., 480 Pa. 547, 391 A.2d 1020 (1978) . . .
> . . .
> **Each defendant was found wholly liable for having caused the death of the victims**. Avco was liable for manufacturing the defective engine, and Hughes, for failing to warn the victims of the defect. **It is impossible to determine that one was more liable than the other**. Had the engine not had a defect, no crash would have resulted. Had Hughes put its knowledge into action, the defect would have been cured and the accident prevented.
> **This Court has continually fortified the theoretical dam between the notions of negligence and strict "no fault" liability**. *See, e.g., Azzarello v. Black Brothers Co., Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978); *Berkebile v. Brantly Helicopter Corp.*, 462 Pa. 83, 337 A.2d 893 (1975). It **would serve only to muddy the waters to introduce comparative fault into an action based solely on strict liability.**

Walton v. Avco Corp., 530 Pa. 568, 582-584, 610 A.2d 454, 462 (Pa. 1992) (emphasis added). *Walton* did permit allocation for the purposes of contribution between the two strictly liable defendants. However, the *Walton* court held that such allocation had to be *pro rata*, as fault could not be considered *even solely for contribution purposes* between strict products liability defendants under the Uniform Contribution Amongst Tortfeasors Act ("UCATA").

The Supreme Court reaffirmed this holding in *Baker*, where it held that a *pro rata* apportionment between products liability defendants for the purposes of contribution claims under the Uniform Contribution Amongst Tortfeasors Act has no effect on joint liability under the Comparative Negligence Act ("CNA"). In other words, there is no causative liability percentage determination between strict products liability defendants for the total liability of the strictly liable defendants; the only apportionment is for the purposes of contribution, and that apportionment is limited to *pro rata* between any Defendants irrespective of product or theory. For instance, in *Baker*, five (5) defendants were sued related to allegations of strict products liability based on different asbestos-related products and theories, yet all were treated pro rata, because relative fault (i.e. causative relationship) could not be considered between them.

Thus, the combination of the Comparative Negligence Act and effect of *Azzarello* precluded percentage determinations between products liability defendants found liable in the same case. In the absence of negligence defendants, this meant that joint liability for the entire verdict was guaranteed, and contribution limited to *pro rata* shares.

Fair Share Act

The foregoing represents the current status of the law, based upon the CNA before the Fair Share Act, and the state of the law of products liability prior to *Tincher v. Omega Flex, Inc.* 104 A.3d 388 (Pa. 2014). However, both of the changes to the law could dramatically affect the liability percentage determination scheme currently in place in Pennsylvania.

First, the Fair Share Act changed the law of joint and several liability in Pennsylvania. Under the CNA prior to the Fair Share Act, as identified in *Baker*, when a defendant was found liable in any percentage for the injuries to a plaintiff, that defendant was jointly and severally liable for the **entire** amount of the verdict, with the recourse of contribution against payments made on behalf of other defendants. This prior rule of joint and several liability was stated in now rescinded 42 Pa.C.S. § 7102(b) as follows:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. **The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery.** Any defendant who is so compelled to pay more than his percentage share may seek contribution.

However, the Fair Share Act changed this rule of joint and several liability in the CNA, replacing § 7102(b) with § 7102(a.1)(2)-(4), which states that a party is only liable jointly (i.e. liable for the

entire amount) if its percentage of liability is found to be 60% or more[6]:

> (2) Except as set forth in paragraph (3), **a defendant's liability shall be several and not joint**, and the court shall enter a separate and several judgment in favor of the plaintiff and against each defendant for the apportioned amount of that defendant's liability.
> (3) **A defendant's liability in any of the following actions shall be joint and several,** and the court shall enter a joint and several judgment in favor of the plaintiff and against the defendant for the total dollar amount awarded as damages:
> …
> (iii) **Where the defendant has been held liable for not less than 60% of the total liability apportioned to all parties.**

A jointly liable defendant retains the right to contribution under the Fair Share Act. 42 Pa.C.S.A. § 7102(a.1)(4).

The Fair Share Act undermines one of the two primary underpinnings of the apportionment regime that exists for products liability defendants in Pennsylvania. *Baker* makes it clear that part of the basis for *pro rata* apportionment is the idea that all of the defendants are jointly and severally liable, so each is liable for the total, making apportionment necessary only for the purposes of contribution. This concept is alluded to in *Walton*, where the Court noted that the defendants were each "wholly liable" for the accident, in that each defect was a cause of the accident. *Walton* at 584. In the circumstance where each defendant is ultimately liable to the plaintiff for the full verdict in joint and several liability, the need to apportion is lessened with respect to providing the plaintiff with a remedy and making the Plaintiff whole, which *Walton* also identifies as a goal of strict products liability. *Walton* at 538 (*citing Azzarello*, *Berkebile v. Brantly Helicopters Corp.*, 462 Pa. 83, 337 A.2d 893 (1975) amongst other cases).

However, if the current law of apportionment is used to allocate percentage of liability for the purposes of the Fair Share Act, i.e. *pro rata* apportionment is used to determine joint and several liability under § 7102(a.1)(1) and (a.2), the plaintiff suing more than one products liability defendant will lose the ability to get joint liability everytime two products liability defendants or more are found liable. Wherever there is more than one products liability defendant found liable, the percentage can never exceed 50% with a *pro rata* liability scheme, and defendants can therefore never be jointly liable under the Fair Share Act. Consider *Baker*, *supra*: Applying *pro rata* apportionment to the Fair Share Act liability percentage yields each defendant 1/5 or 20%. Therefore, no defendant could have been liable jointly. This result would appear to be the exact opposite of the stated goals of products liability law on liability percentage apportionment prior to the Fair Share Act: the Plaintiff would potentially not recover the full verdict for the liability caused by defective products, each of which is deemed 100% responsible. *Walton* at 584. This scenario has extreme implications on settlement (which is a topic for another article).

An alternative is an apportionment of causative percentage for each products liability defendant, in comparison to the other potential causes (as would occur, for example, if there were only negligence defendants). This procedure would on the one hand limit the exposure of the products liability defendant whose causative fault is minimal in the eyes of the factfinder, but would on the other hand expose the products liability defendant, liable only with other products liability defendants, to the potential of joint liability (if the apportionment is greater than 60% against it).

The Fair Share Act's language itself appears to suggest this procedure. Section (a.1)(1) of the post CNA Fair Share Act states that:

> "each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of **the amount of that defendant's liability to the amount of liability attributed to all defendants** and other persons to whom liability is apportioned under subsection (a.2)",

and (a.1)(2) states that:

> " a defendant's liability shall be several and not joint, and the **court shall enter a separate and several judgment** in favor of the plaintiff and **against each defendant for the apportioned amount of that defendant's liability.**"

This language appears to mandate a causative liability percentage finding (not merely apportionment for contribution), because it ties the liability percentage to the determination of joint and several liability *for each specific defendant*, with a specific molded judgment to be created therefrom. Obviously, the courts applying

[6] There are additional exceptions in the Fair Share Act, but this exception is the relevant one for this discussion.

this law could hold that the apportionment *pro rata* under *Walton* is such an apportionment by operation of law, use the *Walton* rule for liability percentage allocation, and hold that the Court must mold the verdict prior to entering judgment to reflect the law requiring *pro rata* apportionment. However, this section appears to require the apportionment of liability as to all defendants and all theories, thus overturning *Walton*. On this theory, the Fair Share Act requires individualization for product defendants, since liability percentage allocation is required for each defendant to be determined to enter judgment, and it further is required to determine whether joint liability exists.

Another possible result is that a Court will hold that the apportionment of causative percentage to the strict products liability "unit" is inseparable (as opposed to apportionment for contribution, which is how the law currently works), and that each member of the unit is imputed with the *entire* product liability percentage for the purposes of the Fair Share Act. Using the *Baker* fact pattern again, each strict product liability defendant there would have been 100% causatively responsible under this application, and all would have been jointly and severally liable. Such a decision would be based on *Walton*'s statement that strict products liability defendants are "wholly liable" for the accident, irrespective of allocation or settlement. This determination, however, would appear to be in direct contrast with the Fair Share Act's language and purpose, i.e. requiring determination of causative percentages and limiting joint and several liability.

Tincher v. Omega Flex

A second recent change to the law of products liability in Pennsylvania also has the potential to completely re-write the law of comparative liability percentage and its effects on products liability defendants. In addition to the CNA's requirement of joint and several liability, the Supreme Court precedent on the issues of comparative liability and apportionment regarding products liability defendants was predicated the law of products liability itself. As seen in the block quote above from the *Walton* case, the Supreme Court expressly prevented comparison and apportionment between products defendants based on the fact that it required determinations of relative fault, and fault could not be a consideration because it is a negligence concept, and therefore was verboten under *Azzarello*.

In the recent Pennsylvania Supreme Court decision *Tincher v. Omega Flex Inc.*, 2014 Pa. LEXIS 3031, 104 A.3d 328 (2014), the Supreme changed the state of products liability law in this Commonwealth by overruling *Azzarello v. Black Brothers Company*, 480 Pa. 547, 391 A.2d 1020 (1978)[7], the 1978 Supreme Court case responsible for insulating negligence principles from cases decided under the Restatement (Second) of Torts § 402A. As *Tincher* has now overruled *Azzarello*, *Azzarello*'s complete rejection of any negligence concepts being considered in strict products liability in Pennsylvania at any time for any purpose is no longer impregnable. While there are arguments over the scope of this change (because the *Tincher* Court reaffirmed the Restatement (Second) as the basis for products liability law in the Commonwealth), the *Tincher* Court was clear that the knee-jerk separation of *any* negligence concept from strict liability was improper, and noted:

> "that the decision to overrule *Azzarello* and articulate a standard of proof premised upon alternative tests in relation to claims of a product defective in design may have an impact … upon subsidiary issues constructed from *Azzarello*, such as the availability of negligence-derived defenses, bystander compensation, or the proper application of the intended use doctrine. *Accord Bugosh*, 971 A.2d at 1244-45 & 1248-49."

Tincher at 409. The issue of comparative negligence between products liability defendants based on fault, and the apportionment of liability for the purposes of the CNA and the UTACA are precisely the type of "subsidiary issues" derived from *Azzarello* that now require reexamination[8].

Further, *Walton* indicates that manufacturers are "guarantors" of the product under *Azzarello*, and uses this as a basis for its decision not to permit comparative fault between products liability defendants: since each is a guarantor, each is 100% liable if the guarantee is not met. This "guarantor" language was part of the jury instructions that *Tincher* disapproved of in the opinion overruling *Azzarello*, calling it specifically "impracticable"

[7] *Tincher* had three other holdings: identifying the risk-utility and consumer expectations standards by which to determine defect; placing the entire determination of defect in the hands of the fact finder (where previously the concept of "unreasonably dangerous" was a threshold issue determined by the Court); and holding that the Restatement (Second) of Torts §402A continued as the basis for products liability in Pennsylvania, and not the Restatement (Third).

[8] In fact, *Bugosh v. I.U. N. Am., Inc.*, 601 Pa. 277, 301, 971 A.2d 1228, 1242 (Pa. 2009), in the dissent by Justice Saylor (cited as an Accord in *Tincher*), goes further than apportionment issues, indicating that the entire structure of the comparative liability **between the Plaintiff and products liability defendants** needs to be reexamined. Whether the time has come to overrule *Kimco Development Corporation v. Michael D's Carpet Outlets*, 536 Pa. 1, 637 A.2d 603 (1993), and permit comparative negligence of a plaintiff to be a defense, or liability limiting factor, in strict products liability is also a topic for another article.

Tincher at 379. Thus, *Tincher* rejects both the general *Azzarello* paradigm, and the specific language underpinning the refusal to permit Pennsylvania fact finders to allocate liability percentages between strict products liability defendants.

Discussion

Despite the possibility that the Court might adhere to *Walton* in the face of the Fair Share Act and *Tincher*, such a decision would be logically incoherent. There is a fundamental disconnect between the concept of no fault in the determination of liability (i.e. defect in the product) with the concept that there should be no comparison or apportionment of a percentage of causative liability once liability is determined. Determination of liability without fault is not the same as the determination of percentage of causative liability, or even apportionment for the purposes of contribution, once fault is determined, in comparison to another party or another theory. In other words, determining *defect* of the product in the absence of fault of the manufacturer is not the same as comparing *the percentage of liability attributable to the defect* in comparison to other factors (such as another party's negligence). There is arguably no intellectual disconnect between *Tincher* reaffirming the concept that liability is without fault on one hand, yet not requiring that the Courts extend this concept to the post-liability comparison of products liability defendants' relative percentage of causation to each other (or of products liability defendants to others including Plaintiff[9]) for purposes of molding a verdict or contribution.

In fact, the concept of determination/comparison of causative percentage already exists in the law, as the Pennsylvania Courts permit the comparison of a negligence defendant to strict products liability defendant for the purposes of liability percentage determination directly by a fact finder. See *e.g. Allman v. Sears, Roebuck & Co.*, 1989 U.S. Dist. LEXIS 11897 (E.D. Pa. Oct. 6, 1989), where the jury compared the negligence and products liability defendants for the purposes of apportionment (there, 90/10 respectively)[10]. The Courts have no problem with fact finders comparing one product defendant to one negligence defendant for the purposes of apportionment of liability for the purposes of contribution; such a determination necessarily requires that the relative fault of the products liability defendant be considered, which puts the lie to the idea that fault was being completely excluded even before *Tincher*[11]. Further, the jury is always asked to consider causation or not causation (i.e. or 100%) of the defective product, which in essence is a determination of whether the accident was the *fault* of the defect at all. The added determination of how much (in percentage) a product defect was the cause does not seem much of an evolution, particularly when such determinations are already being made for the purposes of apportionment for contribution claims in other contexts.

In summary, there are many aspects of the Fair Share Act and *Tincher* that implicate the fact finding of causative liability percentages for products liability defendants, and due to the fact that both are new, decision about the scope of either, or both, may ultimately rewrite Pennsylvania law on these critical topics

Patrick J. McStravick is a Member of the Ricci Tyrrell Johnson & Grey and handles a variety of commercial and casualty litigation matters with an emphasis on products liability.

[9] Such a finding is consistent with *Tincher*'s approval of the risk-utility analysis which inculcates negligence concepts into the determination of defect without injecting fault.

[10] *Allman* actually cited *McMeekin v. Harry M. Stevens, Inc.*, 365 Pa. Super. 580, 530 A.2d 462 (Pa. Super. Ct. 1987) for the proposition that it would be "less than equitable" to apportion liability equally between a products liability defendant and a negligence defendant. It is not clear why it is then equitable to take that allocation away from the products liability defendant when there is more than one, leaving the products liability defendant to live with the pro rata apportionment instead of the equitable determination as to the negligence defendant.

[11] It seems clear that under the Fair Share Act, the comparison of liability percentage between the negligence defendants and products liability defendants will continue. However, it is less clear what role a Plaintiff's determination of comparative negligence would play as to the strict products liability defendant's percentage for the purposes of the Fair Share Act. In other words, irrespective of whether the Plaintiff's conduct is a defense or limits liability of the products defendant, does the product liability defendant's Fair Share Act liability percentage include the Plaintiff's for the purposes of joint and several?

IN THE COMMUNITY

RTJG is both a sponsor and partner of **Eagles Youth Partnership (EYP)**, the charitable wing of the Philadelphia Eagles Organization, continuing a relationship that Ricci Tyrrell's predecessor firm, Hollstein Keating, had for over 15 years. In EYP's own words:

Our signature mobile programs - the Eagles Eye Mobile and Eagles Book Mobile - leverage the celebrity and excitement of the Eagles football team, enabling us to capture the attention of some of the hardest to reach children. Additionally, EYP produces an extensive annual playground build, which brings spectacular new murals, mosaics, landscaping and even a mini-Eagles practice field to area schools. The organization also partners with other local non-profits for a variety of vital youth programs.

Each holiday season, Ricci Tyrrell makes a donation to **Philabundance®**, a regional non-profit hunger relief organization.

One of the founding Members of RTJG, **William J. Ricci,** is on the Board of Directors of, and heavily involved with **Renovating Hope**, a charitable organization gaining national prominence which renovates homes for returning war vets. Bill provides pro bono legal work and assists with fundraising for the organization.

Bill is a talented guitarist and member of the band **The O'Fenders**, which frequently donates its time to play at fundraisers for both Renovating Hope and the Billy Lake ALS Research Foundation. The band is currently celebrating the 10th anniversary of its two week sojourn to entertain our troops in Diego Garcia.

Managing Member **John E. Tyrrell** sponsors a scholarship, together with Sylvester McClearn and Barry Weisblatt, in memory of their life-long brother and friend Billy Cathell McClearn. The Billy Cathell McClearn Memorial Scholarship has provided over $25,000 in college tuition assistance to male and female graduates of Valley Central High School in Montgomery, NY.

One of the founding Members of RTJG, **Francis J. Grey, Jr.**, delivered an opening argument to a high school public speaking class at his alma mater, St. Joseph's Preparatory School on May 8, 2015. Fran was first invited to present an opening argument to his son's public speaking class in 2013 and, after such a compelling presentation, has been invited back every year since.

RTJG Chief Operating Officer, **Julianne Farber Johnson** has been involved with the Animal Welfare Association (AWA) as a volunteer at the Voorhees, NJ location helping to care for the animals in the center and with their outreach adoption programs. Julie is also an avid runner and participates in various charity runs throughout the year. Most recently, Julie participated in the Philadelphia Love Half Marathon on March 29, 2015 which benefited the Philadelphia School District as part of Mayor Nutter's Philadelphia Education Supply Fund fundraising initiative. Julie is a long-time volunteer in her Church, St. Thomas More, Cherry Hill, NJ, and as a volunteer, has taught pre-k Sunday school there for the past 20 years.

RTJG Member **Nancy D. Green** was on the planning committee for the annual Women for Greenwood House Becky Deitz Levy Luncheon which took place on May 7, 2015 at Greenacres Country Club in Lawrenceville, NJ. The luncheon is a fundraiser for Greenwood House which is a skilled nursing, assisted living, rehabilitation and hospice facility that provides the highest quality care and services to seniors in an atmosphere of compassion and dignity.

RTJG Member **Patrick J. McStravick,** along with other RTJG Members and Associates, is gearing up to participate in the Brookfield Schools Golf Tournament, scheduled to take place on September 21, 2015. Every year for the past 8 years, RTJG's predecessor firm, Hollstein Keating, has sponsored a hole at the Brookfield Schools Golf Tournament. RTJG will continue the tradition this year. The golf tournament is the organization's main fundraiser. Brookfield Schools has multiple school programs, including an elementary school, high school and transition to college, for kids with emotional and behavioral problems. Pat's wife serves as the business administrator for the schools.

Stephen W. Miller currently serves on the Board of Directors of the Committee of Seventy, the prominent Philadelphia Civil Watchdog Organization. As a Board Member, Steve recently attended a Mayoral candidate forum co-sponsored by Seventy and other Seventy sponsored informational events about the primary election.

In April, RTJG Associate **Tracie Bock Medeiros** was invited to attend and participated in a two-part series "Bringing Women In: Charting Your Path Toward Volunteer Jewish Communal Involvement" hosted by the Philadelphia / Southern New Jersey chapter of AJC, a non-profit global Jewish advocacy organization. On Mother's Day, Tracie attended Susan G. Komen Philadelphia's 25th Annual Race for the Cure where she

and her husband Matt assisted their 2 ½ year old son Zachary in making a donation, in hopes of teaching him the importance of philanthropy at a young age. Tracie is actively involved in Susan G. Komen Philadelphia's Young Professionals Network. She co-hosted the Young Professionals Party of the Pink Tie Ball with her husband and brother in 2013 and has remained on the planning committee for the annual event ever since.

RTJG Associate **Brian J. Scanlon** is a volunteer attorney with the Support Center for Child Advocates, a non-profit organization that provides legal assistance and social service advocacy for abused and neglected children in Philadelphia County. As the father to one year old Sasha, and as a former assistant district attorney who witnessed the downfall of many underprivileged children, his volunteer work for the Support Center provides Brian with a great deal of personal satisfaction knowing that he is helping provide children who would otherwise be overlooked with a chance of success.

As part of the Executive Committee of the Young Lawyer's Division for the Philadelphia Bar Association, on May 1, 2015, RTJG Associate **Samuel Mukiibi** took part in the Young Lawyer's Division's annual Goldilocks Program where attorneys act out trials based on children's novels in front of grade school children to teach them about the law. Sam played the role of Jack Farmer in the Commonwealth v. Jack "Magic Beans" Farmer, a legal adaptation of Jack and the Beanstalk. Judge Ramy I. Djerassi of the Philadelphia County Court of Common Pleas presided over the trial.

RTJG Administrative Assistant **Lisa Tiffany** is an active member of, and currently serves on the Board of Directors of, the Springfield Lions Club. The Club's main goal is to help the hearing and visually impaired. Lisa is also on the Board of Directors of Bethesda House – Lutheran Knolls, Boothwyn, PA. The Bethesda House, which provides care and housing for the aged, is partially government funded and partially privately funded.

RTJG Administrative Assistant **Yolanda Jenkins** serves as a Trustee and Scholarship Ministry leader of the J.E. Cunningham Scholarship Ministry at the Universal Missionary Baptist Church in Philadelphia, PA. As Scholarship Ministry leader, Yolanda works closely with the youth of the church and assists in setting up church and community programs such as tutoring, mentoring and assisting high school students and adults returning to school with college applications and financial aid. She also plans and hosts various fundraisers for the scholarship ministry to provide students leaving for college with financial assistance. As Trustee, Yolanda assists in making financial decisions for the church and administrates the church's tax exempt status filings.

"In the Community" is edited by Ricci Tyrrell Johnson & Grey Associate Tracie Bock Medeiros.

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ATTORNEYS AT LAW