Ricci Tyrrell Johnson & Grey

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Bill Ricci, John Tyrrell, Jim Johnson and Fran Grey

Quarterly Newsletter

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Ricci Tyrrell Johnson & Grey opened its New York office in August, 2016. The address for the firm's new Westchester County office is 445 Hamilton Avenue, Suite 1102, White Plains, NY 10601. Our firm now does business at four locations, with the New York office joining those in Philadelphia, Blue Bell, PA and Marlton, NJ.

William J. Ricci has been re-appointed as Co-Chair of the **Pennsylvania Defense Institute** (PDI) Product Liability Committee and was re-elected to the PDI Board of Directors for a two year term. In mid-July, **Mr. Ricci** lectured at the PDI Annual Meeting in Bedford Springs, PA. His topics were the controversial *Suggested Standard Jury Instructions in Product Liability cases*, as well as *The State of PA Products Liability law post-Tincher and in anticipation of the upcoming argument before the PA Supreme Court in the Amato case*. **Mr. Ricci** co-authored the Amicus Brief in *Amato* on behalf of the PDI.

On August 1, 2016 **Mr. Ricci** was elected to the Executive Committee of the **Philadelphia Association of Defense Counsel** for a two year term. This summer, **Mr. Ricci** was elected to membership in the **International Association of Trial Lawyers.** He was also selected for lifetime membership in **America's Top 100 Attorneys** and was elected to the **National Association of Distinguished Counsel.**

Ricci Tyrrell Johnson & Grey is proud to announce that the firm's Managing Member **John E. Tyrrell** was shortlisted again this year for a **Finance Monthly** Global Award in the category of Sports Law–USA. This is the second time in three years that Mr. Tyrrell has received this distinction. The Finance Monthly Law Awards recognize law firms and legal professionals who, over the past 12 months, have consistently excelled in all aspects of their work and set new standards of client service. Finance Monthly is a global publication delivering news, comment and analysis to those at the center of the corporate sector.

Mr. Tyrrell was also one of the presenters in a team of experienced attorneys and an engineering consultant at a product liability seminar for the+- **Association of Equipment Manufacturers (AEM)**. AEM's one-day Product Liability Seminar concluded its 3 ½ day product safety seminar event. Mr. Tyrrell's topic was *Preparing for Your Deposition.* The Association of Equipment Manufacturers (AEM) is an organization representing over 200 product lines and 850 manufacturers. AEM serves equipment manufacturers in the core service areas of market information, technical/safety, global public policy and exhibitions.

Ricci Tyrrell Associate **Eric Pasternack** authored an article, **"**Lawsuit over Dangerous Water Faces Danger in the Courtroom," for the June 2016 edition of the **Barrister**, which discussed how the Safe Drinking Water Act precludes liability for lead contamination of drinking water under federal law. He also gave a presentation, "Implied Certification: A Theory Implied No More?" to the Health Law Committee of the **Philadelphia Bar Association** on June 7, 2016.

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Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW

PREEMPTION OF STATE LAW AIRCRAFT DESIGN AND MANUFACTURE CLAIMS FOLLOWING *SIKKELEE*

Ever since the Third Circuit held that federal law preempts the field of aviation safety in *Abdullah v. American Airlines, Inc.*, 181 F.3d 363 (3d Cir. 1999), the question of whether state law product liability claims are also preempted has been left unresolved. But now, with the Third Circuit's recent decision in *Sikkelee v. Precision Airmotive Corp.*, 822 F.3d 680 (3d Cir. 2016), there is an answer. Such claims are not preempted, at least under the doctrine of field preemption. The *Sikkelee* decision thus presents a challenge but also an opportunity for manufacturers of aircraft products as they may still attempt to invoke the doctrine of conflict preemption to avoid state tort claims.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). From this design flows the "possibility that laws can be in conflict or at cross purposes." *Arizona v. United States*, 132 S.Ct. 2492, 2500 (2012). Where that is the case, the Supremacy Clause of the Constitution dictates that federal law "shall be the supreme Law of the Land." Art. VI, cl. 2. Congress accordingly has the power to enact legislation that preempts state law, *Arizona*, 132 S.Ct. at 2500-01, which it can do in three ways. First, Congress may expressly preempt state law. *Sikkelee*, 822 F.3d at 687 (slip op. at 14). Second, state law may be implicitly preempted under the doctrine of "field" preemption. *Oneok, Inc. v. Learjet, Inc.*, 135 S.Ct. 1591, 1595 (2015). And third, federal law may preempt state law through "conflict" preemption, which comes into play where compliance with both federal and state law would be impossible. *PLIVA, Inc. v. Mensing*, 564 U.S. 604 (2011). But regardless of which doctrine is invoked, a strong presumption exists against preemption in areas of the law that the states have traditionally occupied, *Meditronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996), such as product liability litigation. So for that reason, all preemption cases "start with the assumption that the historic police powers of the State were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555 U.S. 555, 565 (2009).

It was against this backdrop that the Third Circuit considered whether federal in-flight seatbelt regulations preempted state law negligence claims in *Abdullah*. That case was brought by several passengers of American Airlines Flight 1473 from New York to San Juan, Puerto Rico on August 27, 1991. *Abdullah*, 181 F.3d at 365. During that flight, the First Officer had illuminated the seatbelt warning sign after noticing a weather system developing in the plane's flight path. *Id.* While the First Officer also alerted the flight attendants that the developing weather system could cause turbulence, the crew did not alert the passengers. *Id.* So when the turbulence hit, some of the passengers were wearing seatbelts; others were not. *Id.*

After a jury found American Airlines liable and awarded damages to the plaintiffs who had been injured, the district court ordered a new trial on the basis that the Federal Aviation Act preempted the territorial standards for aviation safety. *Id.* at 365-66. The Third Circuit affirmed, finding that the Federal Aviation Act and the regulations promulgated thereunder "establish complete and thorough safety standards for interstate and international air transportation and that these standards are not subject to supplementation by, or variation among, jurisdictions." *Id.* at 365. Therefore, as the court explained, "federal law establishes the applicable standards of care in the field of air safety, generally, thus preempting the entire field from state and territorial regulation." *Id.* at 367.

In *Sikkelee*, the Third Circuit considered whether the holding of *Abdullah* extends to state law product liability claims. The plaintiff's husband, David Sikkelee, had been piloting a Cessna 172N aircraft, which had crashed shortly after take off. *Sikkelee*,

822 F.3d at 685. The complaint alleged that the aircraft lost power and crashed due to a malfunction or defect in the engine's carburetor, which allowed raw fuel to leak out of the carburetor into the engine. *Id.* After the defendant manufacturers filed a motion for summary judgment, which the district court granted because the plaintiff's state law claims "were premised on state law standards of care and fell within the preempted 'field of air safety[,]'" the plaintiff filed an amended complaint that incorporated federal standards of care in addition to the state law claims. *Id.* at 685-86. The plaintiff thereafter filed an amended complaint that continued to assert state law claims but also incorporated federal standards of care. *Id.* In ruling upon a motion for summary judgment, the district court found that the federal standard of care was established in the type certificate, which certifies that a new design for an aircraft or aircraft part performs properly and meets certain federal safety standards. *Id.* at 686.

On appeal, the Third Circuit expressed a more nuanced view of *Abdullah*. As the Third Circuit explained, "although we stated in broad terms that the Federal Aviation Act preempted the 'field of aviation safety,' the regulations and decisions discussed in *Abdullah* all related to in-air operations." *Id.* at 689 (citing 14 C.F.R. § 1.1; 14 C.F.R. §§ 1.1, 91.13). The Third Circuit thus concluded that *Abdullah* did not control its analysis and went on to consider whether Congress intended that the Federal Aviation Act preempt state law product liability claims.

In so doing, the Third Circuit observed that the Federal Aviation Act contains no express preemption provision. *Sikkelee*, 822 F.3d at 692. To the contrary, as the Third Circuit recognized, the Federal Aviation Act "says only that the FAA may establish 'minimum standards' for aviation safety[.]" *Id.* (citing 49 U.S.C. § 44701). The Third Circuit further recognized that the Federal Aviation Act includes a "savings clause" that provides that a "remedy under this part is *in addition* to any other remedies provided by law[,]" which the court explained, belies the argument that Congress demonstrated a clear and manifest intent to preempt state law *Id.* at 692-93 (citing 49 U.S.C. § 40120(c)). Finally, while acknowledging that Section 601 of the Federal Aviation Act empowers the FAA to promulgate regulations "to promote safety of flight of civil aircraft in air by commerce by prescribing . . . minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines and propellers as may be required in the interest of safety," the Third Circuit found that this too was insufficient to establish preemption as that provision was adopted verbatim from the 1938 Civil Aeronautics Act, H.R. Rep. No. 85-2360, at 16 (1958), which did not preempt state law product liability claims. *Sikkelee*, 822 F.3d at 693.

Having concluded that the Federal Aviation Act does not preempt state law product liability claims, the Third Circuit turned its focus to the regulations promulgated thereunder. To that end, the Third Circuit noted that the FAA had submitted a letter brief as amicus curiae and took the position that the Federal Aviation Act and the accompanying regulations "so pervasively occupy the field of design safety that, consistent with *Abdullah*, they require state tort suits that survive a conflict preemption analysis to proceed under 'federal standards of care found in the Federal Aviation Act and its implementing regulations." *Id.* at 693 (citing Letter Br. Of Amicus Curiae Fed. Aviation Admin. 11). After noting that the FAA's position should be accorded respect, the Third Circuit articulated its disagreement with it, noting that there are "three fundamental differences between the regulations at issue in *Abdullah* and those concerning aircraft design[.]" *Id.* at 694. First, while observing that a type certificate is a threshold requirement for the manufacture of aircraft and aircraft components, the Third Circuit construed such requirements as procedural and not a "general standard of care." *Id.* By contrast, the court observed that the regulations in *Abdullah* "prescribe[] rules governing the operation of aircraft in the United States." *Id.* (citing 14 C.F.R. §91.1(a)). Second, "the standards that

must be met for the issuance of type certificates cannot be said to provide the type of 'comprehensive system or rules and regulations' . . . [that] existed in *Abdullah* to promote in-flight safety 'by regulating pilot certification, pilot pre-flight duties, pilot flight responsibilities, and flight rules." *Id.* at 694 (quoting *Abdullah*, 181 F.3d at 369). Third, "the regulations governing in-flight operations 'suppl[y] a comprehensive standard of care,' that could be used to evaluate conduct not specifically prescribed by the regulations . . . ." *Id.* at 695 (quoting *Abdullah*, 181 F.3d at 371). The same could not be said of the regulations concerning aircraft manufacture and design; and for these reasons, the Third Circuit concluded that the regulations implementing the Federal Aviation Act also fail to evince a clear congressional intent to preempt state law. *Id.*

Although ultimately dismissive of the field preemption argument, the Third Circuit did not rule out application of confliction preemption principles to state law product liability claims. *Id.* at 701-02. In that regard, the Third Circuit noted that the FAA had argued that "to the extent that a plaintiff challenges an aspect of an aircraft's design that was expressly approved by the FAA[,] . . . [the] plaintiff's state tort suit arguing for an alternative design would be preempted under conflict preemption principles . . . because a manufacturer is bound to manufacturer its aircraft or aircraft part in compliance with the type certificate." *Id.* at 702. Consistent with this view, the Third Circuit explained that "type certification does not itself establish or satisfy the relevant standard of care for tort actions, nor does it evince congressional intent to preempt the field of products liability; rather, because the type of certification process results in the FAA's preapproval of particular specifications from which a manufacturer may not normally deviate without violating federal law, the type certificate bears on ordinary conflict preemption principles." *Id.* at 702.

By limiting its holding to field preemption and remanding the matter back to the district court, the Third Circuit signaled that the defense of conflict preemption remains alive. As a practical matter, this means that in preparing a defense, manufacturers should review their type certificates and FAA approvals to determine whether the plaintiffs' state law theories would require them to make major changes in the design or manufacture of the aircraft or aircraft components. The defense of such claims under a conflict preemption theory should, in other words, focus on whether compliance with both the state law standard of care and the FAA-approved design would be impossible.

Eric Pasternack is an Associate at Ricci Tyrrell Johnson & Grey.

PATENTS VERSES TRADE SECRETS

In some of my prior articles, I addressed the benefits of patent protection for new products, product improvements and processes. Specifically, an individual who receives a United States patent obtains a valuable property right to exclude others from making, using, selling and distributing an invention for a given period of time, normally twenty years from the date a patent application is filed. During this period, the inventor has a viable weapon against potential competitors who improperly infringe on this property right. However, after twenty years passes, the patent lapses and the inventive subject matter in the patent becomes part of the public domain; that is, anyone can now make, use, sell and distribute the invention. So how does an inventor who wants to secure his or her property

rights for longer than the period allowed by the patent accomplish this objective? An alternative form of protection is by keeping the invention as a trade secret.

Trade secret protection was originally established by common law, dating back to the nineteenth century. Over the years, trade secret law developed inconsistently by means of a variety of different state common law and random state statutes. In order to reconcile these differences and create a more uniform body of trade secret law, in 1979 the National Conference on Uniform State Laws adopted the Uniform Trade Secrets Act (UTSA). Since that time, almost all of the states have adopted some form of trade secret statute based on the USTA, thereby bringing a measure of uniformity to trade secret law. For instance New Jersey's version of the USTA is the New Jersey Trade Secrets Act, N.J.S.A.§56:15-1, et seq. and Pennsylvania's statute is the Pennsylvania Trade Secrets Act, 12 Pa. C.S.§5301 et seq. In fact, in May of this year, the Defend Trade Secrets Act was signed into law, allowing plaintiffs the option of bringing their claims in federal court.

The trade secret statutes generally define a trade secret as any information "that derives independent economic value . . . from not being generally known to, and not being readily ascertainable by . . . other persons who can obtain economic value from its disclosure or use." A trade secret can be "a formula, drawing, pattern, compilation including a customer list, program, device, method, technique or process." Thus, this broad language includes just about any type of subject matter whose disclosure can literally be kept secret. Specific examples include chemical and commercial product compositions, manufacturing methods, computer software, engineering blueprints or data and business information, such as a business plan or corporate strategy. This proprietary subject matter must also be "the subject of efforts that are reasonable under the circumstances to maintain its secrecy." As a result, as long as the secrecy of a trade secret is properly maintained by a business through "reasonable efforts," its misappropriation by third parties is prohibited.

As a result, trade secrets do not have to meet the stricter criteria of a patented invention. For instance, trade secrets do not have to fall into the category of inventions which are permitted by patents. In other words, they are not restricted to processes, machines, products, or compositions of matter, the only types of inventions allowed by the patent statutes. Trade secrets also do not need to be new or unobvious improvements of prior products, which are also requirements of patents. However, trade secrets have disadvantages. Most critically, an individual who independently develops subject matter which is the trade secret of another can legally use that subject matter. In contradistinction, a patent protects the owner of the patent from any individual who, even independently, invents the subject matter of the patent.

The most famous example of a trade secret is the formula for Coca-Cola®, which has remained a trade secret for over 100 years. The ingredient in Coca-Cola® which gives it its distinctive taste is a secret combination of flavoring oils and ingredients known as Merchandise 7X. The formula for Merchandise 7X is tightly guarded and has been since it was invented by Coca-Cola®. The formula and the only written record of the secret formula is actually kept in a security vault in a bank in Atlanta which can only be opened upon a resolution from the board of directors of Coca-Cola®. As the court commented in the case of *Coca-Cola Bottling Co. of Shreveport, Inc. v. The Coca-Cola Co.*, 107 F.R.D. 288 (D. Del. 1985), "the complete formula for Coca-Cola® is one of the best-kept trade secrets in the world."

In summary, an inventor is advised to be aware of the comparative advantages and disadvantages of seeking patent protection versus keeping the invention as a trade secret. Inventors must realize that when filing for a patent, which truly does afford a valuable, protected property right, all subject matter in the patent will ultimately be disclosed to

the public and the protection has a limited timeframe. In maintaining a trade secret, the public does not obtain access to the invention and it can be maintained for an indefinite period of time; but the trade secret is subject to being lost if its subject matter is independently developed by a third party.

Stuart Goldstein is the head of Ricci Tyrrell Johnson & Grey's Intellectual Property practice.

COVERAGE ALERTS

As a gatekeeping term in an insuring agreement "bodily injury" continues to be a source of uncertain application to suits and claims based on emotional trauma.

Two definitions of "bodily injury" are common. One defines the term as "bodily harm, sickness or disease, including death that results from bodily harm, sickness, or disease."[1] The other defines "bodily injury" to mean "accidental bodily harm to a person and that person's resulting illness, disease or death."[2] More elaborate definitions have come online in recent years; for example, "bodily injury" has been defined to mean "physical harm to the body, including sickness or disease, and resulting death, except that bodily injury does not include: a) any venereal disease; b) Herpes; c) Acquired Immune Deficiency Syndrome (AIDS); d) AIDS Related Complex; e) Human Immunodeficiency Virus (HIV); or any resulting symptom, effect, condition, disease or illness related to (a) through (e) listed above."[3]

No definition of "bodily injury" has been construed, in Pennsylvania or elsewhere, to make the term synonymous with harm *solely* consisting of emotional distress, embarrassment, humiliation or mental pain and suffering.[4] However, consensus deteriorates when emotional trauma is accompanied by physical symptoms such as headache, nausea, or loss of sleep.[5]

In 1995 the Pennsylvania Superior Court reviewed a dispute rooted in a claim under an auto policy for medical benefits. The plaintiff had been involved in a near-miss accident with a tractor-trailer, presumably at highway speeds.[6] Plaintiff was not physically injured but was later diagnosed as suffering from PTSD, anxiety attacks, driving phobia and numerous physical symptoms secondary to the frightening event. The policy defined "bodily injury" to mean "*accidental bodily harm to a person and that person's resulting illness, disease or death*." The court found physical and psychological maladies to be distinct and held the plaintiff was ineligible for benefits conditioned on bodily injury.

Twelve years later, a similar claim came to the Superior Court but involved harm to the witness to a fatal accident.[7] The plaintiff was walking across a highway with her husband when he was struck and

[1] *Glikman v. Progressive Casualty Insurance Company*, 917 A.2d 872 (Pa. Super. Ct. 2007).
[2] *Zerr v. Erie Insurance Exchange*, 667 A.2d 237 (Pa. Super. Ct. 1995), appeal denied, 674 A.2d 1075 (Pa. 1996).
[3] *Allstate Property & Casualty Insurance Company v. Winslow*, 66 F. Supp.3d 661 (W.D.Pa. 2014).
[4] See e.g., *The Philadelphia Contributorship Insurance Company v. Shapiro*, 798 A.2d 781 (Pa. Super. Ct. 2002).
[5] Compare, *Trinh v. Allstate Insurance Company*, 109 Wash. App. 927, 37 P.3d 1259 (2002)(bodily injury includes emotional injury accompanied by physical manifestations), to *Grange Insurance Company v. Sawmiller*, 11 N.E.3d 1199 (3d Dist. Ohio 2014)(PTSD and related physical symptoms are not bodily injury).
[6] *Zerr v. Erie Insurance Exchange*, supra.
[7] *Glikman v. Progressive Casualty Insurance Company*, supra.

killed. Although uninjured at the scene she was later diagnosed with and treated for post-traumatic stress disorder. She did not own a motor vehicle nor did she live with anyone who did; consequently, she applied for first-party medical benefits under the auto policy for the at-fault motorist. The policy defined "bodily injury" as "*bodily harm, sickness, or disease, including death that results from bodily harm, sickness, or disease*." Her application was denied on the grounds that she did not suffer from a bodily injury. The Court disagreed. The definition listed four separate types of "bodily injury": bodily harm, sickness, disease, and/or death that results from the first three. That being so, a "disease" caused by the accident qualified as "bodily injury." Significantly, the insurance carrier did not deny PTSD is a disease, or that the "disease" caused the plaintiff's suffering.[8] The court distinguished "bodily injury" defined as "accidental bodily harm to a person and that person's resulting illness, disease or death" because, unlike the definition at issue, it required antecedent bodily harm.

In 2011 a federal district court predicted the Supreme Court of Pennsylvania would construe "bodily injury" defined, in part, as a "sickness or disease" to embrace a defamation claim alleging an insured's liability for causing severe abdominal pain, irritable bowel syndrome and exacerbation of a pre-existing migraine headache condition.[9] But since 2007 the appellate courts of Pennsylvania have not weighed in; at least not in a precedential opinion. Two extensively developed but non-precedential opinions of the Superior Court, the most recent issued in May of this year, are all that fills the gap.

Lipsky v. State Farm Mutual Auto. Ins. Co. also considered claims of negligent infliction of emotional distress by witnesses to a fatal accident.[10] Benjamin Lipsky, age 17, was walking home from religious services with his father and two brothers when he was struck and killed by a drunk driver. A wrongful death and survival action was commenced for the decedent, and his father and brothers filed suit asserting claims for emotional distress caused by witnessing the accident. None of the three was physically struck by the car. Each alleged non-specific physical harm and emotional distress. State Farm contended that the "bystander claims" did not qualify as "bodily injury" defined as "bodily injury to a person and sickness, disease, or death which results from it." In effect, the carrier argued that without antecedent bodily injury the emotional trauma suffered was not an insured risk under the policy.

The action brought for the decedent settled. As part of the agreement State Farm stipulated to the value of the three bystander claims to set the stage for a coverage suit. The surviving father and brothers then commenced a declaratory judgment action. The plaintiffs did not plead specific physical manifestations of emotional distress in the predicate tort action or in the declaratory judgment complaint, alleging only that they suffered "physical complaints," emotional distress and mental anguish.

[8] No authoritative reference has been found which classifies PTSD as an injury or disease. The Diagnostic and Statistical Manual of Mental Disorders ("DSM"), Fifth Edition, was released in May 2013 and included changes to the classification of and criteria for PTSD. The DSM is published by the American Psychiatric Association and is the manual used by clinicians and researchers to diagnose and classify mental disorders. In DSM-IV PTSD had been classified as an acute stress disorder, but is now among a new class of "trauma and stressor-related disorders." www.ptsd.va.gov/professional/PTSD-overview/diagnostic_criteria_dsm-5.asp. During the 14 year process of revising DSM-IV representatives of the military urged a name change to post-traumatic stress injury, but in the final revision PTSD continues to be identified as a mental disorder.

[9] *Allstate Property & Casualty Insurance Company v. Winslow*, 66 F.Supp.3d 661 (W.D.Pa. 2011)(held: duty to defend arose under a homeowner's policy).

[10] 2011 Pa. Super. LEXIS 4299 (Pa. Super. 2011) (Unpublished Memorandum), affirmed without opinion by an equally divided Supreme Court, 84 A.3d 1056 (Pa. 2014).

The trial court held the policy definition of "bodily injury" to be ambiguous and susceptible to an interpretation that reasonably included the emotional distress claims. On appeal, the Superior Court affirmed but for different reasons derived and essentially dependent on jurisprudence defining the common law tort of negligent infliction of emotional distress ("NIED"). The court reasoned that NIED claims had not been restricted to secondary symptoms of injury from blunt trauma to muscle, tissue or bone. Qualifying physical injuries had been found in knots in the stomach, nightmares, loss of sleep, headaches, low self-esteem, susceptibility to fright, and major depression. The court then construed the broad pleading averments of harm as sufficient under the circumstances – namely, witnessing the sudden and unexpected death of a minor child or brother at the hands of a drunk driver, to necessarily imply debilitating and physical manifestations of the sort recognized to support a claim of negligent infliction of emotional distress. So understood, the court did not find the policy definition ambiguous, as had the trial judge, but instead read "bodily injury" as broadly inclusive of the bystander claims.[11] On further appeal the decision, which departed markedly from earlier decisions construing the same policy language and pleading averments, was affirmed without opinion by an evenly divided Supreme Court.

The most recent installment in the developing non-precedential jurisprudence is the Superior Court's May 24, 2016 decision in the matter of *Steadfast Insurance Company v. Tomei*, 2016 Pa. Super. Unpub. LEXIS 1864 (Pa. Super. 2016). *Steadfast* commenced a declaratory judgment action seeking a declaration of no duty to defend an underlying tort suit brought by 37 patrons of a tanning salon who were surreptitiously videotaped by a third-party as they undressed and were unclothed during tanning sessions. The videotapes were posted on the Internet. Suit was commenced against the owners of the shopping center, who were insured under a *Steadfast* policy, as well as the owner of the tanning salon. All plaintiffs alleged negligent failure to ensure their safety and security. All sought damages for emotional distress, embarrassment, and humiliation with no physical injury or impact. Twelve of the thirty-seven plaintiffs alleged "physical symptoms"; however, they did not allege an antecedent physical injury.

The trial court held that there was no duty to defend because the underlying plaintiffs did not allege "bodily injury," defined in the policy as "*bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time*." The Superior Court affirmed: "Even the 12 plaintiffs who at least alleged some physical symptoms associated with emotional distress did not allege any antecedent physical injury or impact, to themselves or anyone else. Nor did they allege anything resembling a "disease"[ ]. The trial court correctly held that the underlying plaintiffs' claims for emotional distress, humiliation and embarrassment did not qualify is claims for "bodily injury" [as defined in the policy and, therefore, no duty to defend was triggered]."

Distilling rules of thumb in the wake of non-precedential elephants in the room is a daunting exercise. But some observations can be made. All policy definitions examined include emotional harm, with or without physical manifestations, when secondary to an antecedent physical injury. Emotional distress without severe physical manifestations of emotional harm have yet to qualify as "bodily injury" under any policy definition. Even the *Lipsky* decision found severe physical manifestations implied by the egregious

[11] The *Lipsky* decision was issued by a three-judge panel which included the President Judge who issued a dissent. However, the dissent also noted: "If I were writing on a clean slate, I might agree that the overwhelming shock at witnessing your child's death clearly has a visceral physical impact, but I believe this issue has already been resolved [in prior decided cases]." The dissenting judge in *Lipsky* is the author of the Superior Court's 2016 opinion in *Steadfast Insurance Company v. Tomei*, discussed *infra*.

overall context underlying the plaintiffs' averments. *Steadfast* tracks the traditional view: a stand-alone claim for emotional distress, embarrassment, humiliation and similar harm is not "bodily injury." The most elastic policy definition is one that defines "bodily injury" to include sickness or disease.

Looking ahead, courts may be hard pressed to find coverage lacking when physical health is adversely impacted by exposure to traumatic events and physical manifestations of emotional trauma are supported by a medical diagnosis or objective testing.[12] In other words, it is easy to anticipate efforts to construe "bodily injury" to include emotional harm antecedent to and causative of physical health problems in the absence of express contract language that confines the risk insured to emotional injury with an antecedent or contemporaneous bodily injury. If advances in medical science ultimately enable a link between traumatic emotional disorders and physiologic changes in the brain the classic distinction between emotional and bodily injury could become an obsolete notion altogether.

Francis P. Burns III is a member of Ricci Tyrrell Johnson & Grey and head of its insurance coverage practice.

[12] On the other hand, establishing a link between physical health problems and traumatic events can hardly be taken as a given. For example, a growing body of literature has found a link between PTSD and physical health, but the existing research has not been able to determine conclusively that PTSD causes poor health. National Center for PTSD, www.ptsd.va.gov/professional/co-occurring/ptsd-physical-health.asp. (visited 8/17/2016).

IN THE COMMUNITY

During the month of April, Ricci Tyrrell Associate **Samuel Mukiibi** coached the **Drexel Law Basketball Team** as it prepared for the 2016 Dean's Cup, an annual basketball competition between all four Philadelphia law schools. All proceeds from the Dean's Cup benefit each school's public interest organizations, with an emphasis on funding summer fellowship programs.

Ricci Tyrrell's firm picnic on August 6, 2016 featured a "dunk tank" where employees and family forced Members of the firm to get wet for charity. Dunk tank proceeds went to **Eagles Charitable Foundation**.

On the eve of the Pennsylvania primary, the **Barristers Association of Philadelphia**, a bar association which represents African-American attorneys, hosted former Attorney General Eric Holder and Maya Harris, Senior Policy Advisor to Hillary Clinton's 2016 presidential campaign, as they discussed ways to encourage voter participation in the African American community. They also called on members of the Barristers to serve as voter protection volunteer lawyers. Based on **Sam Mukiibi's** involvement with the Barristers, he had the pleasure of meeting the former Attorney General.

On April 29, 2016, Ricci Tyrrell Member **Nancy D. Green** was installed as a member of the Board of Directors of **Shir Ami Synagogue** in Newtown, PA. Nancy was also on the planning committee for the annual **Women for Greenwood House Becky Deitz Levy Luncheon** which took place on May 5, 2016 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 which provides the highest quality care and services to seniors in an atmosphere of compassion and dignity.

On Mother's Day, Ricci Tyrrell Associate **Tracie Bock Medeiros** attended **Susan G. Komen**

Philadelphia's 26th Annual Race for the Cure. She assisted her 3 ½ year old son Zachary in making his annual donation, in hopes of teaching him the importance of philanthropy at a young age. Tracie's daughter Naomi, who was 10 months old at the time, was too young to attend the event this year but will participate in years to come! 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.

On June 18, 2016, **The O'Fenders,** whose talented guitarist is **William J. Ricci,** one of the founding Members of our firm, co-hosted a benefit for **Renovating Hope** at Twenty-9 Restaurant & Bar in Malvern, PA. Bill is on the Board of Directors of Renovating Hope, a charitable organization gaining national prominence which renovates homes for returning war vets. Since 2008, Renovating Hope and its partners have completed over 270 home renovations and repairs in 30 States across the United States. They have played a huge role in helping hundreds of service members, veterans, and their families to renew their lives. Renovating Hope's goal is to grow to a point where every injured American service member and veteran homeowner has a home that is adapted to their unique needs, and one that their family will be proud of. With each project, Renovating Hope brings together a group of professional contractors and suppliers that have the skills and experience to provide long-term solutions to the housing needs of American service members and veteran homeowners with injuries. Bill continuously provides pro bono legal work and assists with fundraising for the organization.

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

Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW