Ricci Tyrrell Johnson & Grey

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RTJG Associate **Sam Mukiibi** volunteering at the 32nd annual **Barristers' Association** Thanksgiving drive. The Barristers provided turkey baskets to more than 600 lower income families in the Philadelphia area.

Quarterly Newsletter

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William J. Ricci has become a Fellow of the **American College of Trial Lawyers**, one of the premier legal associations in North America. Founded in 1950, the College extends fellowship by invitation only, to those experienced trial lawyers of diverse backgrounds, who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. Membership in the College cannot exceed one percent of the total lawyer population of any state or province in the United States and Canada.

John E. Tyrrell received the **2016 Finance Monthly Global Award** in the category of **Sports Lawyer of the Year**. Mr. Tyrrell was a finalist for the award in 2014. Finance Monthly is a global publication delivering news, commentary and analysis to those at the center of the corporate sector.

On October 12, 2016, **Mr. Tyrrell** made a presentation at a snow symposium sponsored by the Professional Grounds Management Society (PGMS). The event, held at Lehigh Valley Iron Pigs Coca-Cola® Stadium, was hosted by Lawn and Golf Supply Co., Inc. and Ventrac PGMS is a professional society whose members include institutional grounds managers at colleges and universities, municipalities, park and recreation facilities, office parks, apartment complexes, hotels/motels, cemeteries, theme parks, as well as landscape management companies.

Francis J. Grey, Jr. was a guest speaker at **St. Joseph's Preparatory School** on December 9, 2016. Mr. Grey taught two sections of Public Speaking classes. He presented a mock Opening Statement for trial in a products liability case to 9-12th grade students who acted as the jury.

On Monday, November 21, 2016, **William J. Ricci** was a guest panelist on the TV program, **The American Law Journal** to discuss products liability litigation. The title of the program was: ***Injury from "Dangerous" Products: How do Juries Deliver Justice?*** The video from the program can be viewed at http://www.lawjournaltv.com/

Mr. Ricci is now on the Board of Directors of **The Philadelphia Association of Defense Counsel.** At their holiday luncheon on December 15, 2016, Mr. Ricci was a guest panelist for the PADC's monthly CLE luncheon program. The topic was the Pennsylvania Supreme Court Decision, ***Tincher v Omega Flex, Inc* - Two years later.**

In this Issue:

MY EXPERIENCE WITH THE BARRISTERS' ASSOCIATION OF PHILADELPHIA

Through my community involvement with The Barristers' Association of Philadelphia, Inc., I have renewed my commitment to diversity, inclusion, and the need to be open minded about religious and cultural differences.

The Barristers' Association was established in 1950. One of its founders, the late Charles Wright, in 1965 became only the fourth African American to sit on the bench of what is now the Philadelphia Court of Common Pleas. Prior to joining Ricci Tyrrell, I had the pleasure of serving as a Judicial Law Clerk to Charles Wright's son, the Honorable Edward C. Wright, who told me many stories of his father's resilience and strength in the face of adversity. Throughout its history, the Barristers' have addressed the professional needs and development of Black lawyers in the City of Philadelphia and surrounding areas through programming, outreach and education, seminars, cultural events and publications. In 1973, members of the Barristers' Association served on the Liacouras Commission, which investigated ways to eliminate racial discrimination in bar admission procedures. In 1978, the Barristers' Association joined other concerned groups in filing an action against the Philadelphia Registration Commission which resulted in the addition of 50,000 Philadelphians to the voter registration polls. In 1983, the Barristers' Association provided testimony before the Pennsylvania State Legislature on the issue of the merit selection of judges.

My first experience with the Barristers' Association was in 2013 at the installation ceremony for the then President-elect. At the time I was a third year law student, with no post-graduate plans, at Drexel University Thomas R. Kline School of Law. One of my law professors encouraged me to attend this event because of the networking opportunities. As an African American male, the sole reason I naively attended the event was because I thought only those who looked like me would be willing to help me. To my surprise the mentoring relationship which blossomed from that first experience was with a partner at a Philadelphia law firm who happened to be an older Caucasian woman. To this day she continues to advise me on my career development. Over time, I would come to see her dedication to diversity, inclusion and equality. From her I learned that many in the legal profession talk about diversity and inclusion but leave it only to the diverse lawyers to foster that environment. In the case of the Barristers' Association, there is a disproportionate load for African-American lawyers when it comes to servicing our communities and institutions, or providing opportunities for those of color who aspire to succeed in the legal profession.

The business interest for diversity and inclusion has been established.[1] The moral obligation is intuitive. When organizations engage in the socially responsible behavior of promoting diversity, they are not only addressing a business imperative but a moral one as well. In terms of outreach into minority communities, businesses may generate growth from either unexplored or undervalued markets. Many firms, including my own, already foster an environment of authenticity and openness. What remains is the concerted effort on action which promotes diversity and extends into these communities.

The Barristers' have five community outreach programs that involve direct contact with the community – Expungement Clinic, Senior Wills Clinic, Education Forum (for high school kids), Community Forum (usually a know your rights town hall meeting) and the Barristers' Thanksgiving Turkey Drive. The weekend before Thanksgiving, I took part in The Barristers' 32nd Annual Thanksgiving Drive. With the support of Ricci Tyrrell, we provided Thanksgiving "turkey baskets" to more than 600 lower income families in the

1 Axelrod, Sheryl L. "Banking on Diversity: Diversity and Inclusion as Profit Drivers-The Business Case for Diversity." American Bar Association, 12 June 2014. Web.

Philadelphia area. Included in the baskets were legal aid materials on understanding the expungement process and the limited access to criminal records. Each year the Barristers' inform the public on a different area of law. In previous years, the legal aid materials have covered the areas of wills and estates, protection from abuse, family law, small claims court, landlord/tenant and mortgage foreclosure.

Other opportunities to support the Barristers' are found within its law school scholarship program (a 501(c)(3)) which identifies, supports and trains exceptionally qualified diverse rising second and third year law students.

Samuel Mukiibi *is an Associate at Ricci Tyrrell Johnson & Grey.*

***TINCHER*: EFFECT ON PROHIBITION OF GOVERNMENT AND INDUSTRY STANDARDS AS EVIDENCE**

The Pennsylvania Superior Court's recent decision in *Mark Webb, as Administrator for the Estate of Sabino Webb, Deceased v. Volvo Cars of North America, et al*, 2016 WL 4721460 (Pa. Super. 2016) addressed whether the Supreme Court's ruling in *Tincher* overruled the prohibition of industry or government standards in a strict liability design defect case established in pre-*Tincher* cases.

The *Webb* action arose from a fatal automobile collision on May 4, 2009 involving a 1997 Volvo Sedan and a Chrysler PT Cruiser. *Id.* at *1. The driver of the Volvo attempted to make an "unsafe" left hand turn across traffic, when the rear passenger side door of the Volvo was struck by the PT Cruiser. *Id.* At the time, a two-month-old was strapped into a car seat behind the passenger side rear seat of the Volvo – the point of impact. The child died as a result of the accident. *Id.* The father brought multiple claims in which he alleged the subject Volvo was defective because it lacked rear door bars to protect against side-impact intrusion during a side-impact collision. *Id.* At the close of evidence, the trial court entered nonsuit on plaintiff's negligence and deceptive practices cause of action, leaving only plaintiff's claim for strict products liability. *Id.*

On November 15, 2013 the jury entered a defense verdict on the strict products liability claim. *Id.* Plaintiff filed an appeal arguing the trial court, *inter alia*, failed to instruct the jury to disregard evidence that the subject vehicle complied with Federal Motor Vehicle Safety Standards ("FMVSS") as nonsuit had been entered on all but the strict products liability causes of action. *Id.* at *2. In support of his position plaintiff relied on *Gaudio v. Ford Motor Co.*, 976 A.2d 524, 547 (Pa. Super. 2009) and *Lewis v. Coffing Hoist Div.,Duff Norton Co., Inc.*, 528 A.2d 593-94 (Pa. 1987) as standing for the proposition that a product's compliance with government standards is not relevant in a strict products liability case. *Id.*

Based on its review of the record, the Superior Court found "the trial court plainly erred in permitting the jury to consider the FMVSS evidence in connection with [plaintiff's] strict product liability claims. *Id.* at *4. Evidence of a product's compliance with government standards is irrelevant and inadmissible in strict products liability action under 402A of the Restatement (Second) of Torts." *Webb*, 2016 WL 4721460 at *4 (citing *Gaudio*, 976 A.2d at 543.) *Id.*

The *Gaudio* opinion relied on the Supreme Court's opinion in *Lewis*, which in turn, relied upon *Azzarello v. Black Bros. Co.*, 391 A.2d 1020 (Pa. 1978), which was overruled by *Tincher v. Omega Flex, Inc.*, 104 A.3d 328 (Pa. 2014). This series of

events required the Superior Court to consider whether *Tincher's* overruling of *Azzarello's* prohibition on introducing negligence concepts into strict products liability claims had an affect on the case at bar. The court ultimately decided "that the overruling of *Azzarello* [did] not provide [the] panel with a sufficient basis for disregarding the evidentiary rule expressed in *Lewis* and *Gaudio*." *Id*. at *6.

Expounding upon its holding, the court noted it is clear that post-*Tincher* the firm division between strict liability and negligence concepts no longer exists, however it is not clear whether the prohibition on evidence of government/industry standards no longer applies. *Id*. at *7. The Court further stated the following:

> The *Tincher* opinion does not undermine [the] rational for excluding governmental or industry standards evidence. Furthermore, *Tincher* expressed two theories of strict products liability-consumer expectations and risk-utility. It is possible that government/industry standards evidence could be admissible under both theories, one and not the other, or neither. It is also possible that the admissibility of such evidence will depend upon the circumstances of a case. The *Tincher* Court noted the possibility of shifting the burden of production and persuasion to the defendant under the risk-utility theory. This burden shift, if it becomes law, may provide defendants a basis to advocate for the admissibility of government or industry standards evidence in risk-utility cases.

Id. The court found that the above prospects will affect every stage of future products liability cases and thus believed "the continued vitality of the prohibition on government and industry standards evidence is a question best addressed in a post-*Tincher* case. *Id.*

In concluding its position on the issue, the Court emphasized that the plaintiff did not open the door to FMVSS evidence in the strict liability claim by bringing claims under both negligence and a strict liability theories. *Id*. The FMVSS evidence was only relevant to the negligence claims, and given the nonsuit entered, an instruction should have been given instructing the jury to disregard the government/industry standards. *Id*. The Superior Court decided the trial court's error was not harmless, vacated the judgment and remanded the case for a new trial. *Id*.

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COVERAGE CORNER – COMING TO GRIPS WITH THE DUTY TO DEFEND

Explaining to those on the receiving end of a coverage denial letter precisely what activates the duty to defend a lawsuit under a liability insurance policy can be a challenging exercise. The difficulty originates in rules of analysis that can differ in subtle and not-so-subtle ways from state to state. Three such rules can be and frequently are exasperating to an Insured seeking coverage under a policy governed by Pennsylvania law: first, any duty to defend is strictly tied to the factual allegations of the civil action complaint[2] - nothing

1 Complaint should be to be understood as inclusive of a third-party complaint, cross-claim or counterclaim, all of which have the potential to activate the duty to defend. Pennsylvania recognizes a conceptual distinction between a "claim" and a "cause of action" (legal theory). A claim is the aggregate of operative facts giving rise to a right enforceable by a court. A "cause of action" or "legal theory" supplies the statutory or common law principle under which a litigant seeks relief or bases a defense. *Steiner v. Markel*, 968 A.2d 1253 n.11 (Pa. 2009).

outside the pleading matters and neither do legal rubrics of any cause of action pleaded; second, the factual allegations must be taken as true, whether the allegations are actually true or false; and third, as a corollary of the second point, it does not matter that the party accused denies, contradicts or tries to add context to allegations of wronging. Three recent federal trial court decisions declaring that an insurer had no duty to defend provide useful illustrations: *First Liberty Insurance Corp. v Anderson*, 2016 U.S. Dist. LEXIS 67104 (E.D. Pa. May 23, 2016); *State Farm Fire & Cas. Co. v Massi*, 2016 U.S. Dist. LEXIS 69329 (E.D. Pa. 2016); *Bealer v Nationwide Mutual Insurance Co*., 2016 U.S. Dist. LEXIS 158438 (E.D. Pa. Nov. 16, 2016).

A slightly expanded recap of the analytical rules and supporting authority may be useful as introduction. An insurer's duty to defend a suit against an Insured is determined solely on the basis of facts pleaded in the underlying complaint.[3] *Kvaerner v. Commercial Union Insurance Co*., 908 A.2d 888, 896 (Pa. 2006)(Insured's expert reports irrelevant). Facts developed in discovery but not reflected in the complaint cannot be used to establish a duty to defend. *Scopel v. Donegal Mutual Ins. Co*., 698 A.2d 602 (Pa. Super. 1997); *State Farm Fire & Cas. Co., v. The Estate of Mehlman*, 589 F.3d 105 n.3 (3d Cir. 2009); *I.C.D. Industries, Inc. v. Federal Ins. Co*., 879 F.Supp. 480 (E.D.Pa. 1995). The particular cause of action pleaded is not determinative of whether a duty to defend is activated or "triggered." *Mutual Benefit Ins. Co. v. Haver*, 725 A.2d 743, 745 (Pa. 1999); *American Nat'l Property & Casualty Cos. v. Hearn*, 93 A.3d 880 (Pa. Super. 2014)(pleading a negligence cause of action does not override facts describing an intentional assault). Finally, because only the facts alleged are relevant to a duty to defend analysis, and the facts must be taken as true (i.e., will coverage apply if the facts stated are proven to be true?), the Insured's denials cannot give rise to a duty to defend. *Humphreys v. Niagara Fire Ins. Co*., 590 A.2d 1267, 1272 (Pa. Super. 1991)(facts alleged are determinative, therefore an insurer has no duty to investigate the truthfulness of the facts to inform a duty to defend analysis); *Erie Insurance Exchange v. Fry*, 39 Pa. D.&C. 4th 20, 26 n.1 (Phila. Com. Pl. 1998)(insured's denials do not give rise to a duty to defend); *Mark I Restoration SVC v. Assurance Company of America*, 248 F.Supp. 2d 397 (E.D. Pa. 2003).

The underlying tort action in *First Liberty v. Anderson* alleged that the defendant, John Anderson, sexually abused his nephew over a period of years. Anderson sought coverage under four successive homeowner insurance policies. First Liberty provided a defense under a reservation of rights and filed a declaratory judgment action seeking to be relieved of any duty to defend or indemnify because: the conduct alleged did not describe an "accident" meeting the requirement of an "occurrence" in the insuring agreements of the policies; the policies excluded claims for bodily injury expected or intended by Anderson; and the policies excluded claims for sexual molestation. Anderson protested that the complaint against him alleged, in addition to intentional torts, counts alleging negligence and recklessness.[4] He also urged the court to consider his deposition testimony and the guilty plea colloquy from his criminal case which he argued more clearly showed his actions were akin to adolescent horseplay.[5] Both arguments

2 This rule, invariably recited in case law, is open to the charge of being only partially true and, therefore, logically false. Even as stated the rule assumes the seeker of coverage qualifies as an Insured under the policy – a condition that as often as not must be established by facts extrinsic and irrelevant to what the suit alleges. Other antecedent conditions unrelated to the suit, but pivotal to the availability of coverage, can also bear on the duty to defend: Payment of the policy premium and timely notice of suit, especially for claims-made policies, come readily to mind.

3 So long as a complaint alleges at least one potentially covered claim, the entire suit must be defended until such time that the suit is confined to a potential recovery the policy does not cover. Costs of defense incurred for claims that are not covered cannot be recouped by the insurance company from the Insured unless the policy specifically provides for reimbursement. *American and Foreign Ins. Co. v. Jerry's Sport Center, Inc*., 2 A.3d 526 (Pa. 2010).

4 Anderson admitted that his "horseplay" involved wrestling, crotch grabbing, crude locker room commentary on genital size, ignoring bathroom privacy expectations and sleeping in the same bed as the boy.

were rejected. The Court held, notwithstanding counts alleging less theories based on less than intentional conduct, that the factual allegations reflected intentional acts incompatible with coverage for a fortuitous "accident." The court also held that allegations of sexual assault of a minor establish a presumptive intent to harm matching the expected or intended harm exclusion, and also fit squarely within the exclusion of coverage for bodily injury "[a]rising out of sexual molestation."

In *State Farm v. Massi* the Insured sought coverage under a homeowner's policy for a lawsuit stemming from his assault of another man in a bar. State Farm entered a defense under a reservation of rights and commenced an action seeking a declaration of no coverage and no duty to defend. Massi had been involved in multiple verbal and physical alterations in the bar during the course of the evening. At about 1:30 a.m. security asked Massi to back off an altercation with other patrons, and shortly afterwards he struck the plaintiff in the face with a billiard ball knocking him unconscious. The complaint by the injured man included counts for negligence and assault and battery. Plaintiff also sued the bar for serving Massi when he was visibly intoxicated. The policy provided coverage for bodily injury but only if the result of an "occurrence," defined as an "accident." The court found the complaint was "not just 'thin on detailed facts' supporting negligence or lack of intent, it lack[ed] such facts entirely." The court rejected Massi's plea that the complaint alleged sufficient facts to permit classifying his conduct as other than intentional because he was too drunk to form the requisite state of mind for an intentional tort.

Bealer v. Nationwide rejected an effort to trigger the duty to defend based on the Insured's theory of defense. Mr. Bealer commenced an action for declaratory judgment when his commercial general liability insurer refused to defend an action for property damage. The dispute arose from the purchase of a newly constructed home that developed cracks in its foundation walls and allegedly caused by defects in design or construction or both. Nationwide refused to defend because the complaint alleged "faulty workmanship," not an "accident." The Insured

conceded that faulty workmanship claims did not qualify for coverage,[6] but insisted the damage was due to superseding events (use of heavy equipment on the property by others and heavy rains) that were an "accident." In effect, the Insured chose to focus on its theory of the cause of the damage and not the claim as pleaded. The Court held it could not look to the Insured's alternative explanation because it was not pleaded in the underlying complaint:

> [Plaintiff's] factual allegations…are that a failure to properly design and construct the property caused the damage at issue. These are faulty workmanship claims, and…attempts to reframe them as an "occurrence" due to the "degree of fortuity" involved in the intervening factors that allegedly led to the damage are unavailing.

As a final note, an Insurer's duty to defend is not necessarily frozen in place once triggered by the allegations of a complaint. If during the course of an action the claims alleged change or are abandoned such that there is not even one claim potentially within coverage the duty to defend ends. Similarly, the duty to defend is not necessarily a dead issue if not triggered by the allegations of the initial complaint. Amendments to pleadings are liberally allowed in state and federal court, creating the potential for the duty to defend to be triggered at a later stage of litigation.

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5 *Kvaerner v. Commercial Union Insurance Co*., 908 A.2d 888, 896 (Pa. 2006)(claims based on faulty workmanship do not present the degree of fortuity contemplated by the ordinary meaning of an "accident.").

PATENTING AN INVENTION: WHAT EVERY POTENTIAL INVENTOR SHOULD KNOW

Many of the inventor clients with whom I consult enthusiastically believe that their invention, based on a million dollar product idea, should be protected by a United States patent. In fact, obtaining a patent is sometimes a key element in ensuring that a product is a success. However, before one goes to the substantial expense of applying for a United States patent and attempting to market and sell it, I routinely recommend that the inventor first consider taking the following important steps.

1. **Search of prior patents**.

   Many inventions have become products which already are or were at one time protected by patents. Therefore, a search of prior patents and products, including those currently on the market, should be done to ensure that an invention is truly unique and not merely an obvious modification of an existing product. While patent attorneys and patent searchers routinely conduct such novelty searches prior to filing a patent application, an inventor can get a good idea of what has already been patented and what is in the marketplace by doing his or her own preliminary search. Various patent search databases are available, such as Google® Patents and the U.S. Patent and Trademark patent library, which can be found at www.uspto.gov. Only if this preliminary search reveals no prior patents or products similar to the contemplated invention, should the next step in the patent application process be taken.

2. **Disclosure of the invention**.

   Any potential inventor should be careful to whom the invention is disclosed. Discussing the viability and economic benefit of the invention with family and close friends is generally safe. However, once a third party becomes privy to an invention, the actual inventor may lose rights to the invention if that party attempts to file for a patent first. In addition, special care should be taken before disclosing an invention on the internet at such sites as Kick Starter. Parties which troll such sites may begin making and selling the application before an application is filed. If an invention is made public and an application for that invention is not filed within one year of the public disclosure, all patent rights will be lost.

3. **Patent invention companies.**

   Advertisements, both on television and in printed material, extol the benefits of companies which will guide an inventor through the patent process. An inventor should be skeptical of signing on with such companies, not so much because the inventive idea may be stolen, although this is always a possibility, but because these companies rely on making profits on the pre-application process itself. In other words, an inventor is almost always required to make an up-front payment, usually anywhere between $1,000.00 and $10,000.00; yet there is no guarantee that the invention will ultimately be awarded a patent. The only entity which is guaranteed to make money on the transaction is the patent invention company itself. As a result, there is little incentive on the part of the company to patent and promote the invention. In almost all cases, the inventor's investment is lost.

4. **Know what you want to do with a patent.**

   Obtaining a U.S. patent is only the first step in the development of a product. Before proceeding with the patent process, the inventor should have an idea of how he or she will proceed, if and

when a patent is granted. It is best to have some type of marketing or other business development plan in mind at the outset. For example, is the inventor going to make, market, and sell the product directly? Will the inventor explore licensing agreement options? Will the patent be sold outright? These are all questions which should be considered prior to engaging in the patent process. Spending money to obtain a patent without having an end game will simply result in a waste of money.

5. **Get help.**

   The prosecution of a patent application before the U.S. Patent and Trademark Office is a complex process. The ultimate value of a patent is derived from the manner in which it is prepared and ferried through the Patent Office system. It is therefore always best to consult with a registered patent attorney or patent agent, professionals who are experienced in the prosecution of patent applications.

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

WAIVER OF PRIVILEGE

Testimonial privileges are formidable things. By empowering a privilege holder to prevent disclosure of information, they stand in contrast to the general principle that "the public … has a right to every man's evidence." *See Branzburg v. Hayes*, 408 U.S. 665, 688 (U.S. 1972) (quoting *United States v. Bryan*, 339 U.S. 323, 331 (1950)). However, privileges are not absolute and may be waived in many ways. This article will address how Pennsylvania state and federal courts have handled two related ways in which a privilege holder may forfeit a privilege: by placing otherwise privileged material "in issue" in litigation, and by selectively waiving privilege to only some communications on a particular subject.

In-issue waiver occurs when a party asserts a claim or defense that requires examination of otherwise privileged material. *Commonwealth v. Harris*, 32 A.3d 243, 253 (Pa. 2011). The Pennsylvania Supreme Court's recent decision in *Commonwealth v. Flor*, 136 A.3d 150 (Pa. 2016), is both a paradigmatic example of in-issue waiver and illustrates the limited extent of such waiver. There, a defendant in a capital case sought post-conviction relief claiming the ineffective assistance of trial counsel. The thrust of the claim was that trial counsel had performed deficiently by failing to pursue a claim that the defendant was ineligible for the death penalty due to an intellectual disability. The prosecution moved for production of trial counsel's complete case file in order to prepare to rebut the defendant's claim. Finding that the defendant's ineffectiveness claim had waived attorney-client privilege and work product protection, the Common Pleas Court granted the motion and ordered production of trial counsel's entire file.

The Supreme Court agreed that the ineffectiveness claim constituted a waiver of privilege but did not agree that the waiver extended to the entirety of counsel's file. The Court explained that by challenging counsel's performance, the defendant had waived privilege as to materials placed "in issue" by the defendant's claims. However, the Court made clear that the waiver only went so far as materials that the defendant had actually placed in issue. The Court directed the Common Pleas Court on remand to discern the extent to which trial counsel's file contained material not subject to in-

issue waiver and to remove such material before producing the file to the prosecution.

In-issue waiver can occur in civil litigation as well. In *Piazza v. County of Luzerne*, Civil Action No. 3:13-CV-1755, 2015 U.S. Dist. LEXIS 147283 (M.D. Pa. Oct. 30, 2015), Judge Conaboy of the United States District Court for the Middle District of Pennsylvania found a defendant waived attorney-client privilege by asserting an advice-of-counsel defense. There, the plaintiff claimed he was unlawfully terminated from a position at the county Bureau of Elections due to his lack of political affiliation, and he sued the county and his supervisor. When the supervisor testified at a deposition that he had terminated the plaintiff's employment on the advice of counsel, plaintiff's counsel asked him what counsel's advice had been. Defense counsel instructed him not to answer, claiming attorney-client privilege. On further questioning, the supervisor further testified that he had terminated the plaintiff based on his belief that the plaintiff had exceeded the scope of his authority under the law, and that that belief was based on conversations with the county's acting chief solicitor.

Judge Conaboy rejected the claim of privilege. He explained that "a party can waive the attorney[-]client privilege by asserting claims or defenses that put his attorney's advice in issue in the litigation." *Id.*, 2015 U.S. Dist. LEXIS 147283, at *7 (quoting *Rhone-Poulenc Rorer Inc. v. The Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994)). Judge Conaboy concluded that the supervisor's assertion that he had acted on the advice of counsel operated as a waiver of attorney-client privilege. However, the judge limited the finding of waiver to communications relevant to that defense – counsel's communications on which the supervisor had relied in deciding to terminate the plaintiff. As the opinions in *Piazza* and *Flor* demonstrate, Pennsylvania law and federal law as applied by federal courts sitting in Pennsylvania are in substantial agreement on the proper application of the in-issue waiver doctrine.

There is considerably less agreement about the proper application of subject-matter waiver. As the Third Circuit candidly acknowledged, "Disclosing a communication to a third party unquestionably waives [attorney-client] privilege. A harder question is whether the waiver also ends the privilege as to any related but not disclosed communications." *Teleglobe Communs. Corp. v. BCE, Inc.*, 493 F.3d 345, 361 (3d Cir. 2007). In the Third Circuit's view, in determining the answer to that question, the "touchstone is fairness." *Id.* (citing *Westinghouse Elec. Corp. v. Repub. of the Philippines*, 951 F.2d 1414, 1425 n.12 (3d Cir. 1991)). The fairness analysis to which the Third Circuit referred is now embodied in Federal Rule of Evidence 502(a). *Lawless v. Del. River Port Auth.*, Civil Action No. 11-7306, 2013 U.S. Dist. LEXIS 6965, at *9 (E.D. Pa. Jan. 16, 2013). Rule 502(a) provides that a disclosure intended to waive privilege as to the disclosed communications or information also waives privilege as to undisclosed communications or information only if the disclosed and undisclosed communications or information concern the same subject matter and in fairness ought to be considered together.

Rule 502(a) was the subject of the Court's analysis in *Lawless*. There, a former employee of the Delaware River Port Authority sued in federal court, alleging that the Port Authority had terminated his employment in violation of the Americans with Disabilities Act. The Port Authority terminated his employment following an "executive session" of its Board of Commissioners that was attended by General Counsel and outside counsel. During the depositions of General Counsel and one of the Commissioners, defense counsel objected to questions about the discussions at the "executive session" on attorney-client privilege grounds and instructed the witnesses not to answer. The plaintiff moved to compel the testimony, arguing that the privilege did not apply to portions of the discussions, and even if it did apply, the Commissioner's testimony about one aspect of the discussions had waived the privilege to other parts of the discussions.

The Court rejected both arguments. The Commissioner had testified, "There were probably

some Commissioners who expressed reservations" about the termination. *Lawless*, 2013 U.S. Dist. LEXIS 6965, at *6. The Court determined that although that statement waived privilege as to the contents of that statement, the waiver went no further. The Court pointed out that extending the waiver is "limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner." *Id.* at *7-8 (quoting Fed. R. Evid. advisory committee's note). The Court concluded that the Port Authority had not engaged in such conduct. The Court pointed out that the Commissioner's testimony merely reiterated information reflected in the board minutes, which were of record and stated that four Commissioners had voted against the termination. The Court added that redeposing the Commissioner was inappropriate because the dissenting Commissioners had already testified about the basis of their dissent. Furthermore, the Court concluded that rather than being selective, misleading, and unfair, the disclosure confirmed the disagreement about the termination and may have harmed the Port Authority's case.

Although federal law has embraced a rule of subject-matter waiver, Pennsylvania law has not. *See Bagwell v. Pa. Dep't of Educ.*, 103 A.3d 409, 419 (Pa. Commw. Ct. 2014).[7] In that case, the question arose in the context of a Right-To-Know Law request for correspondence sent to the Secretary of Education in his capacity as an *ex officio* member of the Board of Trustees of Pennsylvania State University. The request was denied under the attorney-client privilege and the work-product doctrine. The correspondence implicated the investigation into the scandal involving Jerry Sandusky. The requester maintained that by making disclosures to third parties regarding the same subject, the University had waived privilege to the correspondence. The Commonwealth Court disagreed, bluntly stating that "Pennsylvania courts have not adopted subject-matter waiver." *Bagwell*, 103 A.3d at 419. The Court added that where it is recognized, subject-matter waiver exists to prevent a party from unfairly using privilege as a weapon in litigation, and because the request before it had not arisen in litigation, the doctrine could not by its terms apply. The Court additionally noted that in any event there was no evidence that any privileged information on the subject matter in issue had been disclosed. Finally, the Commonwealth Court considered it significant that "Pennsylvania courts recognize selective waiver in the context of work product," and that in such cases, the selective waiver did not constitute a waiver as to other, undisclosed materials. *Id.* (citing *Commonwealth v. Sandusky*, 70 A.3d 886, 898 (Pa. Super. Ct. 2013).

Thus, while state and federal courts in Pennsylvania apply the in-issue waiver doctrine similarly, they disagree on whether a waiver of privilege and work-product protection to some materials amounts to a waiver as to others. Counsel should approach these issues with care, mindful of possible ramifications a disclosure may have for a client in the circumstances presently at issue as well as in future contexts.

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

LACHES AND THE SPILL ACT: AN EQUITABLE DEFENSE INCONSISTENT WITH THE LAW?

Earlier this year, a New Jersey trial court found that the defense of laches barred a private-party's claim for contribution under the New Jersey Spill Compensation and Control Act (the "Spill Act"),

[7] *See also Paramount Fin. Communs., Inc. v. Broadridge Investor Commun. Solutions, Inc.*, Civil Action No. 15-405, 2016 U.S. Dist. LEXIS 133105, at *9 (E.D. Pa. Sept. 28, 2016) (citing *Bagwell*).

notwithstanding the New Jersey Supreme Court's decision only a year ago in *Morristown Assocs. v. Grant Oil Co.*, 220 N.J. 360 (2016). *Morristown Associates* not only found that contribution claims are not subject to any statute of limitations but that the only defenses to claims for contribution are those expressly set out in the Spill Act. The Law Division's decision in *22 Temple Avenue, Inc. v. Audino, Inc.*, Docket No. BER-L-9337-14, 2016 N.J. Super. Unpub. LEXIS 2226 (Law Div. Oct. 5, 2016), could thus be seen as inconsistent with *Morristown Associates*. And though it is not precedential, plaintiffs and defendants alike should be aware of its implications as it will likely prove the source of considerable litigation in the years to come.

In *22 Temple Avenue*, the plaintiffs presumably became aware of the contamination on their property in 2004 upon the conclusion of Phase I of the environmental investigation but did not provide notice to the defendants for ten years. *Id.* at *9-11. The trial court further found that had the plaintiffs contacted the defendants in 2004, one of the defendants, Peter Audino, would have been able to retain his company's records, and knowing the advanced age of the other witnesses, could have preserved their testimony. *Id.* at *12. And as the trial court noted, by the time the plaintiffs had brought suit, Mr. Audino was 89 years old, was legally blind and hard of hearing, and had suffered a stroke, which rendered him unable to testify in his defense. *Id.* at *13. As such, the trial court concluded that the harm in the delay was substantial given that Mr. Audino could not adequately prepare a defense. *Id.* at *18. In granting summary judgment to Mr. Audino, the trial court observed that "[p]ublic policy implications are important to the Spill Act" and "[w]ithout the risk of encountering a laches defense, Spill Act litigants would be encouraged to do what the [plaintiffs] did—postpone investigation and clean up—while other parties are harmed by their delay. *Id.* at *17-18.

Although these concerns are certainly valid, the *22 Temple Avenue* decision ignores the longstanding view, as articulated by the Supreme Court, that the Spill Act, N.J. Stat. Ann. §§ 58:10-23.11 to -23.11z, "is remedial legislation designed to cast a wide net over those responsible for hazardous substances and their discharge on the land and waters of this state. *Morristown Assocs.*, 220 N.J. at 383. Passed in response to concerns about the potential for off-shore oil spills, the Spill Act constituted "a pioneering effort by government to provide monies for swift and sure response to environmental contamination." *Marsh v. N.J. Dep't of Envtl. Prot.*, 152 N.J. 137, 144 (1997); *Buonviaggio v. Hillsborough Twp. Comm.*, 122 N.J. 5, 7, 9-10 (1997). In the years since its first passage, the Act has been amended and now "'prohibits the discharge of hazardous substances,' 'provides for the cleanup of that discharge,' and imposes joint and several liability on the responsible parties." *Morristown Assocs.*, 220 N.J. at 364 (quoting *Magic Petroleum Corp. v. Exxon Mobil Corp.*, 218 N.J. 390, 401-02 (2014)). The Spill Act also permits those who remediate a contaminated site to seek contamination from other responsible parties. N.J. Stat. Ann. § 58:10-23.11f(a)(2)(a). That provision provides:

> Whenever one or more dischargers or persons cleans up and removes a discharge of a hazardous substance, those dischargers and persons shall have a right of contribution against all other dischargers and persons in any way responsible for a discharged hazardous substance or other persons who are liable for the cost of the cleanup and removal of that discharge of a hazardous substance. In an action for contribution, the contribution plaintiffs need prove only that a discharge occurred for which the contribution defendant or defendants are liable pursuant to [N.J. Stat. Ann. § 58:10-23.11g(c)], and the <u>contribution defendant shall have only the defenses to liability available to parties</u> pursuant to [N.J. Stat. Ann. § 58:10-23.11g(d)]. In resolving contribution claims, a court may allocate the costs of cleanup and

> removal among liable parties using such equitable factors as the court determines are appropriate.
>
> [N.J. Stat. Ann. § 58:10-23.11f(a)(2)(a) (emphasis added).]

As the Supreme Court has recognized, this provision "does not contain a statute of limitations defense." *Morristown Assocs.*, 220 N.J. at 365. It also provides that the contribution defendant shall have "only the defenses to liability available to parties pursuant" to N.J. Stat. Ann. § 58:10-23.11g(d). *Morristown Assocs.*, 220 N.J. at 381 (citing N.J. Stat. Ann. § 58:10-23.11f(a)(2)(a)). And so, the Supreme Court recognized that the "language of the statute expressly restricting defenses available under the Spill Act provides significant support for a conclusion that no statute of limitations applies." *Id.*

In finding that the Legislature intended to include no statute of limitations defense, the Supreme Court rejected the "argument that a reading of the contribution provision that excludes all other defenses deprives a defendant of other unlisted defenses that should presumably be maintained, such as challenges to venue, service of process, and subject matter jurisdiction." *Id.* at 382. Based upon this statement, the trial court recognized "that other defenses, such as challenges to venue, service of process and subject matter jurisdiction, remain available because such defenses are established by court rules." *22 Temple Ave.*, 2016 Super. Unpub. LEXIS 2226, at *8. And for that reason, the trial court concluded that the *Morristown* decision did not preclude a finding that the doctrine of laches is a viable defense against such claims. *Id.* at *8-9.

As commonly understood, the doctrine of laches "is invoked to deny a party enforcement of a known right when the party engages in an inexcusable and unexplained delay in exercising that right to the prejudice of the other party." *Knorr v. Smeal*, 178 N.J. 169, 180-81 (2003). In determining whether to apply the doctrine, courts consider the length of and reasons for the delay, and the "changing conditions of either or both parties during the delay." *Lavin v. Bd. of Educ.*, 90 N.J. 145, 152 (1982). In many respects then, the doctrine of laches and statutes of limitations serve similar ends, as the underlying purpose of a statute of limitations "is to encourage prompt resolution of claims," particularly "where evidence may be 'vulnerable to the passage of time.'" *Henry v. N.J. Dep't of Human Servs.*, 204 N.J. 320, 332-33 (2010) (quoting *Montells v. Haynes*, 133 N.J. 282, 291 (1993)).

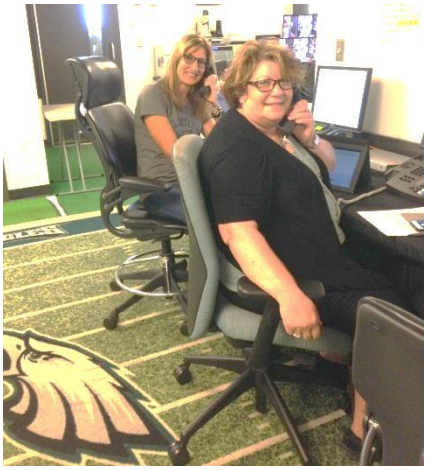
So while the Supreme Court left open the possibility that certain equitable defenses remain viable against contribution claims, there is strong reason to doubt the trial court's conclusion in *22 Temple Avenue* that the defense of laches is among them. As the Supreme Court explained, it could "see no reason to interpose in these factually complex cases a new requirement to determine when one knew of a discharge in order to afford the remediating party the contribution right that the Spill Act confers as against all other parties." *Id.* at 384. In view of this statement, the trial court's reasoning seems particularly unfounded: on the one hand, it recognized that equitable defenses created by court rule are available against contribution claims, but on the other hand, it fails to acknowledge the Supreme Court's role in promulgating those rules and its discouragement of the vary analysis required to determine whether the laches defense is applicable in a given case.

It is doubtful that the Appellate Division and Supreme Court would approve of the laches defense against contribution claims. But until those courts weigh in further on this matter, *22 Temple Avenue* presents a cautionary tale for those seeking contribution.

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

IN THE COMMUNITY

On September 6, 2016, Ricci Tyrrell employees **Angela Forte and Julianne Johnson** volunteered at the **Sportsradio-94 WIP Radiothon** to help raise money for **Eagles Charitable Foundation.** The Radiothon is a multi-day phone-a-thon during which fans bid for 50 exclusive Eagles experiences with their favorite players, coaches and radio personalities from SportsRadio-94 WIP. More than $200,000 was raised through this effort and all of the money went directly to Eagles Charitable Foundation for its charitable programs.



On August 6, 2016, Ricci Tyrrell attorney **Stephen W. Miller** was on the Host Committee for the annual fundraiser event of **The Wetlands Institute** in Stone Harbor, NJ. Additionally, Steve currently serves on the Board of Directors of the **Committee of Seventy**, the prominent Philadelphia Civil Watchdog Organization.

Ricci Tyrrell Chief Operating Officer **Julianne Johnson** regularly volunteers for the **Cathedral Kitchen** which provides nutritious meals for the impoverished residents of Camden, NJ. On October 15, 2016, she along with a group of other volunteers from **Christ our Light Church** in Cherry Hill helped serve lunch, seat guests and clean up after the meal. Julianne is scheduled to serve meals again on January 21, 2017. The Cathedral Kitchen also has a Culinary Arts Training Program and a Baking Arts Training Program which collectively enroll approximately 60 students per year. Both programs include classroom instruction in culinary/baking arts, plus ServSafe certification training, life skills, financial literacy and interviewing skills training. Graduates are assisted with job placement and over 80 percent of graduates find employment during the first three months following graduation.

Julianne Johnson is also a supporter of the **South Jersey Food Bank** and recently helped sponsor the **2016 Food Bank of South Jersey Tennis Tournament** held on October 29, 2016. Ricci Tyrrell matched Julianne's donation.

In honor of **Breast Cancer Awareness Month** and all those we know affected by breast cancer, October 13, 2016 was “wear pink” day at Ricci Tyrrell. The firm provided pink donuts and collected donations on behalf of **Susan G. Komen Philadelphia.** On October 15, 2016, Ricci Tyrrell Associate **Tracie Bock Medeiros** attended the **Young Professionals Party of the Pink Tie Ball.** Tracie co-chaired the event with her husband and brother in 2013 and has remained involved with the organization.

On November 19, 2016, Ricci Tyrrell Associate **Eric S. Pasternack** volunteered to teach **Philadelphia high school students** about mock trial at **Temple Law School.** Eric was also recently appointed to be the co-chair of the **Camden County Bar Association’s Health Law Committee.**

On November 20, 2016, Ricci Tyrrell Associate **Tracie Bock Medeiros** attended **The Noreen Cook Center for Early Childhood Education of Har Zion Temple’s** fall “fun”draiser **Super Hero Dance-a-thon.** In the months leading up to the event, rather than asking for pledges on behalf of her 4 year old son Zachary, she assisted him in

making video pledge requests to send to friends and family. He enjoyed the exchange of video messages and learned the importance of fundraising.

Founding Member **John E. Tyrrell** will again join Barry Weisblatt and Sylvester McClearn, Jr. in sponsoring the **Billy Cathell McClearn Athletic Scholarship** in honor of their deceased friend and brother. A scholarship is awarded to both a boy and girl senior athlete at Valley Central High School, Montgomery, NY. The scholarship has provided over $30,000 in college assistance since its inception.

The weekend before Thanksgiving, Ricci Tyrrell Associate **Samuel Mukiibi** took part in **The Barristers' Association of Philadelphia's 32nd Annual Thanksgiving Drive.** With the support of Ricci Tyrrell, the Barristers provided Thanksgiving "turkey baskets" to more than 600 lower income families in the Philadelphia area. Included in the baskets were legal aid materials on understanding the expungement process and the limited access to criminal records. Each year the Barristers inform the public on a different area of law. In previous years, the legal aid materials have covered wills and estates, protection from abuse, family law, small claims court, landlord/tenant and mortgage foreclosure.

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

Ricci Tyrrell Johnson & Grey
ATTORNEYS AT LAW